022 SCSL-2003-13-PT (482-776) 482

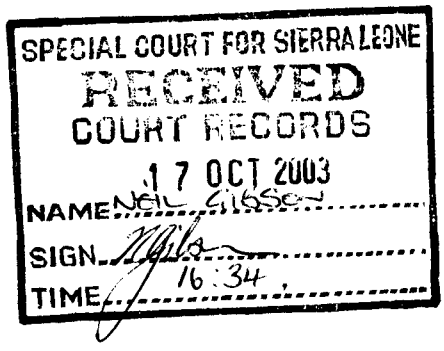
SPECIAL COURT FOR SIERRA LEONE

Case No. 2003-13-PT

Before: Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: October 16, 2003



THE PROSECUTOR

against

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S.B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT AND FOR PARTICULARIZATION OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté
Ms. Brenda J. Hollis
Mr. Robert Petit

Defense Counsel:
Mr. Geert-Jan Alexander Knoops

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I INTRODUCTION

1. Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence (hereafter referred to as the "**Rules**"), the Defense herewith files a preliminary Motion with regard to the defects in the form of the Indictment.

2. On September 16, 2003, the Indictment against the Accused Mr. Kanu, was approved by Judge Pierre Boutet.

II JUDICIAL BASIS OF THE MOTION

3. In this Motion, it will be purported that the present Indictment filed against the Accused on September 15, 2003 bears several defects as to the requisite form and lacks sufficient specificity with respect to the person of the Accused. Furthermore, this Motion assesses that the Indictment is also insufficiently particularized. In this respect, the Defense holds that present Indictment is not in compliance with Article 17(4)(A) of the Statute of the Special Court for Sierra Leone (hereafter referred to as "**Statute**") providing, *inter alia*, that the Accused is entitled to be informed in detail of the nature and cause of the charge against him. Moreover, the text of the present indictment, as the Defense holds, infringes the principle as set forth in Rule 47(C) of the Rules, stating that the indictment shall contain, *inter alia,* the name and particulars of the suspect, as well as a statement of each specific offense of which the named suspect is charged.

III FACTUAL BASIS OF THE MOTION

A Lack of Specificity Regarding Different Forms of Individual Criminal Responsibility

4. In the Indictment, the Prosecution – as the Defense understands the text of paras. 23 – 26 – alleges that (i) primarily, the Accused participated in a joint criminal enterprise, and (ii) alternatively, the Accused would bear individual criminal responsibility by means of superior responsibility. Both forms of criminal responsibility lack the requisite specificity as required by the provisions mentioned in Chapter II above.

Ad (i) – Joint Criminal Enterprise

5. In the **first** place, in paras. 23 – 25 of the Indictment, it is asserted that the AFRC, including the Accused, and the RUF shared a common plan, a common purpose or design, which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone. According to the Indictment, the Accused planned, instigated, ordered, committed, or otherwise aided and abetted crimes within the concept of joint criminal enterprise. However, the Indictment does not delineate any specific details of the alleged role or position of the Accused within the purported joint criminal enterprise.

6. In the **second** place, para. 23 of the Indictment apparently intends to connect the existence of a joint criminal enterprise to the AFRC and the RUF. Without any particularization, it is not evident that the Accused, as an individual, could have played a relevant role in an alleged joint criminal enterprise which, in view of the Prosecution, was comprised of two organized armed factions, and not constituted of private persons. This argument was not addressed in the Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, issued by

the Trial Chamber of the Special Court dated October 13, 2003, in *Prosecutor* v. *Sesay* (hereafter referred to as the "***Sesay* Decision**").[1]

7. In the **third** place, the Indictment, as to the assertion that the Accused should have participated in a joint criminal enterprise, fails to identify the exact category of joint criminal enterprise, which categories are defined in the *Tadic* Appeals Judgment.[2] Para. 24 of the Indictment merely mentions that the crimes alleged in this Indictment "*were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.*" Apparently, the Indictment thus seems to focus on either the first or the third category. In this respect, the Indictment does not meet the requirement of specificity. From the ICTY Trial Chamber judgment *Prosecutor* v. *Krnojelac*, it can be derived that the Prosecution bears the obligation to expressly choose in the Indictment for either the basic joint criminal enterprise concept, or the extended one.[3] As the prosecutor in that case did not specifically plead that the accused was liable within the third category of joint criminal enterprise, the Trial Chamber held that it would not be fair to the accused to allow the prosecution to rely upon the extended form of joint criminal enterprise in the absence of an amendment to the indictment.[4] As a result hereof, the ICTY Trial Chamber ruled that if the prosecution intends on advancing a theory that the accused participated in such an extended form of joint criminal enterprise, it is obliged to specifically plead that the accused is liable for the "*natural and foreseeable consequences*," arising from this third category.[5] The present Indictment in the case against Mr. Kanu results in legal uncertainty as para. 24 hereof does not opt clearly for one of the aforementioned categories, and therefore infringes the principle as set forth by the ICTY Trial Chamber in the *Krnojelac* case.

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[1] Case No. SCSL-2003-05-PT.
[2] *Prosecutor* v. *Tadic*, Judgment, ICTY Appeals Chamber, July 15, 1999, Case No. IT-94-1A, paras. 195 – 219.
[3] *Prosecutor* v. *Krnojelac*, ICTY Judgment, March 15, 2002, Case No. IT-97-25-T, para. 81.
[4] Ibid., see para. 86.
[5] Ibid.

8. **Fourthly**, the Indictment fails to implement specific formulations whereby the concept of joint criminal enterprise is keyed to each of the separate crimes for which the Accused is charged. This existence of this requirement as a principle of due process may also be derived from ICTY case law.[6] Projected on the Indictment against the Accused, Mr. Kanu, none of the particular crimes he is charged with is specifically keyed to one of the categories of joint criminal enterprise. For example, with respect to the alleged responsibility for terrorizing the civilian population and collective punishments (Counts 1 and 2), it is not indicated on which basis and facts this concept would apply here, especially with regard to holding the Accused individually liable.

9. In **conclusion**, the Defense primarily prays that the concept of joint criminal enterprise as a whole should be deleted from the Indictment (see paras. 5 and 6 above), or, in the alternative, this concept should be substantially specified and amended, as set forth in paras. 7 and 8 above.

Ad (ii) - Superior Responsibility

10. Para. 26 of the Indictment is dedicated to a second form of individual criminal responsibility, namely the concept of superior responsibility. Nowhere in the Indictment, the factual and material elements as to the alleged "*effective control over his subordinates*" are specified.

11. In the *Sesay* Decision, the Trial Chamber of this Court ruled that the Prosecution, in the indictment, does not require to distinguish the acts for which the accused incurs criminal responsibility under Article 6(1) of the Statute from those for which he incurs criminal responsibility under Article 6(3) of the Statute.[7] However, this observation does not affect the argument of the Defense as put forward in this Motion, namely that an indictment should provide the factual

[6] See for the requirement that the concept of joint criminal enterprise is specifically keyed to each of the particular crimes, *Prosecutor* v. *Krnojelac*, paras. 127, 170, 315, 346, 427 and 487. Although the reasoning of the Trial Chamber was applied with respect to the burden of proof, the Prosecution has to meet, it can be argued that this principle equally applies to the form of the Indictment.
[7] See para. 14 of the Decision.

foundation for the assertion that an accused had "*effective control over his subordinates*", as mentioned in para. 26 of the Indictment.

12. In this particular case, the relevance of this argument is supported by the fact that the Accused, during his active military career, held merely the rank of a Corporal.[8] The allegation mentioned in para. 26 of the Indictment is therefore, without further substantiation, not self-evident. As the Indictment should also meet the principle of legal certainty from the perspective of the Accused, the Indictment should be particularized on this specific point.

B Lack of Specificity Regarding the Various Counts

13. In the *Sesay* Decision, the Trial Chamber of this Court was already called upon to assess the compliance of that particular indictment with Article 17(4)(A) of the Statute and Rule 47(C) of the Rules. In paras. 22 – 25 of this decision, the Court, in this context, gave its opinion about the phrase, "*other superiors in the RUF*", "*at all relevant times to this Indictment*", "*at various locations in the district*" and similar wording. However, close reading of this decision learns that the following elements of the Indictment in the case of the Accused were not part of this assessment, and therefore justify the opinion of this Court.

14. Below will be set out (i) the general complaints of the Defense regarding the lack of specificity of the Indictment, and (ii) the specific complaints of the Accused as regards the wording employed in the Indictment.

Ad (i) – General Complaints

15. In the first place, a general complaint about the lack of specificity of the language of the Indictment concerns the phrases "*but not limited to these events*" as well as "*included, but were not limited to*", used on various occasions in the Indictment. This argument was also formulated by the defense of Mr. Sesay in its motion

[8] Para. 2 of the Indictment incorrectly mentions that the Accused rose to the rank of Sergeant.

leading to the aforementioned decision, and was accepted. Accordingly these phrases were found impermissibly broad, as the Trial Chamber held that "*the phrase 'but not limited to those events' is impermissibly broad and also objectionable in not specifying the precise allegations against the Accused. It creates a potential for ambiguity. (...). The Prosecution is accordingly put to its election: either to delete the said phrase in every count or wherever it appears in the Indictment or provide in a Bill of Particulars specific additional events alleged against the Accused in each count.*"

16. In the case of Mr. Kanu, the Prosecution equally employs on a frequent basis the phrase "*but not limited to those events*". It is therefore submitted that the Prosecution be ordered to either delete the said phrase in every count or wherever it appears in the Indictment, or alternatively, that the Prosecution be ordered to provide, as was ordered in the *Sesay* Decision, a Bill of Particulars setting out the specific additional events alleged against the Accused in each count.

17. A second general complaint pertains to the wordings employed in several of the charges, namely the phrases "*unknown number of (...)*", "*hundreds of (...)*", and "*large scale*", "*widespread*", which will be further specified below.[9] Especially given the fact that these terms, by its nature vague, are used in almost every paragraph of the several counts, the condition of specificity is clearly not met. Therefore, the Defense submits that the phrases "*unknown number of (...)*", "*hundreds of (...)*" be deleted, or, in the alternative, the Prosecution be ordered to provide the particulars as required.

18. Thirdly, the Indictment does not make any mention of names or particulars of the victims mentioned therein. This particularly leads to insufficient specificity, given the fact that, as mentioned above, the Indictment does not even provide a close indication of the number of the alleged victims of the mentioned crimes.[10]

[9] These phrases were not addressed in the *Sesay* Decision.
[10] See also the amendments in the Indictment in *Prosecutor* v. *Milosevic*, Case No. IT-02-54.

Moreover, the *Sesay* Decision did not deal with this complaint. Therefore, the Defense submits that the Prosecution be ordered to specify both the exact number of alleged victims and their names, so that the Accused is able to prepare his defense properly and adequately in accordance to Article 17(4)(A) and (B) of the Statute.

Ad (ii) – Specific Complaints

19. Concerning **Count 2** of the Indictment, the Defense holds the opinion that the term "*collective punishments*" has not been specified because it is as such not keyed to the alleged events as set forth in the paras. 32 – 57 to which paragraphs the Indictment here refers. Para. 31 of the Indictment merely states that the charges in Count 3 – 13 were committed to punish the civilian population for allegedly supporting the elected government of President Kabbah, or for failing to provide sufficient support to the AFRC/RUF. However, when reading the paras. 32 – 57 of the Indictment, no mention is made of these crimes being committed as part of the alleged collective punishments. It is thus not clear to the Accused what exactly he has been accused of in this matter. Moreover, as this term "*collective punishments*" is only inserted in Article 4(2) of Additional Protocol II to the Geneva Conventions, without being explicitly employed in common Article 3 of the Geneva Conventions, arguably this is not a self-evident term. This part of Count 2 does therefore not fulfill the requirement mentioned in the *Sesay* Decision, namely the observation that "*[a]llegations in an indictment are defective in form if they are not sufficiently clear and precise so as to enable the accused to fully understand the nature of the charges brought against him*".[11] The Defense therefore submits that the term "*collective punishments*" be deleted in this Count or, in the alternative, the Prosecutor be ordered to provide particulars as to the alleged nexus between this term and the separate Counts 3 – 13.

[11] See the *Sesay* Decision.

20. In **Counts 3 – 5** of the Indictment, the following terms are employed in an insufficiently specific manner, as already referred to under the first and second arguments as developed under B above. In para. 32 of the Indictment, the phrase "*included, but not limited to*" is employed. Part B of this Chapter already indicated that this phrase should be deleted, or the Prosecutor should be ordered to provide the requisite particulars. This equally counts for the section which directly follows para. 39 of the Indictment, using the phrase "*but not limited to these events*".

21. In paras. 33, 34, 36, 37, and 38, the Indictment speaks of an "*unknown number of civilians*". Para. 35 mentions "*several hundred civilians*", whereas para. 39 uses the word "*large scale*". The Defense holds that these phrases lack any specificity as to the amount of civilians that were allegedly unlawfully killed. Equally to the reasoning of the Trial Chamber in the *Sesay* Decision, it may be said that these phrases create a potential for ambiguity.[12] Therefore, the Defense holds that these words should be deleted, or the Prosecution be ordered to provide particulars.

22. With regard to the **Counts 6 – 8** of the Indictment, the Defense holds the following. Para. 40 of the Indictment employs the phrase "*included, but were not limited to,*" whereas the section directly following para. 45 uses the phrase "*but not limited to these events*". All these phrases create a potential for ambiguity and are equally impermissibly broad. Therefore, they should be deleted, or the Prosecutor be ordered to provide particulars.

23. In paras. 41, 42, 43, and 44, the Indictment refers to an "*an unknown number of (...)*". Para. 45 mentions "*hundreds of (...)*". The Defense challenges this phrase, as it lacks any specificity as to the amount of civilians and their identities (see para. 18 above) that were allegedly unlawfully killed. The Defense thus submits that these words should be deleted, or particulars should be provided.

[12] See para. 33 of the *Sesay* Decision.

24. **Counts 9 – 10** of the Indictment again employ the phrases "*included, but not limited to*" (para. 46), and "*but not limited to these events*" (the section following para. 49). For the same reasons, these words should be deleted, or particulars should be provided.

25. Moreover, as the wording "*unknown number of (...)*", is present in these Counts (see paras. 47, 48 and 49), this phrase should be deleted, or particulars should be provided.

26. **Count 11** again mentions the term "*but not limited to these events*", which is, as indicated before, too vague and equally creating a potential for ambiguity. Accordingly, this phrase should be deleted, or, in the alternative, particulars should be provided.

27. **Count 12** (para. 51) puts forward the term "*widespread and large scale*", whereas paras. 52, 54, and 55 use the term "*an unknown number*". In addition, paras. 53 and 57 speak of "*hundreds of (...)*", and para. 57 mentions "*a large number of children*". All these phrases and terms are too vague and bear the potential for ambiguity as meant by the Trial Chamber in the *Sesay* Decision. Indeed, the use of such phrases lacks any specificity as to the amount of civilians that were allegedly unlawfully killed, so that the Defense challenges the precise nature of these terms. As a consequence, they should be deleted, or particulars should be provided.

28. The same conclusion is warranted with regard to para. 51, mentioning the term "*included, but were not limited to*," which again lacks specificity.

29. Under **Count 13**, the Prosecution makes mention of the phrase "*included, but was not limited to*" (para. 58), and directly following para. 63 of the Indictment, the term "*but not limited to these events*" emerges. For the same reasoning, these phrases should be deleted or particulars should be provided.

30. Paras. 59 and 62 of the Indictment mention the term "*unknown number*", and paras. 60, 61 and 63 use the word "*widespread*". Both types of allegations are in itself unclear and result in legal uncertainty as to what the Prosecutor intends to prove.[13] Accordingly, the use of such a formulation is tantamount to lack of necessary specificity. As a result hereof, these terms should be deleted from the Indictment or particulars should be provided.

31. Under **Counts 14 to 17** of the Indictment the word "*widespread*" is used again in para. 64, as well as the term "*hundreds of (...)*".These phrases should be deleted or particulars should be provided.

32. Moreover, in para. 64, the following term is used: "*including, but not limited to*", and in the section directly following this paragraph, the description includes the words "*in relation, but not limited to these events*", which, again, lacks specificity. These terms should be deleted or particulars should be provided.

33. This analysis of the indictment justifies the **conclusion** that the Indictment is not issued in accordance with the principle laid down in Article 17(4)(A) of the Statute, and Rule 47(C) of the Rules.

IV CRITERIA DERIVING FROM CASE LAW WITH RESPECT TO FORMS OF INDICTMENT

34. The latter conclusion is supported by the following observations. Despite the fact that ICTY case law reveals that the requisite criteria with respect to the condition of specificity is not absolute, it indicates that the indictment must enable the accused and the defense to finally and adequately prepare the defense so that it

[13] See for this criterion para. 33 of the *Sesay* Decision.

must provide (some) information as to the identity of victims, place, date of the alleged crimes and means by which the offense was committed.[14]

35. Therefore, the indictment should not prevent the defense in, for example, investigating the potential alibi or in the cross-examination of witnesses.[15] In the event the identity of victims, place and date of the events and other factual elements are more material, the degree of specificity is required to be more particular.[16]

36. In the case against Mr. Kanu, the factual elements, as set forth in Chapter III of this Motion, are material to his defense. Therefore, the absence of concrete and precise allegations and particulars as to these elements, clearly affects the validity of the Indictment.

V REMEDIES AND CONCLUSION

37. As regards the judicial consequences and remedies for the analyzed deficiencies in the particular Indictment, the Defense respectfully prays that primarily the Prosecutor be ordered to specify or particularize the elements of the Indictment as mentioned in Chapter III above within a time frame as to be set by Your Court, failure of which should result in dismissal of the Indictment.

38. With regard to the particularization of the Indictment, the Defense refers to paras. 31 – 33 of the abovementioned *Sesay* Decision, and respectfully prays the Special Court to implement them equally in the case of Mr. Kanu. Accordingly, the Defense respectfully prays that the Prosecution be ordered to provide a Bill of Particulars as set out in the Annexure to the *Sesay* Decision, in order to remedy the deficiencies in the present Indictment.

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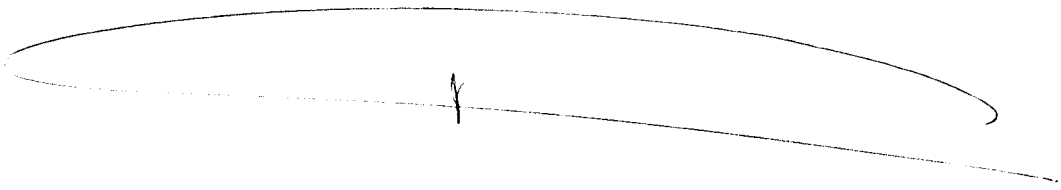
[14] See *Prosecutor* v. *Krnojelac*, ICTY Decision of the Defense Preliminary Motion on the Form of the Indictment, February 24, 1999, para. 12.
[15] See also G.J. Knoops, *Introduction to the Law of International Tribunals. A Comparative Study*, New York: Transnational Publishers 2003, p. 104.
[16] See also *Prosecutor* v. *Kayishema and Ruzindana*, ICTR Judgment, May 21, 1999, para. 86.

Done in Freetown on this 16th day of October 2003.
For the Defense,



Geert-Jan Alexander Knoops

Paragraph 25 of the Indictment alleges:

> "**ISSA HASSAN SESAY**, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Indictment, which crimes the **ACCUSED** planned, instigated, ordered, committed or in whose planning, preparation or execution the **ACCUSED** otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which the **ACCUSED** participated or were reasonably foreseeable consequence of the joint criminal enterprise in which the **ACCUSED** participated.

Paragraph 26 of the Indictment alleges:

> "In addition, or alternatively, pursuant to Article 6.3 of the Statute, **ISSA HASSAN SESAY,** while holding positions of superior responsibility and exercising command and control over his subordinates, is individually criminally responsible for the crimes referred in Articles 2, 3, and 4 of the Statute. The **ACCUSED** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and the **ACCUSED** failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

11. Article 6 (1) of the Statute provides thus:

> "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 4 of the present Statute shall be indirectly responsible for the crime."

Article 6 (3) provides as follows:

> "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof."

12. Predicated upon the reasoning in the foregoing paragraphs herein, and relying *persuasively* on the decisions of the ICTY in *Prosecutor v. Kvocka et al*,[14] and *Prosecutor v. Mile Mrksic*[15] and that of the ICTR in *Prosecutor v. Musema*[16] and a considered analysis of Article 6(1)

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[14] *Supra 11.*
[15] Case No ICTY- 95-13- PT. Decision on the Form of the Indictment, 19 June 2003.

and 6(3), it is the view of the Chamber that depending on the circumstances of the case, it may be required that with respect to an Article 6(1) case against an accused, the Prosecution is under an obligation to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, that the particular head or heads of liability should be indicated.[17] For example, it may be necessary to indicate disjunctively whether the accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution" of the particular crime against humanity, or violation of Article 3 common to the Geneva Convention and of Additional Protocol II, or other serious violation of international humanitarian law, as alleged. This may be required to ensure clarity and precision as regards the exact nature and cause of the charges against the accused and to enable him to adequately and effectively prepare his defence. Such a methodology would also have the advantage of showing that each count is neither duplicitous nor multiplicitous. However, the Chamber must emphasize that the material facts to be pleaded in an indictment may vary with the specific head of Article (6) (1) responsibility, and the specificity with which they must be pleaded will necessarily depend upon any or some or all of the factors articulated in paragraph 8 herein especially where the crimes in question are of an international character and dimension. For example, the material facts relating to "planning" the particular crime may be different from those supporting an allegation that the accused "ordered" the commission of the crime depending on the factors set out in paragraph 8.

13. Further, in a case based on superior responsibility pursuant to Article 6(3), the minimum material facts to be pleaded in the indictment are as follows:

(a) (i) that the accused held a superior position;

(ii) in relation to subordinates, sufficiently identified;

(iii) that the accused had effective control over the said subordinates;

(iv) that he allegedly bears responsibility for their criminal acts;

(b) (i) that accused knew or had reason to know that the crimes were about to be or had been committed by his subordinates;

(ii) the related conduct of those subordinates for whom he is alleged to be responsible;

(iii) the accused failed to take the necessary and reasonable means to prevent such crimes or to punish the persons who committed them.

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[16] *Supra* 11.

[17] *The Prosecutor v. Delalic and Others*, Case ICTY-96-21-A, Judgement, 20 February, 2001.

14. With regard to the nature of the material facts to be pleaded in a case under Article 6(3) it follows, in the Chamber's view, that certain facts will necessarily be pleaded with a far lesser degree of specificity than in one under Article 6(1). It would seem, therefore, that in some situations under Article 6(3), given the peculiar features and circumstances of the case and the extraordinary nature of the crimes, it may be sufficient merely to plead as material facts the legal prerequisites to the offences charged as noted in paragraph 13 herein. Further, based on the foregoing reasoning and a close examination of paragraphs 25 and 26 of the Indictment, the Chamber finds the Defence submission that the Prosecution must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3) to be legally unsustainable. The Chamber also finds that it may be sufficient to plead the legal prerequisites embodied in the statutory provisions. The Defence contention that the same facts cannot give rise to both heads of liability is, likewise, meritricious. The implication that they are mutually exclusive also flies in the face of the law.[18]

15. It is also contended by the Defence that each count charging superior responsibility under Article 6 (3) of the Statute should include "the relationship between the accused and the perpetrators as well as the conduct of the accused by which he may be found (a) to have known or had reason to know that the acts were about to be done, or had been done, by those others, and (b) to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who did them" (para. 8 of the Motion). In response, the Prosecution submits that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators for purposes of superior responsibility at paragraphs 17-19.

16. In this regard, paragraphs 17 -19 allege that:

> 17. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.
>
> 18. Between early 1993 and early 1997 the **ACCUSED** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, the **ACCUSED** held the position of the Battled Group commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.
>
> 19. During the Junta regime, the **ACCUSED** was a member of the Junta governing body. From early 2000 to about August 2000, the **ACCUSED** served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY

[18] See *Kvocka, supra* 12.

SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

The Chamber finds that the Indictment sufficiently pleads the relationship between the Accused and the perpetrators in question as "subordinate members of the RUF and AFRC/RUF forces" and the different superior positions that he held at various times, it being sufficient in certain cases under Article 6 (3) to identify the persons who committed the alleged crimes by means of the category or group to which they belong. It is clear from the Indictment that the AFRC/RUF forces were the alleged perpetrators. The Chamber further emphasizes that whether or not the Accused exercised actual control over the subordinate members of the RUF and AFRC/RUF forces is an evidentiary matter that must be determined at the trial. Given such detailed pleading, it is disingenuous to suggest that the Accused does not know precisely his role in the alleged criminality. By no stretch of the legal imagination, taking the indictment as a whole, can it be reasonably inferred that the Accused has been charged for playing the role of a "foot soldier". The Indictment, in various parts, does specify the conduct for which it is being alleged that he must bear responsibility for the acts of his subordinates, for example, paragraphs 31-37.

17. In a more general challenge, the Defence submits that all the counts are vague and imprecise, and that the Prosecution failed to specify the identity or identities of the subordinates with whom the Accused is alleged to be involved in respect of each crime. The Defence submits that it is not enough to identify the alleged subordinates by their group name as " Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay" and that such a formulation "does not enable the Accused to understand the nature and the cause of the charges against him" (paras. 6-11 of the Motion). It is noteworthy that in *Prosecutor v. Karemera*, an authority relied upon by the Defence, the order of the Trial Chamber to the Prosecution to specify certain allegations was much qualified. It used the phrase "to the extent possible" and the order was "with regard to the actual crimes allegedly committed that entail his command responsibility, in which capacity, and with regard to which accused's subordinates are concerned". Applying relevant case-law authorities[19] *persuasively*, the Chamber finds that the Indictment herein is pleaded, as far as is practicable, with reasonable particularity, and that it is sufficient and permissible in law to identify the subordinates of the Accused by reference to their group or category, namely, AFRC/RUF.[20]

18. A further Defence submission is that in respect of each and every count, the Prosecution should be ordered to specify , to the extent possible, any further information the Prosecution is in a position to disclose at this stage concerning the identity of the co-accused or co-perpetrator and the involvement of the accused with them. The Defence further submitted that the formulation *"Members of the AFRC/RUF subordinate to or acting in concert with Issa Hassan Sesay..."* is not sufficient (para. 12 of the Motion). The Chamber finds no merit in these submissions, and fails to see how much more detailed information is required in respect of the identities of the co-accused and co-perpetrators and their involvement with the accused, given the scale and level of hostilities, widespread disorder and terrorizing of the population and the

[19] eg. *Kvocka*, *supra* 17.
[20] *Musema* , *supra* 12.

routine nature of the crimes, as alleged, in the Indictment as a whole. The Chamber is also mindful that it is trite law that an indictment must plead facts not evidence.

19. Another position taken by Defence is that the Indictment should be more precise as to the formulation *"other superiorss in the RUF"* in paragraph 21 (para. 13 of the Motion). The Chamber disagrees with this submission and notes that where an indictment charges the commission of crimes on the part of the accused with *"other superiors"*, the prosecution is under no obligation to provide an exhaustive list of such *"other superiors"*[21].

20. The Defence further submits that the Indictment should also include the identity of the victims (if not protected) and the precise location of the crimes(para. 14 of the Motion). The Chamber's response to this submission is that generally in cases where the Prosecution alleges that an accused personally committed the criminal acts, an indictment generally must plead with particularity the identity of the victims and the time and place of the events. Exceptionally, however, the law is that in cases of mass criminality (as can be gathered from the whole of the Indictment herein) the sheer scale of the offences may make it impossible to identify the victims.[22] Further, the Chamber wishes to emphasize that even where mass criminality is not being alleged, the specificity required to plead these kinds of facts is not necessarily as high where criminal responsibility is predicated upon superior or command responsibility[23] (as is the case in respect of the Accused herein). The Defence submission is, accordingly, rejected.

21. The next Defence challenge focuses on paragraph 51 of the Indictment. It is contended that the paragraph should be more precise and should include the appropriate date of commission of the offence and that the entire paragraph is too vague and should be set aside (para. 15 of the Motion). Paragraph 51 of the Indictment specifically charges the Accused, as a member of the AFRC/RUF, with abductions and forced labour under Count 12. It alleges that *"at all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour"*. The count goes on to detail the alleged forms of forced labour and abductions engaged in by the AFRC/RUF in diverse places, including Kailahun District where, it is again alleged that *"at all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour"* by the AFRC/RUF. The Chamber does not find the formulation "at *all times relevant to the this Indictment"* problematic in terms of adequate notice of the alleged abductions and forced labour thereby making it difficult for the Accused to prepare his defence. It is, likewise, not vague.

22. The Chamber agrees with the Prosecution that the use of the said formulation is with reference to a determinable time frame. It presupposes that the alleged criminal activities took place over that time frame and with much regularity, a presupposition that can only be refuted by evidence. Given the brutal nature of the specific crimes alleged, the alleged massive and widespread nature of the criminality involved, and the peculiar circumstances in which they

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[21] See *Prosecutor v. Nahimana, supra 8.*

[22] *The Prosecutor v. Laurent Semanza, supra 2.*

[23] Id.

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allegedly took place, the date range specified in the Indictment is not too broad or inconsistent with the latitude of prosecutorial discretion allowed the Prosecution in such matters. In addition, the Chamber notes that the said paragraph is specific as to the victims of the alleged forced labour and that the place of the events is patently restrictive, to wit, "*at various locations in the District*" in contrast to, for example, "*at various locations in Sierra Leone,*" or "*at various places in West Africa*". The Defence submission, therefore, fails.

23. Under category (iii) challenges, the Defence takes objection to the general formulation of the counts in certain particular respects. The main submission is that general formulations like "*such as*" or "*various locations*", or "*various areas....including*" do not specify or limit the reading of the counts but expand the Indictment without concretely identifying precise allegations against the Accused. The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to this submission is that it is inaccurate to suggest that the phrases "*various locations*" and "*various areas including*" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "*within the Southern or Eastern Province*" or "*within Sierra Leone*" This is clearly permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "*such as*" and "*including but not limited to*" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein. In the ultimate analysis, having regard to the cardinal principle of the criminal law that the Prosecution must prove the case against an accused beyond reasonable doubt, the onus is on the Prosecution to adduce evidence at the trial to support the charges, however formulated. The Chamber finds that even though, as a general rule, phrases of the kind should be avoided in framing indictments, yet in the specific context of paragraphs 23 and 24 they do not unfairly prejudice the Accused or burden the preparation of his defence. The Defence protestation, is therefore, untenable.

24. Another complaint of the Defence is that paragraphs 28, 32, 37, 38, 40, 41 as to the location of the sexual violence as well as the location of the camps, paragraph 42 as to the Freetown area, paragraphs 43, 44, 45, 46, 47, 49 as to the location of the abductions as well as the location of the camps and paragraphs 51, 52, 53, 55, 56 etc are not pleaded with specificity. It is also contended that the Prosecution should be ordered to specify in each count, whether the Accused is charged with having committed the acts solely in specific locations (para. 17 of the Motion). In the alternative, the Defence requests that the general formulation be deleted. After a careful review, *seriatim*, of the paragraphs listed in the Defence Motion, the Chamber's response is that, given the magnitude, scale, frequency and widespread nature of the alleged criminal acts, it is unrealistic to expect the perpetrators of such conduct, as alleged, to leave visible and open clues of the locations and of their partners in crime thereby providing incontestible factual bases of the said crimes. The Chamber finds that the submission is without merit. The Chamber, again, reiterates that it is rudimentary law that an indictment must plead facts not evidence.

25. The next Defence submission is that the description of the offences (or crimes alleged) should be precise and not expressed vaguely, for example, as in paragraph 45 relating to counts 9 and 10 as to physical violence, i.e. "*The mutilations included*", and "*Forced labour included*" in paragraph 47 relating to count 12. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber rejects this submission as untenable.

26. Another specific Defence challenge revolves around the description of a common plan. It is that the Prosecutor should be ordered to be more specific regarding the nature or purpose of the common plan. The law on this issue where it is alleged (as in the instant Indictment) that the specific international crimes with which an accused is charged involved numerous perpetrators acting in concert, is that the degree of particularity required in pleading the underlying facts is not as high as in case of domestic criminal courts.[24] This principle notwithstanding, the Chamber finds more than sufficient the pleadings in question based on an examination of paragraph 23 and also paragraphs 8, 20, 21 and 22 of the Indictment. Paragraph 23 alleges:

> The RUF, including the Accused, and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

27. It is evident from paragraph 23 that the Indictment sets out with much particularity the nature of the alleged joint criminal enterprise, namely "*to take actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond areas*". As to the specific identities of those alleged to have been involved in the joint criminal enterprise, the Indictment sets these out with a reasonable measure of specificity in paragraphs 8, 20,21 and 22. The Indictment also details in paragraph 24 the crimes alleged to have been within the scope of the joint criminal enterprise. The nature of the participation of the Accused in the said joint criminal enterprise is likewise set out with much specificity in paragraphs 17-23. Based on the foregoing analysis, the Chamber finds the challenges of the Defence on these matters completely devoid of merit.

28. Based on the reasoning in paragraph 23 above on the issue of prejudice to the Accused, the Chamber also rejects the submission of the Defence that the words "*in particular*" and "*included*" in paragraphs 23 and 24 of the Indictment should be deleted (para. 20 of the Motion).

29. For the reasons stated in paragraph 27 above, the Chamber likewise finds no merit in the Defence submission that paragraph 24 of the Indictment should be more precise and that the word "*included*" should not be used in describing the joint criminal enterprise (para. 21 of the Motion).

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[24] See *Archbold*, supra 12 at para.6-45.

30. The next submission by the Defence is that when charging joint criminal enterprise, the indictment should include precisely the nature of the accused's participation in the criminal enterprise. Specifically, the Defence contends that the Indictment against the Accused does not satisfy the criteria of an indictment charging joint criminal enterprise as stated in *Archbold, para 6-57* and should, therefore, be dismissed (para. 22 of the Motion). *Archbold, para 6-57* sets out the criteria for charging joint criminal enterprise in these terms:

> An indictment charging joint criminal enterprise is required to include the nature of the enterprise, the time periods involved, and the nature of the accused's participation in the criminal enterprise (*Krnojelac, Decision on Form of Amended Indictment, May 11, 2000)*

Upon a close examination of the paragraphs of the Indictment herein charging and alluding to joint criminal enterprise, the Chamber is satisfied that the Indictment fulfils the above criteria, and accordingly rejects the Defence submission.

31. The final challenge put forward by the Defence to the Indictment is in relation to each and every count (in particular paragraphs 31, 37, 42, 45, 46, 52, 57, 58).The main submission in this regard is that the Prosecutor should be ordered to delete the general formulation "*By his acts of omissions in relation, but not limited to those events...Issa Hassan Sesay...is individually criminally responsible...*". The pith of the objection here is that the general formulation chosen by the Prosecutor expands the Indictment without concretely identifying precise allegations against the Accused. Accordingly the Defence requests that the Indictment be dismissed, or alternatively that each count should mention the specific allegation against the Accused. (para. 23 of the Motion).

32. The Prosecution's Response is noteworthy for its candour. The Prosecution submit that "while there may be events not specifically alleged in the Indictment, the Statute and Rules provide sufficient safeguards against attempts to unfairly introduce evidence or events outside the framework of the Indictment" (para. 23 of the Response).

33. After meticulously reviewing each count and paragraphs 31, 37, 42, 45, 46, 52, 57 and 58 in particular, the Chamber is satisfied that the phrase "*but not limited to those events*" is impermissibly broad and also objectionable in not specifying the precise allegations against the Accused. It creates a potential for ambiguity. Where there is such potential, the Chamber is entitled to speculate that may be the omission of the additional material facts was done with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[25] It is trite law that the Prosecutor should not plead what he does not intend to prove. In the Chamber's considered view, the use of such a formulation is tantamount to pleading by ambush. The doctrine of fundamental fairness precludes judicial endorsement of such a practice. It is, however, not an insuperable procedural difficulty warranting dismissing the Indictment. The Defence submission, in this respect, therefore succeeds. Prosecution is accordingly put to its election: either to delete the said phrase in every count or wherever it appears in the Indictment or provide in a Bill of Particulars specific

[25] *Kupreskic, supra 2.*

additional events alleged against the Accused in each count. The Amended Indictment or Bill of Particulars should be filed within 21 days of the date of service of this Decision; and also served on the Accused in accordance with Rule 52 of the Rules.

34. In conclusion, based on the analysis in paragraphs 5-33 herein and a thorough examination of the Sample Indictments and Charges contained in Appendix H of *Archbold*[26], the Chamber finds the Indictment in substantial compliance with Article 17 (4) (a) of the Court's Statute and Rule 47 (C) of the Rules as to its formal validity.

AND BASED ON THE FOREGOING DELIBERATION, THE CHAMBER HEREBY DENIES THE DEFENCE MOTION in respect of the several challenges raised as to the form of the Indictment except as regards the challenge hereinbefore (paragraphs 31-33) found to be meritorious and upheld, an ORDER to which effect is set out *in extenso* in the annexure hereto for the sake of completeness.

Done at Freetown on the 13th day of October 2003

Judge Bankole Thompson
Presiding Judge, Trial Chamber

[26] Pages 1409 -1481.

SPECIAL COURT FOR SIERRA LEONE
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge,
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date: 13th day of October 2003

The Prosecutor against

Issa Hassan Sesay
(Case No.SCSL-2003-05-PT)

ANNEXURE TO THE DECISION AND ORDER ON DEFENCE PRELIMINARY MOTION FOR DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:
Mr. Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel

Defence Counsel:
Mr. William Hartzog, Lead Counsel
Alexandria Marcil, Co-Counsel

THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court);

SITTING as Trial Chamber ("the Trial Chamber") composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

BEING SEIZED of the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay ("the Motion") pursuant to Rule 72 (B) (ii) and (D) of the Rules;

CONSIDERING that the said Motion is one which, according to Rule 72 (B) (ii), falls within the jurisdiction of the Trial Chamber for determination;

NOTING that the several challenges raised by the Defence in the Motion are as to alleged defects in the form of the Indictment against Issa Hassan Sesay approved by Judge Bankole Thompson on the 7th day of March, 2003 sitting as designated Judge of the Trial Chamber pursuant to Rules 28 and 47 of the Rules;

CONSIDERING ALSO the paramount importance of the right of the Accused to object preliminarily to the formal validity of the Indictment as distinct from raising the substantive issue as to whether the criteria for approving the Indictment were satisfied, and the need to keep the two issues separate and distinct;

HAVING METICULOUSLY EXAMINED the merits of the challenges and submissions by the Defence in support of the Motion alongside those contained in the Prosecution's Response, and those of the Defence in their Reply;

CONVINCED that the several challenges raised by the Defence as to the formal validity of the Indictment, except one, are devoid of merit; and having so ruled in the Decision herein;

HEREBY DENIES THE SAID MOTION AND ORDER as follows:

(i) that the Defence Preliminary Motion for Defects in the Form of the Indictment filed on the 24th day of June, 2003 on behalf of Issa Hassan Sesay is denied in so far it relates to all challenges except that found to be meritorious and upheld in paragraphs 31-33 of the Decision;

(ii) that consistent with the qualification to (i) above the Prosecution elect either to delete in every count and wherever it appears in the Indictment the phrase *"but not limited to those events"* or provide in a Bill of Particulars specific additional events alleged against the Accused in each count;

(iii) that the aforesaid Amended Indictment or Bill of Particulars be filed within 21days of the date of the service of this Decision and also on the Accused according to Rule 50 of the Rules;

(iv) that this Annexure is deemed to form part of the Decision herein.

Done at Freetown

13th day of October 2003

Judge Bankole Thompson
Presiding Judge

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IN THE APPEALS CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DUSKO TADIC

JUDGEMENT

The Office of the Prosecutor:

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

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

I. INTRODUCTION

A. Procedural background

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

Chamber.

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

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

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

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

HEREBY RENDERS ITS JUDGEMENT.

1. The Appeals

(a) Notices of Appeal(A)

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

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

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

(b) Filing of Briefs

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

10. The Defence filed separate briefs for the Appeal against Judgement ("Appellant's Brief on Judgement") and the Appeal against Sentencing Judgement ("Appellant's Brief on Sentencing

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

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

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

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

2. Applications for Admission of Additional Evidence under Rule 115

14. A confidential motion for the admission of a significant amount of additional evidence was filed by the Defence on 6 October 1997.[22] In the motion, as supplemented by subsequent submissions, the Defence sought leave under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to present additional documentary material and to call more than 80 witnesses before the Appeals Chamber.[23] In addition, or in the alternative, the Defence requested that the motion be considered as a motion for review of the Judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules.[24]

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

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

17. Further motions for the admission of additional evidence pursuant to Rule 115 were made by the

Defence on 8 January and 19 April 1999.[27] By oral orders of 25 January and 19 April 1999, the motions were rejected by the Appeals Chamber.[28]

3. Contempt proceedings

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

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

B. Grounds of Appeal

1. The Appeal against Judgement

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

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

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

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

2. The Cross-Appeal

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

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").[34]

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

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

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

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

3. The Appeal against Sentencing Judgement

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

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

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

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

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

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

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

C. Relief Requested

1. The Appeal against Judgement

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

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

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

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

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

2. The Cross-Appeal

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

(i) That the majority decision of the Trial Chamber at page 227, paragraph 607 of the Judgement,

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

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

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

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

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

3. The Appeal against Sentencing Judgement

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

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

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

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

D. Sentencing Procedure

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

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

> An amendment shall enter into force seven days after the date of issue of an official

Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

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

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

A. Submissions of the Parties

1. The Defence Case

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

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms.[54] The Defence accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms.[55] However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial.[56]

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

32. In support of its submissions, the Defence cites paragraph 530 of the Judgement to show that the

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

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

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

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

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

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.[59]

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

2. The Prosecution Case

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

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or "manifest injustice" to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.[63]

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

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

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

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal

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

B. Discussion

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

43. Article 20(1) of the Statute provides that "[t] he Trial Chambers shall ensure that a trial is fair and expeditious [...] ". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"),[71] the European Convention on Human Rights (1950),[72] and the American Convention on Human Rights (1969).[73] The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.[74]

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

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.[78] In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the *Republika Srpska* could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

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

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

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*[79], a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[80] In *Dombo Beheer B.V. v. The Netherlands*,[81] another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[82] The Court decided in a criminal proceeding, *Delcourt v. Belgium*,[83] that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused unfairly at a disadvantage."[84] It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

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

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

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States without having the power to compel them to cooperate through enforcement measures.[88] The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59*bis*, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.[89]

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

access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

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

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

(3) summon witnesses and order their attendance;

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

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

A further important measure available in such circumstances is:

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

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

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

53. Relying on the principle of equality of arms, the Defence is submitting that the Appellant did not receive a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the *Republika Srpska* in securing the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber was negligent in responding to a request for assistance. The Appeals Chamber finds that the Defence has not substantiated its claim that the Appellant was not given a reasonable opportunity to present his case. There is no evidence to show that the Trial Chamber failed to assist him when seised of a request to do so. Indeed, the Defence concedes that the Trial Chamber gave every assistance it could to the Defence when asked to do so, and even allowed a substantial adjournment at the close of the Prosecution's case to help Defence efforts in tracing witnesses.[90] Further, the Appellant acknowledges that the Trial Chamber did not deny the Defence attendance of any witness but, on the contrary, took virtually all steps requested and necessary within its authority to assist the Appellant in presenting witness testimony. Numerous instances of the granting of such motions and orders by the Trial Chamber, on matters such as protective measures for witnesses, approving the giving of evidence via video-conference link from Banja Luka in the *Republika Srpska*, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.[91] Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.[92] She requested the

President of the International Tribunal to send a letter to the Acting President of the *Republika Srpska*, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia,* of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."[93]

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.

C. Conclusion

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

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

A. Submissions of the Parties

1. The Defence

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

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

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

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

2. The Prosecution

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

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

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

B. Discussion

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

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")[96] to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferovic cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opacic, who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferovic's association with the Bosnian government does not taint him. The circumstances of Mr. Seferovic and Mr. Opacic are different. Mr. Opacic was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferovic's introduction was made through the Bosnian embassy in Brussels. Mr. Seferovic was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not

recall him after learning of the withdrawal of Mr. Opacic as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferovic's testimony be disregarded on the ground that he, like Mr. Opacic, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovic.

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

C. Conclusion

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

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

A. Submissions of the Parties

1. The Prosecution Case

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

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

70. In distinguishing the present situation from the facts in *Nicaragua,* the Prosecution notes that *Nicaragua* was concerned with State responsibility rather than individual criminal responsibility. Further, the Prosecution asserts that the International Court of Justice in *Nicaragua* deliberately avoided dealing with the question of which body of treaty rules was applicable. Instead the Court focused on the minimum yardstick of rules contained in Common Article 3 of the Geneva

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

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

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

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

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

2. The Defence Case

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

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

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

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

control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

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

B. Discussion

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

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

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

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

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

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

2. The Nature of the Conflict

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

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

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

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.[104] However, the Trial Chamber did not explicitly state what the nature of the conflict was *after* 19 May 1992. As the Prosecution points out, "[t] he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb Army (VRS) and the BH after the VRS was established in May 1992".[105] Nevertheless, it may be held that the Trial Chamber at least implicitly considered

that after 19 May 1992 the conflict became internal in nature.[106]

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

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

(a) International Humanitarian Law

88. The Prosecution maintains that the alleged perpetrator of crimes must be "sufficiently linked to a Party to the conflict" in order to come under the jurisdiction of Article 2 of the Statute.[108] It further contends that "a showing of a demonstrable link between the VRS and the FRY or VJ" is sufficient.[109] According to the Prosecution, "[s]uch a link could, at most, be proven by a showing of a general form of control. This legal standard finds support in the provisions of the Geneva Conventions, the jurisprudence of the trials that followed the Second World War, the Tribunal's decisions, the writings of leading publicists, and other authorities." [110]

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

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

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

92. A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949.[112] Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form "part of [the] armed forces" of a Party to the conflict (Article 4A(1)) or "belong [...] " to a "Party to the conflict" (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2).[113] It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants.

Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".

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

> In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.[115]

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

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

96. This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as - if they are in a position of authority - to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield *de facto* power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.[116]

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

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

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials.[117] Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.

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

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

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

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

(i) Two Preliminary Issues

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

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

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of *the conditions on which under international law an individual may be held to act as a de facto organ of a State*. Logically these conditions must be the same both in the

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

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

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

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

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

109. It would therefore seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals,

the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law",[128] that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State[129] or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[130] The other two categories embraced individuals who, by contrast, were not formally organs or agents of the State. There were, first, those individuals not having United States nationality (the UCLAs) who acted while being in the pay, and on the direct instructions and under the supervision of United States military or intelligence personnel, to carry out specific tasks such as the mining of Nicaraguan ports or oil installations. The Court held that their acts were imputable to the United States, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision,[131] or because "agents of the United States" had "participated in the planning, direction, support and execution" of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil and storage facilities, etc.).[132] The other category of individuals lacking the status of United States officials comprised the *contras*. It was primarily with regard to the *contras* that the Court asked itself on what conditions individuals without the status of State officials could nevertheless engage the responsibility of the United States as having acted as *de facto* State organs. It was with respect to the *contras* that the Court developed the doctrine of "effective control".

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

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

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

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

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

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

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

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

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

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

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee.[138] Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

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

would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it *ex post facto* publicly endorsed those acts.

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

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

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,[139] a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[140]

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

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

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

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

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

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

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

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

deny responsibility for wrongful acts committed by them [146]

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

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

129. A substantially similar stand was recently taken in the *Jorgic* case by the *Oberlandesgericht* of Düsseldorf in a decision of 26 September 1997.[154] With regard to crimes committed in Bosnia and Herzegovina by Bosnian Serbs, the Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs "a close personal, organisational and logistical interconnection [*Verflechtung*]", which was considered to be a sufficient basis for regarding the conflict as international.[155] The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FRY.[156]

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

assistance to the *contras,* the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as "its obligation [...] not to use force against another State."[158] This was clearly a case of responsibility for the acts of its own organs).

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

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

133.The Appeals Chamber will mention, first of all, the *United States Diplomatic and Consular Staff in Tehran* case.[159] There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, had not initially acted on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts.[160] Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States' diplomatic premises and subsequently to put an end to that attack.[161] Later on, the Iranian authorities formally approved and endorsed the occupation of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, the militants became *de facto* agents of the Iranian State and their acts became internationally attributable to that State.[162]

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

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

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

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

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

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

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

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

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

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

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

143. Another case is more recent. This is the judgement handed down by the Dutch Court of

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Cassation on 29 May 1978 in the *Menten* case.[171] Menten, a Dutch national who was not formally a member of the German forces, had been accused of war crimes and crimes against humanity for having killed a number of civilians, mostly Jews, in Poland, on behalf of German special forces (SD or *Einsatzkommandos*). The court found[172] that Menten *in fact behaved as a member of the German forces* and consequently was criminally liable for these crimes.[173]

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

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

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

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

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

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

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

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

Montenegro)".[178] According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces.[179] The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.[180]

151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:

> (i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.[181]
>
> (ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS.[182] As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.
>
> (iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina.[183] Much *de facto* continuity, in terms of the ongoing hostilities,[184] was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.[185]
>
> (iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.[186]

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

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade.[188] It was apparent that even after 19

May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade.[189] In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that "without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out 'on behalf of' the Federal Republic of Yugoslavia (Serbia and Montenegro)."[190]

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

154. Furthermore, the Trial Chamber, noting that the pay of all 1st Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well "be equated with control".[192] The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being "as much matters of convenience as military necessity" and noted that such evidence "establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced."[193] In the Appeals Chamber's view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution.[194] In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the *Republika Srpska* by the Government of the FRY to have been "crucial" to the pursuit of their activities and that "those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations."[195] Despite this finding, the Trial Chamber declined to make a finding of overall control. Much was made of the lack of concrete evidence of specific instructions. Proof of "effective" control was also held to be insufficient,[196] on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from Belgrade.[197] However, this finding was based upon the Trial Chamber having applied the wrong test.

156. As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs

of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opstina Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.

157. An *ex post facto* confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the *Republika Srpska* in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in 1995 cannot constitute direct proof of the nature of the link that existed between the Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the issue of control in this period. Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated a dialogue with all political and military forces wielding actual power on the ground (whether *de facto* or *de iure*) and a continuous response to the shifting military and political fortunes of these forces. The political process leading up to Dayton commenced soon after the outbreak of hostilities and was ongoing during the key period under examination. To the extent that its contours were shaped by, and thus reflect, the actual power structures which persisted in Bosnia and Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular insight into the political, strategic and military realities which prevailed in Bosnia and Herzegovina up to 1995, and including May 1992. The fact that from 4 August 1994 the FRY appeared to cut off its support to the *Republika Srpska* because the leadership of the former had misgivings about the authorities in the latter is not insignificant.[198] Indeed, this "delinking" served to emphasise the high degree of overall control exercised over the *Republika Srpska* by the FRY, for, soon after this cessation of support from the FRY, the *Republika Srpska* realised that it had little choice but to succumb to the authority of the FRY.[199] Thus, the Dayton-Paris Accord may *indirectly* shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

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

159. By an agreement concluded on 29 August 1995 between the FRY and the *Republika Srpska* and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the *Republika Srpska.* The Delegation was to be chaired by President Milosevic, who would have a casting vote in case of divided votes.[200] Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the *Republika Srpska.* The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milosevic. This signature had the effect of guaranteeing respect for these commitments by the *Republika Srpska.* Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the *Republika Srpska* fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord).[201] In addition, the letter by which the *Republika Srpska* undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign

Minister of the FRY, Mr. Milutinovic, for the *Republika Srpska*.[202]

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

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

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

5. The Status of the Victims

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

(a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" - hence possible victims of grave breaches - as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2),[203] the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work,[204] the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

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

166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected 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. 547

(b) Factual Findings

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

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

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

C. Conclusion

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

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

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

A. Submissions of the Parties

1. The Prosecution case

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

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

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

174. In relation to the first error, the Prosecution submits that the only reasonable conclusion to be drawn from the facts found by the Trial Chamber is that of guilt.[209] The test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt."[210] According to the Prosecution, the Trial Chamber's hypothesis that it was a "distinct possibility that the killing of the five victims may have been the act of a quite distinct group of armed men"[211] is not fair or rational.[212] The use of such terms as "bare possibility"[213] and "could suggest"[214] indicates the misapplication of the test of proof beyond reasonable doubt.[215]

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

2. The Defence Case

176. The Defence submits that, in light of its finding that nobody was killed in Sivci on 14 June 1992, the Trial Chamber correctly found that it was a possibility that the five victims in Jaskici were killed by another, distinct group of armed men, especially as nothing is known as to who shot the victims or in what circumstances.[220] Accordingly, the standard of proof beyond reasonable doubt was correctly applied.[221]

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

Appellant was involved in a criminal enterprise with the design of killing.[223]

B. Discussion

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

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

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

> The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death. [226]

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

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

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

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

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

184. In the light of the above finding, the Appeals Chamber need not consider the second possibility advanced by the Trial Chamber, namely, that the killing of the five men in Jaskici could have been the "unauthorized and unforeseen act of one of the force that entered Sivci".

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

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

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

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

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

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

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

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

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

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

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

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

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the

actus reus of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*).

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

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

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

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

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

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

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

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

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

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

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

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

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

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

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

> [...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T] o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and

> directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...] . [I] n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...] .[241]

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

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

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

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

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp,*[248] decided by a United States court sitting in Germany and *Belsen,*[249] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[250] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.[251] The convictions of several of the accused appear to have been explicitly based upon these criteria.[252]

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty,

were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory"[253] but failed to do so.[254] It would seem that in these cases the required *actus reus* was the active participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

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

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

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

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

Nations War Crimes Commission:

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

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

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

The Prosecutor then went on to add:

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

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission, three civilians "were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death".[259]

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all

"concerned in the killing". The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.[260]

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich's Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst.* They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them "like dogs". They were then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with "wilfully, deliberately and wrongfully encourag[ing] , aid[ing] , abett[ing] and participat [ing] in the killing" of the airmen and with "wilfully, deliberately and wrongfully encourag[ing] , aid[ing] , abett[ing] and participat[ing] in assaults upon" the airmen.[261] In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

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

In short, noted the Prosecutor, the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs".[263] As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt "that each one of these accused played *his part* in mob violence which led to the unlawful killing of the seven American flyers, [...] under the law *each and every one of the accused [was] guilty of murder".*[264]

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of

this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.[265] Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,[266] or they argued that, if there had been such a plot, it did not involve the killing of the airmen.[267]

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

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

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

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

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

The court then noted that in the case at issue:

> [t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted "illegal restraint" [...] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event,

> namely the shooting (by d'Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, *and foresaw the possible commission of a different crime*. This *foresight* (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.[271]

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

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

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of "collaboration with the occupying Germans" but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been "an exceptional and unforeseen (*imprevisto*) event", for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.[273] A similar position was taken by the same court in *Ferrida*. The appellant had participated, "only in his capacity as a nurse," in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.[274] In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it "was in any case a consequence, albeit indirect, of his participation".[275]

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

> The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita'*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former* (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita'*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship (emphasis added).[276]

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

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

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

person who:

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

The negotiating process does not shed any light on the reasons behind the adoption of this text.[279] This Convention would seem to be significant because it upholds the notion of a "common criminal purpose" as distinct from that of aiding and abetting (couched in the terms of "participating as an accomplice [in] an offence"). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

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

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

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furundzija.*[281] There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States. This is consistent with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.[282]

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany[283] and the Netherlands.[284] Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of

them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France[285] and Italy.[286]

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

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

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

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

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

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

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

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted

system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

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

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

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

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

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

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

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

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

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

> Of the killing of the five men in Jaskici, the witnesses Draguna Jaskic, Zemka [ahbaz

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

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

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

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

3. The Finding of the Appeals Chamber

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

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

C. Conclusion

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

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

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

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

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be

satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

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

A. Submissions of the Parties

1. The Prosecution Case

240. The Prosecution submits that there is nothing in Article 5 of the Statute which suggests that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. In the submission of the Prosecution, no such requirement can be inferred from the requirement that the crime must have a nexus to the armed conflict. In fact, to read the armed conflict requirement as requiring that the perpetrator's motives not be purely personal "would [...] transform this merely jurisdictional limitation under Article 5 into a substantive element of the *mens rea* of crimes against humanity".[302]

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

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

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

2. The Defence Case

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

committed for purely personal motives.[307]

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

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

B. Discussion

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

1. Article 5 of the Statute

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

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

250. This distinction is important because, as stated above, if the exclusion of "purely personal" behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it; indeed it is a correct statement of the law. It is only if this phrase is understood as requiring that the motives of the accused ("personal reasons", in the terminology of the Trial Chamber) *not be unrelated to the armed conflict* that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of the accused's *motives*, as distinct from the intent to commit the crime and the knowledge of the context into which the crime fits.

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

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

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

252. The Trial Chamber seems additionally to have conflated the notion of committing an act for purely personal motives and the notion that the act must not be unrelated to the armed conflict. The Trial Chamber appears to have viewed the proposition that "the act must not be unrelated to the armed conflict"[314] as being synonymous with the statement that the act must "not be done for the purely personal motives of the perpetrator".[315] These two concepts, neither of which is a prerequisite for criminal culpability under Article 5 of the Statute, are, in any case, not coextensive. It may be true that if the act is related to the armed conflict, then it is not being committed for purely personal motives. But it does not follow from this that, if the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The act may be intimately related to the attack on a civilian population, that is, it may fit precisely into a context of persecution of a particular group, and yet be unrelated to the armed conflict. It would be wrong to conclude in these circumstances that, since the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The converse is also true; that is, merely because personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.

2. The Object and Purpose of the Statute

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

254. The Appeals Chamber would also reject the Prosecution's submission concerning the onerous evidentiary burden which would be imposed on it in having to prove that the accused did not act from personal motives,[317] as equally question-begging and inapposite. It is question-begging because if, *arguendo*, under international criminal law, the fact that the accused did not act from purely personal motives was a requirement of crimes against humanity, then the Prosecution would have to prove that element, whether it was onerous for it to do so or not. The question is simply whether or not there is such a requirement under international criminal law.

3. Case-law as Evidence of Customary International Law

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

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

257. The Prosecution is correct in stating that the 1948 case cited by the Trial Chamber[318] supports rather than negates the proposition that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as "part and parcel of all the mass crimes committed during the persecution of the Jews". As the Supreme Court for the British Zone stated, "in cases of crimes against humanity taking the form of political denunciations, only the perpetrator's consciousness and intent to deliver his victim through denunciation to the forces of arbitrariness or terror are required".[319]

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

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

260. In *Sch.*, the accused had denounced her landlord solely "out of revenge and for the purpose of rendering him harmless" after tensions in their tenancy had arisen. The denunciation led to investigation proceedings by the Gestapo which ended with the landlord's conviction and execution. The Court of First Instance convicted *Sch.* and sentenced her to three years' imprisonment for crimes against humanity.[321] The accused appealed against the decision, arguing that "crimes against humanity were limited to participation in mass crimes and ... did not include all those cases in which someone took action against a single person for personal reasons". The Supreme Court dismissed the appeal, holding that neither the Nuremberg Judgement nor the statements of the Prosecutor before the International Military Tribunal indicated that Control Council Law No. 10 had to be interpreted in such a restrictive way. The Supreme Court stated:

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

> and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.[322]

261. This view was upheld in a later decision of the Supreme Court in the case of H. H. denounced his father-in-law, V.F., for listening to a foreign broadcasting station, allegedly because V.F., who was of aristocratic origin, incessantly mocked H. for his low birth and tyrannised the family with his relentlessly scornful behaviour. The family members supposedly considered a denunciation to be the only solution to their family problems. Upon the denunciation, V.F. was sentenced by the Nazi authorities to three years in prison. V.F., who suffered from an intestinal illness, died in prison. Despite the fact that H.'s denunciation was motivated by personal reasons, the Court of First Instance sentenced H. for a crime against humanity, stating that "it can be left open as to whether [...] H. was motivated by political, personal or other reasons". Referring to the established jurisprudence of the Supreme Court for the British Zone,[323] the Court of First Instance held that "the motives ("*Beweggründe*") prompting a denunciation are not decisive (*nicht entscheidend)*".[324]

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

263. Turning to the decisions of the United States military tribunals under Control Council Law No. 10 cited by the Prosecution,[326] it must be noted that they appear to be less pertinent. These cases involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal" defence which has as its premise "non-official acts". The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for "purely personal" motives and that it therefore cannot constitute a crime against humanity is pre-eminently for the defence to raise and one would not expect the court to rule on the issue *proprio motu* and as *obiter dictum*.

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

265. The Prosecution also refers to the *Eichmann* and *Finta* cases. The *Eichmann* case is inappropriate as the defendant in that case *specifically denied* that he ever acted from a personal motive, claiming that he did what he did "not of his own volition but as one of numerous links in the chain of command".[329] Moreover the court found Eichmann, who was the Head of the Jewish

Affairs and Evacuation Department and one of the persons who attended the infamous Wannsee Conference, to be "no mere 'cog', small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine".[330] Such a senior official would not be one to whom the "purely personal reasons" consideration could conceivably apply.

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

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

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

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

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

269. The Appeals Chamber approves this submission, subject to the *caveat* that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following *reductio ad absurdum*. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the "purely personal" reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for "purely personal" reasons. Similarly, if the same man said that he participated in the genocide only for the "purely personal" reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of "non-personal" motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused's acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a "motive" requirement; it simply duplicated the context and *mens rea* requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated. 570

C. Conclusion

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

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea,* a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof of the accused's *motives*. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute.

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

A. Submissions of the Parties

1. The Prosecution Case

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

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

275. A requirement of discriminatory intent for all crimes against humanity is also absent from customary international law. The Prosecution notes that the Nuremberg Charter and Control Council Law No. 10, upon which Article 5 is based, distinguish between "murder type" crimes such as murder, extermination, enslavement, etc., and "persecution type" crimes committed on political, racial, or religious grounds. Discriminatory intent need only be shown in relation to "persecution" crimes. The Prosecution submits that the Trial Chamber erred in relying upon a statement in paragraph 48 of the Report of the Secretary-General[337] and statements made in the Security Council by three of its fifteen Members to conclude that Article 5 of the Statute was to be interpreted as requiring that all crimes against humanity be committed with a discriminatory intent. In the Prosecution's submission, these sources do not purport to reflect customary international law and

thus should not be given undue, authoritative weight in interpreting Article 5.[338] It is the view of the Prosecution that Article 5 does not contain any ambiguity. Thus, to accord weight to these sources to resolve an ambiguity which, in the Prosecution's submission, does not exist, would lead to considerable uncertainty with regard to the scope and content of Article 5 of the Statute.[339]

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

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

2. The Defence Case

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

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

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

B. Discussion

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

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

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

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

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

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against humanity", thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. *A fortiori*, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.[347] Such an interpretation of Article 5 would create significant *lacunae* by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

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

2. Article 5 and Customary International Law

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

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

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

290. The letter of these provisions is clear and indisputable. Consequently, had customary international law developed to restrict the scope of those treaty provisions which are at the very origin of the customary process, uncontroverted evidence would be needed. In other words, both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity. Such judicial and other practice is lacking. Indeed, the relevant case-law points in the contrary direction. Generally speaking, customary international law has gradually expanded the notion of crimes against humanity laid down in the London Agreement. With specific reference to the question at issue, it should be noted that, except for a very few isolated cases such as *Finta,*[350] national jurisprudence[351] includes many cases where courts found that in the circumstances of the case crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

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

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds". [355] 574

295. It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was "adopt[ed]" (see operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.

296. Moreover, the Report of the Secretary-General does not purport to be a statement as to the position under customary international law. As stated above, it is open to the Security Council - subject to respect for peremptory norms of international law (*jus cogens*) - to adopt definitions of crimes in the Statute which deviate from customary international law.[356] Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources. The Report of the Secretary-General does not provide sufficient indication that the Security Council did so intend Article 5 to deviate from customary international law by requiring a discriminatory intent for all crimes against humanity. Indeed, in the case under consideration it would seem that, although the discrepancy between the Report and the Statute is conspicuous, the wording of Article 5 is so clear and unambiguous as to render it unnecessary to resort to secondary sources of interpretation such as the Secretary-General's Report. Hence, the literal interpretation of Article 5 of the Statute, outlined above, must necessarily prevail.

297. Furthermore, it may be argued that, in his Report, the Secretary-General was merely *describing* the notion of crimes against humanity in a general way, as opposed to stipulating a technical, legal definition intended to be binding on the Tribunal. In other words, the statement that crimes against humanity are crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" amounts to the observation that crimes against humanity *as a matter of fact usually are* committed on such discriminatory grounds. It is not, however, a legal *requirement* that such discriminatory grounds be present. That is, at least, another possible interpretation. It is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.

4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute.[357] By contrast, the remarks of the United States representative were expressly couched as an "interpretative statement"; furthermore, that representative added a significant comment: "[W] e understand that other members of the Council share our view regarding the following clarifications related to the Statute"[358] including the "clarification" concerning Article 5.[359] With regard to the representative of the Russian Federation,

his statement concerning Article 5 was expressly conceived of as an interpretative declaration.[360] Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 "encompasses" crimes committed with a "discriminatory intent" without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the "context" of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties.[361] In particular, those statements cannot be regarded as an "agreement" relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the "clarifications" she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report.[362] In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (*quod plerumque accidit*) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure*. As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its *Tadic* Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance,

when interpreting Article 3 of the Statute[363] and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.[364]

C. Conclusion

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.

VIII. THE FIFTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: DENIAL OF THE PROSECUTION'S MOTION FOR DISCLOSURE OF DEFENCE WITNESS STATEMENTS

A. Submissions of the Parties

1. The Prosecution Case

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

> The majority of the Trial Chamber, composed of Judge Ninian Stephen and Judge Lal Chand Vohrah, erred when it denied the Prosecution motion for production of witness statements[.] [365]

This ground of appeal arose out of the Decision on Prosecution Motion for Production of Defence Witness Statements of the Trial Chamber delivered on 27 November 1996. By a majority (Judge McDonald dissenting), the Trial Chamber rejected the Prosecution's motion for disclosure of a prior statement of a Defence witness after he had testified. This decision was reached on the basis that such statements are subject to a legal professional privilege, which protects the Defence from any obligation to disclose them. The Prosecution submits that the Trial Chamber erred in the application of the substantive law in the Witness Statements Decision.[366]

307. The Prosecution submits that a Trial Chamber has the power to order the production of prior statements of Defence witnesses pursuant to Rule 54, unless they are protected by some express or implied privilege in the Statute or Rules.[367] This power ensures that a Trial Chamber, entrusted with the duty of making factual findings on the evidence adduced, is presented with evidence which has been fully tested.[368] It is submitted that a Trial Chamber should have the benefit of weighing any inconsistencies between statements made by witnesses in arriving at its determinations. [369]

308. According to the Prosecution, if regard is had to Article 21(4)(g) of the Statute and to Sub-rules 70(A), 90(F) and 97 of the Rules, no express privilege exempts Defence witness statements from disclosure.[370] The privilege adopted by the International Tribunal in Rule 97 of the Rules does not cover third party statements given to Defence counsel, at least not once the Defence decides to present evidence by calling a particular witness.[371] Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.[372]

309. The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vohrah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen's

reference to the legal professional privilege found in national jurisdictions is incorrect.[373] The Prosecution submits that, even if an ambiguity exists, it is incorrect to resolve it by referring to the most common practice in adversarial jurisdictions, despite the obvious influence of adversarial systems on the Rules.[374] Sub-rule 89(B) of the Rules expressly requires the application of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". In line with this provision, the Trial Chamber should have favoured an interpretation allowing it to order disclosure of Defence witness statements "where it considers that this would enable it to reach a verdict based on all pertinent evidence".[375] The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in *United States v. Nobles*.[376]

310. The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial.[377] In particular, the principle of equality of arms does not require that the Defence be allowed to call witnesses under conditions more favourable than those afforded to the Prosecution.[378] If the Defence decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.[379]

2. The Defence Case

311. The Defence submits that the Trial Chamber's Witness Statements Decision was correctly decided.

312. The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue.[380] The Defence also submits that, in light of the essentially adversarial system under which the Tribunal operates, the term "the general principles of law" in Sub-rule 89(B) should be interpreted as meaning "the general principles of law emerging from adversarial systems".[381]

313. The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.[382]

314. It is also submitted that to allow such disclosure would increase the inequality of arms between the parties.[383] Furthermore, the Defence emphasises that because privilege can be claimed for communications between the client and third parties when litigation is ongoing in most adversarial jurisdictions, such disclosure would be incorrect.[384] The Defence also submits that such a disclosure requirement might deter witnesses from testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.[385]

B. Discussion

1. The Reason for Dealing with this Ground of the Cross-Appeal

315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),[386] they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. The Prosecution further submits that the Witness Statements Decision, as it stands, remains persuasive authority that the Defence cannot be ordered to disclose

prior witness statements.[387]

316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

317. It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

2. The Power to Order the Disclosure of Prior Defence Witness Statements

318. The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.

319. There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

320. The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.[388] The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

321. The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfil its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial, Article 21 dealing with the rights of the accused, and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights[389] and Article 6 of the European Convention on Human Rights, [390]which are similar to Article 21 of the Statute.

322. With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those

powers mentioned by the Appeals Chamber in the *Blaskic (Subpoena)* decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice.[391]

323. It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal, including the basic notion that the Prosecution has to prove its case against the accused. Although this provision was not in force at the time relevant to the present enquiry, it is worth noting that Sub-rule 73*ter*(B) provides that should a Pre-Defence Conference be held:

> [...] the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
>
> [...] ;
>
> (iii) a list of witnesses the defence intends to call with:
>
> (a) the name or pseudonym of each witness;
>
> (b) a summary of the facts on which each witness will testify;
>
> [...]

This Sub-rule does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.

324. As stated above, once the Defence has called a witness to testify, it is for a Trial Chamber to ascertain his or her credibility. If there is a witness statement, in the sense referred to above, it would be subject to disclosure only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure. The provisions of Rule 68 are limited to the Prosecution and do not extend to the Defence. Disclosure would follow only once the Prosecution's case has been closed. Even then, Sub-rules 89(C),[392] (D)[393] and (E) [394]would still apply to such a disclosed witness statement, with the consequence that a Trial Chamber might still exclude it. Furthermore, the provisions of Sub-rule 90(F) relating to self-incrimination would of course apply.

325. The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97[395] relates to lawyer-client privilege; it does not cover prior Defence witness statements.

C. Conclusion

326. For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

327. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY

(1) DENIES the first ground of the Appellant's Appeal against Judgement;

(2) DENIES the third ground of the Appellant's Appeal against Judgement;

(3) RESERVES JUDGEMENT on the Appellant's Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;

(4) ALLOWS the first ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;

(5) ALLOWS the second ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;

(6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;

(7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal's Statute relating to such crimes;

(8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal's Statute;

(9) HOLDS that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

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

_____
Mohamed Shahabuddeen
Presiding

_____
Antonio Cassese

_____
Wang Tieya

_____
Rafael Nieto-Navia

_____
Florence Ndepele Mwachande Mumba

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

Judge Nieto-Navia appends a Declaration to this Judgement.
Judge Shahabuddeen appends a Separate Opinion to this Judgement.

[Seal of the Tribunal]

ANNEX A - Glossary of Terms

Additional Protocol I Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.

Amended Notice of Appeal against Judgement Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.

Appellant Dusko Tadic.

Appellant's Amended Brief on Judgement Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.

Appellant's Brief on Judgement Appellant's Brief on Appeal Against Opinion and Judgement of 7 May 1997, Case No.: IT-94-1-A, 12 January 1998.

Appellant's Brief on Sentencing Judgement Appellant's Brief on Appeal against Sentencing Judgement, Case No.: IT-94-1-A, 12 January 1998.

BH Bosnia and Herzegovina.

Claims Tribunal Iran-United States Claims Tribunal.

Cross-Appellant Office of the Prosecutor.

Cross-Appellant's Brief Brief of Argument of the Prosecution (Cross-Appellant), Case No.: IT-94-1-A, 12 January 1998.

Cross-Appellant's Brief in Reply Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.

Dayton-Paris Accord General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995.

Decision on Admissibility of Additional Evidence Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", *The Prosecutor v. Dusko Tadic*, Cas No.: IT-94-1-A, Appeals Chamber, 15 October 1998.

Defence's Skeleton Argument on the Cross-Appeal Skeleton Argument - Prosecutor's Cross-Appeal, Case No.: IT-94-1-A, 20 April 1999.

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

DR European Commission of Human Rights, Decisions and Reports.

ECHR European Convention on Human Rights.

Eur. Commission H.R. European Commission of Human Rights.

Eur. Court H.R. European Court of Human Rights.

FRY Federal Republic of Yugoslavia (Serbia and Montenegro).

Geneva Convention III (Third Geneva Convention) Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

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

HRC Human Rights Committee.

ICCPR International Covenant on Civil and Political Rights.

ICRC International Committee of the Red Cross.

ICRC Commentary on Additional Protocols Yves Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987.

ICRC Commentary on Geneva Convention III Jean Pictet (ed.), Commentary: III Geneva Convention Relative to Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First Reprint, 1994.

ICRC Commentary on Geneva Convention IV Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994.

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

ICTY JR International Criminal Tribunal for the Former Yugoslavia, Judicial Reports, Kluwer Law International, The Hague.

ILC International Law Commission.

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

JNA Yugoslav People's Army.

Judgement Opinion and Judgment, *The Prosecutor v. Dusko Tadic*, Case No IT-94-1-T, Trial Chamber II, 7 May 1997.

Nicaragua Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J Reports (1986), p. 14.

Notice of Cross-Appeal Notice of Appeal, Case No.: IT-94-1-A, 6 June 1997.

Prosecution's Response to Appellant's Brief on Judgement Cross-Appellant's Response to Appellant's Brief on Appeal Against Opinion and Judgement of May 7, 1997 Filed on 12 January 1998, Case No.: IT-94-1-A, 17 November 1998.

Prosecution Response to Appellant's Brief on Sentencing

Judgement Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998, Case No.: IT-94-1-A, 16 November 1998.

Report of the Secretary-General Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.

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

Rules Rules of Procedure and Evidence of the International Tribunal.

Sentencing Judgement Sentencing Judgment, *The Prosecutor v Duško Tadic,* Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.

Separate and Dissenting Opinion of Judge McDonald Opinion and Judgment - Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *The Prosecutor v. Duško Tadic,* Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997.

Skeleton Argument - Appellant's Appeal Against Conviction Skeleton Argument - Appellant's Appeal against Conviction, Case No.: IT-94-1-A, 19 March 1999.

Skeleton Argument of the Prosecution Skeleton Argument of the Prosecution, Case No.: IT-94-1-A, 19 March 1999.

Statute Statute of the International Tribunal.

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

Tadic Decision on Jurisdiction Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Du{ko Tadi},* IT-94-1AR72, Appeals Chamber, 2 October 1995 (Tadi} (1995) I ICTY JR 353).

Third Geneva Convention Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

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

TRNC Turkish Republic of Northern Cyprus.

UNWCC Law Reports of Trial of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947.

VJ Army of the Federal Republic of Yugoslavia.

VRS Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.

Witness Statements Decision Decision on Prosecution Motion for Production of Defence Witness Statements, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber II, 27 November 1996.

1. Composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Ninian Stephen and Judge Lal Chand Vohrah.
2. "Opinion and Judgment", *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997. (For a list of designations and abbreviations used in this Judgement, *see* Annex A – Glossary of Terms).
3. "Sentencing Judgment", *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.
4. "Judgement", *The Prosecutor v. Drazen Erdemovic,* Case No.: IT-96-22-A, Appeals Chamber, 7 October 1997.
5. It should be observed that Dusko Tadic in the present proceedings is appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity of presentation, however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant" will be employed throughout this Judgement.
6. "Amended Notice of Appeal", Case No.: IT-94-1-A, 8 January 1999.
7. Transcript of hearing in *The Prosecutor v Dusko Tadic*, Case No.: IT-94-1-A, 25 January 1999, p. 307 (T. 307 (25 January 1999). (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).
8. "Notice of Appeal", Case No.: IT-94-1-A, 6 June 1997.
9. "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.
10. T. 105 (22 January 1998).
11. "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.
12. "Appellants Brief on Appeal Against Opinion and Judgement of 7 May 1997", Case No.: IT-94-1-A, 12 January 1998, with accompanying appendices separately filed; "Appellant's Brief on Appeal Against Sentencing Judgement" Case No.: IT-94-1-A, 12 January 1998.
13. "Cross-Appellant's Response to Appellant's Brief on Appeal against Opinion and Judgement of May 7, 1997, Filed on 12 January 1998", Case No.: IT-94-1-A, 17 November 1998; "Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998", Case No.: IT-94-1-A, 16 November 1998.
14. "Amended Brief of Argument on behalf of the Appellant", Case No.: IT-94-1-A, 8 January 1999.
15. T. 308 (25 January 1999).
16. "Brief of Argument of the Prosecution (Cross-Appellant)", Case No.: IT-94-1-A, 12 January 1998 and accompanying "Book of Authorities", Case No.: IT-94-1-A, 22 January 1998. (See also "Corrigendum to Prosecutor's Brief of Argument filed on 12 January 1998 and Book of Authorities filed on 22 January 1998" Case No.: IT-94-1-A, 9 September 1998).
17. "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 12, 1998", Case No.: IT-94-1-A, 24 July 1998.
18. "Prosecution (Cross-Appellant) Brief in Reply", Case No.: IT-94-1-A, 1 December 1998.
19. "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.
20. "Order Accepting Filing of Substitute Brief", Case IT-94-1-A, 4 March 1999. (*See* also "Opposition to the Appellant's 19 January 1999 filing entitled 'The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of 19 January, 1999 (sic)'", Case No.: IT-94-1-A, 21 January 1999; "Submission in relation to Appellant's 'Substitute Brief' filed on 19 January 1999", Case No.: IT-94-1-A, 24 February 1999).
21. "Skeleton Argument – Appellant's Appeal Against Conviction", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument – Appellant's Appeal Against Conviction"); "Skeleton Argument – Appeal Against Sentence", Case No.: IT-94-1-A, 19 March 1999; "Skeleton Argument of the Prosecution", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument of the Prosecution"). See also "Skeleton Argument – Prosecutor's Cross-Appeal", Case No.: IT-94-1-A, originally filed by the Defence on 19 March 1999 and subsequently re-filed on 20 April 1999 ("Defence's Skeleton Argument on the Cross-Appeal").
22. "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.
23. Rule 115 provides:

> "(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing. (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require."

24. Rule 119 provides:

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

25. "Motion to Extend the Time Limit", Case No.: IT-94-1-A, 10 September 1997; "Motion for the Extension of the Time Limit" (Confidential), Case No.: IT-94-1-A, 6 October 1997; "The Motion for the Extension of Time", Case No.: IT-94-1-A, 17 March 1998; "Application for Extension of Time to File Additional Evidence on Appeal", Case No.: IT-94-1-A, 1 May 1998; "Motion for Extension of Time to File Reply to Cross-Appellant's Response to Appellant's Submissions since 9th March 1998 on the Motion for the Presentation of Additional Evidence under Rule 115", Case

No.: IT-94-1-A, 15 June 1998; "Request for an Extension of Time to File a Reply to the Appellant's Motion Entitled 'Motion for the Extension of the Time Limit'", Case No.: IT-94-1-A, 9 October 1997; "Request for a Modification of the Appeals Chamber Order of 22 January 1998", Case No.: IT-94-1-A, 13 February 1998; "Request for a Modification of the Appeals Chamber Order of 2 February 1998", Case No.: IT-94-1-A, 7 May 1998. The following orders were made in relation to these applications: "Scheduling Order", Case No.: IT-94-1-A, 24 November 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 23 March 1998; "Order Granting Requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 10 June 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 17 June 1998; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 9 October 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 19 February 1998; "Order Granting requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998.

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

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

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

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

30. Appellant's Amended Notice of Appeal against Judgement, paras. 1.1–1.4; Appellant's Amended Brief on Judgement, paras. 1.1-1.12.

31. Appellant's Amended Notice of Appeal against Judgement, paras. 3.1–3.6; Appellant's Amended Brief on Judgement, paras. 3.1-3.11.

32. Amended Notice of Appeal, paras. 2.1-2.4.

33. T. 307 (25 January 1999).

34. Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 2.1-2.88.

35. Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 3.1-3.33.

36. Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 4.1-4.23.

37. Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 5.1-5.28.

38. Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 6.1-6.32 with reference to "Decision on Prosecution Motion for Production of Defence Witness Statements", Case No.: IT-94-1-T, Trial Chamber II, 27 November 1996.

39. T. 306 (21 April 1999).

40. T. 303 (21 April 1999).

41. Appellant's Brief on Sentencing Judgement, pp. 4–6; T. 304 (21 April 1999).

42. Appellant's Brief on Sentencing Judgement, pp. 9-10; T. 305 (21 April 1999).

43. Sentencing Judgement, para. 76. See Appellant's Brief on Sentencing Judgement, p. 10.

44. *Ibid.*, p. 14.

45. Appellant's Amended Notice of Appeal against Judgement, p. 3.

46. Notice of Cross-Appeal, p. 3.

47. *Ibid.*, p. 4.

48. *Ibid.*

49. *Ibid.*

50. *Ibid.*

51. Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).

52. Appellant's Amended Brief on Judgement, para 1.11.

53. Appellant's Amended Notice of Appeal against Judgement, p. 6.

54. *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274; *Neumeister v. Austria*, Eur. Court H. R., judgement of 27 June 1968, Series A, no. 8; *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11; *Borgers v. Belgium*, Eur. Court H. R., judgement of 30 October 1991, Series A, no. 214; *Albert and Le Compte v. Belgium*, Eur. Court H. R., judgement of 10 February 1983, Series A, no. 58; *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284; *Kaufman v. Belgium*, Application No. 10938/84, 50 Decisions and Reports of the European Commission of Human Rights ("DR") 98; *X and Y v. Austria*, Application No. 7909/74, 15 DR 160.

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

56. T. 31 (19 April 1999).

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

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

59. T. 52-53 (19 April 1999).

60. T. 50-51 (19 April 1999).

61. T. 45-49(19 April 1999).

62. Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8–3.16, 3.30.

63. Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).

64. T. 90-91 (20 April 1999).

65. T. 97 (20 April 1999).
66. T. 90, 98-99 (20 April 1999).
67. Skeleton Argument of the Prosecution, para.10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.
68. Skeleton Argument of the Prosecution, para. 6.
69. T. 96 (20 April 1999).
70. T. 100 (20 April 1999).
71. Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] ."
72. Article 6(1) of the ECHR provides in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
73. Article 8(1) of the American Convention on Human Rights provides in part:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

74. T. 29-35 (19 April 1999).
75. *Morael v. France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416.
76. *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.
77. *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.
78. T. 29-35 (19 April 1999).
79. *Kaufman v. Belgium,* 50 DR 98.
80. *Ibid.*, p. 115.
81. *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.
82. *Ibid.*, para. 40.
83. *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.
84. *Ibid.*, para. 34.
85. In *Kaufman v. Belgium*, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In *Neumeister v. Austria*, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant's request for provisional release, despite the prosecutor having been heard *ex parte*. In *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank's witness was heard.
86. *B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442.
87. *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.
88. *See* "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-AR108*bis*, Appeals Chamber, 29 October 1997, para. 26.
89. *Ibid.*, para. 33.
90. T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 [...] .").
91. Judgement, paras. 29-35.
92. T. 59, 60 (20 April 1999).
93. Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid.*).
94. In its submissions, the Defence refers to the victim identified by the Trial Chamber only as one "Osman", by the name "Osman Didovic". The Appeals Chamber is not here called upon to determine whether the name thus given by the Defence is accurate.
95. Prosecution's Response to Appellant's Brief on Judgement, para. 2.14.
96. More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
97. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV" or "Fourth Geneva Convention").
98. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits), Judgment, ICJ Reports (1986), p. 14 ("*Nicaragua*").
99. *See* Defence's Substituted Response to Cross-Appellant's Brief, para. 2.6.
100. *See* Defence's Substituted Response to Cross-Appellant's Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).

101. *See* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995 ("Tadic Decision on Jurisdiction"), paras. 79-84 (*Tadic* (1995) I ICTY JR 353).
102. *See* para. 2.25 of the Cross-Appellant's Brief:

> "?Theg SFRY/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently, *it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992."* (emphasis added).

103. *See* para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 ("Separate and Dissenting Opinion of Judge McDonald") where she held: "I find that at all times relevant to the Indictment, the armed conflict in opstina Prijedor was international in character [...] ".
104. *See* Judgement, paras. 569-608:

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

105. Cross-Appellant's Brief, para. 2.5.
106. *See* Judgement, paras. 607-608.
107. In addition to the evidence referred to in para. 570 of the Judgement, reference may also be made to the facts cited by Judge Li in his Separate Opinion to the *Tadic* Decision on Jurisdiction (paras. 17-19), for example BH's Declaration that it was at war with the FRY and the reports of various expert bodies suggesting that the conflict was international. Moreover, in three Rule 61 Decisions involving the conflict between the Serbs and the BH Government (*Nikolic, Vukovar Hospital,* and *Karadzic and Mladic),* Trial Chambers have found the conflict to have been an international armed conflict. (*See* "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", *The Prosecutor v. Dragan Nikolic*, Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995, para 30 (*Nikolic* (1995) II ICTY JR 738); "Review of Indictment Pursuant to Rule 61", *The Prosecutor v. Mile Mrksic et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 25; "Review of the Indictments Pursuant to Rule 61 of the Rules Procedure and Evidence", *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, Case No.: IT-95-18-R61, Trial Chamber I, 11 July 1996, para. 88)).
108. Cross-Appellant's Brief, para. 2.31.
109. *Ibid.*, para. 2.30.
110. Ibid.
111. *Ibid.*, paras. 2.21-2.23.
112. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III" or "Third Geneva Convention").
113. These four conditions are as follows:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognisable at a distance;
(c) that of carrying arms openly; and
(d) that of conducting their operations in accordance with the laws and customs of war.
It might be contended that these conditions, which undoubtedly had become part of customary international law, may now be considered to have been replaced by the different conditions set out in Article 44(3) and 43(1) of Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977). This contention should of course be premised on the assumption – for which proof is required - that these two Articles have already been transformed into customary international rules.
Be that as it may, the requirement in Article 43(1) of "[being] under a command responsible to [a] party [to the conflict] for the conduct of its subordinates" has not replaced that of "belonging to a Party to the conflict" provided for in Article 4 (A)(2) of the Third Geneva Convention. *See* generally the International Committee of the Red Cross ("ICRC") Commentary on the Additional Protocols (Yves Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987), pp. 506-517, paras. 1659-1681.
114. Jean Pictet (ed.), Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First reprint, Geneva, 1994, p. 57:

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

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

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

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

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

117. The Appeals Chamber is aware of another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber is referring to the view whereby by virtue of Article 3 of the IVth Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this *lex specialis* States are responsible for all acts committed by their "armed forces" regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the "armed forces" of that State. This opinion was authoritatively set forth by some members of the International Law Commission ("ILC") (Professor Reuter observed that "[i] t was now a principle of codified international law that States were responsible for all acts of their armed forces" (*Yearbook of the International Law Commission*, 1975, vol. I, p. 7, para. 5). Professor Ago stated that the IVth Hague Convention of 1907 "made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons" (*ibid.*, p. 16, para. 4)). This view also has been forcefully advocated in the legal literature.
As is clear from the reasoning the Appeals Chamber sets out further on in the text of this Judgement, even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.
118. *Nicaragua,* para. 115. As the Court put it, there must be "effective control of the military or paramilitary operations in the course of which the alleged violations ?of international human rights and humanitarian lawg were committed".
119. *Ibid.*, para. 115:

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

120. *See* "Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", *The Prosecutor v. Ivica Rajic*, Case No.: IT-95-12-R61, Trial Chamber II, 13 September 1996, para. 25.
121. Cross-Appellant's Brief, paras. 2.14-2.17.
122. Cross-Appellant's Brief, paras. 2.16-2.17; Cross-Appellant's Brief in Reply, para. 2.19.
123. Cross-Appellant's Brief, para. 2.56.
124. According to the Prosecution (Cross-Appellant's Brief, para. 2.58), the Court applied the "agency" test when considering whether the *contras* engaged the responsibility of the United States. The Prosecution has pointed out that in this regard the Court "did not refer to the need for effective control, but rather" – to quote the words of the Court cited by the Prosecution – "whether or not the relationship [...] was so much one of dependency on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (*Nicaragua,* para. 109).
125. Cross-Appellant's Brief, paras. 2.57-2.58.
126. *See Nicaragua*, pp. 187-190.
127. *See Nicaragua*, para. 75.

128. *See* the Advisory Opinion delivered by the ICJ on 29 April 1999 in *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, para. 62.
129. Customary international law on the matter is correctly restated in Article 5 of the Draft Articles on State Responsibility adopted in its first reading by the United Nations International Law Commission: "For the purposes of the present articles ?of Chapter II: The 'Act of the State' under International Lawg, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question" (*Report of the International Law Commission on the work of its Forty-Eighth Session* (6 May-26 July 1996), U.N. Doc. A/51/10, p. 126).
Article 5, as provisionally adopted by the ILC Drafting Committee in 1998, is even clearer. It provides (International Law Commission, Fiftieth Session, 1998, U.N. Doc. A/CN.4/L.569, p. 2):

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

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

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

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

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

131. *See Nicaragua*, paras. 75-80.
132. *Ibid.*, para. 86.
133. *Ibid.*, para. 109 (emphasis added).
134. Separate and Dissenting Opinion of Judge McDonald, para. 25.
135. Cross-Appellant's Brief, para. 2.58.
136. *See* the Separate Opinion of Judge Ago in *Nicaragua*, paras. 14-17. Judge Ago correctly stated that it fell to the Court first to establish whether the individuals at issue had the status of national officials or officials of national public entities and then, where necessary, to consider whether, lacking this status, they acted instead as *de facto* State officials, thereby engaging the responsibility of the State. For the purpose of establishing the international responsibility of a State, he therefore identified two broad classes of individuals: those having the status of officials of the State or of its autonomous bodies, and those lacking such a status. Clearly, for Judge Ago the issue of deciding whether an individual had acted as a *de facto* State organ arose only with respect to the latter category. Furthermore, Judge Ago characterised the CIA and the so-called UCLAs in a manner different from the Court (*see* para. 15).
137. Judgement, paras. 584-588.
138. Article 8 of the Draft provides:

> "The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
> a) it is established that such person or group of persons was in fact acting on behalf of that State; or
> b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority" (U.N. Doc A/35/10, para. 34, in *Yearbook of the International Law Commission*, 1980, vol. II (2)).

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

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

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

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

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

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

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

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

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

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

142. *See United States v. Mexico (Stephens Case), Reports of International Arbitral Awards,* vol. IV, pp. 266-267.
143. *See Kenneth P. Yeager v. Islamic Republic of Iran*, 17 *Iran-U.S. Claims Tribunal Reports*, 1987, vol. IV, p. 92).
144. *Ibid.,* para. 23.
145. *Ibid.,* para. 37.
146. *Ibid.*, paras 39, 45. The Claims Tribunal went on to note that:

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

147. *Ibid.*, paras. 12, 41.
148. *Ibid.*, para. 61.
149. *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports (1980), p. 13, para. 17.
150. The Claims Tribunal stated the following:

> "The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances,

and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of 'Komitehs' or 'Guards' were in fact *not* acting on its behalf, or were not exercising elements of government authority, or that it could not control them". (*Kenneth P. Yeager v. Islamic Republic of Iran*, 17 *Iran-U.S. Claims Tribunal Reports,* 1987, vol. IV. p. 92, at para. 43).

151. The Claims Tribunal went on to say:

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

The Tribunal then concluded that:

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

See *William L. Pereira Associates, Iran v. Islamic Republic of Iran*, Award No. 116-1-3, 5 *Iran-U.S. Claims Tribunal* 1984, p. 198 at p. 226. *See* also *Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran*, Award No. 338-484-1, 17 *Iran-U.S. Claims Tribunal Reports,* 1987, p. 245). Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of "armed men wearing patches on their pockets identifying them as members of the revolutionary guards" (para. 53). A similar stand was taken in *Schott v. Islamic Republic of Iran,* Award No. 474-268-1, 24 *Iran-U.S. Claims Tribunal Reports*, 1990, p. 203 at para. 59.
In *Daley,* on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for the five Iranian "Revolutionary Guards" who had taken the car were "in army-type uniforms" at the entrance of a hotel which had come "under the control of Revolutionary Guards" a few days before. (*Daley v. Islamic Republic of Iran*, Award No. 360-1-514-1, 18 *Iran-U.S Claims Tribunal Reports*, 1988, 232 at paras. 19-20).
152. *Loizidou v. Turkey* (Merits), Eur. Court of H. R., Judgement of 18 December 1996 (40/1993/435/514).
153. In its judgement, the Court stated the following on the point at issue here:

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

154. 2 StE 8/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal's Library).
155. The Court stated the following:

> "The conflict in Bosnia-Herzegovina was an international conflict for the purposes of Article 2 of the Fourth Geneva Convention. Owing to the declaration of independence and the referendum of 29 February and 1 March 1992 and to international recognition on 6 April 1992, Bosnia-Herzegovina had become an autonomous State, independent from Yugoslavia.
> The armed conflict that took place on its territory in the following period was not an internal clash (conflict), in which an ethnic group was trying to break with the existing State of Bosnia-Herzegovina and which [as a consequence] had no international character. The expert witness Fischer pointed out that, by using the term international humanitarian law applicable to this conflict, the United Nations Security Council has used the term usual in international terminology to refer to the law applicable to international armed conflicts. This [according to the expert witness] showed that the Security-Council considered the conflict to be international. The expert witness Fischer cited the following circumstances as indicia of an international conflict according to the prevailing view in international law: the participation of organs of a State in a conflict on the territory of another State, e.g. the participation of officers in the clashes, or the financing of and provision of technical equipment to one party to the conflict by another State; the latter at least when it is combined with the aforementioned interconnection [Verflechtung] between personnel. According to this Chamber's findings, these criteria are met in the case at hand. The Chamber has found that at the beginning of May officers of the JNA, which at that time

> was purely Serb, began taking Doboj and the surrounding villages. There can, therefore, be no doubt regarding the existence of an international armed conflict at that point in time. However, this Chamber has further found that after 19 May 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May *maté riel*, weapons and vehicles were still being brought from Belgrade to Bosnia-Herzegovina. As a consequence, a close personal, organisational and logistical interconnection [Verflechtung] of the Bosnian-Serb army, paramilitary groups and the JNA persisted. The headquarters of the Bosnian-Serb army maintained a liaison office in Belgrade." (*ibid.*, pp. 158-160 of the unpublished typescript; unofficial translation).

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

157. See e.g., the debates in the U.N. Security Council in 1976, on the raids of South Africa into Zambia to destroy bases of the SWAPO (*see* in particular the statements of Zambia (SCOR, 1944th Meeting of 27 July 1976, paras. 10-45) and South Africa (*ibid.,* paras. 47-69); *see* also SC resolution no. 393 (1976) of 30 July 1976)); *see* also the debates on the Israeli raids in Lebanon in June 1982 (in particular the statements of Ireland (SCOR, 2374th Meeting of 5 June 1982, paras. 35-36) and of Israel (*ibid.,* paras. 74-78 and SCOR, 2375th Meeting of 6 June 1982, paras. 22-67) and in July-August 1982 (*see* the statement of Israel, SCOR, 2385th Meeting of 29 July 1982, paras. 144-169)); *see* also the debates on the South African raid in Lesotho in December 1982 (*see* in particular the statements of France (SCOR, 2407th Meeting of 15 December 1982, paras. 69-80), of Japan (*ibid.,* paras. 98-107), of South Africa (SCOR, 2409th Meeting of 16 December 1982, paras. 126-160) and of Lesotho (*ibid.,* paras. 219-227)).
Although there does not seem to exist any international practice in this area, it may happen that a State simply providing economic and military assistance to a military group (hence not necessarily exercising effective control over the group) directs a member of the group or the whole group to perform a specific internationally wrongful act, e.g. an international crime such as genocide. In this case one would face a situation similar to that described above, in the text, of a State issuing specific instructions to an individual.

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

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

160. The Court stated the following:

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

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

162. The Court stated the following:

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

163. *See Nicaragua*, para. 75.

164. *Ibid.*, para. 80.

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

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

> "The Claimant's reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the

> Claimant's departure in circumstances amounting to an expulsion. While these statements are of anti-foreign and in particular anti-American sentiment, the Tribunal notes that these pronouncements were of a general nature and did not specify that Americans should be expelled *en masse*." (*ibid.*, para. 35).

167. For examples of State practice apparently adopting this approach to the question of attribution, *see* for instance the relevant documents in the *Cesare Rossi* case (an Italian antifascist staying in Switzerland who was lured by two other Italians acting on behalf of the Italian authorities into crossing the border with Italy, where he was arrested: *see* 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1929, pp. 280-294); the *Jacob Salomon* case (a German national was kidnapped by another German national in Switzerland and taken to Germany: *see* the relevant documents mentioned in 29 *American Journal of International Law* 1935, pp. 502-507, 36 *American Journal of International Law* 1936, pp.123-124). *See* further the *Sabotage* cases decided by the United States-Germany Mixed Claims Commission (*Lehigh Valley Railroad Co., Agency of Canadian Can and Foundry Co., Ltd., and various underwriters (United States) v. Germany, Reports of International Arbitral Awards*, vol. VIII, pp. 84 *ff.* (especially pp. 84-87) and pp. 225 *ff.* (especially 457-460). In these cases, in July 1916 some individuals, at the request of the German authorities intent on bringing about sabotage in the United States, had set fire to a terminal in New York harbour and to a plant of a company in New Jersey.
Mention can also be made of the *Eichmann* case (*Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports* 1968, pp. 277-344): *see* for instance Security Council resolution 4349 of 23 June 1960 and the debates in the Security Council; *see* in particular the statements of Argentina (SCOR, 865th Meeting of 22 June 1960, paras. 25-27), of Israel (SCOR of the 866th Meeting on 22 June 1960, para. 41), of Italy (SCOR of the 867th Meeting of 23 June 1960, paras. 32-34), of Ecuador (*ibid.*, paras. 47-49), of Tunisia (*ibid.*, para. 73) and of Ceylon (SCOR of the 868th Meeting of 23 June 1960, paras. 12-13).
In many of these cases, the need for specific instructions by the State concerning the commission of the specific act with which the individual had been charged, or the *ex post facto* public endorsement of that act, can be inferred from the facts of the case.
168. These cases, although they concern war crimes (the notion of "grave breaches" had not yet come into existence at the time), are nevertheless relevant to our discussion. Indeed, they provide useful indications concerning the conditions on which civilians may be assimilated to State officials.
169. *Trial of Joseph Kramer and 44 Others*, British Military Court, Luneberg, 17th September-17th November, 1945, *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947 ("UNWCC"), vol. II, p. 1.
170. *Ibid.*, p. 152 (emphasis added) (the Austrian civilian, Schlomowicz, was not found guilty). *See* also *ibid.*, p. 109. Most of the accused civilians were found guilty and sentenced to imprisonment. It is clear from this case that according to the court, by acting as *de facto* members of the German apparatus running the Belsen concentration camp, the Polish civilians could be assimilated to German State officials.
171. *Public Prosecutor v. Menten*, 75 *International Law Reports* 1987, pp. 331 *ff.*
172. The court stated the following:

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

The court concluded that:

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

173. Menten was sentenced to ten years' imprisonment by the District Court of Rotterdam (Judgement of 9 July 1980, *ibid.*, p. 361). It should be pointed out that the Dutch Court of Cassation had been obliged to investigate whether Menten was "in military, state or public service of or with the enemy" as this was an ingredient of the relevant Dutch law (*ibid.*, p. 346). The Appeals Chamber holds, however, that the *Menten* case is in line with the rules of general international law concerning the assimilation of private individuals to State officials.
174. *See*, e.g., the *Daley* case, where the Iran U.S. Claims Tribunal attributed international responsibility to Iran for acts of five Iranian "Revolutionary Guards" in "army type uniforms" (18 *Iran-U.S. Claims Tribunal Reports*, 1988, p. 238, at para. 19).

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

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

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

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

177. Judgement, para. 601.

178. *Ibid.*

179. *Ibid.*, paras. 601-602.

180. As Judge McDonald noted:

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

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

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

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

182. Judgement, para. 115:

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

See further *ibid.*, para. 590: "The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the 'Banja Luka' or '1st Krajina' Corps after 19 May 1992 but retained the same commander." *See* also *ibid.*, paras. 114-116, 118-121, 594.
183. *Ibid.*, para. 118 ("Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ [...] remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993") and para. 569 ("[...] the forces of the VJ continued to be involved in the armed conflict after that date").
184. See in particular *ibid.*, para. 566:

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

See also para. 579: "[T]he take-over of opstina Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date". *See* also the Dissenting Opinion of Judge McDonald who noted "[t]he continuity between the JNA and the VRS particularly as it relates to the military operations in the Opstina Prijedor area [...]." (Separate and Dissenting Opinion of Judge McDonald, para. 15).
185. Moreover, it is interesting to observe that while concluding that by 19 May 1992 effective control over the VRS had been lost by the JNA/VJ, the Trial Chamber simultaneously observed that such control nevertheless did not appear to have been regained by the Bosnian authorities. In particular, the Trial Chamber found that the "Government of the Republic of Bosnia and Herzegovina [...] faced [...] major problems [...] of defence, *involving control over the mobilization and operations of the armed forces*" (Judgement, para. 124, emphasis added).
186. In and of itself, the logistical difficulties of disengaging from the conflict and withdrawing such a large force would have been considerable. With regard to the extent and depth of the involvement of the large number of JNA forces engaged in Bosnia and Herzegovina and the ongoing nature of their activities beyond 19 May 1992, *see ibid.*, paras. 124-125: "By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. [...] On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS."
187. *See* in particular *ibid.*, para. 116 (citing the 1993 publication of the former Yugoslav Federal Secretary for Defence, General Veljko Kadijevic, entitled *My view of the Break-up: an Army without a State (*Prosecution Exhibit 30)):

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

See also para. 590:

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

188. While the relationship between the JNA and VRS may have included coordination and cooperation, it cannot be seen as limited to this. As the Trial Chamber itself noted: "In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and *acted under the command and within the framework of the JNA*."(*ibid.*, para. 593; emphasis added).
189. *Ibid.*, para. 598:

> "The Trial Chamber has already considered the overwhelming importance of the logistical support provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. [...] [I] n addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade [...] ."

190. *Ibid.*, para. 601.
191. The Trial Chamber noted that:

> "[i]t is clear from the evidence that the military and political objectives of the *Republika Srpska* and of the

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

192. *Ibid.*, para. 602. On this point, the Trial Chamber noted, further, that:

> "given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that existing administrative mechanisms for financing those soldiers and their operations would be relied on after 19 May 1992[...] ." (*ibid.*).

193. Ibid.
194. *See* in this regard the testimony of the expert witness Dr. James Gow, transcript of hearing in *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-T, 10 May 1996, pp. 308-309; *ibid.*, 13 May 1996, pp. 330-338.
195. Judgement, para. 605.
196. It was deemed insufficient by the Trial Chamber that the VJ "'made use of the potential for control inherent in that dependence', *or was otherwise given effective control over those forces* [...] " (*ibid.;* emphasis added).
197. The Trial Chamber noted that:

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

198. *See Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the establishment and commencement of operations of an International Conference on the Former Yugoslavia Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro)*, S/1994/1074, 19 September 1996, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) ordered, *inter alia*, the breaking off of political and economic relations with the *Republika Srpska* and the closure of the border between the *Republika Srpska* and the FRY to all transport towards the *Republika Srpska*, except food, clothing and medicine. International observers were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the Government of the FRY appeared to be "meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces." (*Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the state of implementation of the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)*, S/1994/1124, 3 October 1994, pp. 2-3).
199. As outlined below, this process culminated in the agreement of the *Republika Srpska* to be represented at the Dayton conference by the FRY (below, at paragraph 159). This appears to have been in spite of intense opposition, within the *Republika Srpska*, to the peace settlements proposed by the international community, as is evidenced by the overwhelming rejection by the Bosnian Serbs of the international community's peace plan for Bosnia and Herzegovina in a referendum which took place in Bosnian Serb-held territory on 27 – 28 August 1994 (*See Report of the Secretary-General on the Work of the Organization*, UNGAOR, 49th sess., supp. no. 1 (A/49/1), 2 September 1994, p. 95).
200. This agreement stipulated that the delegation of the *Republika Srpska* was to be "headed by the President of the Republic of Serbia Mr. Slobodan Milosevic" (Article 2). Pursuant to this agreement, the leadership of the *Republika Srpska* agreed "to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milosevic, shall be decisive" (Article 3). That Mr. Milosevic was head of the joint delegation was confirmed by Mr. Milosevic himself in his letter of 21 November 1995 to President Izetbegovic concerning Annex 9 to the Dayton-Paris Accord. (Agreement on file with the International Tribunal's Library).
201. This letter had been signed by Mr. Milutinovic, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the "Delegation of *Republika Srpska*" to Mr. Milosevic.
202. *See* the texts of the Dayton-Paris Accord (General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995).
203. Article 4(2) of Geneva Convention IV provides as follows:

> "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

204. The preparatory works of the Convention suggests an intent on the part of the drafters to extend its application, *inter alia*, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to find themselves on the territory of the other Party to the conflict occupied by their national State, they nevertheless do not lose the status of "protected persons" (*see Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II, pp. 561-562, 793-796, 813-814).
205. *See* also Article 44 of Geneva Convention IV:

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

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

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

206. Cross-Appellant's Brief, para. 3.6.
207. T. 169 (20 April 1999).
208. T. 170 (20 April 1999).
209. T. 176 (20 April 1999).
210. Cross-Appellant's Brief, para. 3.12.
211. Judgement, para. 373.
212. Skeleton Argument of the Prosecution, para. 42.
213. Judgement, para. 373: "The bare possibility that the deaths of the Jaskici villagers were the result of encountering a part of that large force would be enough [...] to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths."
214. *Ibid.*, para. 373: "The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part [...] ."
215. T. 172 (20 April 1999).
216. Cross-Appellant's Brief, para. 3.19.
217. *Ibid.*, paras. 3.24, 3.27.
218. Cross-Appellant's Brief, paras. 3.27-3.29; T. 179-180 (20 April 1999).
219. Cross-Appellant's Brief, para. 3.29.
220. Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.8-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(c).
221. T. 251 (21 April 1999).
222. Defence's Substituted Response to Cross-Appellant's Brief, para. 3.19; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
223. Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.9-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
224. Judgement, paras. 369, 373.
225. *Ibid.*, paras. 370-373.
226. *Ibid.*, para. 373.
227. *Ibid.*
228. An example is provided by Article 27 para. 1 of the Italian Constitution ("*La responsibilità penale è personale.*" ("Criminal responsibility is personal.") (unofficial translation)).
229. *See* for instance Article 121-1 of the French *Code pénal* ("*Nul n'est responsable pénalement que de son propre fait*"), para. 4 of the Austrian *Strafgesetzbuch* ("*Strafbar ist nur, wer schuldhaft handelt*" ("Only he who is culpable may be punished") (unofficial translation)).
230. This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, *see*, for Great Britain, *R. v. Dalloway* (1847) 3 Cox CC 273. *See* also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).
231. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 53 (emphasis added).
232. *Ibid.*, para 54 (emphasis added).

233. *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35).
234. The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that "the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot" (*ibid.*, p. 37). In his summing up the Judge Advocate pointed out that:

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

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (*ibid.*, p. 41).
235. *Hoelzer et al.*, Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal's Library).
236. *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).
237. *Ibid.*, p. 241.
238. *Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).
239. *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).
240. The Prosecutor had stated the following:

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

241. *Ibid.*, summing up of the Judge Advocate, p. 7.
242. In this regard, the Judge Advocate noted that: "[o] f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]" (*ibid.*, pp. 7-8).
243. In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

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

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

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

> who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they a knew [...] " (*ibid.*, p. 276).

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

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

245. The tribunal went on to say:

> "Even though these men [Radetsky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that *they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder*. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman" (*ibid.*, p. 373; emphasis added).

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

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

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

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

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

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

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

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

251. The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms: **601**

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

252. In particular, the accused Kramer appears to have been convicted on this basis. (*See ibid.,* p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held.*" (emphasis added).
253. *Ibid.,* p.121.
254. In a similar vein, the *Case against R. Mulka et al.* ("*Auschwitz concentration camp* case") can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (*see* in particular the *Bundesgerichtshof* in *Justiz und NS-Verbrechen,* vol. XXI, pp. 838 *ff.,* and especially pp. 881 *ff*). The BGH stated, p. 882:

> "[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).

255. *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.
256. *Ibid.,* p. 89.
257. *See* transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).
258. *Ibid.,* p. 66 (emphasis added).
259. UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing "that the motives of the crowd against them [the airmen] were deadly, and yet he joined in" (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal's Library); the second, Kaufer, was found to have "beaten the airmen" and taken "an active part" in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.,* pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airman, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.,* p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen's death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.,* pp. 66-67, UNWCC, vol. I, p. 91).
260. The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being "concerned in the killing" of the airmen rather than murder as this was "not a trial under English law" (*ibid.,* at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that "as long as everyone realised what was meant by the word 'murder' for the purposes of this trial, [there ...] was [no] difficulty" (*ibid.,* pp. 91-92).
261. *See* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).
262. *Ibid.,* p. 1186 (emphasis added). *See* also p. 1187.
263. *Ibid.,* p. 1188. *See*, further note 240 and accompanying text, with regard to the comments made regarding causation in the *Ponzano* case.
264. *Ibid.,* p. 1190 (emphasis added). *See* also pp. 1191-1194.
265. *See* e.g. *ibid.,* pp. 1201, 1203-1206.
266. *See ibid.,* pp. 1234, 1241, 1243.
267. *See ibid.,* pp. 1268-1270.

268. The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (*ibid.*, pp. 1280-1286).
269. The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (*ibid.*).
270. *See* handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).
271. *See* handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).
272. *See* handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). For a headnote on this case *see Archivio penale,* 1949, p. 472.
273. Judgement of 12 September 1946, in *Archivio penale,* 1947, Part II, pp. 88-89.
274. Judgement of 25 July 1946, in *Archivio penale,* 1947, Part II, p. 88.
275. *See* handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1945-46, Part II, cols. 530-532.
For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, *see Torrazzini*, judgement of 18 August 1946, in *Archivio penale* 1947, Part II, p. 89; *Palmia*, judgement of 20 September 1946, *ibid.*
276. See *Giustizia penale,* 1950, Part II, cols. 696-697 (emphasis added).
277. *See* e.g. Court of Cassation, 15 March 1948, *Peveri* case, in *Archivio penale,* 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in *Giustizia penale,* 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, *P.M. v. Minafò*, in *Giustizia penale,* 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino, ibid.,* col.821; 19 April 1950, *Solesio et al., ibid.,* col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.,* held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale,* 1947, Part II, col. 483, no. 382).
278. In the *Antonini* case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding, holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (*see* text of the judgement in *Giustizia penale,* 1949, Part II, cols. 740-742).
279. The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (*see* UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that "some terms used [in the Convention] such as [...] 'such contribution' (Article 2, para. 3(c)) were ambiguous" (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore "interpret 'such contribution' [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation" (*ibid*). *See* also *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UNGAOR, 52nd sess., 37th supp., A/52/37.
280. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.
281. "Judgement", *Prosecutor v. Anto Furundzija,* Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.
282. Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.
283. *See* Para. 25(2) of the *Strafgesetzbuch: "Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)*". ("If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator." (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. *See* BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

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

284. In the Netherlands, the term designated for this form of criminal liability is "medeplegen". (*See* HR 6 December 1943, *NJ 1944*, 245; HR 17 May 1943, *NJ 1943*, 576; and HR 6 April 1925, *NJ 1925*, 723, W 11393).
285. *See* Article 121-7 of the *Code pénal*, which reads:

> "*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre*". ("Any person who knowingly has assisted in planning or committing a crime or offence, whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it." (unofficial translation)).

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

> "Article 110: Pena per coloro che concorrono nel reato.- *Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilità, salve le disposizioni degli articoli seguenti.*" ("Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles." (unofficial translation)); and
> "Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- *Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento e conseguenza della sua azione od omissione.*" ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. *See* in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, *Archivio Penale* 1965, part II, pp. 430 *ff*. In some cases courts require so-called abstract foreseeability (*prevedibilità astratta*) (*see* e.g., instance, Court of Cassation, 3 March 1978, *Cassazione penale,* 1980, pp. 45 *ff*; Court of Cassation, 4 March 1988, *Cassazione penale,* 1990, pp. 35 *ff*); others require concrete (or specific) foreseeability (*prevedibilità concreta*) (*see* e.g., Court of Cassation, 11 October 1985, *Rivista penale,* 1986, p. 421; and Court of Cassation, 18 February 1998, *Rivista penale,* 1988, p. 1200).
287. *See R. v. Hyde* [1991] 1 QB 134; *R. v. Anderson; R. v. Morris [* 1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise (*see* Hui Chi-Ming v. R. [1992] 3 All ER 897 at 910-911).
288. Criminal Code, Section 21(2) reads that where:

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

It should be noted that despite the fact that the section refers to an objective foreseeability requirement, this has been modified by the Supreme Court of Canada which held that: "[i] n those instances where the principal is held to a *mens rea* standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard" (R. v. Logan [1990] 2 SCR 731 at 735). Hence, a subjective standard is applied in the case of offences such as murder. *See* also R. v. Rodney [1990] 2 SCR 687.
289. E.g., in Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (19997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed

in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (*see Pinkerton v. United States,* 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); *State v. Walton,* 227 Conn. 32; 630 A.2d 990 (1993); *State of Connecticut v. Diaz,* 237 Conn. 518, 679 A. 2d 902 (1996)).

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

291. Article 22 of the Penal Code states:

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

292. *See* Report of the Secretary-General, para. 36 (emphasis added).
293. *See* Judgement, paras. 127-179, which outlines the background to the conflict in the opstina Prijedor.
294. Judgement, para. 660.
295. *Ibid.*, para. 370.
296. *Ibid.*
297. Judgement, para. 633.
298. *Ibid.*
299. *Ibid.*, para. 634.
300. Ibid., paras. 656-657.
301. *Ibid.* paras. 658-659.
302. Cross-Appellant's Brief, para. 4.9.
303. Skeleton Argument of the Prosecution, para. 26.
304. Cross-Appellant's Brief, para. 4.11; T. 150 (20 April 1999).
305. Cross-Appellant's Brief, paras. 4.15 – 4.18.
306. *Ibid.* paras. 4.22; T. 152 (20 April 1999).
307. Appellant's Amended Brief on Judgement, para. 4.9; T. 227 (20 April 1999).
308. Appellant's Amended Brief on Judgement, para. 4.12; T. 229 (20 April 1999).
309. Appellant's Amended Brief on Judgement, paras. 4.17 – 4.18.
310. Article 25(1) of the Statute reads as follows: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice".
311. This requirement had already been recognised by this Tribunal in the *Vukovar Hospital* Rule 61 Decision:

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

312. Cross-Appellant's Brief, para. 4.9.
313. On the issue of whether the Statute exceeds customary international law in requiring that there be an armed conflict, *see* the Tadic Decision on Jurisdiction, para. 141.
314. Judgement, para. 634.
315. Ibid.
316. Cross-Appellant's Brief, para. 4.20.
317. *Ibid.*, para. 4.23.
318. Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), S. StS 78/48, in *Justiz und NS-Verbrechen* vol. II, pp. 498-499. The Accused, Mrs. *K. and P.,* had denounced P's Jewish wife to the Gestapo for her anti-Nazi remarks. The defendants' sole purpose was to rid themselves of Mrs. *P.,* who would not agree to a divorce, and the Accused saw no other means of so doing than by delivering Mrs. *P.* to the Gestapo. Upon her denunciation, Mrs. *P.* was arrested and brought to Auschwitz concentration camp where she died after a few months due to malnutrition. The Court of First Instance convicted *K. and P.* of crimes against humanity. (*See* Decision of *Schwurgericht* Hamburg from 11 May 1948, (50). 17/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 491-497). The Accused appealed to the Supreme Court of the British Zone which dismissed their appeal and confirmed their convictions, stating that both the physical and the mental elements of a crime against humanity were met. (*See* Decision of the Supreme Court for the

British Zone from 9 November 1948, S. StS 78/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 498-499 at p. 499). According to the Supreme Court, the findings of the Court of First Instance had sufficiently proved that the accused fulfilled this mental requirement.
319. *Ibid.*, p. 499.
320. OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone* I, 1949, pp. 321-343. The Accused, Dr. P and others, were medical doctors and a jurist working in a hospital for mentally disturbed patients. Pursuant to Hitler's directive which ordered the transferral of mentally ill persons to other institutions (where the patients were secretly killed in gas chambers), the Defendants in a few cases participated in the transfer of patients. In most cases, however, they objected to these instructions and tried to save their patients' lives by releasing them from hospital or by classifying them in categories which were not subject to Hitler's directive. The Defendants, charged with aiding and abetting murder, were acquitted by the Court of First Instance because it could not be proven that they had acted with the requisite *mens rea* with regard to participation in the killing of the patients. The Court of First Instance did not take into consideration whether the Defendants' behaviour could constitute a crime against humanity. This was criticised by the Supreme Court for the British Zone, which ordered the re-opening of the trial before the Court of First Instance to ascertain whether the Accused could be found guilty of a crime against humanity. The Supreme Court stated that a "perpetrator [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, [...] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives ("*Beweggründe*"), the action remains linked to this violent and oppressive system ("*Gewaltherrschaft*")" (*ibid.*, p. 341). The Defendants, ultimately, were not convicted of crimes against humanity for procedural reasons unrelated to the definition of the offence.
321. Decision of Flensburg District Court dated 30 March 1948 in *Justiz und NS-Verbrechen*, vol. II, pp. 397-402. *See* this decision for the findings of the District Court to the effect that the denunciation was made for personal reasons.
322. Decision of the Supreme Court of the British Zone dated 26 October 1948, S. StS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I., pp. 122-126 at p. 124 (unofficial translation). The essence of this statement was reiterated in the Decision of the Supreme Court dated 8 January 1949 against *G.* (S. StS 109/48, *ibid.*, pp. 246-249). *G.*, a member of the SA (Stormtroopers), had participated in the mistreatment of a political opponent for apparently purely personal motives, namely personal rancour between his family and the family of the victim. Nevertheless, *G.* was found guilty of a crime against humanity. The Supreme Court dismissed *G.*'s appeal against his conviction, stating that the motive for an attack was immaterial and that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny (*ibid.*, p. 247).
323. The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. StS 43/48, *ibid.*, pp. 60-62 and Decision dated 13 November 1948, S. StS 68/48, *ibid.*, pp. 186-190. *See* also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. StS 120/49, *ibid.*, pp. 385–391, at p. 388.
324. Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen*, vol. VI, pp. 631-644, at p. 639. Note, in particular, the findings of the District Court to the effect that the denunciation was motivated by personal concerns. Mention can also be made of the Decision of *Schwurgericht* Hannover, dated 30 November 1948, in the *B.* case, S. StS 68/48 (in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I, pp. 186-190). *B.*, an inspector of state church offices, informed his superior that one of his colleagues, *P.*, had repeatedly expressed his doubts about the political situation in Germany and voiced his disapproval of the persecution of the Jews, the official propaganda, cultural policy and anti-clerical attitude of National Socialism. This information reached the Gestapo, who arrested *P.* A special court sentenced *P.* to one year and three months in prison. *B.*, charged with crimes against humanity, was acquitted at first instance because the verdict of the Court of First Instance (*Schwurgericht* Hannover), having extensively examined the accused's motives ("*Beweggründe*"), could not determine whether the denunciation had been motivated by politics or religion. The Supreme Court for the British Zone dismissed the judgement of the District Court, stating that "it was erroneous and in contradiction to the consistent jurisprudence of the [Supreme] Court" to consider the motives of the accused as important. (*ibid.*, p. 189).
325. Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I, pp. 19-25. The decision of the Supreme Court did not directly concern the accused *Nu.*, but a co-accused of hers. *Nu.* had been sentenced by the District Court of Hamburg for committing a crime against humanity.
326. *See* Cross-Appellant's Brief, paras. 4.15, 4.16.
327. *U.S. v. Ernst von Weizsaecker et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol XIV, pp. 611, 470-471, cited in Cross-Appellant's Brief, para. 4.15.
328. *U.S. v. Altstoetter et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. III.
329. Attorney-General of the Government of Israel v. Adolf Eichmann, 36 *International Law Reports* 1968, p. 323.
330. *Ibid.*, p. 331.
331. *R. v. Finta,* [1994] 1 SCR 701.
332. *Ibid.*, at p. 819, majority judgement delivered by Cory J.
333. Defence's Substituted Response to Cross-Appellant's Brief, para. 4.16.
334. T. 152-153 (20 April 1999).
335. Cross-Appellant's Brief, para. 5.5; T. 161 (20 April 1999).
336. Cross-Appellant's Brief, para. 5.6; T. 162 (20 April 1999).

337. The statement reads as follows: "Crimes against humanity refer to inhumane acts of a very serious nature [...] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."
338. Cross-Appellant's Brief, paras. 5.7, 5.8; T. 162, 163 (20 April 1999).
339. Cross-Appellant's Brief, paras. 5.20, 5.22.
340. Cross-Appellant's Brief, para. 5.24; T. 165 (20 April 1999).
341. Cross-Appellant's Brief, para. 5.26; T. 165 (20 April 1999).
342. T. 231-232 (21 April 1999).
343. T. 236 – 239 (21 April 1999).
344. Skeleton Argument of the Prosecution, para. 32.
345. *See* Cross-Appellant's Brief, para. 7.1(4), where the Prosecution requests the Appeals Chamber to "reverse the decision of the Trial Chamber, at page 250 paragraph 652, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute."
346. ICJ Reports (1950), p. 8.
347. *See* paragraphs 294-300 below.
348. Article 5 (c) of the Statute of the International Military Tribunal for the Far East provides:

> "*Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

349. Article II (1) (c) of Control Council Law No. 10 provides:

> "*Crimes against Humanity*: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

350. The Supreme Court of Canada held that:

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

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

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

It should be noted, however, that the Court was clearly wrong as far as the question of the famous semi-colon was concerned; it is well known that in actual fact the Protocol of 6 October 1945 replaced the semi-colon with a colon. (For the text of the Protocol *see Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10,* vol. I, pp. XVI-XIX).
Reference can also be made to some cases decided by the German Supreme Court for the British Zone. The Appeals Chamber will briefly mention three of them: *R.*, *P. et al.* and *H.*
In a Decision of 27 July 1948 (S. StS 19/48), the court pronounced on the case of *R.* In 1944, a member of the NSDAP (the German National Socialist Worker's Party) and the NSKK (National Socialist Motor Vehicle Corps) had denounced another member of the NSDAP and of the SA (Stormtroopers) for insulting the leadership of NSDAP; as a result of this denunciation the victim had been brought to trial three times and eventually sentenced to death. (The sentence had not been carried out because the Russians had occupied Germany in the interim). The Court held that the denunciation could constitute a crime against humanity if it could be proved that the agent had intended to hand over the victim to the "uncontrollable power structure of the [Nazi] party and State", knowing that as a consequence of his denunciation the

victim was likely to be caught in an arbitrary and violent system (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone,* vol. I, pp. 45-49 at p. 47).
In a Decision of 7 December 1948 (S. StS 111/48), in the *P. et al.* case, the same court gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military. During the night after Germany's partial capitulation (5 May 1945) four German marines had tried to escape from Denmark back to Germany. The next day they were caught by Danes and delivered to German troops, who court-martialled and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany, i.e. 10 May 1945, the three were executed. The German Supreme Court found that the five members of the court-martial were guilty of complicity in a crime against humanity. According to the Supreme Court, the glaring discrepancy between the offence and the punishment constituted a clear manifestation of the Nazis' brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State; there was "an intolerable degradation of the victim[s] to mere means for the pursuit of a goal, hence the depersonalisation and reification of human beings." (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone, ibid.,* vol. I, pp. 217-229 at p. 220). Consequently, by sentencing the marines to death the members of the court-martial had inflicted an injury upon humanity as a whole.
The same broad interpretation of Control Council Law No. 10 may be found, finally, in a Decision of 18 October 1949 (S. StS 309/49) in the *H.* case (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, vol. II, pp. 231-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (*Bordkriegsgericht*) against two officers of the German Navy, a submarine commander, charged in 1944 with criticising Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The Judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years' imprisonment). The Supreme Court held that the Judge could be found guilty of crimes against humanity even if he had not acted for political reasons, to the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, *ibid.,* vol. II, pp. 233, 238).
352. *See* for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session May 6-July 26, 1996*, UNGAOR 51st sess., supp. no. 10 (A/51/10), pp. 93-94.
353. While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus, others argued that "the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element." These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal's Statute. (*See Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996*, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17).
354. Article 7(1) of the Rome Statute provides: "For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder [...] ." Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the *mens rea* of the defendant and the existence of a widespread or systematic attack directed against a civilian population.
355. Report of the Secretary-General, para. 48.
356. For instance, the express requirement in Article 5 of a nexus with an armed conflict creates a narrower sphere of operation than that provided for crimes against humanity under customary international law.
357. He stated the following: "[W] ith regard to Article 5, that Article applied to all the acts set out therein when committed in violation of the law during a period of armed conflict on the territory of the former Yugoslavia, within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons" (U.N. Doc. S/PV. 3217, p.11).
358. *See* U.N. Doc. S/PV. 3217, p. 15.
359. On Article 5 the United States representative said that: "[I] t is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds" (U.N. Doc. S/PV. 3217, p.16).
360. He said the following: "While believing that the text of the Statute addresses the tasks that face the Tribunal, and for that reason supporting it, we deem it appropriate to note that, according to our understanding, Article 5 of the Statute encompasses criminal acts committed on the territory of the former Yugoslavia during an armed conflict - acts which were widespread or systematic, were aimed against the civilian population and were motivated by that population's national, political, ethnic, religious or other affiliation" (U.N. Doc. S/PV. 3217, p. 45).
361. Article 31(1) and (2) provide:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 608

362. The Trial Chamber in its Judgement of 7 May 1997 has also correctly emphasised that the phrases "widespread" and "systematic" are disjunctive as opposed to cumulative requirements (*see* Judgement, paras. 645-648). *See* also the *Nikolic* Rule 61 Decision, ("Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *The Prosecutor v. Dragan Nikolic,* Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995) (*Nikolic* (1995) II ICTY JR 739).
363. *See Tadic* Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the representatives of the United Kingdom and Hungary).
364. *See ibid.*, para 143 (where reference was made to the statements of the representatives of the United States, the United Kingdom and France).
365. Cross-Appellant's Brief, para. 6.3.
366. *Ibid.*, para. 6.6; T. 190 (20 April 1999).
367. *Ibid.*, paras. 6.6-6.24.
368. T. 186 (20 April 1999).
369. T. 186 (20 April 1999).
370. Cross-Appellant's Brief, paras. 6.7-6.14.
371. T. 187 (20 April 1999).
372. T. 187 (20 April 1999).
373. Cross-Appellant's Brief, paras. 6.15-6.18.
374. *Ibid.*, para. 6.20.
375. *Ibid.*, para. 6.21.
376. 422 U.S. 225 (1975).
377. Cross-Appellant's Brief, paras. 6.25-6.31.
378. *Ibid.*, para. 6.31.
379. Ibid.
380. Defence's Substituted Response to Cross-Appellant's Brief, para. 6.3; Skeleton Argument of the Prosecution, para. 5(b).
381. Defence's Substituted Response to Cross-Appellant's Brief, para. 6.13; Skeleton Argument of the Prosecution, para. 5(d).
382. Skeleton Argument of the Prosecution, paras. 5(f)-(g).
383. T. 275 (21 April 1999).
384. T. 275, 278 (21 April 1999).
385. Skeleton Argument of the Prosecution, para. 5(h).
386. Article 25(1) provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."
387. T. 185 (20 April 1999).
388. Sub-rule 89(B) provides:

> "In cases not otherwise provided for in this Section, a Chamber shall apply Rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

389. Article 14 provides in part:

> "(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] .
> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...] ; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance [...] ; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...] ; (g) not to be compelled to testify against himself or to confess guilt. [...] ."

390. Article 6 provides in part:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established

by law. [...] .
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...] ; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...] ."

391. *See* "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaskic,* Case No.: IT-95-14-AR108*bis,* Appeals Chamber, 29 October 1997, para. 25.
392. Sub-rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."
393. Sub-rule 89(D) provides: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."
394. Sub-rule 89(E) provides: "A Chamber may request verification of the authenticity of evidence obtained out of court."
395. Rule 97 provides in part: "All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial [...] ."

Case No: IT-97-25-T

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Judgment of: 15 March 2002

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGMENT

Counsel for the Prosecutor:

Ms Hildegard Uertz-Retzlaff
Ms Peggy Kuo
Mr William Smith

Counsel for the Accused:

Mr Mihajlo Bakrac

Mr Miroslav Vasic

I. SUMMARY OF THE CHARGES

1. Milorad Krnojelac ("Accused") is charged under the third amended indictment ("Indictment"), dated 25 June 2001, with 12 counts.[1]

2. The Prosecution alleges that, on 7 April 1992, Serb military forces began the occupation of Foca town. The occupation was completed on 16 or 17 April 1992. Once the Serb forces had gained control over parts of Foca town, military police, accompanied by local and non-local soldiers, started to arrest Muslim and other non-Serb inhabitants. Men and women were separated and arrested. Beginning on or around 14 April 1992, the Foca Kazneno-Popravni Dom ("KP Dom"), a prison, became the primary detention centre for Muslim and other non-Serb men, as well as for a few Serbs who had tried to avoid military service. The Prosecution alleges that the KP Dom was overcrowded during the first few months due to the continuing arrests, most of the detainees being civilians who had not been charged with any crime.

3. The Prosecution alleges that the Accused was the commander of the KP Dom from April 1992 until August 1993, and that as such he was responsible for running the detention camp. He was in a position of superior authority with respect to everyone in the camp and exercised powers and duties consistent with this superior position. The Prosecution alleges that he is individually responsible for the crimes charged against him pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), as well as (or alternatively) responsible as a superior for the acts of his subordinates pursuant to Article 7(3) of the Statute.

4. The Accused is charged under COUNT 1 with persecution on political, racial or religious grounds as a crime against humanity, pursuant to Article 5(h) of the Statute. It is alleged that, while acting as the camp commander, the Accused, together with the KP Dom guards under his command and in common purpose with other guards and soldiers, persecuted the non-Serb male civilian detainees at the KP Dom on political, racial or religious grounds. As part of the persecution of non-Serb male civilian detainees, it is alleged that the Accused participated in or aided and abetted the execution of the common plan involving imprisonment and confinement, torture and beatings, killings, forced labour, inhumane conditions and deportation and expulsion.

5. Under COUNTS 2 and 4, the Accused is charged with torture as a crime against humanity, pursuant to Article 5(f) of the Statute, and as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. These counts are based on the Accused's alleged participation in torture and beatings carried out as punishment for even minor violations of the prison rules, such as passing messages to other detainees and giving an extra slice of bread to a fellow detainee when warned not to do so. The Accused is also alleged to have aided and abetted in torture and beatings during interrogations of the detainees.

6. Under COUNTS 5 and 7, the Accused is charged with inhumane acts as a crime against humanity, pursuant to Article 5(i) of the Statute, and cruel treatment as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. These charges are based on his alleged participation in beatings of detainees upon their arrival in the prison yard of the KP Dom on different occasions between April and December 1992. The Prosecution alleges that the Accused also participated in beatings which occurred between May and December 1992 while detainees were on their way to the canteen, as well as in arbitrary beatings of detainees during their confinement. In addition to these beatings, the Prosecution alleges that the Accused participated in beatings and acts of torture in the circumstances described under Counts 2 and 4.

7. Under COUNTS 8 and 10, the Accused is charged with murder as a crime against humanity, pursuant to Article 5(a) of the Statute, and as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. The Accused is alleged to have participated in the murders of detainees which occurred between June and August 1992 in the KP Dom. The Prosecution alleges that KP Dom guards selected groups of detainees according to lists provided by the prison authorities and took them into rooms in the administration building where they were beaten. These beatings are alleged to have resulted in the death of a number of detainees. The Prosecution alleges that the Accused incurred criminal responsibility by ordering and supervising the actions of the guards and by allowing military personnel access to the detainees for this purpose.

8. Under COUNT 11, the Accused is charged with imprisonment as a crime against humanity, pursuant to Article 5(e) of the Statute. The Accused is alleged to have participated in implementing the unlawful confinement of Muslim and other non-Serb civilians between April 1992 and August 1993 through his actions as warden of the KP Dom.

9. Under COUNTS 13 and 15, the Prosecution charges the Accused with having committed inhumane acts as a crime against humanity, pursuant to Article 5(i) of the Statute, and with cruel treatment as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions. This charge is based on the Prosecution's allegation that, while the Accused was warden of the KP Dom, living conditions in the camp were characterised by inhumane treatment, overcrowding, starvation, forced labour and constant physical and psychological assault.

10. Finally, under COUNTS 16 and 18, the Accused is charged with enslavement as a crime against humanity, pursuant to Article 5(c) of the Statute, and with slavery as a violation of the laws or customs of war, pursuant to Article 3 of the Statute and recognised under the Slavery Convention and international customary law. The Accused is alleged to have participated in subjecting detainees to forced labour between May 1992 and August 1993. The Prosecution alleges that the Accused approved decisions to force individual detainees to work during May 1992. In July 1992, he, together with other high ranking prison staff, are alleged to have formed and supervised a workers' group of approximately seventy of the detainees with special skills. These detainees are alleged to have been kept in detention from summer 1992 until October 1994 for the primary purpose of being used for forced labour.

11. Counts 3, 6, 9, 12, 14 and 17, which pleaded charges pursuant to Article 2 of the Statute, were withdrawn prior to the commencement of the trial. The procedural background of this case is set out in Annex II.

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

A. Facts relevant to the general requirements of Article 3 and Article 5 of the Statute

12. The parties agree that, from April 1992 until at least August 1993, a state of armed conflict existed in the Republic of Bosnia and Herzegovina.[2] The parties to the armed conflict in Foca town and municipality were composed primarily of ethnic Serb forces on one side and of ethnic Muslim forces on the other.[3] The existence of an armed conflict is relevant to charges under both Article 3 and Article 5 of the Statute.

13. Foca town and municipality are located in the Republic of Bosnia and Herzegovina ("Bosnia and Herzegovina"), Southeast of Sarajevo, near the border of Serbia and Montenegro.[4] According to the 1991 census, the population of Foca consisted of 40,513 persons; 51.6% were Muslim, 45.3% Serb and 3.1% of other ethnicities.[5] Although ethnically mixed, individual neighbourhoods in Foca town or villages in the municipality could be identified as predominantly Muslim or Serb areas.[6] The following paragraphs represent findings made by the Trial Chamber based upon the evidence presented.

14. As in much of Bosnia and Herzegovina, Foca municipality was affected at the beginning of the 1990s by the rise of opposing nationalist sentiments which accompanied the disintegration of the Socialist Federal Republic of Yugoslavia ("SFRY"). Tensions between the two major ethnic groups in Foca were fuelled by the Serbian Democratic Party ("SDS") on behalf of the Serbs and the Party for Democratic Action ("SDA") on behalf of the Muslims. Before the multi-party elections held in Foca in 1990, inter-ethnic relations appear to have been relatively normal,[7] but afterwards the inhabitants of Foca began to split along ethnic lines and inter - ethnic socialising ceased.[8]

15. Both the SDS and the SDA organised rallies or "promotional gatherings" in Foca, similar to those being organised throughout Bosnia.[9] The SDA rally was attended by Alija Izetbegovic, leader of the Bosnian SDA,[10] while the SDS rally attracted leading party members such as Radovan Karadzic, Biljana Plavsic, Vojislav Maksimovic, Ostojic, Kilibadar and Miroslav Stanic.[11] Nationalist rhetoric dominated both rallies.[12] In the period leading up to the outbreak of hostilities, members of the SDS leadership made various announcements which were hostile to the Muslim population. Maksimovic stated that the Muslims were the greatest enemies of the Serbs.[13] Karadzic said that either Bosnia would be divided along ethnic lines, or one of the nations (meaning ethnic groups) would be wiped out from these areas.[14] SDS leaders also said that, if they were to reach power, the political and economic affairs of Foca would be run by Serbs only.[15]

16. In the months before the outbreak of conflict in Foca, both Serbs[16] and Muslims[17] began to arm themselves with light weapons, though the Muslims were not able to do so as quickly as the Serbs,[18] leaving the latter better prepared for the conflict. The Serbs armed themselves surreptitiously at first, distributing weapons by truck in the evenings,[19] or from local businesses.[20] Immediately prior to the outbreak of the conflict, the distribution of arms to Serbs was done openly.[21] The Serbs also began to deploy heavy artillery weapons on elevated sites around Foca,[22] controlling not only heavy weapons which belonged to the JNA,[23] but also the weaponry of the Territorial Defence.[24]

17. Administrative bodies in Foca, previously jointly controlled by Muslims and Serbs, ceased to function as had been envisaged by March 1992. The Serbs formed a separate local political structure, the Serbian Municipal Assembly of Foca,[25] and both groups established Crisis Staffs along ethnic lines. The Muslim Crisis Staff was based in the Donje Polje neighbourhood of Foca.[26] The Serb Crisis Staff operated from a location in the Serb neighbourhood of Cerežluk,[27] with Miroslav Stanic, President of the SDS-Foca, as Chairman[28] and so-called "First War Commander" in Foca.[29] Daily meetings of SDS politicians in Foca began in early April.[30] On 7 April 1992, following pressure from the SDS leadership, the local police were divided along ethnic lines and stopped functioning as a neutral force.[31]

18. Immediately prior to the outbreak of the conflict, Serbs began evacuating their families and children from Foca, generally to Serbia or to Montenegro.[32] Some Muslims, alerted by the movements of their Serb neighbours coupled with general tension in the town, also fled or managed to evacuate their families before the outbreak of the conflict.[33] Although many Muslims had Serb friends, neighbours and relatives, few were warned about the coming attack.[34] Even for those who did get away, leaving Foca was not easy, with frequent military checkpoints en route to different destinations.[35]

19. In the days before the outbreak of the conflict, the first roadblocks appeared in Foca, mostly set up by the Muslims.[36] By 7 April 1992, there was a Serb military presence in the streets,[37] and some people failed to report for work, fearful of the rising tensions in the town.[38] A number of Serbs were mobilised on that day and issued with weapons.[39] That night, Serbs took over the Foca radio station, the warehouse of the regional medical centre and the Territorial Defence warehouse where weapons were stored.[40]

20. On 8 April 1992, an armed conflict broke out in Foca town,[41] mirroring events unfolding in other municipalities.[42] Roadblocks were set up throughout the town.[43] Sometime between

8.30 and 10.00 am, the main Serb attack on Foca town began, with a combination of infantry fire and shelling from artillery weapons in nearby Kalinovik and Miljevina.[44] Serb forces included local soldiers as well as soldiers from Montenegro and Yugoslavia, and in particular a paramilitary formation known as the White Eagles.[45] Most of the shooting and shelling was directed at predominantly Muslim neighbourhoods, in particular Donje Polje,[46] but the Serbs also attacked mixed neighbourhoods such as Cohodor Mahala.[47] Despite Muslim resistance, consisting mostly of infantry concentrated in Donje Polje and Šukovac,[48] Serb forces proceeded to take over Foca area by area, including eventually the hospital and the KP Dom prison facility.[49] The military attack resulted in large numbers of wounded civilians, most of them Muslims.[50]

21. During the conflict, many civilians hid in their houses, apartments, basements of their apartment buildings, or with relatives in other areas of town; others left Foca altogether, thinking they would be safer.[51] Many of the Muslims in hiding gave up their personal weapons so that they could not be accused of participating in the conflict.[52] The attack continued for six or seven days, although the worst shelling and damage took place in the first few days.[53] Foca town fell to the Serbs somewhere between 15 and 18 April 1992,[54] with many of the Muslims who had remained during the fighting fleeing at that time.[55]

22. Following the successful military take-over of Foca town, the attack against the non-Serb civilian population continued.[56] Outside the town, Serb forces carried on their military campaign to take over or destroy Muslim villages in the Foca municipality.

23. Villages in Foca municipality sustained attacks until some time in early June.[57] Serb troops followed fleeing Muslims in the direction of Gorazde,[58] and captured the JNA fuel depot warehouse at Pilipovici where many Muslim civilians had been seeking shelter.[59] At the warehouse, Muslim men were separated from women and children.[60] After finding an SDA membership card which did not identify to whom it belonged, the Serb forces selected several men whose names were on a list and arbitrarily selected several others. In total, nine men were separated from the others and shot. Of these men, one escaped and one survived.[61]

24. The village of Brod, four kilometres from Foca, was attacked on 20 April 1992, after the village authorities did not respond to a Serb Crisis Staff demand that the village surrender.[62] Serb forces in Miljevina, approximately 18 kilometres from Foca town in the direction of Kalinovik and Sarajevo, set the surrounding Muslim villages on fire,[63] and arrested male Muslim civilians.[64] Jelec, about 22 kilometres from Foca near Miljevina, was shelled and then attacked by infantry and taken over by Serb forces on 4 or 5 May 1992.[65] When Serb forces set the village on fire, the population fled to a nearby forest.[66] Muslims who stayed in their homes or who tried to escape were killed.[67] Other male Muslim villagers were captured and detained in the Kalinovik and Bileca barracks and then transferred to the Foca KP Dom.[68] From Jelec it was possible to see houses burning,[69] and to see people fleeing from other villages.[70]

25. Muslim houses in Pilipovici and the neighbouring village of Paunci were burned to the ground around 25 or 26 April 1992.[71] Around 28 April 1992, Serb troops attacked Ustikolina where some Muslims had tried to form a resistance.[72] After taking the village, Serb forces set fire to Muslim houses.[73] From there, Serb forces continued attacking and destroying Muslim villages along the left bank of the Drina, downstream from Ošanica, while the population fled or was

killed.[74]

26. On 3 July 1992, the Muslim village of Mješaja/Trošanj, situated between Foca and Tjienstište, was attacked by Serb soldiers. At the time of the attack, some Muslim villagers in Trošanj continued living in their houses but would sleep in the woods at night and only return to their homes during the daytime.[75] They were afraid because they were able to see other Muslim villages burning and they felt targeted because they were Muslim.[76] Three villagers were killed during the initial attack and, after capturing a group of about 50 Muslim villagers, a further group of seven male villagers were beaten and shot.[77]

27. After the Serb take-over in and around Foca, there was a noticeable presence of Serb soldiers and Serb paramilitary formations.[78] Immediately after the Serb take-over, restrictions were imposed on the non-Serb inhabitants. Muslims were referred to by Serb soldiers by the derogatory term " balija",[79] and cursed when being arrested.[80]

28. It was announced on the radio during the second half of April 1992 that the administration of the entire municipality of Foca would be run by the Serbs.[81] From April 1992, Muslims were laid off from their jobs or were prevented or discouraged from reporting to work.[82] Those who had held management positions prior to the conflict found themselves fired or replaced by Serbs.[83] Although the Serb Crisis Staff ordered Serbs to return to work sometime at the end of April or beginning of May 1992,[84] Muslims were not allowed to do so.[85]

29. Restrictions were placed on the movement of non-Serbs. A police car with a loudspeaker went through the town announcing that Muslims were not allowed to move about the town.[86] A similar announcement was made over the radio.[87] At the same time, the Serb population could move around freely,[88] with the exception of a night curfew from 8.00 pm to 6.00 am imposed on all inhabitants.[89] Muslims were forbidden to meet with each other, and had their phone lines cut off.[90] In April and May 1992, Muslims stayed in apartments in Foca under virtual house arrest, either in hiding or at the order of Serb soldiers.[91] Houses such as "Planika's" and "Šandal's" were used as interim detention centres by the Serb military.[92] People wishing to leave Foca were required to get papers from the SUP (Secretariat of the Interior) permitting them to go.[93] Military checkpoints were established, controlling access in and out of Foca and its surrounding villages.[94]

30. In April and May 1992, Muslim households were searched by the Serb military police or soldiers for weapons, money and other items.[95] Serb houses were not searched,[96] or at most were searched superficially.[97] Muslims were ordered to surrender their weapons while Serbs were allowed to keep theirs.[98] Muslim businesses were looted or burned,[99] or had equipment confiscated.[100]

31. During the attack, neighbourhoods were destroyed systematically. Muslim houses were set ablaze by Serb soldiers during the battle for control of the town as well as after the town had been secured.[101] Donje Polje,[102] the largely Muslim neighbourhood of Sukovac,[103] and Muslim houses in Kamerici[104] and in Granovski Sokak[105] were burned. The old town neighbourhood of Prijeka Carsija, with its oriental-Islamic style market, was burned down on or around 12 April 1992.[106] Some Serb houses were also burned down during the conflict, including that of the Accused.[107] Serb soldiers later burned Muslim houses not destroyed by Serb shelling.[108] On one occasion, Muslim houses were found devastated beside an untouched

Serb apartment identified with a note saying "Serb apartment – do not torch".[109] As Muslim houses burned, fire engines protected Serb houses.[110]

32. Other Muslim houses were dismantled for the materials,[111] or reallocated to Serbs who had lost their own homes.[112]

33. Several mosques in Foca town and municipality were burned or otherwise destroyed.[113] The Aladža mosque dating from 1555 and under UNESCO protection was blown up,[114] and the mosque in the Granovski Sokak neighbourhood was destroyed.[115] The mosque in Jelec was burned and its minaret destroyed.[116] Serb fire brigades stood by and watched as mosques burned.[117]

34. Following the Serb take-over of Foca town, non-Serb civilians were physically beaten by Serb soldiers and military police.[118] Civilians were beaten upon arrest and during transportation to detention facilities from neighbourhoods in town or from villages in the municipality.[119] On one occasion, a Serb soldier severely kicked and beat with a chair three patients in Foca hospital after learning that they were Muslim. The beating stopped only when the doctor intervened and called the police.[120] On 31 October 1992, a group of 35 non-Serb detainees was transferred from the KP Dom to Kalinovik in a military lorry. On their way to the Kalinovik police station, the detainees were beaten and at least one was seriously injured.[121]

35. In mid-June 1992, about 27 Muslim civilians, mostly women and children, were killed in the ethnically mixed Cohodor Mahala neighbourhood.[122] More civilians were killed in Jelec,[123] Mjesaja/Trosanj[124] and Pilipovici.[125] The bodies of others were found floating in the Drina River.[126] KP Dom detainees who were assigned to work duty at the riverbank were made to push bodies downstream using planks and sticks.[127]

36. Non-Serbs were arrested throughout the municipality of Foca. Muslim men were rounded up in the streets, separated from the women and children and from the Serb population.[128] Others were arrested in their apartments or in the houses of friends and relatives,[129] taken away from their workplaces,[130] or dragged from their hospital beds.[131]

37. During the conflict, many of the Muslims arrested were taken to be detained at the Territorial Defence military warehouses at Livade.[132] Around 14 or 15 April 1992, Muslims and some Serbs were arrested in the centre of Foca town. While the Serbs were allowed to return home after a few hours, the Muslims were required to stay.[133]

38. Between 14 and 17 April 1992, Muslim civilians from other areas of Foca town were arrested and detained in Livade, including several doctors and medical staff from Foca hospital.[134] During the arrests, several of the detainees were severely beaten up and injured.[135]

39. Muslim women were transferred to Buk Bijela, Foca High School and Partizan Sports Hall. Serb soldiers repeatedly raped Muslim women and girls, either at these locations or elsewhere.[136] KP Dom detainees who took part in a failed exchange in Cajnice met some of the rape victims there, who told them about their ordeal.[137]

40. On 17 April 1992, all the male Muslim civilians detained at Livade were transferred to the KP Dom, which had served as a prison prior to the conflict. At this time, soldiers from the Užice Corps in Serbia were running the facility, the control of which was transferred to local Serbs

during the course of the following few weeks.[138] Other non-Serb civilians from the municipality were also unlawfully arrested and detained in the KP Dom.[139] Several of them arrived at the KP Dom severely beaten and injured.[140]

41. The illegal arrest and imprisonment of non-Serb civilian males was carried out on a massive scale and in a systematic way. Hundreds of Muslim men, as well as a few other non-Serb civilians, were detained at the KP Dom without being charged with any crime.[141] At all times from the end of the fighting until the end of 1994, up to several hundred Muslim civilian men were thus arbitrarily interned at the KP Dom.[142] They were detained there for periods lasting from four months to more than two and a half years.[143]

42. Apart from a short period at the beginning of their detention at the KP Dom, Muslim detainees were denied any contact with the outside world or with their families,[144] and (for a long time) with the Red Cross.[145] The legality of their detention was never reviewed by the Serb authorities.

43. The conditions under which non-Serbs were detained were below any legal standard regulating the treatment of civilians in times of armed conflict.[146] Non-Serb detainees were given insufficient food, as a result of which many of them suffered substantial weight loss, sometimes more than 40 kilograms or up to a third of their weight.[147] They were kept in various rooms, including solitary confinement cells, which were not heated and were extremely cold during the harsh winter of 1992; clothes which they had made from spare blankets to keep warm were confiscated by guards.[148]

44. Hygienic conditions were deplorable and washing facilities minimal,[149] while medical care was inadequate and medicine in very short supply.[150] A basic medical service was provided but those in need of urgent medical attention were left unattended or given insufficient treatment. At least one detainee died as a result of the lack of or late medical care.[151]

45. Non-Serb detainees were locked up in their rooms for most of the day, being allowed out only to go to the canteen and back.[152] Some, however, were taken out to work knowing that they would receive additional and much needed food if they did.[153]

46. Many of the detainees were subjected to beatings and other forms of mistreatment, sometimes randomly, sometimes as a punishment for minor breaches of the prison regulations or in order to obtain information or a confession from them.[154] The screams and moans of those being beaten could be heard by other detainees, instilling fear among all detainees.[155] Many were returned to their rooms with visible wounds and bruises resulting from the beating.[156] Some were unable to walk or talk for days.

47. The few Serb convicts who were detained at the KP Dom were kept in a different part of the building from the non-Serbs. They were not mistreated like the non- Serb detainees. The quality and quantity of their food was somewhat better, sometimes including additional servings. They were not beaten or otherwise abused, they were not locked up in their rooms, they were released once they had served their time, they had access to hygienic facilities and enjoyed other benefits which were denied to non-Serb detainees.[157]

48. Many non-Serb detainees were taken out of the KP Dom during the period covered by the Indictment, allegedly to be exchanged or in order to carry out certain tasks such as picking plums. Many of them did not come back and were never seen again.[158]

49. The expulsion, exchange or deportation of non-Serbs, both detainees at the KP Dom and those who had not been detained, was the final stage of the Serb attack upon the non-Serb civilian population in Foca municipality. Initially there was a military order preventing citizens from leaving Foca.[159] However, most of the non-Serb civilian population was eventually forced to leave Foca. In May 1992, buses were organised to take civilians out of town,[160] and around 13 August 1992 the remaining Muslims in Foca, mostly women and children, were taken away to Rozaje, Montenegro.[161] On 23 October 1992, a group of women and children from the municipality, having been detained for a month at Partizan Sports Hall, were deported by bus to Goražde.[162] In exhumations conducted in the Foca area, 375 bodies were identified by the State Commission for the Tracing of Missing Persons. All but one of these were Muslim. The remaining one was a Montenegrin who had been married to a Muslim.[163] In late 1994, the last remaining Muslim detainees at the KP Dom were exchanged, marking the end of the attack upon those civilians and the achievement of a Serbian region ethnically cleansed of Muslims. By the end of the war in 1995, Foca had become an almost purely Serb town. Foca was renamed "Srbinje" after the conflict, meaning "Serb town".[164]

50. The detention of non-Serbs in the KP Dom, and the acts or omissions which took place therein, were clearly related to the widespread and systematic attack against the non-Serb civilian population in the Foca municipality.

B. General requirements under Article 3 of the Statute

51. Two preliminary requirements must be satisfied for the application of Article 3 of the Statute.[165] First, an armed conflict, either internal or international,[166] must have existed at the time of the alleged commission of the offences.[167] An "armed conflict" is defined to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[168] Second, a close nexus must exist between the alleged offence and the armed conflict.[169] The "required relationship" is satisfied where the alleged crimes were "closely related to the hostilities".[170]

52. In addition, four requirements specific to Article 3 must be satisfied, namely,

> (i) the violation must constitute an infringement of a Rule of international humanitarian law; (ii) the Rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...]; (iii) the violation must be "serious", that is to say, it must constitute a breach of a Rule protecting important values, and the breach must involve grave consequences for the victim. [...]; (iv) the violation of the Rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[171]

Accordingly, depending on the specific basis of the relevant charges brought under Article 3, some of the requirements for the application of Article 3 may differ.[172] In the present case, the basis of the torture,[173] cruel treatment[174] and murder[175] charges under Article 3 is common Article 3 of the 1949 Geneva Conventions ("com mon Article 3"). It is well established by the jurisprudence of the Tribunal that Article 3 of the Tribunal's Statute includes violations of common Article 3.[176] Common Article 3 in relevant part reads as follows:

> 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. 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; [...]; (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. [...].

Another requirement for the application of any Article 3 charge based on common Article 3 is that the victims must not at that time be taking part in the hostilities.[177] Enslavement under Article 3 has been charged on the basis of a specific convention and customary international law, not on the basis of common Article 3.[178]

C. General requirements under Article 5 of the Statute

53. The following elements constitute the general requirements which must be met for an act to constitute a crime against humanity:[179]

(i) there must be an "attack";[180]

(ii) the acts of the accused must be part of the attack;[181]

(iii) the attack must be directed against any civilian population;[182]

(vi) the attack must be widespread or systematic;[183] and

(v) the principal offender must know of the wider context in which his acts occur and know that his acts are part of the attack.[184]

Additionally, the Statute of the ICTY imposes a jurisdictional requirement that the crimes be "committed in armed conflict".[185]

54. An "attack" can be defined as a course of conduct involving the commission of acts of violence.[186] The concept of "attack" is distinct and independent from the concept of "armed conflict". [187] In practice, the attack could outlast,[188] precede, or run parallel to the armed conflict, without necessarily being a part of it.[189] That is not to say that, in the context of an armed conflict, the laws of war play no role in the Tribunal's determination as to whether the attack was, or was not, "directed against any civilian population". On the contrary, that body of law plays an important part in the assessment of the legality of the acts committed in the course of an armed conflict and whether a civilian population may be said to have been targeted as such.

55. The acts of the accused need to be objectively part of the "attack" against the civilian population,[190] but need not be committed when that attack is at its height. These acts must not be isolated, but must form part of the attack.[191] A crime committed several months after, or

several kilometres away from, the main attack against the civilian population could still, if sufficiently connected, be part of that attack.[192]

56. The victims of the acts must be civilians and the attack must be directed against a "civilian population".[193] A population may be civilian even if non-civilians are present – it must simply be predominantly civilian in nature. The definition of civilian is expansive, including individuals who at one time performed acts of resistance as well as persons *hors de combat* when the crime is perpetrated.[194]

57. The acts which form part of the attack must be either widespread or systematic. The adjective "widespread" connotes the large-scale nature of the attack and the number of victims,[195] while " systematic" refers to the organised nature of the acts of violence and the improbability of their random occurrence.[196]

58. This Trial Chamber is satisfied that there is no requirement under customary international law that the acts of the accused person (or of those persons for whose acts he is criminally responsible) be connected to a policy or plan.[197] Such plan or policy may nevertheless be relevant to the requirement that the attack must be widespread or systematic and that the acts of the accused must be part of that attack.[198]

59. In addition to the intent to commit the underlying offence, the accused must know that there is an attack directed against the civilian population and he must know that his acts are part of that attack, or at least take the risk that they are part thereof.[199] This, however, does not entail knowledge of the details of the attack.[200] It is sufficient that, through his acts or the function which he willingly accepted, he knowingly took the risk of participating in the implementation of that attack.[201]

D. Findings in respect of the general requirements of Articles 3 and 5 of the Statute

60. On the basis of the findings of fact made in Section A, the Trial Chamber is satisfied that all the general requirements of both Article 3, including common Article 3, and Article 5 of the Statute have been met.

61. In particular, the Trial Chamber is satisfied that, at the time and place relevant to the Indictment, there was an armed conflict and that the acts of the Accused were closely related to that armed conflict.[202] The acts with which the Accused is charged were committed as a direct result, in furtherance of and under the guise of the hostilities. The Trial Chamber is satisfied that a widespread and systematic attack by the Serb forces against the non-Serb civilian population took place in and around Foca in the period covered by the Indictment, and that the acts which took place at the KP Dom were part thereof. This attack included the systematic rounding up and imprisonment of non-Serb civilians, the burning and destruction of non-Serb, mostly Muslim, properties, the demolition of several mosques in the Foca town and municipality, the unlawful killing of non-Serb civilians, as well as the torture and mistreatment of many male non-Serb detainees at the KP Dom.[203]

62. The Trial Chamber is also satisfied that the Accused knew of the attack upon the non-Serb civilian population of Foca and surrounding areas. His role and position as the warden of the KP Dom, his continued presence at the KP Dom where the crimes were committed, his repeated contacts with the military and the general knowledge among Serbs about the situation of the non-Serb population at the time in Foca, all point to the conclusion that the Accused did in fact know that the Muslim civilian population was systematically targeted and abused in many ways. The Accused conceded that he knew that the mosques in Foca were being

destroyed and that prison camps for the detention of Muslims were set up in other municipalities of the area which subsequently became Republika Srpska.[204] He also conceded that he was aware of the danger to non-Serbs if they remained in Foca town and municipality, and that he knew that by the middle or the end of August 1992 most non-Serbs had been forced out of the area.[205] The Trial Chamber is further satisfied that the Accused knew about the conditions of the non-Serb detainees, the beatings and the other mistreatment to which they were subjected while detained at the KP Dom, and that he knew that the mistreatment which occurred at the KP Dom was part of the attack upon the non-Serb population of Foca town and municipality.[206]

63. With respect to the cruel treatment, torture, murder and enslavement charges under Article 3 of the Statute, the Trial Chamber finds that the four requirements specific to the application of Article 3 have been met.[207]

64. In particular, the offences of cruel treatment, torture and murder, as part of common Article 3, are violations of international humanitarian law.[208] At the time relevant to the Indictment, common Article 3 was customary in nature.[209] While it is not clear from the Tribunal's jurisprudence whether *all* violations of common Article 3 would be serious,[210] there is no doubt that cruel treatment, torture and murder constitute serious offences.[211] As offences constituting serious violations of common Article 3, cruel treatment, torture and murder entail individual criminal responsibility under customary international law.[212] These offences have also been committed against victims taking no active part in the hostilities at the relevant time.[213] The offence of slavery, charged on the basis of customary and treaty law and not common Article 3, also meets the four requirements specific to the application of Article 3.[214]

III. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

65. The Trial Chamber has assessed the evidence in this case in accordance with the Tribunal's Statute and its Rules of Procedure and Evidence ("Rules") and, where no guidance is given by those sources, in such a way as will best favour a fair determination of the case and which is consonant with the spirit of the Statute and the general principles of law.[215]

66. The Trial Chamber has applied to the Accused the presumption of innocence stated in Article 21(3) of the Statute, which embodies a general principle of law, so that the Prosecution bears the onus of establishing the guilt of the Accused, and, in accordance with Rule 87(A), the Prosecution must do so beyond reasonable doubt.

67. Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute was admitted pursuant to Rule 93(A) in the interests of justice.[216] Such evidence is similar to circumstantial evidence. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist.[217] 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 non-existence of that fact, the conclusion cannot be drawn.[218]

68. The Trial Chamber has taken the evidence given by the Accused into account in determining whether or not the Prosecution case should be accepted. His election to give evidence does not

mean that the Accused accepted any onus to prove his innocence. Nor does it mean that a choice must be made between his evidence and that of the witnesses called by the Prosecution. The approach taken by the Trial Chamber has been to determine whether the evidence of the witnesses upon which the Prosecution relied should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence given by the Accused and the witnesses upon which the Defence relied.

69. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail. In determining whether any minor discrepancies should be treated as discrediting their evidence as a whole, the Trial Chamber has taken into account the fact that these events took place some nine years before the witnesses gave evidence. Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.

70. In assessing the evidence of witnesses, the Trial Chamber has also taken into account the fact that many of the Prosecution witnesses relied upon notes made prior to the giving of their evidence, some recently and others closer to the events in question. In many cases, the notes made were made by reference to material which was not within the witness's own knowledge but which had been given to the witness by other persons. In such cases, the evidence of the witness was not the same as evidence given from a witness's own recollections, and the Trial Chamber has not given the evidence of such witnesses the same weight as evidence given from a witness's own recollection. Evidence of facts not within the testifying witness's own knowledge constitutes hearsay evidence and, whilst there is no prohibition against accepting such evidence, the Trial Chamber has been careful to scrutinise that evidence with care before determining to rely upon it, taking into account that such material is not capable of being tested by cross-examination, its source is not the subject of a solemn declaration, and its reliability may be affected by a potential compounding of errors of perception and memory. [219]

71. In some cases, only one witness has given evidence of an incident with which the Accused has been charged. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[220] In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against the Accused.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY AND SUPERIOR RESPONSIBILITY

A. Individual criminal responsibility under Article 7(1) of the Statute

72. Article 7(1) of the Tribunal's Statute 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.

73. The Prosecution pleaded Article 7(1) in its entirety, and it includes within the terms of that Article the criminal responsibility of the Accused as a participant in various joint criminal enterprises. Such an approach is permitted by what was said by the Appeals Chamber in the *Tadic* Appeal Judgment:

> 191. [...] Although only some members of the group may physically perpetrate the criminal act, [...] the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.
>
> 192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[221]

The Prosecution has sought to relate the criminal liability of a participant in a joint criminal enterprise who did not personally physically commit the relevant crime to the word "committed" in Article 7(1), but this would seem to be inconsistent with the Appeals Chamber's description of such criminal liability as a form of accomplice liability,[222] and with its definition of the word "committed" as "first and foremost the physical perpetration of a crime by the offender himself".[223] For convenience, the Trial Chamber proposes to refer to the person who physically committed the relevant crime as the "principal offender".

74. The purpose behind the Prosecution's approach appears to be to classify the participant in a joint criminal enterprise who was not the principal offender as a "perpetrator" or a "co-perpetrator", rather than someone who merely aids and abets the principal offender. The significance of the distinction appears to be derived from the civil law, where a person who merely aids and abets the principal offender is subject to a lower maximum sentence.

75. The Trial Chamber does not accept that this distinction is necessary for sentencing in international law, and in particular holds that it is irrelevant to the sentencing practice of this Tribunal. The Appeals Chamber has made it clear that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.[224] The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent.[225]

76. Two recent decisions by Trial Chamber I have explored this issue of perpetration in some detail. In *Prosecutor v Krstic*, a distinction was drawn between an accomplice (as a secondary form of participation) and a co-perpetrator (as a direct and principal form of participation, but falling short of that of the principal offender).[226] In *Prosecutor v Kvocka,* a distinction was drawn between a co-perpetrator (who shares the intent of the joint criminal enterprise) and an aider and abettor (who merely has knowledge of the principal offender's intent).[227] In determining the relevant category, the Trial Chamber said, the greater the level of participation, the safer it is to draw an inference that the particular accused shared the intent of the joint criminal enterprise.[228]

77. This Trial Chamber does not hold the same view as Trial Chamber I as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater

sentence than the many functionaries who between them carry out the actual killing. Categorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed and it does not compel the length of sentences which will be appropriate in the particular case. This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice.[229] This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadic* , that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice.[230] For convenience, however, the Trial Chamber will adopt the expression "co-perpetrator " (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.

1. Joint criminal enterprise

78. The *Tadic* Appeal Judgment identified three categories of criminal liability pursuant to a joint criminal enterprise. The first category is where all the participants in the joint criminal enterprise share the same criminal intent. The second category is similar but relates to the concentration camp cases. Neither the existence of this second category nor its detailed definition was an issue in the *Tadic* Appeal. The Trial Chamber is satisfied that the only basis for the distinction between these two categories made by the *Tadic* Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II. Many of the cases considered by the *Tadic* Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations,[231] so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation. As such, those cases may not provide a firm basis for concentration or prison camp cases as a separate category. The Trial Chamber is in any event satisfied that both the first and the second categories discussed by the *Tadic* Appeals Chamber require proof that the accused shared the intent of the crime committed by the joint criminal enterprise. It is appropriate to treat both as basic forms of the joint criminal enterprise.[232] The third category identified by the *Tadic* Appeal Judgment is distinguishable. It applies where all of the participants share a common intention to carry out particular criminal acts and where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a " natural and foreseeable consequence" of effecting the agreed joint criminal enterprise.[233]

79. For liability pursuant to a joint criminal enterprise to arise, the Prosecution must establish the existence of that joint criminal enterprise and the participation in it by the Accused.[234]

80. A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.[235]

81. A person participates in that joint criminal enterprise either:

(i) by participating directly in the commission of the agreed crime itself (as a principal offender);

(ii) by being present at the time when the crime is committed, and (with

knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or

(iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

82. If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission.[236]

83. To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime.[237] Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.

84. In the Indictment, the Prosecution specifically alleges that the Accused acted pursuant to a joint criminal enterprise with guards and soldiers to persecute the Muslim and other non-Serb male civilian detainees at the KP Dom on political, racial or religious grounds.[238] This was expressly interpreted by the Trial Chamber as alleging a basic joint criminal enterprise, but not an extended one relating to crimes which did not fall within the agreed aspects of that joint criminal enterprise.[239] The Indictment also alleges that the Accused acted "in concert" with others with respect to acts of torture, beatings[240] and enslavement.[241] The Trial Chamber interprets the words "in concert with" to connote acting pursuant to a basic joint criminal enterprise. Accordingly, the Accused is specifically alleged to have acted pursuant to a basic joint criminal enterprise[242] with respect to certain acts alleged as torture, enslavement, cruel treatment and inhumane acts.[243]

85. Even where a particular crime charged has not been specifically pleaded in the indictment as part of the basic joint criminal enterprise, a case based upon the Accused's participation in a basic joint criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the indictment and such a case is included within the Prosecution's Pre-Trial Brief.[244] In the present case, the Prosecution Pre-Trial Brief sufficiently put the Accused on notice that a basic joint criminal enterprise was alleged with respect to all the crimes charged in the Indictment.[245]

86. Although there has been no relevant amendment made to the Indictment following the Trial Chamber's express interpretation of the Indictment as alleging a basic joint criminal enterprise, but not an extended one, the Prosecution nevertheless sought in their Pre-Trial Brief to rely on the extended form of the joint criminal enterprise. It asserted that, even if it were not established that the Accused participated in a joint criminal enterprise of persecution, beatings, torture and murder, these crimes were "natural and foreseeable consequences" of the Accused's participation in a joint criminal enterprise of illegal imprisonment of the non- Serb detainees and in particular of the Accused's action in permitting outsiders access to the detainees.[246] The Trial Chamber in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly.

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

2. Aiding and abetting

88. It must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender.[247] The act of assistance need not have actually caused the act of the principal offender,[248] but it must have had a substantial effect on the commission of the crime by the principal offender.[249] The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender.[250]

89. Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender.[251]

90. The *mens rea* of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.[252] The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender.[253]

B. Superior responsibility under Article 7(3) of the Statute

91. The Prosecution also alleges that the Accused incurred criminal responsibility as a superior under Article 7(3) of the Tribunal's Statute for each of the criminal acts charged. Article 7(3) 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.

92. The elements of individual criminal responsibility under Article 7(3) of the Statute have been firmly established by the jurisprudence of the Tribunal.[254] Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates:

> 1. the existence of a superior-subordinate relationship;
>
> 2. the superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and
>
> 3. the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders thereof.

93. The existence of a superior-subordinate relationship requires a hierarchical relationship between the superior and subordinate. The relationship need not have been formalised and it is not necessarily determined by formal status alone.[255] A hierarchical relationship may exist by

virtue of an accused's *de facto,* as well as *de jure*, position of superiority.[256] What must be demonstrated is that the superior had "effective control" over the persons committing the alleged offences. Effective control means the material ability to prevent offences or punish the principal offenders. Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his subordinates.[257] Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.[258]

94. It must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that (i) the superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates.[259] This knowledge requirement has been applied uniformly in cases before this Tribunal to both civilian and military commanders.[260] The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders.

95. It must be shown that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. The measures required of the superior are limited to those which are feasible in all the circumstances and are "within his power". A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.[261]

V. THE ACCUSED'S POSITION AS WARDEN

96. The Accused was, by his own admission, warden of the KP Dom prison facility from 18 April 1992 until the end of July 1993.[262] He was originally appointed as acting warden of the KP Dom by Radojica Mladenovic, the President of the Executive Committee of the Municipal Assembly of Foca, on 18 April 1993.[263] This appointment took the form of a work assignment.[264] Following the outbreak of the conflict in April 1992, many members of the local Serb population in Foca were given such work assignments.[265] The Accused held the position of acting warden of the KP Dom until 17 July 1992, at which time he was officially appointed warden by Momcilo Mandic, the Minister of Justice of the Serbian Republic of Bosnia and Herzegovina.[266] He occupied this position until he resigned or was dismissed by the Minister of Justice and Administration of the Republika Srpska.[267] The decision terminating the Accused's employment is dated 1 July 1993, but it was to enter into force on the day of its adoption. The Accused's replacement commenced work at the KP Dom on 9 August 1993.[268] In September 1994, the Accused began work as a school principal under a work assignment issued by the Ministry of Defence.[269]

97. The position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs. This general understanding of the position of warden accords with the structure of the KP Dom prior to the conflict.[270] The warden held the highest position of authority in the KP Dom and it was his responsibility to manage the entire prison.[271] In effect, the warden was responsible for the convicted male detainees,[272] and all the business units and work sites associated with the prison.[273] The deputy warden,[274] the commander of the guards,[275] the chief of service for rehabilitation and the head of the

economic unit were all subordinate to the warden.[276] Each of these persons was required to report to the warden with respect to the management of their areas of responsibility.[277]

98. The Trial Chamber is not satisfied that the position or powers of the warden within the prison hierarchy significantly changed once the conflict commenced. Counsel for the Accused submitted that the powers of warden were severely limited during the conflict and that documents would be produced before the Court to this effect.[278] It was alleged that the work assignment of the Accused clearly stipulated that his role as warden within the KP Dom was limited to carrying out repairs and the commencement of production in the work units.[279] A certificate was produced from the Ministry of Defence, dated 11 January 2000, which purported to summarise data from an inspection of original documents kept as official records by the Ministry of Defence.[280] The certificate was said to confirm that the Accused was the manager of the KP Dom responsible only for preserving the property of the KP Dom. Following an objection by the Prosecution to the tender of the certificate, the Trial Chamber questioned what weight could be given to the certificate. It was of recent origin and sought to place a limitation upon the clear wording of a contemporaneous document already tendered into evidence from the Ministry of Justice which appointed the Accused the warden of the KP Dom without any such limitation.[281] The Trial Chamber advised the Defence that, if it wanted weight to be given to the certificate, the Trial Chamber would need to know upon what contemporaneous records the Ministry of Defence relied in interpreting the Accused's appointment. If it relied upon official records of the Accused's appointment, then this would have included the appointment made by the Ministry of Justice. The Trial Chamber would need to know upon what basis the Ministry interpreted the clear wording of that document as limiting the Accused's responsibility to the preservation of the property of the KP Dom.[282] The Defence said that it would seek to obtain the documents upon which the Ministry of Defence relied and re-offer the certificate for tender at that stage.[283] These documents were never produced and the Defence did not seek to enter the certificate into evidence at any later stage.[284] The Trial Chamber takes these circumstances into account, in conjunction with other facts discussed below, in reaching its conclusion that the Accused's work assignment was not limited in the way the Defence alleged.

99. The Trial Chamber is satisfied that the Accused voluntarily undertook the position of acting warden and then warden until his departure from the KP Dom in July 1993. In his defence, the Accused claimed that work orders could not be refused and that any attempt to do so would run the risk of imprisonment. While some evidence was heard to this effect,[285] the Trial Chamber is satisfied that no such risk was present in the instant case. On the contrary, there is evidence that two individuals turned the position down with no adverse consequences before it was assigned to the Accused.[286] There is no evidence that any threats were made to the Accused concerning the consequences which might follow should he refuse the position.[287] The Chamber further notes that the Accused appears to have accepted the position of warden after turning down a different work assignment on the front, and that he claimed[288] that he was able to resign from his position in June 1993 without any adverse consequences.[289] The Trial Chamber concludes that the Accused could have refused the original work assignment, was always in a position to leave the KP Dom and that it was unlikely that he would have been punished had he done so.

100. The Trial Chamber is also satisfied that the Accused voluntarily accepted the positions in full awareness that Muslim civilians were being illegally detained at the KP Dom because of their ethnicity. Upon his first arrival at the KP Dom, he asked who was being detained and for what reason. He was told that the prisoners were Muslims and that they were being detained because they were Muslims.[290] He also knew that none of the procedures in place for legally

detained persons was ever followed at the KP Dom.[291]

101. The Trial Chamber accepts that part of the KP Dom was leased to the military for its own use, in a lease agreement signed by the Accused as warden.[292] The Defence argued that, as a result of the lease, the KP Dom was divided into civilian and military sections and the warden's authority was limited to matters arising in the civilian section of the prison, involving the convicted Serb detainees and the Drina Economic Unit.[293] The Defence claimed that the Uzice army members initially responsible for the non-Serb detainees were succeeded by a platoon of the Livade Company, who continued governing the military part of the KP Dom.[294] The Defence claimed that all matters relating to the military part of the prison, including non-Serb detainees, were strictly the responsibility of the Military Command, which was assisted by the Chief of the Guards, Mitar Rasevic, and the Deputy Warden, Savo Todovic. The Accused said that he knew the name of the person who was the actual warden of the non-Serb detainees, but that he was too fearful to identify this person in open court.[295] In support of this argument, the Defence called as witnesses a number of former KP Dom guards who confirmed the Accused's limited role.[296] Many of these witnesses identified Savo Todovic as the person in charge of the military section of the KP Dom.[297]

102. The Trial Chamber is satisfied that, on the contrary, the lease did not affect the single hierarchy within the KP Dom, and that there was no significant division between military and civilian personnel. Prison guards under the authority of the warden looked after both Serb and non-Serb detainees,[298] with no regard to any civilian/military split.[299] Both the commander of the guards, Mitar Rasevic,[300] and the deputy warden, Savo Todovic,[301] remained responsible to the warden. The warden retained and sometimes exercised the power to instigate and take disciplinary measures against subordinates who acted inappropriately towards detainees.[302] The warden also retained jurisdiction over all detainees in the KP Dom. When any of the detainees had matters of concern they were always taken to see the Accused,[303] and it was made clear to them by the guards of the KP Dom that the Accused as warden was the person ultimately responsible for their welfare.[304] Further, the Accused represented the KP Dom in discussions with visiting representatives of the International Committee of the Red Cross ("ICRC") with respect to the detention of all detainees at the KP Dom.[305] At no time during these discussions did the accused state that he was not the person ultimately responsible for the non-Serb detainees held at the KP Dom.[306]

103. The Trial Chamber is satisfied that the lease agreement signed by the Accused related only to the use by the military of the property of the KP Dom, and that the Accused retained all powers associated with the pre-conflict position of warden at the KP Dom.[307] This is also shown by the fact that it was the Accused who exercised responsibility for ensuring that detainees did not escape from the KP Dom, without regard to ethnicity. To this end, he requested increased security from the Herzegovina Corps and the Foca Territorial Defence, more oil for lighting from the Ministry of Economy[308] and the placing of land mines inside the KP Dom compound from the War Presidency.[309] It was also the Accused who exercised responsibility for supervising the provision of food and other provisions to both Serb and non-Serb detainees.[310] He wrote to various institutions trying to obtain additional food for everyone in the KP Dom.[311] In response to complaints made by non-Serb detainees regarding the amount and quality of food, instead of denying that their welfare fell under his jurisdiction, the Accused usually indicated that he was concerned with the matter and would try to do something about it.[312] Similarly, when a non-Serb detainee raised the question of medical assistance, the Accused indicated that he would see what he could do.[313] Finally, it was the Accused who exercised final control over the work of detainees in and for the KP Dom,

although it is clear that the deputy warden, Savo Todovic, looked after this on a daily basis. The Accused had regular meetings with the heads of the factory, metal workshop, and farm, where detainees worked.[314] In a report to the Ministry of Justice, the Accused referred to the fact that Muslim detainees were used for labour in the KP Dom in work units for which he was ultimately responsible.[315]

104. Although the Trial Chamber is satisfied that the lease agreement with the military did not impact upon the Accused's powers as warden of the KP Dom, it accepts that the powers of a warden within a prison system are not unlimited. As both temporary warden and warden, the Accused was responsible to the Ministry of Justice,[316] and to a certain extent to the Military Command. The Trial Chamber is also satisfied that, with respect to the convicted Serb detainees, the Accused did have responsibilities which he did not have with respect to the non-Serb detainees (and which were in any event irrelevant to them). The Accused was required to report to the Ministry of Justice with respect to these detainees and, based on the behaviour of these prisoners within the KP Dom, he could make recommendations to the Ministry that sentences be reduced or parole be granted.[317] The Accused could also inform the Foca Tactical Group of convicted Serbs who wished to be released from the KP Dom to allow them to join fighting units and make recommendations as to whom should be released for this purpose.[318] One important ramification of the lease agreement with the military was that it was the Military Command and, in particular, Commander Kovac and not the Ministry of Justice who had power to make decisions concerning which non-Serb detainees would be detained in and released from the KP Dom.[319] In this respect, the Accused was obliged to forward requests for release of these detainees to the Crisis Staff or the Foca Tactical Group.[320] The military did, however, have an obligation to ensure that the Accused was kept informed about who it decided was to be detained and who was to be released,[321] and the Accused did exercise some powers in this regard such as his proposal that detainees held at Bileca prison be transferred to the KP Dom.[322] The Military Command could also make decisions about which persons would be permitted to enter the KP Dom,[323] and it had some power over the appointment of persons to work assignments at the KP Dom and the type of work to be completed by persons assigned to work at the KP Dom.[324] A general consequence of the conflict situation was that guards assigned to the KP Dom who were of military age and in good health were required from at least 30 September 1992 until 2 September 1993 to spend time on the frontline.[325] This factor, however, did not impinge upon the Accused's authority over these guards while performing duties at the KP Dom.

105. There were also certain groups who entered the KP Dom over whom the Accused could exercise only limited control. These included the investigators and the paramilitaries. Members of the military would enter the KP Dom, although they needed the prior permission of the military authorities.[326] The Accused was able to ensure that such persons did not remove detainees from the KP Dom without the appropriate authority from the Military Command.[327] With respect to the investigators, it is also clear that the Accused exercised influence over them and had power to instruct them to interview detainees favoured by him with a view to recommending their exchange or release.[328]

106. The Trial Chamber is not satisfied that, in his position as temporary warden and then warden, the Accused could unilaterally order or grant the release of any detainees.[329] The release of non -Serb detainees was a matter for the military and Crisis Staff. The Trial Chamber notes, however, that this fact does not signify any real limit on the warden's powers.[330] A warden does not generally have a unilateral power of release, and at the KP Dom it was the Ministry of Justice who had the power over the continued detention of convicted Serb detainees, and not the Accused. The Military Command, however, had the power to release Serb soldiers

imprisoned for military offences during the conflict.[331]

107. In conclusion, the Trial Chamber is satisfied that the Prosecution has established that the Accused held the position of warden, as that term is generally understood, at the KP Dom, that the lease agreement by which the Accused leased part of the KP Dom to the military had little impact upon the single hierarchy within the KP Dom or the Accused's position as warden within that hierarchy, and that the Accused exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom.

1 - A Glossary of Terms is included in Annex I to this Judgment.
2 - Prosecutor's Submission Related to Rule 65 ter (E)(ii) and (iii), 16 Oct 2000 ("Matters not in dispute"), par 8.
3 - Pre-Trial Conference, T 118.
4 - Matters not in dispute, par 4.
5 - Matters not in dispute, par 5.
6 - Ex P 14, Ex P 15/1; FWS-33 (Ex P 106, p 469); Safet Avdic (Ex P 123, p 647); Osman Subasic (Ex P 286, p 4047). "FWS" is the acronym chosen by the Office of the Prosecutor to designate witnesses testifying in cases concerning the conflict in Foca for whom protective measures involving the use of pseudonyms were granted, and for consistency the Chamber has adopted this same system. The identity of all witnesses was known to the Accused.
7 - FWS-66 (T 1047); FWS-33 (Ex P 106, p 446); FWS-182 (T 1573-1574).
8 - FWS-66 (T 1047-1048).
9 - FWS-111 (T 1296).
10 - FWS-33 (Ex P 106, p 541).
11 - FWS-66 (T 1050); FWS-86 (T 1447); FWS-33 (Ex P 106, p 448); FWS-111 (T 1296) ; FWS-182 (T 1572).
12 - *See* for example FWS-66 (T 1048-1049).
13 - Safet Avdic (Ex P 123, p 643).
14 - FWS-33 (Ex P 106, p 450).
15 - Dzevad S Lojo (T 2519, 2522-2523).
16 - Osman Subasic (Ex P 286, p 4049, 4053); FWS-86 (T 1451); FWS-33 (Ex P 106, pp 456-457); FWS-182 (T 1574-1575) who described it as a "public secret" that the Serbs were arming themselves.
17 - FWS-182 (T 1658-1659); Slobodan Jovancevic (T 5545); Risto Ivanovic (T 6103).
18 - FWS-86 (T 1452); FWS-33 (Ex P 106, pp 575-576).
19 - FWS-33 (Ex P 106, p 575); FWS-86 (T 1451).
20 - FWS-73 (T 3191).
21 - FWS-15 (T 3001-3003).
22 - FWS-66 (T 1050); FWS-111 (T 1191).
23 - Osman Subasic (Ex P 286, p 4061).
24 - FWS-86 (T 1450).
25 - Ex P 24.
26 - Osman Subasic (Ex P 286, p 4058).
27 - Osman Subasic (Ex P 286, pp 4055-4056).
28 - Ex D 73.
29 - FWS-33 (Ex P 106, p 500).
30 - FWS-86 (T 1448).
31 - FWS-33 (Ex P 106, pp 451-452); Osman Subasic (Ex P 286, pp 4050, 4054, 4058-4059).
32 - FWS-A (T 5521); Radomir Dolas (T 5811); FWS-54 (T 726); FWS-249 (Ex P 161, p 2074); Safet Avdic (Ex P 123, p 651); FWS-33 (Ex P 106, p 450).
33 - FWS-162 (T 1348) personally took his family out of Foca on 11 or 13 April, first to Ustikolina; FWS-A (T 5521); RJ (T 3824); FWS-249 (Ex P 161, p 2074); FWS-210 (T 4820).
34 - FWS-33 (Ex P 106, p 460); FWS-198 (T 941) was alerted by his Serb neighbour.
35 - FWS-162 (T 1350).
36 - Zoran Mijovic (T 6216); Radomir Dolas (T 5811); Risto Ivanovic (T 6070).
37 - Slobodan Jovancevic (T 5541).
38 - Milomir Mihajlovic (T 5627); Safet Avdic (Ex P 123, p 653).
39 - Lazar Stojanovic (T 5724) (in Cere`luk).
40 - Osman Subasic (Ex P 286, p 4059); FWS-182 (T 1575).
41 - Lazar Stojanovic (T 5724); FWS-182 (T 1575); FWS-82 (T 1691) (saying that the conflict broke out on 6 April); FWS-142 (T 1816); FWS-119 (T 1929); FWS-249 (Ex P 161, p 2080). See agreed facts stated in par 12, *supra*.
42 - Such as Visegrad, Cajnice, Rudo and Rotagica, according to a broadcast of Radio Sarajevo: Dzevad S Lojo (T 2530).
43 - Slobodan Solaja (T 5491); FWS-33 (Ex P 106, p 462).
44 - FWS-215 (T 825); Osman Subasic (Ex P 286, pp 4061, 4131); FWS-66 (T 1054) all reported that hostilities started on 7 April 1992. FWS-54 reported the first shelling as having started on 6 April 1992 (T 727); FWS-139 (T 311); FWS-86 (T 1450).
45 - FWS-139 (T 312); Safet Avdic (Ex P 123, T 659); FWS-172 (T 4548).
46 - FWS-54 (T 726).
47 - Slobodan Jovancevic (T 5556).
48 - Osman Subasic (Ex P 286, pp 4061, 4131).
49 - Slobodan Jovancevic (T 5559).
50 - Dr Amir Berberkic (T 3717-3718); FWS-172 (T 4547-4548).
51 - FWS-162 (T 1347); FWS-215 (T 826); FWS-82 (T 1693); FWS-03 (T 2226-2228); FWS-71 (T 2773-2774); FWS-15 (T 2996-2998); FWS-113 (T 2525); FWS-73 (T 3190); FWS-69 (T 4031); FWS-33 (Ex P 106, p 462).
52 - FWS-82 (T 1692-1693); FWS-210 (T 4822-4824).
53 - FWS-215 (T 828); FWS-33 (Ex P 106, pp 464-465); Osman Subasic (Ex P 286, pp 4061-4062); FWS-66 (T 1060) (who estimated between four and five days); FWS-85 (T 588).
54 - Osman Subasic (Ex P 286, p 4063); Lazar Stojanovic (T 5725).

55 - FWS-66 (T 1060).
56 - The Trial Chamber understands that the term "non-Serb" connotes both religious and political distinctions, but does not proceed upon the basis that different ethnicities within the former Yugoslavia constitute different races within the meaning of Article 5(h) of the Statute. *See Prosecutor v Tadic*, Case IT-94-1-T, Judgment, 14 July 1997 ("*Tadic* Trial Judgment"), par 714, in which the Trial Chamber found that the accused "shared the concept that non-Serbs should forcibly be removed from the territory, thereby exhibiting a discriminatory basis for his actions and that this discrimination was on religious and political grounds".
57 - *See*, par 35 *infra*.
58 - Safet Avdic (Ex P 123, p 660).
59 - FWS-104 (T 2153-2155).
60 - FWS-104 (T 2155).
61 - FWS-104 (T 2156-2157) and Jusco Tarragon (T 3006-3009).
62 - FWS-119 (T 1931-1933).
63 - FWS-144 saw Jelec, Susjesno, Budanj and Izbisno burning (T 2294-2296). FWS-69 saw the villages of Podgaj, Banjine, Gradac, Ratina and Govze burning, as well as his own house in Jelec (T 4034, 4036-4037, 4052-4053). Close to the village of Laza, a soldier asked FWS-69 to confirm that certain houses were Muslim. After he did so, the houses were set on fire (T 4053). Nezir Cengic saw Govze, Drace, Poljice, Banjine, Izbisno and Mrdjanovici burning (T 4683, 4701). FWS-49 saw Govze, Jelec, Drace, Polijice, Banjine, Izbisno, and Mrdjanovici burning (T 4683).
64 - Nezir Cengic was arrested with four other elderly people from Rataja (T 4683-4685).
65 - FWS-249 (Ex P 161, pp 2099-2101); FWS-144 (T 2294-2296).
66 - FWS-144 (T 2295-2296); FWS-69 (T 4042-4044); FWS-249 (Ex P 161, p 2083); Safet Avdic (Ex P 123, pp 683-685).
67 - Safet Avdic (Ex P 123, pp 683-685); FWS-69 (T 4054); FWS-69 gave the number of people killed in Jelec as 35 (T 4043, 4046, 4048).
68 - Safet Avdic (Ex P 123, pp 684-685); FWS-69 (T 4054).
69 - In Kozja, Luka and Budanj: FWS-249 (Ex P 161, p 2083); FWS-69 (T 4035).
70 - Sokolina, Cilec and Vis: FWS-69 (T 4043).
71 - Dr Amir Berberkic (T 3725-3727).
72 - Osman Subasic (Ex P 286, pp 4063-4066).
73 - Osman Subasic (Ex P 286, pp 4069-4070).
74 - Osman Subasic (Ex P 286, p 4069).
75 - FWS-96 (Ex P 186, pp 2501-2502, 2504).
76 - *Ibid.*
77 - FWS-96 (Ex P 186, pp 2504-2505, 2511-2512).
78 - FWS-113 (T 2518); Safet Avdic (Ex P 123, p 659).
79 - FWS-35 (T 2731); Muhamed Lisica (T 4834); Dr Amir Berberkic (T 3718); RJ (T 3827-3828); FWS-146 (T 3063, 3065).
80 - Safet Avdic (Ex P 123, p 679); FWS-73 (T 3192, 3209); Dr Amir Berberkic (T 3730); FWS-69 (T 4049); Juso Taranin (T 3005-3007).
81 - FWS-113 (T 2519).
82 - FWS-96 (Ex P 186, p 2498); FWS-215 (T 831-832); FWS-139 (T 316); FWS-66 (T 1061); FWS-35 (T 2740); FWS-69 (T 4030-4032); FWS-33 (Ex P 106, pp 485-486); FWS-138 (T 2039-2040); RJ (T 3823-3825, 3833, 3839); Dzevad S Lojo (T 2527); Ekrem Zekovic (T 3435-3436).
83 - RJ (T 3840); Dzevad S Lojo (T 2526); Safet Avdic (Ex P 123, T 673).
84 - Slobodan Solaja (T 5495).
85 - Safet Avdic (Ex P 123, pp 672-673); FWS-249 (Ex P 161, p 2087).
86 - FWS-03 (T 2230-2231); FWS-139 (T 316-317); FWS-35 (T 2739); Juso Taranin (T 3036-3037); Ekrem Zekovic (T 3437, 3440, 3519); RJ (T 3840); FWS-249 (Ex P 161, p 2096); Dzevad S Lojo (T 2527).
87 - Juso Taranin (T 3048); Ekrem Zekovic (T 3436).
88 - FWS-139 (T 316-317).
89 - Divljan Lazar (T 6012); Slobodan Jovancevic (T 5572); Zoran Mijovic (T 6402); Zarko Vukovic (T 6759); FWS-66 (T 1063).
90 - Ekrem Zekovic (T 3437); FWS-33 (Ex P 106, p 488); FWS-249 (Ex P 161, p 2096).
91 - Rasim Taranin (T 1693-1694); FWS-104 (T 2198-2200); FWS-35 (T 2718-2719, 2721-2722, 2730-2731, 2733, 2736); RJ (T 3840); Muhamed Lisica (T 4825-4827); Dzevad S Lojo (T 2633). The evidence led by the Defence that Muslims were restricted to their apartments for their own safety is rejected (Zoran Mijovic T 6389).
92 - Muhamed Lisica (T 4825-4827).
93 - FWS-85 (T 580); FWS-33 (Ex P 106, pp 487-488). *See also* Ex D 40 which refers to the Operative Staff/Executive Committee of the Serbian Municipality of Foca. It contains an order for lists to be made identifying "loyal citizens" who would be allowed to leave by the authorities.
94 - FWS-162 (T 1342-1343); FWS-58 (T 2673).
95 - Safet Avdic (Ex P 123, p 670); FWS-215 (T 858); FWS-139 (T 317); FWS-182 (T 1579-1582); FWS-3 (T 2229-2230); Dzevad S Lojo (T 2528); FWS-35 (T 2729, 2731, 2736); Ekrem Zekovic (T 3438); FWS-86 (T 1453, 1456); FWS-58 (T 2675, 2677) and FWS-249 (Ex P 161, pp 2093-2095). Juso Taranin (T 3037) said that the military police were searching for a radio transmitter.
96 - Juso Taranin (T 3038, 3048).

97 - FWS-249 (Ex P 161, p 2093).
98 - FWS-86 (T 1448); FWS-182 (T 1579-1582); Rasim Taranin (T 1692-1693); FWS-69 (T 4037-4040).
99 - FWS-162 (T 1340, 1346); FWS-182 (T 1575); FWS-73 (T 3188-3192, 3284).
100 - FWS-249 (Ex P 161, pp 2117, 2121).
101 - FWS-249 (Ex P 161, pp 2080-2081); FWS-66 (T 1061); FWS-111 (T 1188); FWS-86 (T 1457); FWS-113 (T 2529); Safet Avdic (Ex P 123 pp 674-676); FWS-138 (T 2020); Dr Amir Berberkic (T 3728); RJ (T 3842).
102 - FWS-139 (T 313, 315); FWS-33 (Ex P 106, pp 469, 486-487); FWS-A (T 5533); FWS-54 (T 727); FWS-111 (T 1191-1192); Safet Avdic (Ex P 123, pp 661-664).
103 - FWS-215 (T 834); FWS-A (T 5533).
104 - FWS-89 (T 4657).
105 - FWS-111 (T 1191-1192).
106 - *See also* FWS-33 (Ex P 106, pp 466, 470, 527); Safet Avdic (Ex P 123, pp 661-662); FWS-215 (T 833); Dzevad S Lojo (T 2529).
107 - FWS-66 (T 1140); FWS-111 (T 1188); FWS-215 (T 930); Slobodan Jovancevic (T 5557); FWS-138 (T 2121); FWS-113 (T 2529); FWS-33 (Ex P 106, p 531); FWS-A (T 5533); Vitomir Drakul (T 5693); Risto Ivanovic (T 6080); Miladin Matovic (T 6422); Arsenije Krnojelac (T 6912-6913); Bozo Drakul (T 7171-7173); Bozidar Krnojelac (T 7364); Slavica Krnojelac (T 7495).
108 - Safet Avdic (Ex P 123, pp 674-675); FWS-54 (T 727-728).
109 - RJ (T 3826).
110 - FWS-249 (Ex P 161, pp 2099, 2166-2167); Safet Avdic (Ex P 123, p 665).
111 - FWS-73 (T 3188).
112 - FWS-139 (T 416).
113 - FWS-66 (T 1061); FWS-111 (T 1192-1193); FWS-139 (T 315-316); FWS-73 (T 3187); Safet Avdic (Ex P 123, p 669); FWS-54 (T 728); Rasim Taranin (T 1710, 1720).
114 - FWS-33 (Ex P 106, p 487); FWS-249 (Ex P 161, pp 2133-2134); FWS-96 (Ex P 186, p 2550); Safet Avdic (Ex P 123, p 668).
115 - FWS-111 (T 1191-1192).
116 - FWS-69 (T 4054); FWS-249 (Ex P 161, p 2133).
117 - RJ (T 3825); Safet Avdic (Ex P 123, p 665).
118 - FWS-144 (T 2315-2316); RJ (T 3901).
119 - FWS-215 (T 854-856); FWS-66 (T 1064-1066); FWS-182 (T 1586); Juso Taranin (T 3004-3006, 3008, 3044); FWS-109 (T 2359-2361, 2364); FWS-58 (T 2701-2702); FWS-71 (T 2820-2822, 2824); FWS-73 (T 3216-3217, 3263); RJ (T 3861); FWS-69 (T 4054-4056).
120 - FWS-146 (T 3063-3065, 3074, 3089); Nezir Cengic (T 4688-4690, 4693, 4701-4703).
121 - FWS-104 (T 2194-2197).
122 - FWS-33 (Ex P 106, pp 491-494).
123 - *See* par 24, *supra.*
124 - *See* par 26, *supra.*
125 - *See* par 25, *supra.*
126 - Ex P 287 (under seal); Ex P 288, Ex P 289, Ex P 290. *See also* Osman Subasic (Ex P 286, pp 4101-4110, 4140); Dr Amir Berberkic (T 3809-3810).
127 - Ekrem Zekovic (T 3545); FWS-250 (T 5051-5054); Ex P 9/1.
128 - Dzevad Lojo (T 574); FWS-215 (T 834); FWS-54 (T 730); FWS-139 (T 318); FWS-86 (T 1454); FWS-182 (T 1582); FWS-142 (T 1816); Ahmet Hadzimusic (T 1936); FWS-144 (T 2296); FWS-109 (T 2352); FWS-120 (T 3114).

129 - FWS-66 (T 1066); FWS-198 (T 943); FWS-215 (T 827, 856); FWS-54 (T 729); Dzevad Lojo (T 551); FWS-86 (T 1453).
130 - FWS-111 testified that he, the director of his working place and the other Muslim worker were taken to the basement, that their hands were tied with bandages and they were taken out through the side door of the building (T 1195-1196). FWS-172 testified that Dr Aziz Torlak was taken away from the hospital on 24 April and that he himself was taken away with two colleagues, Enver Cemo and Izet Causevic, on 25 April from his working place (T 4554).
131 - Dr Amir Berberkic testified that he had not yet recovered from his leg wounds and was not able to stand on his feet without crutches when he was taken from Foca hospital to the KP Dom (T 3731). Safet Avdic corroborated the evidence that sick people were brought directly from the hospital (T 682).
132 - FWS-33 (Ex P 106, p 484); Bozo Drakul (T 7250).
133 - FWS-33 (Ex P 106, pp 473-478, 511, 619). *See also*, FWS-142 (T 1816-1818).
134 - FWS-33 (Ex P 106, p 478).
135 - FWS-33 (Ex P 106, p 479); FWS-111 (T 1195-1203); FWS-182 (T 1583-1586).
136 - FWS-96 (Ex P 186, pp 2516, 2531-2532, 2560, 2597, 2599-2600).
137 - FWS-186 (T 1534).
138 - FWS-33 (Ex P 106, pp 506-507); Safet Avdic (Ex P 123, p 691).
139 - Safet Avdic (Ex P 123, pp 676, 757); FWS-249 (Ex P 161, pp 2102-2107; FWS-58 (T 2679-2684).
140 - *See* for example FWS-33 (Ex P 106, pp 481-482, 483).
141 - *See* pars 116-124, *infra.*
142 - At its peak in the summer of 1992, there were about 500-600 detainees at the KP Dom. The number decreased from the autumn of 1992 until 1993 when about 200-300 detainees remained. Around October 1994, the last detainees, by then

numbering less than 100, were released. See, eg, FWS-66 (T 1078); FWS-111 (T 1218); FWS-162 (T 1313); FWS-139 (T 329-330); FWS-54 (T 743); FWS-85 (T 583-584); FWS-65 (T 548); FWS-86 (T 1531-1532); FWS-138 (T 2035, 2038); FWS-104 (T 2205): FWS-03 (T 2273); FWS-71 (T 2893); FWS-113 (T 2560); Ekrem Zekovic (T 3682); RJ (T 3898); FWS-69 (T 4163-4164); FWS-33 (T 508); Safet Avdic (Ex P 123, pp 686-687); Muhamed Lisica (T 4850-4851). *See also* par 35, *supra*.

143 - For instance, FWS-139 (T 319); FWS-66 (T 1068); FWS-82 (T 1700); FWS-73 (T 3194); FWS-250 (T 5021) were detained at the KP Dom for almost or more than two and a half years.

144 - *See* par 134, *infra*; Safet Avdic (Ex P 123, pp 689-690).

145 - Several detainees were in fact hidden from the Red Cross; see, FWS-111 (T 1267-1268); FWS-215 (T 880-881); FWS-65 (T 530); FWS-139 (T 332); FWS-162 (T 1437); FWS-182 (T 1588); FWS-82 (T 1750-1752); FWS-71 (T 2897); FWS-214 (T 3935-3937).

146 - *See* pars 122-124, 133-144, *infra*.

147 - *See* pars 139, 149-155, 158, 160-165, *infra*.

148 - *See* pars 137-138, *infra*.

149 - *See* par 136, *infra*.

150 - *See* pars 140-141, *infra*.

151 - *See* FWS-66 (T 1086-1088); FWS-111 (T 1230-1234); FWS-162 (T 1393-1395); FWS-54 (T 750); FWS-139 (T 344-345); FWS-182 (T 1618-1619, 1686); FWS-08 (T 1782-1783, 1806).

152 - *See* par 134, *infra*.

153 - *See* par 374, *infra*.

154 - *See* pars 142, 217-306, *infra*.

155 - *See* par 143, *infra*.

156 - *See* pars 250, 260, 287, *infra*.

157 - *See* pars 139, 442-443, *infra*.

158 - *See* pars 477-485, *infra*.

159 - Ex D 40, Zoran Mijovic.

160 - Ekrem Zekovic (T 3615); Juso Taranin (T 3030-3041).

161 - FWS-104 (T 2198-2199).

162 - Ex P 291; *See also* Osman Subasic (Ex P 286, pp 4111-4112).

163 - Amor Masovic (T 4239).

164 - FWS-96 (Ex P 186, p 2499).

165 - *Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995 ("*Tadic* Jurisdiction Decision"), pars 65, 67. Although these requirements are relevant to other Articles of the Statute as well, only Article 3 is of immediate concern.

166 - *Tadic* Jurisdiction Decision, par 137, confirmed in Prosecutor v Delalic and Others, IT-96-21-A, 20 Feb 2001 ("Delalic Appeal Judgment"), pars 140,150.

167 - *Tadic* Jurisdiction Decision, par 67.

168 - *Tadic* Jurisdiction Decision, par 70.

169 - *Tadic* Jurisdiction Decision, par 70; *Prosecutor v Kunarac and Others*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 Feb 2001 ("*Kunarac* Trial Judgment"), par 402; *Prosecutor v Delalic and Others*, IT-96-21-T, Judgment, 16 November 1998 ("*Delalic* Trial Judgment"), par 193; *Prosecutor v Blaskic*, IT-95-14-T, Judgment, 3 Mar 2000, ("*Blaskic* Trial Judgment"), pars 65,69.

170 - *Tadic* Jurisdiction Decision, par 70.

171 - *Tadic* Jurisdiction Decision, par 94; endorsed in *Prosecutor v Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999 ("*Aleksovski* Trial Judgment"), par 20.

172 - *Kunarac* Trial Judgment, par 404.

173 - Count 4.

174 - Counts 7 and 15.

175 - Count 10.

176 - The Appeals Chamber has consistently interpreted Article 3 to be a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 of the Statute. Tadic Jurisdiction Decision, par 89, confirmed in Delalic Appeal Judgment, pars 125,136.

177 - *Delalic* Appeal Judgment, par 420. There is the unresolved matter of whether the common Article 3 phrase "each Party to the conflict shall be bound to apply" means that only parties to a conflict or individuals acting for such parties are bound by common Article 3. See *Kunarac* Trial Judgment, par 407; *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 Sept 1998 ("Akayesu Trial Judgment"), pars 631, 633; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgment") pars 175-176; *Prosecutor v Rutaganda*, ICTR-96-3-T, Judgment and Sentence, 6 Dec 1999 ("*Rutaganda* Trial Judgment") pars 97-98; *Prosecutor v Musema*, ICTR-96-13-T, Judgment and Sentence, 27 Jan 2000 ("*Musema* Trial Judgment") pars 266, 274; Pictet (gnl ed), Commentary to Geneva Convention IV, ICRC, 1958, pp 26-44; remarks of Special Rapporteur in Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-B, Article 2A, Federal Political Department, pp 332; contra the views expressed in Le Procureur c/Akayesu, Affaire ICTR-96-4-A, Arrest, 1er Jun 2001, pars 12-28, 425-446. The Trial Chamber considers it unnecessary to resolve this matter. Assuming that a link between a principal offender and a party to the conflict is required, the Accused clearly acted for the Serb side to the conflict.

178 - Count 18.

179 - *Kunarac* Trial Judgment, par 410.

180 - *Prosecutor v Tadic*, IT-94-1-A, Judgment 15 July 1999 ("*Tadic* Appeal Judgment"), par 251; *Kunarac* Trial Judgment, pars 415-417; *Kayishema and Ruzindana* Trial Judgment, par 122.
181 - *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, par 418.
182 - *Kunarac* Trial Judgment, pars 421-426; *Tadic* Trial Judgment, pars 635-644.
183 - *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, pars 427-431.
184 - *Tadic* Appeal Judgment, par 248; *Kunarac* Trial Judgment, pars 433-435.
185 - See *Tadic* Jurisdiction Decision, par 141; *Tadic* Appeal Judgment, par 249.
186 - *Kunarac* Trial Judgment, par 415.
187 - *Tadic* Appeal Judgment, par 251.
188 - *Kunarac* Trial Judgment, par 420.
189 - *Tadic* Appeal Judgment, par 251.
190 - *Kunarac* Trial Judgment, pars 418, 592.
191 - *Prosecutor v Kupreskic and Others*, IT-95-16-T, Judgment, 14 Jan 2000 ("*Kupreskic* Trial Judgment"), par 550.
192 - See for example *Kunarac* Trial Judgment, par 417 ff.
193 - *Kunarac* Trial Judgment, pars 421-426.
194 - *Tadic* Trial Judgment, pars 638, 643; *Prosecutor v Jelisic*, IT-95-10-T, Judgment, 14 Dec 1999 ("*Jelisic* Trial Judgment"), par 54; *Blaskic* Trial Judgment, par 214; *Kunarac* Trial Judgment, 425.
195 - See *Kunarac* Trial Judgment, par 428; *Tadic* Trial Judgment, par 648; *Blaskic* Trial Judgment, par 206; *Akayesu* Trial Judgment, par 580.
196 - *Kunarac* Trial Judgment, par 429. *See also Blaskic* Trial Judgment, par 203; *Tadic* Trial Judgment, par 648.
197 - See fn 1109 in *Kunarac* Trial Judgment, at page 144 which relies, *inter alia*, upon the following authorities: the Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg 30 September/1 October 1946 ("*Nuremberg* Judgment"), reprinted in *Trial of the Major War Criminals before the International Military Tribunal,* Nuremberg, 14 November 1945–1 October 1946, Vol 1, pp 84, 254, 304 (with respect to Streicher) and pp 318-319 (with respect to Von Schirach); Articles 9 and 10 of the Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, Berlin, 6 October 1945 ("Nuremberg Charter"); the Control Council Law No 10 case of the court at Stade (Germany) ILR 14/1947, pp 100-102; Supreme Court of the British Zone, OGH br Z, Vol I, p 19 and Vol II, p 231; *In re Altstötter*, ILR 14/1947, pp 278, 284; the Dutch case *In re Ahlbrecht*, ILR 16/1949, p 396; the Australian case *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, Case FC 91/026 at 1991 Aust Highct LEXIS 63, BC9102602; Yearbook of the International Law Commission ("ILC") (1954); Vol II, p 150; Report of the ILC on the Work of its 43rd Sess, 29 Apr–19 July 1991, Supp No 10 (UN Doc No A/46/10), pp 265-266, of its 46th sess, 2 May–22 July 1994, Supp No 10 (UN Doc No A/49/10), pp 75-76, of its 47th sess, 2 May–21 July 1995, pp 47, 49, 50, and of its 48th sess, 6 May–26 July 1996, Supp No 10 (UN Doc No A/51/10), pp 93, 95-96.
198 - *See Prosecutor v Kordic and Cerkez*, Case IT-95-14/2-T, Judgment, 26 Feb 2001 ("Kordic and Cerkez Trial Judgment"), par 182; Kunarac Trial Judgment, par 432.
199 - *See Tadic* Appeal Judgment, par 248; Kunarac Trial Judgment, par 434; Tadic Trial Judgment, par 659; Kupreskic Trial Judgment, par 556; Blaskic Trial Judgment, pars 247, 251; Kordic and Cerkez Trial Judgment, par 185.
200 - *Kunarac* Trial Judgment, par 434.
201 - *Kunarac* Trial Judgment, par 434; *Blaskic* Trial Judgment, par 251.
202 - *See* Matters not in dispute, par 8.
203 - *See* pars 12-50, *supra.*
204 - T 7887-7888, 7895.
205 - T 7890 7892.
206 - *See* pars 125-127, 169-173, 308-320, 486-502 (where findings in relation to individual charges are made), *infra.*
207 - *See* pars 52, 60-62, *supra.*
208 - *Delalic* Appeal Judgment, pars 143, 150.
209 - *Tadic* Jurisdiction Decision, par 98; Delalic Appeal Judgment, par 143; *See also* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, S/25704, par 35.
210 - *Tadic* Jurisdiction Decision, par 134 ("[...] customary international law imposes criminal liability for serious violations of common Article 3 [...]". (emphasis added)); Kunarac Trial Judgment, par 408.
211 - *Delalic* Appeal Judgment, pars 134, 147.
212 - *Tadic* Jurisdiction Decision, pars 134; *See also* Chapter Sixteen of the SFRY Criminal Code, entitled "Criminal Acts Against Humanity and International Law", Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code falls within the said Chapter, and it provides as follows: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture; inhuman treatment [...], immense suffering or violation of bodily integrity or health [...] [...] other illegal arrests and detention [...] forcible labour [...] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty." This Article gives effect to the provisions of Geneva Convention IV and Additional Protocols I and II; *Prosecutor v Tadic*, IT-94-1-T, Sentencing Judgment, 14 July 1997, ("*Tadic* Sentencing Judgment") par 8; *Tadic* Jurisdiction Decision, par 134; confirmed in *Delalic* Appeal Judgment, par 174.
213 - See, inter alia, pars 40-41, 61, *supra.*
214 - See reasoning and more detailed findings in par 350 ff, *infra.*
215 - Rule 89(B).
216 - Rule 93(A) limits the admission of such evidence to where it is in the interests of justice.

217 - *Delalic* Appeal Judgment, par 458.
218 - *Ibid.*
219 - For example, the Trial Chamber and the Defence were informed by the Prosecution during the course of the proceedings that witness Muhamed Lisica had spoken to witness Ekrem Zekovic after that witness had given his evidence and prior to Muhamed Lisica giving his own evidence. The Prosecution claimed that the witnesses had not discussed the trial. However, it was also disclosed by the witness Muhamed Lisica that, soon after his release from the KP Dom, he and witness Ekrem Zekovic met in Sarajevo and discussed the bloodstains on the Zastava Kedi vehicle (*See* pars 334-335, *infra*). On the basis of these conversations, witness Muhamed Lisica made a new statement to correct his earlier statement. In his new statement, he stated that he washed the vehicle alone whereas in his previous statement he claimed to have washed it with Ekrem Zekovic (T 4997-4999, 5010-5016). Rasim Taranin gave evidence that on 15 January 2001 he saw a portion of the trial from the public gallery. He only saw it briefly from the corner as he was asked to leave (T 1690). Ahmet Hadzimusic prepared his evidence in writing in 1999 when he knew that he would be coming to testify (MFI 15). He had not prepared himself for the statement he gave to investigators (T 1951, 1980, 1986-1988). Ekrem Zekovic prepared notes after his release from the KP Dom in 1994-1995. These notes were not comprehensive (T 3707). FWS-73 had spoken to other witnesses before giving evidence. The names are noted on Ex P 433 (T 3373-3375). FWS-172 gave evidence that he prepared a list of names of persons who disappeared just after he got out of prison. He compiled the list from memory and did so to enable him to answer the questions of families (T 4560). The list was entered into evidence (Exs P 299/P 299A/P 299A). The list was prepared on the basis of a joint shared memory (T 4611). FWS-73 gave evidence that he talked to a number of people prior to giving his evidence. They were witnesses who were to give evidence at trial. Their names were written down and tendered into evidence Ex P 433 (T 3373-3375). FWS-109 prepared a list of names of the persons taken out in the evenings about one month after his release (T 2386-2391, 2403 Ex P 421). Dzevad S Lojo prepared notes prior to trial. He made notes in April 1993. The notes were complied from his memory (T 2539-2540). However, the list of those names had been added to after he spoke to the Red Cross and saw their list of the missing (T 2453-2456). FWS-71 kept a private diary in the KP Dom which was taken from him when he was exchanged. About a month after he left, he wrote down notes which he later typed. He primarily relied on his own memory but also on the memory of others. The first notes he put down in December 1994. He consulted with the people who were in the camp with him and made the typed notes. He only had the typed notes with him when he gave evidence (T 2868-2873). FWS-162 prepared notes of the names of persons killed in the KP Dom (T 1397). FWS-137 made a list of the names of people who were taken out so that he could tell their families. The list was taken away from him when he left the KP Dom, and he made a new list and other notes when he knew he would be coming to the Tribunal. He made the original and the duplicate in 1993, Ex P 444 (T 4751-4556). FWS-215 made notes while detained at the KP Dom. They were taken away from him while detained at the KP Dom and reconstructed by him after his release (T 918-920).
220 - *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal Judgment"), par 62.
221 - *Tadic* Appeal Judgment, pars 191-192. This statement has been interpreted by the Prosecutor as meaning that an accused person who does not personally physically perpetrate the crime can still be held to have committed the crime when he or she participated in a joint criminal enterprise.
222 - *Tadic* Appeal Judgment, par 192.
223 - *Tadic* Appeal Judgment, par 188.
224 - *Delalic* Appeal Judgment, pars 429-430; *Aleksovski* Appeal Judgment, par 182.
225 - *See Prosecutor v Brdanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36 PT, 26 June 2001 ("*Brdanin and Talic* Decision on Form of Further Amended Indictment"), par 27, fn 108; *See also Prosecutor v Furundzija*, IT-95-17/1-T, Judgment, 10 Dec 1998 ("Furundzija Trial Judgment"), pars 245, 249; *Kupreskic* Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Prosecutor v Furundzija* , IT-95-17/1-A, 21 July 2000 ("*Furundzija* Appeal Judgment"), par 118.
226 - *Prosecutor v Krstic*, IT-98-33-T, Judgment, 2 Aug 2001 ("*Krstic* Trial Judgment"), pars 642-643.
227 - *Prosecutor v Kvocka and Others*, IT-98-30/1-T, Judgment, 2 Nov 2001 ("*Kvocka* Trial Judgment"), pars 249, 284.
228 - *Kvocka* Trial Judgment, pars 287-289.
229 - The jurisprudence of the post-World War II cases surveyed by Trial Chamber I in Kvocka drew no distinction between the categories of co-perpetrator and aider and abettor in determining the criminal responsibility of the accused, as Trial Chamber I conceded: *Kvocka and Others* Trial Judgment, par 282, *See also* fn 488.
230 - An accomplice to a joint criminal enterprise refers to a person who shares the intent of that enterprise and carries out acts to facilitate the commission of the agreed crime: *Furundzija* Trial Judgment, pars 245, 249; *Kupreskic* Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Furundzija* Appeal Judgment, par 118.
231 - *See* Nuremberg Charter, Control Council No. 10.
232 - *See Brdanin and Talic* Decision on Form of Further Amended Indictment, par 27.
233 - *See Brdanin and Talic* Decision on Form of Further Amended Indictment, pars 24 - 27.
234 - *Tadic* Appeal Judgment, par 227.
235 - Decision on Form of Second Indictment, 11 May 2000, par 15; *See also Tadic* Appeal Judgment, par 227(ii); *Furundzija* Appeal Judgment, par 119.
236 - Decision on Form of Second Amended Indictment, 11 May 2000, par 15. In that decision, the direct participant in the joint criminal enterprise, ie the person who physically perpetrates the crime is referred to as a co-perpetrator rather than a perpetrator. Given the ambiguity surrounding the term co-perpetrator engendered by the Prosecution's arguments referred to above, the Trial Chamber prefers to use the term principal offender to make it clear that it is only the person who physically carries out the crime personally that commits that crime. In par (ii); the Trial Chamber refers to a person being present at the time the offence is committed by another. However, presence at the time a crime is committed is not

necessary. A person can still be liable for criminal acts carried out by others without being present – all that is necessary 638
is that the person forms an agreement with others that a crime will be carried out.
237 - *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 26.
238 - Indictment, par 5.1.
239 - Decision on Form of Second Indictment, 11 May 2000, par 11.
240 - Indictment, pars 5.17, 5.21, 5.22 and 5.26.
241 - Indictment, par 5.41.
242 - That is, not within an extended common purpose.
243 - Although it is not necessary for the purposes of this case, the Trial Chamber notes that the Indictment also alleges that the Accused participated in or aided and abetted the execution of a common plan involving imprisonment, torture and beatings, killings, forced labour, inhumane conditions and deportation and expulsion as persecution (Indictment, par 5.2). This sufficiently put the Accused on notice that the common purpose was also alleged for those crimes identified as part of the persecution count where charged as separate offences.
244 - *Kupreskic* Appeal Judgment, par 14.
245 - Prosecution Pre-Trial Brief, pars 45, 47-56.
246 - Prosecution Pre-Trial Brief, pars 57-62.
247 - *Furundzija* Trial Judgment, pars 235, 249.
248 - *Furundzija* Trial Judgment, pars 233, 234,249; *Kunarac* Trial Judgment, par 391.
249 - *Aleksovski* Appeal Judgment, par 162.
250 - *Aleksovski* Trial Judgment, par 129; *Blaskic* Trial Judgment, par 285; *Kunarac* Trial Judgment, par 391.
251 - *Furundzija* Trial Judgment, par 232; *Tadic* Trial Judgment, par 689; *Kunarac* Trial Judgment par 393.
252 - *Aleksovski* Appeal Judgment, par 162; *Tadic* Appeal Judgment, par 229; *Kunarac* Trial Judgment, par 392.
253 - *Aleksovski* Appeal Judgment, par 162.
254 - *Delalic* Appeal Judgment, pars 189-198, 225-226, 238-239, 256, 263; *Aleksovski* Appeal Judgment, par 72.
255 - *Delalic* Appeal Judgment, pars 205-206.
256 - *Delalic* Appeal Judgment, pars 192-194, 266.
257 - *Delalic* Appeal Judgment, pars 196-198.
258 - *Blaskic* Trial Judgment, par 303; *Aleksovski* Trial Judgment, par 106.
259 - *Delalic* Appeal Judgment, pars 223-226.
260 - *Delalic* Appeal Judgment, pars 196-197.
261 - *Delalic* Appeal Judgment, par 226.
262 - The Accused gave evidence that he ceased working at the KP Dom at the end of July 1993 (T 7708). He filed a request with Radojica Mladenovic in June 1993 requesting that he be relieved of his duty in the KP Dom and he was replaced around the end of July 1993 when he received a decision on the termination of his employment (Ex P 46A, OTP interview 6 June 2000, pp 2-3). Although Ex P 3 would seem to indicate that the Accused remained as warden of the KP Dom until 8 September 1994, the Prosecution did not contend that this was the case. The Accused explained that it was possible that he stayed on the record for reasons of social security as he did not find a new job until 1994 when he started working as a school principal (T 7710). Some witnesses estimated when the Accused ceased to be warden of the KP Dom: FWS-139, early October 1993 (T 398-399); FWS-66, mid-1993 (T 1127); FWS-162, October 1993 (T 1406); FWS-215, mid-1993 (T 916); FWS-182, mid-1993 (T 1653); FWS-138, 1993 (T 2098); FWS-250, the escape of Ekrem Zekovic (T 5066-5067).
263 - The Accused (T 7599).
264 - Ex D 33A, Ex D 33-1-A (Decree on the Organisation and Discharge of Work Obligation for the Needs of the Defence).
265 - Milomir Mihajlovic (T 5642); Vitomir Drakul (T 5666-5667); Slobodan Jovancevic (T 5569); Zarko Vukovic (T 6757); Svetozar Bogdanovic (T 7081); Slavica Krnojelac (T 7495); Zoran Mijovic (T 6217); Miladin Matovic (T 6423); Arsenije Krnojelac (T 6984); Milan Pavlovic (T 6871).
266 - Ex D 77A. At one point in his testimony the Accused states that he was appointed both warden and director of the economic unit by the Ministry of Defence in August 1992, although he had already started working in this function in July 1992 (T 7638).
267 - Ex D 78A states that the Accused is dismissed from the position.
268 - Ex P 3, no 129.
269 - The Accused (T 7711).
270 - Ex P 2 (Letter from the warden of the KP Dom, Zoran Sekulovic, submitting information on the KP Dom).
271 - FWS-139 (T 297).
272 - Prior to the conflict, the KP Dom was a prison for convicted male detainees: FWS-139 (T 294). The capacity of the KP Dom was between 1000-1200 inmates, although it appears that just prior to the conflict in 1992 there were only about 200-400 prisoners: FWS-138 (T 2021).
273 - FWS-139 (T 295); Zoran Mijovic (T 6376).
274 - FWS-138 (T 2025); FWS-139 (T 297).
275 - FWS-139 (T 298).
276 - Divljan Lazar (T 6050).
277 - FWS-139 (T 298).
278 - In the Opening Statement of the Defence, Counsel stated that "The Defence intends to tender many exhibits, and that will show how unfounded many of the counts in the indictment are in view of the true role and position that Milorad Krnojelac had in the KP Dom Foca" (T 5162), and "There is clear-cut evidence that prisoners of war of Muslim

ethnicity, as well as detainees who had violated regulations in the army of the Republika Srpska, (were(under full factual and formal control of the military command and the military authorities. For this purpose the Defence will submit many documents which unequivocally show that the accused, Milorad Krnojelac, was the civilian warden and that he did not have any authority, either formally or factually, over these persons" (T 5177).
279 - (T 7599); Ex D 77A.
280 - The Defence sought to tender the document through witness Milenko Dundjer (T 5349-5358).
281 - Ex D 30A; T 5353-5354.
282 - T 5356, 5357.
283 - T 5358.
284 - The Prosecutor attempted to cross-examine the accused on the certificate. Counsel for the accused objected on the ground that the certificate had not been admitted into evidence (T 7867-7870).
285 - Milomir Milhajlovic (T 5651-5653); Svetozar Bogdanovic (T 7084); Slavica Krnojelac (T 7533); Zoran Vukovic (T 5777-5779); Krsto Krnojelac (T 5921-5922).
286 - These two individuals are Radojica Tesovic and Veselin Cancar. Tesovic was the previous warden who was either replaced because he did not agree with SDS policy, or refused to continue working in the position as warden after the conflict started and became the director of the farm at Brioni: FWS-214 (T 3939); Ex P 438 (under seal); Risto Ivanovic (T 6105); FWS-109 (T 2348); FWS-138 (T 2024); FWS-182 (T 1648); FWS-113 (T 2612). In criminal proceedings against him before the Canton Court in Sarajevo, Veselin Cancar stated that members of the Crisis Staff had tried to persuade him to take up the post of KP Dom Director. He claimed that his refusal was accepted and that he was sent to the field as a quartermaster instead, an appointment he agreed with: Ex P 36A p 4, Ex P 37A p 2.
287 - The Accused gave evidence that he was not threatened by Mladenovic to accept the position. However, he said that he believed that if he had not accepted the position the military police would have been called in (T 7855). Two witnesses gave evidence that the brother of the Accused, Arsenije Krnojelac, had criticised his acceptance of the position as warden calling him an idiot and an arsehole for accepting it: FWS-73 (T 3205); FWS-216 (T 3458). Arsenije Krnojelac denied making any of these statements (T 6926-T 6927, T 6934-T 6935) and the Trial Chamber does not rely upon it.
288 - The Accused's gave evidence that he filed a request with Radojica Mladenovic in June 1993 requesting that he be relieved of his duty in the KP Dom and was subsequently dismissed (T 7708); Ex P 46A, OTP interview, 6 June 2000, pp 2-3. He submitted his resignation because he did not want the responsibility of determining which persons assigned to work duty at the KP Dom would go to the front line and which persons would remain working at the KP Dom (T 7859-7865).
289 - RJ gave evidence that he found out from Z that the Accused had first been offered the position of army commander which he had rejected. Because of this, when he was offered the position of warden he could not refuse it. RJ claimed that people in mixed marriages like the Accused whose wife was Croatian did not enjoy a favourable position (T 3832-3834). This was not followed up in the evidence of the Accused.
290 - T 7604, 7844; Bozidar Krnojelac (T 7419, 7605).
291 - T 7846.
292 - Ex D 85A; Ex D 38A; Ex D 38-1-A; Ex P 4; Ex P 5; Vitomir Drakul (T 5687); Zoran Vukovic (T 5769-5770); Risto Ivanovic (T 6083-6084); Zoran Mijovic (T 6274); Miladin Matovic (T 6440-6441); Milosav Krsmanovic (T 6614-6616). To the contrary, a number of Prosecution witnesses testified that the KP Dom was not divided into military and civilian parts and that it was one institution under one command: FWS-139 (T 389); FWS-66 (T 1129); FWS-215 (T 917); FWS-65 (T 482-483); FWS-86 (T 1565); FWS-198 (T 962). The Accused gave evidence that Mladenovic negotiated the terms of the lease and that he merely signed the lease agreement on behalf of the KP Dom. He claimed that the Ministry of Justice was informed that he had leased part of the KP Dom to the army command and that he did not have to report to the Ministry of Justice about Muslim detainees held in the KP Dom (T 8215, 7639).
293 - With respect to which matters he reported to the Ministry of Justice: the Accused (T 7639). Ex D 80A is a letter dated 7 May 1992 addressed to the Executive Committee of the Serbian Municipality of Foca and signed by the Accused as the acting warden, requesting the supply of metal sheeting to repair roofs damaged by the conflict. Ex D 81A is a letter dated 7 May 1992 addressed to the Serbian Police Station in Foca and signed by the Accused as acting warden, reporting vehicles that had been stolen from the KP Dom. Ex D 82A is a request dated 7 May 1992 to the Serbian Police signed by the Accused as acting warden requesting that a vehicle be given to the KP Dom. Slobodan Javancevic (T 5617-5618); Milomir Mihajlovic (T 5628); Zoran Vukovic (T 5772); Krsto Krnojelac (T 5918); Risto Ivanovic (T 6086-6087); Lazar Divljan (T 5979-5780); Zoran Mujovic (T 6236); Milovan Dubrilovic (T 6373); Miladin Matovic (T 6438-6439); Zarko Vukovic (T 6754, 6756); Milan Pavlovic (T 6877); Arsenije Krnojelac (T 6951); Slavica Krnojelac (T 7502). The Drina Economic Unit is described at par 362 *infra*.
294 - The Accused (T 8217-8128). Ex P 2 dated 28 October 1998 to the Ministry of Justice from Warden of the KP Dom, Zoran Sekulovic in response to a request for a list of employees who worked between 18 April 1992 until 31 October 1994, states that "A unit was set up in Foca Penal and Correctional Facility that spent part of the time on the front lines and a part of the time on work obligation in the period from 30 September 1992 until 2 September 1993. The members of the unit were issued certificates concerning their service in the VRS in the said period."
295 - T 7688-7690 (Private Session).
296 - Defence witnesses Lazar Divljan, Radomir Dolas, Miladin Matovic and Miloslav Krsmanovic all gave evidence that Savo Todovic was in charge of the military section of the KP Dom (T 5982, 5819, 6440, 6616). Lazar Stojanovic gave evidence that the guards were under military command (T 5716). Risto Ivanovic and Zoran Mijovic gave evidence that they received orders from Mitar Rasevic who would assign them their working hours (T 6114, T 6274). Zoran Mijovic and Miladin Matovic both claimed that the Accused never gave orders to the guards as his authority was limited

to matters concerning convicts who were already in the KP Dom before the outbreak of the conflict (T 6274, T 6388, T 6443); Ex D 115A, statement of Blagojevic Dragomir, Ex D 116A statement of Rasevic Cedo, Ex D 121A, statement of Zoran Vukovic, all stating that the Accused was not responsible for the military section of the KP Dom.
297 - Lazar Divljan (T 5982); Radomir Dolas (T 5817, T 5862); Milenko Dundjer (T 5496); Miladin Matovic (T 6439-6441); Miloslav Krsmanovic (T 6616); Ex D 114A statement of Risto Ivanovic.
298 - During the first 2-4 weeks after the start of the conflict, the KP Dom was "policed" by military units, apparently from the Uzice Battalion: FWS-86 (T 1463). Muslim detainees were rounded up, arrested and taken to the KP Dom by paramilitary units: FWS-85 (T 585). Inside the KP Dom it was mainly members of the military who supervised the Muslim detainees during their first weeks of captivity: FWS-182 (T 1587); FWS-210 (T 4840); Risto Ivanovic (T 6082). From about 18 or 19 April 1992 onwards, at around the same time that the Accused was appointed warden, former Serb guards from the KP Dom returned to carry out their work assignments: FWS-66 (T 1081); FWS-111 (T 1212-1213); FWS-86 (T 1463); FWS-182 (T 1649); FWS-71 (T 2916); FWS-214 (T 3965); FWS-210 (T 4841). Ex P 2 list of employees who carried out their work obligation at the KP Dom. Lazar Diviljan gave evidence that the guards addressed the Accused as "upravnik" which means warden (T 6033); Milosav Krsmanovic gave evidence that at the KP Dom the Accused was addressed as warden (T 6664).
299 - The Accused admitted that there was no separate guard or security service with regard to the Drina Economic Unit (T 7956). Miladin Matovic gave evidence that the rehabilitation officer of the KP Dom was in charge of both Serb convicts and Muslim detainees (T 6492-6493). Ex D 29A Official Gazette of the Serbian People in BH, 12-17 May 1992 Decision on establishment of penal and correctional institutions in the territory of the Serbian Republic of BH; Article 2: "Penal and correctional institutions in the territory of the Serbian Republic of BH shall be taken over and shall continue to operate as organs of the state administration of the Republic; Article 4: The internal organisation of the KPO/penal and correctional institutions/shall be determined by the rules on internal organisations issued by the warden with the agreement of the Minister of Justice; Article 5: The security of the KPO shall be provided by the employees working in those institutions up to now and, if necessary, employees of the MUP/Ministry of the Interior/police shall help them; Article 11: Penal and correctional institutions shall be managed by the warden and deputy warden appointed by the Minister of Justice." Ex D 30A letter dated 25 July 1992 from Minister Momcilo Mandic to the Warden of the KP Dom: "Subject: Answer to your question concerning the status of Foca KPD. Foca KPD was established in July 1992 pursuant to a Decision of the Presidency of the Serbian Republic of BH/Bosnia and Herzegovina/ which will be published in one of the forthcoming issues of the Official Gazette of the Serbian People in BH. The Decision envisaged Foca KPD as a general closed prison with separate sections for detainees, convicted minors, young adults and women. Work units will be formed in the KPD when necessary and registered with the competent Lower Court in Trebinje. Finance is provided by the budget of the Serbian Republic of BH. Please send this Ministry a list of employees so that salaries can be ensured. We also hereby inform you that Milorad Krnojelac is appointed warden of the prison. Please find enclosed the decision on his appointment". FWS-214 (T 3965) and FWS-139 (T 396) gave evidence that Mitar Rasevic made it clear to them that only the warden could improve the situation of the detainees after they made complaints to him about the living conditions and beating of detainees.
300 - FWS-139 (T 395); FWS-66 (T 1132); FWS-111 (T 1281); FWS-198 (T 961); FWS-54 (T 749); FWS-85 (T 619); FWS-86 (T 1484); FWS-182 (T 1649); FWS-138 (T 2102); FWS-03 (T 2263-2264); FWS-71 (T 2915); Dzevad S Lojo (T 2619); Dr Amir Berberkic (T 3962); FWS-69 (T 4143); FWS-172 (T 4591); FWS-137 (T 4769); Muhamed Lisica (T 4983); Lazar Stojanovic (T 5753); Radomir Dolas (T 5815); Miladin Matovic (T 6443). Zoran Miljovic and Risto Ivanovic both gave evidence that the Accused never issued orders to the guards (T 6274-6276, T 6089-6090). However there was evidence that the Accused did on occasion instruct the guards to do certain things: FWS-86 (T 1466).
301 - A number of Prosecution witnesses gave evidence that Savo Todovic was the deputy warden of the KP Dom and second in command to the Accused: FWS-139 (T 393, T401); FWS-65 (T 475); FWS-82 (T 1703); FWS-119 (T 1982); FWS-71 (T 2912); FWS-109 (T 2410); FWS-113 (T 2619); FWS-73 (T 3296); FWS-111 (T 1280); FWS-85 (T 630); FWS-144 (T 2317); FWS-66 (1132); Todovic was responsible for assigning work duties to the Muslim detainees: FWS-198 (T 969); FWS-86 (T 1499); FWS-14 (T 2316); FWS-71 (T 2912); FWS-113 (T 2619); FWS-109 (T 2410); FWS-113 (T 2619); FWS-214 (T 3959); FWS-73 (T 3297); FWS-216 (T 3491); FWS-249 (T 4500). As a result of Todovic's direct authority over the Muslim detainees in the KP Dom, many saw him more often than the Accused and this led some of them to conclude that he had more authority than the Accused: FWS-54 (T 812); FWS-82 (T 1703); FWS-08 (T 1800); FWS-249 (T 4503). To other detainees however he was clearly subordinate to the Accused: FWS-198 (T 1027); FWS-85 (T 700); FWS-73 (T 3324). The Accused gave evidence that, on at least one occasion, Todovic prepared a document for his signature (T 8177-8180).
302 - There was no evidence to suggest that the pre-conflict reporting system that operated in the KP Dom ceased when the Accused took up the position as warden of the KP Dom. The system functioned as follows: each position held within the KP Dom had a logbook that was maintained by the employees. All new facts relevant to that position would be recorded by the employees in the log book: FWS-138 (T 2030). The heads of the various guard units would give both verbal and written reports to the chief of the section. The written report would then be given to the chief of the guards, chief of the rehabilitation unit and the warden: FWS-138 (T 2030). If an unusual event took place during a guard's shift he would inform the officer on duty who was under an obligation to report to the warden. The warden would in turn call the police who would attend with an investigative judge: FWS-138 (T 2030). Where complaints were made by inmates about a guard, the inmate would write a report to the rehabilitation officer. The complaint would be passed on to the chief of the guards or the warden. The chief of the rehabilitation unit would deal with less serious complaints. There was no evidence that any person was appointed to this position during the Accused's time as warden at the KP Dom. Ex P 2 which lists employees at the KP Dom during the relevant period does not identify any of those employees as holding this position. Where a guard had acted incorrectly, disciplinary action would follow: FWS-138 (T 2032). The warden had an

obligation to report serious incidents, such as the beating of an inmate by a guard, to the Ministry of Justice: FWS-138 (T 2030-2034). Inmates could apply to see the warden through the guards. The warden would see the inmates about certain complaints: FWS-138 (T 2032). The Accused claimed that he did not have the rules and procedure to punish (T 7964-7965).
303 - FWS-138 requested that the Accused allow him to leave the KP Dom to see if his old uncle was still alive. The Accused allowed it but the permission of the U`ice Battalion units had to be secured. This was given and he was escorted by a soldier and the Accused's son (T 1473-1475); FWS-66 gave evidence that the Accused permitted him to make various visits to his mother under the escort of his son Bozidar, dressed in military uniform (T 1112-1113); FWS-111 was permitted by the Accused to make a telephone call to his wife after sending a request via a guard (T 1271-1272); FWS-85 gave evidence that at his brother's request they were taken to see the Accused and tried to discuss whether it would be possible for them to leave the KP Dom and go to Montenegro (T 621-625). Later, a failed exchange and the issue of food were discussed (T 627-628); FWS-65 gave evidence that he asked the guards if the warden would receive him and was taken that day. He asked to have the food improved and the Accused said he would see what he could do (T 479); FWS-182 asked the guards to take him to see the warden where he asked the Accused for medical help. The Accused said that he would see what he could do (T 1599); RJ was taken to see the Accused on a number of occasions and made various complaints to him (T 3846-3880); When he told the Accused about mistreatment of the detainees, the Accused said that he had no power to prevent it (T 3917); Ekrem Zekovic gave evidence of soldiers mistreating him and the Accused intervening to stop them (T 3450); Muhamed Lisica gave evidence that he complained to the Accused about the food and was told that the Accused could do nothing about it (T 4895, 4889-4896). He also asked the Accused why all the civilians were locked up and the Accused told him that it was not for him to decide such things, but for the command (T 4889); FWS-119 gave evidence of Cankusic going to the Accused to find out the fate of his sons. He was told by the Accused that they had been sentenced and gone to serve their time in Bileca and that it was necessary for them to be beaten to have them confess (T 1980).
304 - FWS-214 (T 3965); FWS-139 (T 396); FWS-215 (T 863); FWS-54 (T 777-779); FWS-85 (T 628); FWS-182 (T 1596); FWS-82 (T 1704); FWS-08 (T 1769-1771); FWS-142 (T 1821); FWS-104 (T 2189); FWS-109 (T 2410); Ekrem Zekovic (T 3947); FWS-73 (T 3200-3206); FWS-111 (T 1323); Dr Amir Berberkic (T 3965).
305 - FWS-73 (T 3236); Ex P 48A, pp 13-15; Ex D 64; (T 7707).
306 - The Accused gave unsubstantiated evidence to the contrary in private session (T 7690) which the Chamber does not accept as giving rise to any reasonable possibility that his evidence was true.
307 - Ex P 4A is the request of Miro Stanic, Commander, Srpska Territorial Defence Headquarters, dated 8 May 1992 to the KP Dom: "We request utilisation of your premises for accommodation of prisoners of war. The premises will be used on a temporary basis and after the premises are no longer needed we will hand them over in a proper condition". Ex P 5A is the Decision issued by the Accused as temporary warden on 10 May 1992 following the request of the Foca Tactical Group/Command (Ex D 38A). It states: "The premises of the Foca Penal and Correctional Facility are temporarily allocated for the accommodation of prisoners-of-war and detained persons. The user of the premises is obliged to maintain them and return them in good condition".
308 - Ex D 83A is a letter to the Ministry of Economy of Republika Srpska dated 7 December 1992, signed by the Accused as warden of the KP Dom, in which he asks for approval of an allocation of 20 tons of oil. The reasons given are the necessity of light for the farm animals and for security.
309 - Ex D 39A is a report dated 6 May 1993, signed by the Accused as Warden, in which he requests the provision of additional personnel to carry out security and the necessary funds for the accommodation, food, hygiene and other needs of the inmates and a special vehicle for the transport of inmates.
310 - Ex D 107A is a request from the Accused as warden to the Military Post 7141 Foca Garrison, dated 3 March 1993, in which he requests quantities of food: "Pursuant to the agreement on making KPD premises available for the accommodation of detained persons, the Foca KPD/ Correctional Facility/holds Muslim detainees and Serbian offenders from the ranks of the Republika Srpska Army. For the purpose of feeding them please approve allocation of the following food supplies".
311 - The Accused (T 7630); Ex D 105A; Ex D 106A; Ex D 107A.
312 - FWS-85 (T 627); FWS-65 (T 479); RJ (T 3859); FWS-119 (T 1981); FWS-250 (T 5062); Safet Avdic (T 478-479); Muhammed Lisica (T 4889).
313 - FWS-182 (T 1599).
314 - The Accused (T 7692-7693). Ekrem Zekovic and FWS-210 both gave evidence that the Accused would sometimes give instructions to detainees working in the metal workshop (T 3445-3446, 4872).
315 - Ex D 85A.
316 - Ex D 29A Official Gazette of the Serbian People in BH.
317 - Ex D 85A Report dated 24 Nov 1992 to the Ministry of Justice of Republika Srpska, signed by the Accused as Manager, on the convicted persons at the KP Dom, the business units and the property damage due to the conflict.
318 - Ex D 88A letter dated 27 July 1992 to the Foca Tactical group advising of Serb convicts who wished to be released from the KP Dom to enable them to voluntarily join fighting units and recommending that only two are suitable candidates, signed by the Accused as Temporary Administrator.
319 - Ex D 42A; Ex D 43A; Ex D 45A; Ex D 46A; Ex D 48A; Ex D 54A. Witness FWS-86 gave evidence of being taken to the Accused's office and speaking to his brother on the telephone. His brother said he would like him to be exchanged and the Accused insisted that his brother should try and find someone to swap him for (T 1478).
320 - Ex D 66A; Ex D 67A; Ex D 66-1-A; Ex D 66-2-A; Ex D 67A; Ex D 67-1-A.
321 - Ex D 54A is a document dated 7 September 1992 in which Commander Colonel Marko Kovac orders that certain authorities be permitted to arrest persons, orders that the VP Company Commander and the Chief of Security be

permitted to release persons from custody, and orders that the warden of the KP Dom be informed of the Order.
322 - Ex D 39A.
323 - Ex D 50A; Ex D 51A. These documents, dated 2 July 1992 and 11 July 1992 respectively, record permissions granted by Colonel Marko Kovac for the wife and daughter of Lazar Stojanovic to visit him at the KP Dom.
324 - Ex D 55A is an Order of Commander Kovac dated 27 May 1993 in which he orders that Captain Kovac be removed from the military payroll and transferred to work detail at the KP Dom. Ex D 71A dated 8 May 1993 is an Order to the Foca Tactical Group Command from Commander Kovac ordering that a vehicle of the KP Dom be taken and handed to the Foca Hospital and that Arsenije Krnojelac and Miroslav Krsmanovic, who had been assigned to the KP Dom for compulsory work service, shall be the drivers.
325 - Miladin Matovic (T 6432, 6573, 6577); Risto Ivanovic (T 6089); Miladin Matovic (T 6431); Ex D 34A; Decision of Executive Committee of the Serbian Municipality of Foca, dated 26 April 1992 and signed by Radojica Mladenovic, stating that the KP Dom is granted permission to impose a work obligation on persons fit for work who are not engaged in Yugoslav Army Units, that a work obligation should be imposed on workers according to the list submitted by the Foca KPD which had been approved by the Crisis Staff of the Serbian Municipality of Foca, and that, if necessary, the Crisis Staff of the Serbian Municipality of Foca and the Command of the Yugoslav's Peoples Army Unit shall engage workers mentioned in the previous item depending on the circumstances. Ex P 2 dated 28 October 1998 to the Ministry of Justice from Warden of the KP Dom, Zoran Sekulovic, in response to a request for a list of employees from 18 April 1992 until 31 October 1994: "A unit was set up in Foca Penal and Correctional Facility that spent part of the time on the front lines and a part of the time on work obligation in the period from 30 September 1992 until 2 September 1993. The members of the unit were issued certificates concerning their service in the VRS in the said period."
326 - Zoran Mijovic (T 6221, 6400-6401).
327 - In one instance a commander of the U'ice Battalion tried to remove two persons from the KP Dom. The Accused refused to allow the commander to take anyone unless he received a document to that effect. It was only after some documents were presented that the Accused allowed the commander to remove the detainees: FWS-86 (T 1486). In another incident, members of the White Eagles were provoking a Muslim detainee. The Accused intervened, told the soldiers to go away and they obeyed his command: Ekrem Zekovic (T 3450). In a further incident, a busload of women and children arrived at the KP Dom. Members of the White Eagles were threatening to kill the women and children if they were not paid the same day. The Accused intervened and told them to call their superior to resolve the situation: FWS-120 (T 3129-3142, 3166-3167).
328 - The Accused told RJ that he would instruct the investigators to conduct an interview with him so that the Accused could then take the documents to the Crisis Staff and ask them to permit the release of RJ. RJ was subsequently interviewed and the Accused told him that he had taken the documents to the Crisis Staff: RJ (T 3848-T 3850).
329 - FWS-86 (T 1473); FWS-111 (T 1277); Muhamed Lisica (T 4889).
330 - *See* Imprisonment par 126, *infra*.
331 - Ex D 54A.
332 - Article 9 of the Universal Declaration of Human Rights (1948) states that nobody shall be subjected to arbitrary arrest, detention or exile. Article 9 of the ICCPR (1966) requires that no one shall be subjected to arbitrary arrest or detention. Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) defines the "arbitrary arrest and illegal imprisonment of the members of a racial group or groups" as an act constituting the crime of apartheid. The Convention on the Rights of the Child (1989) enshrines in Article 37(b) that no child shall be deprived of his or her liberty unlawfully or arbitrarily.
333 - The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) enshrines in Article 5 the right to liberty and security and states that no one shall be deprived of his liberty except in particular cases, as enumerated in the Convention. The American Convention on Human Rights (1969) provides in Article 7 that "no one shall be deprived of his physical liberty" except in certain cases and that "no one shall be subject to arbitrary arrest or imprisonment".
334 - *Kordic and Cerkez* Trial Judgment, pars 292-303.
335 - *Kordic and Cerkez* Trial Judgment, pars 301-302.
336 - *Kordic and Cerkez* Trial Judgment, par 302. Unlike the instant case, imprisonment under Article 5 was charged in connection with unlawful confinement under Article 2, both charges referring to the same act, the alleged illegal detention of Bosnian Muslims, par 273.
337 - *Kordic and Cerkez* Trial Judgment, par 303.
338 - International instruments use various terms to refer to deprivation of liberty, including *inter alia* "arrest," "detention" and "imprisonment". The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as adopted by the General Assembly resolution 43/173 of 9 December 1988, defines these terms in its preamble while declaring that the principles enshrined shall apply "for the protection of all persons under any form of detention or imprisonment". The Working Group on Arbitrary Detention (1991) also points out that deprivation of liberty is referred to by different names, including, "apprehension, incarceration, prison, reclusion, custody and remand", United Nations High Commissioner for Human Rights, Fact Sheet No 26, Working Group on Arbitrary Detention, p 4. The Commission on Human Rights adopted in its resolution 1997/50 the definition "deprivation of liberty imposed arbitrarily", E/CN.4/RES/1997/50, 15 April 1997, par 15.
339 - FWS-109 (T 2355); FWS-66 (T 1068); FWS-198 (T 957); FWS-139 (T 319); FWS-73 (T 3194); FWS-210 (T 4833); FWS-250 (T 5021).
340 - The United Nations High Commissioner for Human Rights' Working Group on Arbitrary Detention arrived at the same conclusion by stating that the question of when detention is or becomes arbitrary is not definitely answered by the international instruments, Fact Sheet No. 26, p 4.

341 - Article 9.
342 - Article 9 (1).
343 - Article 37 (b).
344 - Article 7 (2).
345 - Article 5(1) (a)-(f). Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalised draft text of the Elements of Crimes, PCNICC/2000/INF/3/Ad.2, p 11. It must be noted, however, that the Statute of the International Criminal Court ("ICC Statute" or "Rome Statute") has not entered into force, nor have the Draft Elements of Crime been formally adopted. The UN Working Group on Arbitrary Detention, in contrast, identifies three categories under which a deprivation of liberty will be regarded as being imposed arbitrarily. According to the Working Group's report, the deprivation of liberty is arbitrary when (a) it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (category I), when (b) the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as State parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the ICCPR (category II), when (c) the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III); Commission on Human Rights, Question of the Human rights of all persons subjected to any form of detention or imprisonment, Report of the Working Group on Arbitrary Detention, E/CN.4/1998/44, 19 December 1997, Annex I, par 8. The Draft Elements of Crimes for the ICC Statute define imprisonment as constituting a crime against humanity where the conduct of the principal offender carrying out the imprisonment "was in violation of fundamental rules of international law".
346 - In particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily.
347 - The Trial Chamber notes that arbitrariness of imprisonment pursuant to Article 5(e) may further result from an otherwise justified deprivation of physical liberty if the deprivation is being administered under serious disregard of fundamental procedural rights of the person deprived of his or her liberty as provided for under international law. Basic procedural guarantees are, for instance, provided for in Article 9 and 14 of the ICCPR. In addition, Article 43 of Geneva Convention IV, enshrines basic procedural rights of civilians who are detained on the legal basis of Article 42 of the same Convention. Article 43 entitles interned protected persons to have, inter alia, the internment reconsidered as soon as possible by an appropriate court or administrative board, and, in case that the internment is maintained, to have it periodically, considered. With regard to the case before it, however, the Trial Chamber sees no need to elaborate on this aspect, since the Prosecution and the Defence case focused on the allegation of the initial unlawfulness of the imprisonment of the non-Serbs.
348 - *See* pars 34-41, *supra.*
349 - When asked during the Pre-Defence Conference, "You mean it is your case [...] that those people who were detained in the KP Dom were prisoners of war and not merely civilians?" counsel for the Accused replied "Yes, Your Honour." (T 5142).
350 - FWS-198 had a firearm, a pistol, in his apartment. He denied, though, that he ever possessed any explosive device (T 992); FWS-109 owned a rifle (T 2376); FWS-182 had a Beretta pistol that had belonged to his wife's father (T 1581); Dr Amir Berberkic was provided with a pistol by his neighbour (T 3724).
351 - FWS-198 kept a pistol as a souvenir. It was an heirloom from his grandfather (T 992). He was arrested in his apartment when he went back to retrieve some clothes for his children (T 943); FWS-109 was arrested in Igalo when all Bosniaks present were asked to show their ID (T 2352); FWS-182 took the Beretta to his sister's home at Zubovici, where he hid with women and children before he was arrested, because he felt safer with it. The weapon was in the house when he was arrested (T 1688); Dr Berberkic had the pistol as a weapon to protect himself or to kill himself. It was not, he said, a weapon with which one can kill others in times of war. It was the first time he had ever held a pistol, and he handed it over to his brother-in-law when he was wounded (T 3980, 3988).
352 - Persons who had been soldiers in the army of Bosnia-Herzegovina were brought into the KP Dom wounded, but they were kept separated from the other detainees: Dzevad S Lojo (T 2539); FWS-139 (T 372-373); FWS-159 was caught by the Bosnian Serb army as a member of the Bosnian Muslim army near a place called Kacelj on 28 January 1993, and he was kept in an isolation cell at the KP Dom for three months (T 2441, 2442, 2457).
353 - *See* par 438, *infra.* One witness described the systematic and collective nature of the detention of the Muslim male population in his own words by testifying that "everybody was brought there, even if all they had with Islam was their name." This was well borne out by the evidence.
354 - There were only a handful of Croats, Albanians and Roma: Safet Avdic (T 681); FWS-66 (T 1076); FWS-111 (T 1217-1218); FWS-139 (T 327-329); FWS-198 (T 952); FWS-182 (T 1594); Rasim Taranin (T 3015, 3018); FWS-08 (T 1763, 1768); FWS-71 (T 2792); FWS-138 (T 2050); FWS-104 (T 2193); Dzevad S. Lojo (T 2537, 2539); Dr Amir Berberkic (T 3735); Muhamed Lisica (4851).
355 - The uncle of the son-in-law of FWS-75 was 75 years old (T 731). Regarding the age range of detainees, see: FWS-66 (T 1076); FWS-111 (T 1218); FWS-139 (T 437); FWS-182 (T 1593); Dzevad S Lojo (T 2537); FWS-49, who was already 72 years old in 1992, was kept in a room where "everyone was old, worn out and weak" (T 4692). A little girl, about seven years old was in the room where FWS-182 was kept (T 1595).
356 - FWS-111 (T 1218); FWS-139 (T 329); Dzevad Lojo (T 581); FWS-69 suffered from angina pectoris (T 4062). FWS-182, who himself was suffering from an ulcer on the duodendum and who was depending on a certain diet, saw persons with tuberculosis, asthma and heart problems (T 1595). Two men suffered from tuberculosis. A man called Glusac: FWS-109 (T 2366) and a man called Hamdzija Mandzo: FWS-71 (2797). There were a lot of sick people in room 16. FWS-182 had problems with his stomach. FWS-172 and FWS-104 were quite sick persons, Muradif Konjo had

high blood pressure and Abid Sahovic had liver bleeding problems: Dr Amir Berberkic (T 3736). Ramiz Dzamo was brought in from the hospital with serious facial injuries which prevented him from eating: Dr Amir Berberkic (T 3737). Two old men of at least 75 years, Ejub Durmisevic and Adil, were brought to the isolation cell occupied by Ramiz Dzamo. Ejub's ear was severely cut: FWS-159 (T 2470). An old blind man and another man who had been released from the military as a disabled person shared a cell with FWS-49 (T 4692). Ahmet Hadzimusic was a disabled person who had to use crutches ever since he contracted polio in 1947 and never underwent compulsory military training (T 1928). In Room 16 there was a man with a serious heart condition, Hasan Hadzimuratovic, who was 80 years old, and there were also some young men who had bullet wounds and wounds from an accident and who had been brought in from the hospital: Dzevad Lojo (T 2549, 2539). A mental patient injured himself severely twice: Dzevad Lojo (T 1218-1219). A mental patient named Mujo Murguz was very tense and aggressive, and another person had psychological problems which caused him to eat a cake of soap: FWS-71 (T 2794).

357 - Several detainees gave evidence that they had not been shown any arrest warrant before being taken away: FWS-139 (T 318); Dzevad S Lojo (T 2533). Zoran Vukovic told RJ that he was sorry to have to take him to the police station without a warrant: RJ (T 3842). Some witnesses managed, however, to cast a glance at "name lists" with which the arresting persons were equipped, and on which they could identify their own names: Safet Avdic (Ex P 123, T 676); Ahmet Hadzimusic (T 1936, 1939); FWS-139 (T 318-319).

358 - FWS-66 (T 1068); FWS-111 (T 1199); FWS-198 (T 943); FWS-215 (T 858-859); FWS-54 (T 731); FWS-86 (T 1454); FWS-142 (T 1819); FWS-138 (T 2043); Dzevad S. Lojo (T 2533); Ekrem Zekovic (T 3341); FWS-69 (T 4051); FWS-172 (T 4554); FWS-137 (T 4733).

359 - FWS-109 (T 2355).

360 - FWS-66 (T 1068); FWS-198 (T 957); FWS-139 (T 319); FWS-73 (T 3194); FWS-210 (T 4833); FWS-250 (T 5021).

361 - FWS-86 (T 1460); Muhamed Lisica (T 4833).

362 - FWS-109 (T 2355); Dzevad S Lojo (T 2535); FWS-104 (T 2161); FWS-139 (T 320); Dr Amir Berberkic (T 3733).

363 - FWS-111 (T 1260); FWS-215 (T 862); FWS-54 (T 751); Dzevad Lojo (T 634); FWS-139 (T 346); Ahmet Hadzimusic (T 1940); FWS-144 (T 2308); FWS-109 (T 2372); Dr Amir Berberkic (T 3768); Ekrem Zekovic (T 3468).

364 - FWS-137 was interrogated only 55 days after his arrest, after he had asked Risto Ivanovic to be interviewed, hoping to be released thereafter (T 4735). Rasim Taranin attempted to be interviewed for a long time before he finally succeeded. He also thought that he would then be released but was not. He was taken out of the KP Dom and detained at Rudo for approximately 9 months and then transferred to Kula Prison Camp. He was released from Kula after a couple of months, on 6 or 7 October 1994 (T 1721-1742). FWS-138 spent 10 months at the KP Dom before he was interrogated (T 2045).

365 - FWS-08 (T 1769); Dzevad S Lojo (T 2533).

366 - FWS-111 (T 1261); FWS-198 (T 990); FWS-215 (T 865); FWS-54 (T 752); Dzevad Lojo (T 635); FWS-139 (T 350); FWS-86 (T 1464); Rasim Taranin (T 1721-22); FWS-138 (T 2045); FWS-104 (T 2191); FWS-144 (T 2309); FWS-109 (T 2375); FWS-120 (T 3148); Dr Amir Berberkic (T 3769); FWS-73 (T 3250); Ekrem Zekovic (T 3468); Muhamed Lisica (T 4935); FWS-250 (T 5021); Juso Taranin (T 3019).

367 - *See* par 143, *infra*; FWS-111 (T 1264); FWS-198 (T 990); FWS-54 (T 752); FWS-104 (T 2193); FWS-109 (T 2376); FWS-109 (T 2375); Dr Amir Berberkic (T 3771); Ekrem Zekovic (T 3472); FWS-69 (T 4072, 4074); FWS-137 (T 4738); FWS-66 (T 1116).

368 - FWS-69 (T 4073); FWS-210 (T 4935); FWS-73 (T 3250); Dr Amir Berberkic (T 3771); Rasim Taranin (T 1722).

369 - This applies equally for Muslim detainees who were taken for interrogations several times, as, for instance, FWS-198 (T 988); Ahmet Hadzimusic (T 1951, 2003); FWS-104 (T 2190); FWS-159 (T 2459); FWS-120 (T 3148); Dr Amir Berberkic (T 3768, 3749); Ekrem Zekovic (T 3468).

370 - FWS-250 (T 5022); FWS-159 (T 2459); FWS-104 (T 2193); FWS-86 (T 1464); Dzevad Lojo (T 635); FWS-215 (T 865); FWS-111 (T 1199); FWS-119 (T 1939, 1994); FWS-73 (T 3194); FWS-137 (T 4733).

371 - FWS-104 (T 2194); FWS-66 (T 1068); FWS-198 (T 957); FWS-54 (T 731); FWS-139 (T 318); FWS-142 (T 1832); FWS-03 (T 2265); FWS-144 (T 2326); FWS-71 (T 2780); FWS-89 (T 4707); Safet Avdic (Ex P 123, p 679).

372 - The Trial Chamber notes that, after the initial arrest of the non-Serb detainees, there was no lawful mechanism in place by which the lawfulness of their detention could be reviewed. "Interrogations" were carried out in an atmosphere of terror and fear of mistreatment, and they did not constitute a process of review. However, as the initial detention was itself unlawful, the Trial Chamber does not need to consider the fact that no lawful process of review took place at the KP Dom. *See* pars 34-42, *supra*; pars 237-306, *infra*.

373 - The Accused gave evidence that at some point he asked why the men were detained at the KP Dom and received the answer "They are Muslims". He disputed, however, that this answer was to be interpreted to mean that the men were brought in because they were Muslims. He claimed that he was only told that the detained persons were Muslims (T 7844). The Trial Chamber finds this explanation not credible. Further, the Accused clearly admitted that he knew that none of the procedures in place for legally detaining persons were ever followed at the KP Dom, by stressing that this very fact was the reason why he asked not to continue at the KP Dom (T 7845, 7846).

374 - See Warden par 100, *supra*; The Accused (T 7845-7846, 7887-7889, 7895, 7936, 7945); Ex P 46A, dated 6 June 1992, p 33; Ex P 48A, dated 13 July 1992, p 30-31; FWS-66 (T 1044, 1113-1114); FWS-111 (T 1269-1271); R.J (T 3828, 3829, 3835, 3847, 3851); Ex D 66-1-A, dated 30 July 1992; Ex D 66-2-A, dated 30 July 1992; Slobodan Jovancevic (T 5619, 5605); Miladin Matovic (T 6501, 6506).

375 - *Delalic* Appeal Judgment, par 342.

376 - *See* par 106, *supra*.

377 - *See* pars 104-106, *supra*; Delalic Appeal Judgment, par 331-369.

378 - *Tadic* Appeal Judgment, par 188; *Kunarac* Trial Judgment, par 390; In the *Krstic* Trial Judgment, it was held that "committing" covers personally perpetrating a crime (ie, the principal offender) or engendering a culpable omission in violation of criminal law, par 601.
379 - *See* par 173, *infra.*
380 - *See* pars 60-64, *supra.*
381 - In the *Tadic* Trial Judgment, it was acknowledged that cruel treatment is treatment that is inhumane, par 723. In the *Delalic* Trial Judgment, it was held that cruel treatment carries an equivalent meaning for the purposes of Article 3 of the Statute, as inhuman treatment does in relation to grave breaches, par 552. The *Kordic and Cerkez* Trial Judgment followed this finding, par 265. The *Delalic* Trial Judgment further integrated the concept of inhumane acts pursuant to Article 5 into the context of the definition of inhuman treatment by stating that the elaborate analysis and discussion conducted in the judgment "with regard to inhuman treatment is also consistent with the concept of "inhumane acts", in the context of crimes against humanity", pars 533-534. Recently, the Appeals Chamber analysed in the context of multiple convictions whether inhuman treatment under Article 2 and cruel treatment under Article 3 contained additional elements vis-à-vis each other. The Appeals Chamber, in both the majority decision and the separate and dissenting opinion, came to the conclusion that the "sole distinguishing element stems from the protected person requirement under Article 2", and, respectively, that "the requirement that each offence have a unique element is therefore not satisfied", par 426 of the *Delalic* Appeals Judgment and par 51 of the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna. The offence of inhumane acts under Article 5 was not subject to the discussion of the Appeals Chamber.
382 - The Appeals Chamber in *Delalic* confirmed the definition of cruel treatment as constituting "an intentional act or omission... which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity", par 424. By comparison, inhumane acts were defined to comprise "acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity" and which must be of "similar gravity and seriousness to the other enumerated crimes"; *Kayishema and Ruzindana* Trial Judgment, pars 151,154. The Trial Chamber in *Jelisic* appears to have confused the terms "cruel treatment", "inhumane acts" and "inhuman treatment" several times in its analysis (par 41 and finding in pars 45, 52 and the reference to "inhumane treatment" as to be that set out in Article 5) but explicitly put forward that the notions of cruel treatment within the meaning of Article 3 and of "inhumane treatment set out in Article 5" (thereby obviously referring to "inhumane acts" under Article 5) "have the same legal meaning": Jelisic Trial Judgment, par 52.
383 - *Delalic* Trial Judgment, par 536; *Jelisic* Trial Judgment, par 57 (referring to outrages upon personal dignity).
384 - This was recently held by the Trial Chamber with regard to the offence of outrages upon personal dignity in *Kunarac* Trial Judgment, par 501.
385 - *Kayishema and Ruzindana* Trial Judgment, par 153; *Aleksovski* Trial Judgment, par 56.
386 - FWS-08 (T 1762); FWS-66 (T 1088); FWS-54 (T 751); FWS-65 (T 546); FWS-139 (T 345).
387 - FWS-159 (T 2457, 2460, 2463, 2467); Ekrem Tulek FWS-182 T 1611).
388 - *Ibid.*
389 - FWS-66 (T 1090); FWS-215 (T 873); FWS-54 (T 751); FWS-65 (T 473); FWS-139 (345).
390 - Ekrem Zekovic (T 3543); FWS-215 (T 875).
391 - FWS-65 (T 467); FWS-159 (T 2463).
392 - FWS-65 (T 460, 535); FWS-172 (T 4605).
393 - FWS-65 (T 535); FWS-250 (T 5068); FWS-172 (T 690).
394 - FWS-172 (T 4605); Ekrem Zekovic (T 3442).
395 - Dzevad S Lojo (T 2553); FWS-182 (T 1611); Ekrem Zekovic (T 3543-3544); FWS–215 (T 875); FWS- 182 (T 1612-1613); FWS-65 (T 460). FWS-172 (T 690); Lazaro Stojanovic (T 5726 T 5750 T 5757); Zoran Vukovic (T 5769, T 5800, 5794); Risto Ivanovic (T 6166); Milan Pavlovic T 6891); Zoran Mijovic (T 6235). This was disputed by guards Risto Ivanovic (T 6106); Miladin Matovic (T 6446, 6450) and the KP Dom Clerk Divljan Lazar (T 6047) who claimed that the detainees could talk freely with the guards. Risto Ivanovic conceded however that the non-Serb detainees were afraid of the guards (T 6194).
396 - FWS-138 (T 2021); FWS-12 (T 241); Miladin Matovic (T 6460); FWS-162 (T 1359); FWS-198 (T 952, 954); FWS-139 (T 327); FWS-182 (T 1590); FWS-86 (T 1461); FWS-104 (T 2162); FWS-73 (T 3212).
397 - FWS-198 (T 950); FWS-119 (T 1941-1942); FWS-159 (T 1078); FWS-12 (T 243).
398 - FWS-104 T 2162); FWS-54 (T 741); FWS-73 (T 3212).
399 - Safet Avdic (Ex P 121, p 685).
400 - FWS-85 (T 664); Safet Avdic (T 456); Ex P 123, p 685; FWS-159 (T 2450).
401 - FWS-250 (T 5117-5118); FWS-182 (T 1615); Dzevad S Lojo (T 2562).
402 - FWS-139 (T 341); FWS-182 (T 1615); FWS-73 (T 3422). A couple of detainees who worked had access to hot water. FWS-250 could heat water and wash because he worked where there were heating facilities: (T 5117). FWS-89 also had access to hot water because he worked in the kitchen (T 4661).
403 - FWS-172 (T 4607); FWS-69 (T 4066); FWS-139 (T 341); FWS-182 (T 1615).
404 - FWS-73 (T 3424); FWS-159 (T 2466); FWS-250 (T 5118); (Ex P 123, p 686); FWS-73 (T 3424). There were some items of clothing which had been left behind by former regular convicts.
405 - FWS-111 (T 1227); FWS-182 (T 1615); Dzevad S Lojo (T 2564); FWS-73 (T 3422).
406 - FWS-111 (T 1226); Dzevad S Lojo (T 2562); FWS-139 (T 339). It was so cold in one of the isolation cells that the tap water was frozen for about seven days: FWS-159 T 2465).
407 - FWS-198 (T 943); FWS-86 (T 1454).
408 - Milan Pavlovic (T 6837). The central heating system in the KP Dom broke down in 1992. Muhamed Lisica was

ordered to make furnaces for the offices in the administration building (T 4906). FWS-89 worked on the heating in May 1992. He conceded that the breakdown in the heating system and the existing shortage of electricity and resources may have been the reason for the absence of heating in the KP Dom (T 4724-4725). Because the central boiler was out of order meals were prepared outside in wood fuelled caldrons (Safet Avdic T 547). There were frequent power failures in Foca throughout the war and for periods there was no electricity for the prisoners' quarters: FWS-03 (T 2272). There was no power at the KP Dom until September 1992: FWS-71 (T 2968). On many occasions there was no power supply in Foca and surrounding villages: FWS-109 (T 2426); FWS-35 (T 2750); Ekrem Zekovic (T 3547). *See also* Ex D 85A, pp 2-3. The Trial Chamber rejects the evidence of defence witness Miladin Matovic that there was not a single room at the KP Dom that was not heated during the winter for a single second (T 6488).

409 - FWS-66 (T 1146); FWS-111 (T 1226); Dzevad S Lojo (T 663); FWS-139 (T 339); FWS-71 (T 2948); Muhamed Lisica (T 4906).

410 - Muhamed Lisica (T 4906); FWS-89 (T 4724); Rasim Taranin (T 1719-1720).

411 - Muhamed Lisica (T 4906); Ekrem Zekovic (T 3691); (Safet Avdic T 686).

412 - Dzevad Lojo (T 663); FWS-71 (T 2948); FWS-73 (T 3357, 3421); FWS-249 (T 4532); FWS-89 (T 4725); Muhamed Lisica made some furnaces for the detainees' rooms in October 1993 (T 4906).

413 - Divljan Lazar (T 5980).

414 - FWS-66 (T 1084); Ekrem Zekovic (T 3621). Some of the detainees were given additional blankets during the winter: Dzevad Lojo (T 663); FWS-139 (T 339); FWS-89 (T 4725).

415 - FWS-66 (T 1084); Ekrem Zekovic (T 3621).

416 - FWS-159 (T 2465).

417 - Dr Amir Berberkic (T 3746); FWS-66 (T 1084); Dzevad S Lojo (T 2563)

418 - Dr Amir Berberkic (T 3746 T 3764); Dzevad S Lojo (T 2562); FWS-66 (T 1084); FWS-71 (T 2807).

419 - Slobodan Solaja (T 5498, 5500); Witness A (T 5522); Milomir Mihajlovic (T 5629); Radomir Dolas (T 5820); Miloslav Krsmanovic (T 6623); Witness B (T 6713); Zarko Vukovic (T 6759); Svetozar Bogdanovic (T 7084); Arsenije Krnojelac (T 7122-7124); Bozo Drakul (T 7191); Vitomir Drakul (T 5669); Dr Drago Vladicic (T 6307); Dr Milovan Dobrilovic (T 6366).

420 - Dr Amir Berberkic (T 3755, 3756); FWS-49 (T 4698); Dzevad Lojo (T 666); FWS-139 (T 343); FWS-86 (T 1507); FWS-49 (T 4698).

421 - FWS-66 (T 1084); FWS-111 (T 1312); FWS-162 (T 1361); FWS-198 (T 956); FWS-215 (T 874); FWS-54 (T 750); Dzevad Lojo (T 664); Safet Avdic (T 536); FWS-139 (T 343); FWS-86 (T 1506); FWS-182 (T 1618); Rasim Taranin (T 1729); FWS-08 (T 1772); FWS-71 (T 2805); FWS-109 (T 2371); FWS-159 (T 2464); Dr Amir Berberkic (T 3755); Safet Avdic (Ex P 123, p 686); FWS-78 (T 2113); FWS-96 (Ex P 186, p 2539).

422 - Rasim Taranin (T 1712-1715).

423 - FWS-162 (T 1361); FWS-198 (T 955); FWS-111 (T 1380); Dzevad Lojo (T 665); FWS-139 (T 341); Dr Amir Berberkic (T 4007); FWS-71 (T 2947); Juso Taranin (T 3027).

424 - FWS-172 (T 4607); FWS-250 (T 5116); FWS-89 (T 4725, 4674). At a later stage of their detention, and only for a period of 15 days, the detainees were given eggs, beans, rice, potatoes or pasta for breakfast: Rasim Taranin (T 1750).

425 - Lazar Stojanovic (T 5717, 5749); Vitomir Drakul (T 5673); Zoran Vukovic (T 5771, 5784-5785).

426 - FWS-08 (T 1804); FWS-138 (T 2063); FWS-71 (T 2952-2953); Rasim Taranin (T 1715); FWS-66 (T 1083); FWS-111 (T 1228-1229); FWS-162 (T 1360).

427 - Krsto Krnojelac (T 5903, 5914, 5916-5917, 5927, 5930); Risto Ivanovic (T 6092, 6094, 6193); Divljan Lazar (T 6043-6044); Miladin Matovic (T 6451-6452); Bozo Drakul (T 7189); The Accused (T 7665); Zoran Vukovic (T 5784-5785); Lazar Stojanovic (T 5717);

428 - Lazar Stojanovic (T 5718); Risto Ivanovic (T 6097); Miladin Matovic (T 6457); The Accused (T 7666); FWS-86 (T 1551); Gojko Jokanovic (T 1146); FWS-71 (T 2950); FWS-109 (T 2422); Dzevad S Lojo (T 2511); (Dr Amir Berberkic (T 3738).

429 - Dr Drago Vladicic (T 6311); Dr Milovan Dobrilovic (T 6369-T 6299, 6297); Miladin Matovic (T 6457-6458); Lazar Stojanovic (T 5718); Risto Ivanovic (T 6097); Miladin Matovic (T 6457-6458); Dr Vladicic (T 6339-6340); Dr Milovan Dobrilovic (T 6343); The Accused (T 7666); FWS-182 (T 1840). Cedo Dragovic would give medicines to those with heart conditions: FWS-03 (T 2273); FWS-71 (T 2949); Dzevad S Lojo (T 2550). Dr Amir Berberkic (T 3741); FWS-69 (T 4063); FWS-172 (T 4595).

430 - FWS-71 T 2949); FWS-69 (T 4063); FWS-172 (T 4595). In other cases, however, detainees did receive sophisticated treatment, as, for instance, infusions or antibiotic injections: FWS-86 (T 1551); FWS-66 (T 1146); FWS-182 (T 1688); FWS-03 (T 2273); FWS-71 (T 2949-2950). Dr Drago Vladicic and Dr Milovan Dobrilovic both claimed that the infirmary was sufficiently equipped and that they could procure lacking medicine from Foca hospital. (T 6304-6306, 6344).

431 - See the case of Enes Hadzic par 145, *infra*.

432 - FWS-86 (T 1532-1533); FWS-182 (T 1586); FWS-159 (T 2442, 2448); Dzevad S Lojo (T 2539, 2350); Dr Amir Berberkic (T 3737). Dr Drago Vladicic never treated any injuries caused by maltreatment and never came across combat injuries such as wounds from firearms at the KP Dom (T 6324). Likewise, Dr Milovan Dobrilovic testified that he never noticed any traces of mistreatment on any Muslim patient (T 6345).

433 - As to the numerous victims of beatings and torture and the injuries observed by detainees, *See* pars 190-306 *infra*; FWS-109 (T 2167-2168); FWS-03 (T 2248); FWS-73 (T 3261); Dzevad S Lojo (T 2572); FWS-198 (T 1010); Dr Amir Berberkic (T 3782).

434 - FWS-159 (T 2470, 2507); Ekrem Zekovic (T 3588, 3595). The visiting doctors claimed that all detainees who were in need could receive medical help. However they never visited any detainee in his room and never went to the isolation

cells: Dr Milovan Dobrilovic (T 6353); Dr Drago Vladicic (T 6328). Only those detainees who were brought to the infirmary received treatment: Dr Milovan Dobrilovic (T 653-654); Dr Drago Vladicic (T 6316, 6328).
435 - FWS-182 (T 1611); Safet Avdic (T 460); Dzevad Lojo (T 660, 703).
436 - FWS-138 (T 2067).
437 - FWS-250 (T 5031-5032); FWS-172 (T 4571); FWS-249 (T 4412); FWS-115 (T 746-747).
438 - FWS-71 (T 2807); FWS-111(T 1224-1225); FWS-215 (T 875-877)
439 - Safet Avdic (Ex P 123, p 690).
440 - FWS-182 (T 1613-1614).
441 - FWS-182 (T 1613); Ekrem Zekovic (T 3447-3448); FWS-215 (T 877- 878); FWS-250 (T 5023).
442 - Safet Avdic (T 537).
443 - FWS-66 (T 1111); FWS-111 (T 1259); FWS-162 (T 1392); FWS-215 (T 901); FWS-54 (T 773); Safet Avdic (T 489); FWS-139 (T 367); FWS-86 (T 1530); Rasim Taranin (T 1724); FWS-138 (T 2090); FWS-104 (T 2182); FWS-03 (T 2261); FWS-144 (T 2301); FWS-71 (T 2889); FWS-109 (T 2377); Dzevad S Lojo (T 2587); Dr Amir Berberkic (T 3931); Safet Avdic (T 494); FWS-86 (T 1520); FWS-144 (T 2301); FWS-71 (T 2889); FWS-198 (T 1013); FWS-215 (T 902).
444 - FWS-111 (T 1259); FWS-162 (T 1392); FWS-54 (T 773); FWS-109 (T 2377).
445 - Rasim Taranin (T 1724); FWS-104 (T 2182); Safet Avdic (T 537).
446 - FWS-66 (T 1111); FWS-198 (T 1023); FWS-215 (T 902); Rasim Taranin (T 1724); FWS-03 (T 2261); Dzevad S Lojo (T 2587-2588).
447 - Dr Amir Berberkic (T 3931- 3932); FWS-159 (T 2508); FWS-215 (T 902); FWS-65 (T 537).
448 - FWS-71 (T 865); Safet Avdic (T 537). Muharem Causevic was taken out and beating during the time his daughter was detained with him: FWS-215 (T 895); FWS-62 (T 1092).
449 - FWS-111 (T 1230); FWS-162 (T 1395); Dzevad Lojo (T 646, 668); FWS-182 (T 1619); FWS-08 (T 1782-1783).
450 - FWS-71 (T 2790); FWS-109 (T 2366); FWS-08 (T 1782); Dr Amir Berberkic (T 3758); Dr Drago Vladicic (T 6325, 6331); Risto Ivanovic (T 6199); Dr Milovan Dobrilovic treated Enes Hadzic at the infirmary but was never called to the detainees rooms (T 6346, 6353).
451 - FWS-08 (T 1782-1783); Dr Amir Berberkic (T 3758); FWS-109 (T 2366-2367, 2374); FWS-71 (T 2791-2792).
452 - FWS-111 (T 1222); Dr Amir Berberkic (T 3730-3731).
453 - Dr Amir Berberkic (T 3755).
454 - T 4020.
455 - T 3972.
456 - FWS-111 (T 1218).
457 - FWS-111 (T 1219).
458 - *Ibid.*
459 - FWS-111 (T 1219).
460 - T 1220.
461 - T 1084.
462 - T 1146.
463 - T 1086.
464 - T 1137.
465 - T 2371.
466 - T 2372.
467 - T 2805.
468 - T 2805-2807.
469 - T 2949-2950.
470 - T 2806.
471 - T 2919.
472 - T 2919.
473 - T 2931-2932.
474 - FWS-159 (T 2469).
475 - T 2470.
476 - T 4431.
477 - T 4432-4433.
478 - T 343.
479 - T 340.
480 - T 439.
481 - T 1361.
482 - *Ibid.*
483 - T 1595-1596.
484 - T 1686, 1688.
485 - T 1618.
486 - FWS-111 (T 1220-1221).
487 - T 3876.
488 - T 1312.
489 - T 1226.
490 - T 1287.

491 - T 1287.
492 - T 1288.
493 - The Prosecution claimed that his name was misspelled under Schedule D 17 and that he is the same person referred to under Schedule B 35 (T 3763).
494 - FWS-66 (T 1088); FWS-111 (T 1230); FWS-162 (T 1395); Dr Amir Berberkic (T 3760).
495 - Dr Torlak, who was an experienced surgeon, examined Kunovac and said that it appeared to be an injury to the internal organs of the abdomen: Dr Amir Berberkic (T 3760-3763); FWS-111 (T 1231).
496 - Dr Amir Berberkic (T 3760); FWS-111 (T 1231); FWS-162 (T 1393); Risto Ivanovic accompanied Gojko Jokanovic and Dr Karovic to the KP Dom pharmacy to get medicine for Kunovac (T 6168).
497 - FWS-111 (T 1231).
498 - FWS-111 (T 1231); Dr Amir Berberkic (T 3760); FWS-162 (T 1393); Risto Ivanovic (T 6169).
499 - T 2327.
500 - *Ibid.* T 2377.
501 - T 664.
502 - T 665.
503 - T 663.
504 - T 2197.
505 - FWS-104 (T 2194-2195, 2197).
506 - T 2198.
507 - *Ibid.*
508 - T 2120.
509 - T 874.
510 - T 876-877.
511 - T 920.
512 - T 1506.
513 - T 1495, 1505.
514 - T 1499.
515 - T 1502.
516 - T 1502-1504.
517 - T 1499.
518 - T 1504.
519 - *Ibid.*
520 - T 1499.
521 - T 1729.
522 - Rasim Taranin (T 1742-1743).
523 - This has been conceded by the Prosecution, see Prosecution Final Trial Brief, Schedule D, pp 2, 3, 4 and 9.
524 - Safet Avdic (T 534-538, 461, 469); FWS-142 (T 1832-1833); Ahmet Hadzimusic (T 1985, 1941); FWS-138 (2120); FWS-144 (T 2326-2327); FWS-162 (T 1411); FWS-54 (T 750, 786); FWS-86 (T 1540, 1542); FWS-08 (T 1772, 1799); Dzevad S Lojo (T 2627-2628); FWS-58 (T 2706-2707); Ekrem Zekovic (T 2706-2707); FWS-98 (T 951-952, 956, 1025); FWS-250 (T 5069); FWS-69 (T 4068); FWS-172 (T 4599); FWS-73 (T 3297-3298, 3312); FWS-159 (T 2442-2443, 2448-2449, 2463-2466, 2467, 2469-2470, 2478- 2479, 2484, 2493, 2495, 2506); FWS-159 (2493, 2497, 2499, 2508).
525 - Muhamed Lisica once approached the Accused and told him that it was hard to work and that he was going to faint. He told the Accused that the food was not sufficient and that he was hungry (T 4889, 4895); FWS-182 approached the Accused twice for medical help and expressed his fear of dying (T 1599, 1604). Safet Avdic asked the warden for soap and toiletries (T 479); RJ, a close friend of the Accused from before the war, was asked by the Accused at least twice during his detention to inform him about the treatment of the detainees. RJ told the Accused about the problems of the detainees, not only about the insufficient food, but also about the hygienic problems and the need to improve the medical care. RJ stressed that he was "honest" with the Accused and that he told him about the "bad things" that were happening to the detainees (T 3867, 3859-3860). He specifically told the Accused about the mistreatment of a disabled detainee in the yard and his subsequent internment in solitary confinement (T 3865).
526 - Safet Avdic (T 479, 482); FWS-182 (T 1599, 1602, 1604); RJ (T 3859, 3865); Muhamed Lisica (T 4889, 4895).
527 - T 8091-8092.
528 - *See* pars 88-90, *supra.*
529 - *Delalic* Appeal Judgment pars 400-413.
530 - *See* pars 51-59, *supra.*
531 - *See* pars 60-64, *supra.*
532 - *See* pars 53-59, 60-64, *supra.*
533 - *See* pars 130-132, *supra.*
534 - *See* pars 51-64, *supra.*
535 - This is necessarily implicit in the following cases: Delalic Trial Judgment, pars 468-469; Furundzija Trial Judgment, pars 139, 153-154; *Kunarac* Trial Judgment, par 497; *Kvocka* Trial Judgment, par 158.
536 - *Kunarac* Trial Judgment, par 497.
537 - See, for example, Article 1(2) of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, "?tgorture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

538 - *Delalic* Trial Judgment, pars 468-469. The European Court of Human Rights held that "torture" involves "suffering of a particular intensity or cruelty" which accounts for the "special stigma" attached to this offence (Ireland v United Kingdom, 18 Jan 1978, Series A No 25, par 167).
539 - Delalic Trial Judgment, par 468.
540 - See *Kunarac* Trial Judgment, pars 470-471.
541 - *Kunarac* Trial Judgment, pars 470-496.
542 - *Furundzija* Trial Judgment, par 139; Delalic Trial Judgment, par 454 and sources quoted therein. *See also* Articles 32 and 147 of Geneva Convention IV, Articles 12 and 50 of Geneva Convention I, Article 12 and 51 of Geneva Convention II, Article 13, 14, 17 and 130 of Geneva Convention III, Common Article 3 to the four Geneva Conventions, Article 4 of Additional Protocol II and Article 75 of Additional Protocol I. *See also*, Principle 6 of the *Body of Principles for the Protection of All Persons under Any Form Detention or Imprisonment*, 9 December 1988, provides that "[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment." Those principles apply for the protection of *all persons* under any forms of detention or imprisonment.
543 - See *Kvocka* Trial Judgment, pars 143, 149, 151 and sources quoted therein. *See also*, Keenan v UK, Judgment, 3 April 2001, Application No 27229/95, par 112; Selmouni v France, Judgment, Application No 25803/94, 28 July 1999, par 104; *Ireland v United Kingdom*, Judgment, 18 Jan 1978, Series A No. 25, pars 167 and 174; Greek case, Report of 5 Nov 1969, (1969) 12 Yearbook, Vol II, pars 12, 18 of the Opinion of the Commission; *Aydin v Turkey*, Judgment, 25 Sept 1997, Application No. 23178/94, 25 Sept 1997, par 84. On the effect of time on the court's assessment of the severity of the abuse, see for example *Soering v United Kingdom*, Judgment, 7 July 1989, Series A No. 161, pars 106, 111. See for example the allegations contained under pars 5.7, 5.11, 5.24, 5.26 and 5.29 of the Indictment, as well as the incidents 1, 2, 4 and 13 listed under Schedule A and 38, 40, 49 and 56 under Schedule B.
544 - *See General Comment* 20/44 of 3 April 1992 [Prohibition of Torture], point 6, where the Committee for Human Rights notes that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7 [of the ICCPR – *Prohibition of Torture*]." *See also*, before the European Commission of Human Rights, Bonzi (Switzerland), 7854/77, 12 D.R. 85 and Kröcher and Möller (Switzerland), 84463/78, 26 D.R. 24.
545 - *See*, for example, Article 55 of Geneva Convention IV and Article 26 of Geneva Convention III. *See also* Article 20 of the *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955; *Setelich v Uruguay*, (28/1978) Report of the Human Rights Committee, GAOR, 14th Session, par 16.2; the 1986 Report of the Special Rapporteur on torture which lists "prolonged denial of food" as one specific form of torture (E/CN.4/1986/15); and the Greek case, where the European Commission of Human Rights considered Greece's breaches of Article 3 of the ECHR in light of its failure to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners (Report of 5 Nov 1969, (1969) 12 Yearbook, Vol II).
546 - *Furundzija* Trial Judgment, par 162; *Akayesu* Trial Judgment, par 594; *Kunarac* Trial Judgment, par 497.
547 - *Delalic* Trial Judgment, par 470; *Kunarac* Trial Judgment, par 486.
548 - *See Kunarac* Trial Judgment, par 485; *Delalic* Trial Judgment, pars 470-472; *Akayesu* Trial Judgment, par 594.
549 - *Furundzija* Trial Judgment, par 162; *Kvocka* Trial Judgment, pars 141, 152, 157.
550 - Article 50 of Geneva Convention I, Articles 51 of Geneva Convention II, Article 130 of Geneva Convention III and Article 147 of Geneva Convention IV prohibit, *inter alia*, "torture" as a grave breach of the Geneva Conventions. The Commentary states that the word "torture" must be given a "legal meaning", ie that "torture" consists of "the infliction of suffering on a person *to obtain from that person, or from another person, confessions or information*" (emphasis added); in Pictet (ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 598. *See also* Article 1 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by UN General Assembly resolution 3452 of 9 Dec 1975; Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by UN General Assembly resolution 39/46 of 10 Dec 1984, entered into force on 26 June 1987; Article 2 of the *Inter-American Convention to Prevent and Punish Torture* of 9 December 1985, signed on 9 Dec 1985 and entered into force on 28 Feb 1987 (OAS Treaty Series No 67, OEA/Ser.A/42 (SEPF)); the Inter-American Convention prohibits the infliction of "physical or mental pain or suffering (...) on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, *or for any other purpose*" (emphasis added); *See also* jurisprudence of the *European Courts of Human Rights on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, for example, *Greek case*, 1969, YB Eur Conv on H R 12, p 186.
551 - See *Furundzija* Trial Judgment, par 162.
552 - *Kunarac* Trial Judgment, pars 488-496.
553 - Prosecution Final Trial Brief, par 80.
554 - FWS-71 (T 2780-2781, 2774).
555 - *Ibid.*
556 - FWS-71 (T 2784).
557 - FWS-71 (T 2785).
558 - FWS-71 (T 2784).
559 - FWS-71 (T 2785-2786).
560 - FWS-71 (T 2788).
561 - FWS-71 (T 2786, 2788).
562 - *See* par 4.9 of the Indictment.

563 - *See* FWS-73 (T 3286-3288, 3289); FWS-139 (T 368); FWS-111 (T 1264); FWS-54 (T 774); FWS-182 (T 1621).
564 - FWS-54 testified that beatings in passing in the compound were a daily occurrence during the first days after the camp was set up in late May or early June before the regular guards took over from the soldiers (T 743-744). See, however, FWS-215 (T 913-916).
565 - *See* T 2893; Prosecution Final Trial Brief, par 82 and fn 285.
566 - FWS-71 (T 2891, 2892-2893).
567 - FWS-71 (T 2891-2892).
568 - T 5957-5958.
569 - Defence witness Krsto Krnojelac who worked in the canteen and who testified that he never witnessed such an incident and claimed that he would have if this had indeed taken place (T 5954-5955). The Trial Chamber does not accept that, due to his work in the canteen, he would have been able to see at all times every such incident which would have taken place in or nearby the canteen. The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth.
570 - FWS-69 (T 4088-4092, 4061). FWS-69 stated that the incident took place between 1 ½ - 2 months prior to July-August 1992, that is, while the Accused was still the warden: FWS-69 (T 4092). FWS-69 left the KP Dom on 8 December 1992 (T 4144). See, however, Krsto Krnojelac (T 5954-5955) and remark in the previous footnote.
571 - *Ibid.*
572 - FWS-71 (T 2889).
573 - FWS-69 (T 4093); FWS-71 (T 2889).
574 - FWS-69 (T 4094); FWS-71 (T 2990).
575 - FWS-69 (T 4094).
576 - FWS-137 (T 4742-4744).
577 - FWS-137 (T 4745).
578 - Dr Amir Berberkic (T 3763); Dzevad S Lojo (T 2565).
579 - Dr Amir Berberkic (T 3763-3764).
580 - Dzevad S Lojo (T 2565).
581 - Dr Amir Berberkic (T 3765); Dzevad S Lojo (T 2556).
582 - The Trial Chamber is satisfied that this incident is different to that pleaded under B4. The allegation made under B4 relates to beatings inflicted upon Dzemo Balic while he was detained in the isolation cell, *See* par 262, *infra*. Dzemo Balic
583 - FWS-69 (T 4081).
584 - *Ibid.*
585 - FWS-69 (T 4083).
586 - FWS-69 (T 4082).
587 - FWS-69 (T 4082-4083).
588 - FWS-69 (T 4084).
589 - FWS-71 (T 2807).
590 - FWS-71 (T 2808-2809).
591 - *See* par 5.14 of the Indictment.
592 - FWS-66 (T 1091).
593 - FWS-66 (T 1091-1092).
594 - FWS-111 testified that he was hit with a baton and fists and that he was slapped (T 1209-1211). There is no indication, however, as to the duration, the effect or the severity of the beating inflicted upon him on that occasion.
595 - In respect of incident A 8, see FWS-198 (T 1001-1002). In respect of incident A 13, see Rasim Taranin (T 1717).
596 - FWS-215 (T 895); FWS-66 (T 1092).
597 - FWS-66 (T 1093); FWS-215 (T 894); Dzevad Lojo (T 641).
598 - FWS-215 (T 895).
599 - Ahmet Hadzimusic (T 1941).
600 - Ahmet Hadzimusic (T 1942, 1943).
601 - Ahmet Hadzimusic (T 1942).
602 - Ahmet Hadzimusic (T 1947, 1950).
603 - Ahmet Hadzimusic (T 1948-1949).
604 - *See* par 46, *supra*.
605 - FWS-54 (T 747); Rasim Taranin (T 1716).
606 - FWS-54 (T 749).
607 - *See* par 180, *supra*.
608 - FWS-69 (T 4096-4098, 4181-4184).
609 - FWS-69 said that they were slapped and that, as a result, their faces were all red (T 4096).
610 - Prosecution Final Trial Brief, p 36, fn 303.
611 - II is also referred to as FWS-08.
612 - FWS-71 (T 2809-2813); FWS-08 (T 1773).
613 - FWS-71 (T 2812-2813).
614 - FWS-71 (T 2812).
615 - FWS-08 (T 1776).
616 - Par 5.17 reads as follows: "Milorad Krnojelac in concert with other high-level prison staff, ordered the guards to

beat detainees even for minor violations of the prison rules, *as described in paragraphs 5.18 through 5.21*." (emphasis added)
617 - Par 5.21 speaks of the collective punishment imposed upon *other* detainees as a result of Ekrem Zekovic's attempt to escape, but there is no reference to any beating or other punishment of Ekrem Zekovic himself.
618 - *Kupreskic* Appeal Judgment, par 114.
619 - *Ibid*, par 83.
620 - *Ibid*, pars 93, 100.
621 - The Prosecution Pre-Trial Brief expanded the very general statement in the Indictment, but still failed to notify the Defence of the real case (*Ibid*, par 116). The statements of the relevant witnesses were provided less than a month before the first of them gave evidence, during most of which period the trial was proceeding, and still without any forewarning of the nature of the case which was to be put (*Ibid*, par 120).
622 - *Ibid*, par 124; *See also* par 113.
623 - This was done in respect of par 5.2 of the Indictment. The Accused was required to re-plead to the Indictment as amended.
624 - Ekrem Zekovic (T 3555-3565).
625 - Ekrem Zekovic (T 3567-3569).
626 - Ekrem Zekovic (T 3569-3570).
627 - Ekrem Zekovic (T 3567-3569, 3573-3575); *See also* Miladin Matovic (T 6587).
628 - T 8121.
629 - Ekrem Zekovic (T 3570, 3579-3580).
630 - Ekrem Zekovic (T 3574-3575); *See also* The Accused (T 7681, 8121).
631 - Ekrem Zekovic (T 3588).
632 - Ekrem Zekovic (T 3591-3595). The second time, he was taken away but not beaten (Ekrem Zekovic, T 3593-3594).
633 - *See* pars 227-230, *supra*.
634 - See for example Ekrem Zekovic (T 3587-3588); FWS-250 (T 5066). The Accused himself conceded that he was present during Todovic's speech (T 7684-7686).
635 - FWS-216 (T 3587).
636 - Ekrem Zekovic (T 3587-3588); Safet Avdic (Ex P 123, pp 694-695); FWS-250 (T 5065-5066).
637 - FWS-250 (T 5066).
638 - FWS-73 (T 3240-3245); FWS-182 (T 1614); FWS-249 (T 4460-4470); Muhamed Lisica (T 4921-4924).
639 - T 7686.
640 - FWS-73 (T 3240).
641 - FWS-73 (T 3240); FWS-249 (T 4471); Muhamed Lisica (T 4926).
642 - FWS-73 (T 3240).
643 - Rasim Taranin (T 1731-1734); FWS-08 (T 1781-1782); Ahmet Hadzimusic (T 1982); FWS-138 (T 2095); FWS-73 (T 3242-3246); FWS-249 (T 4414, 4445, 4471); Muhamed Lisica (T 4926-4927).
644 - *See* pars 239-306, *infra*.
645 - FWS-03 (T 2234-2235, 2238-2239); *See also* FWS-69 (T 4106).
646 - FWS-03 (T 2236).
647 - FWS-03 (T 2236); *See also* FWS-172 (T 4569) who describes Hajro Sabanovic's injuries when returned to his room.
648 - FWS-03 (T 2237-2238).
649 - FWS-03 (T 2238-2239).
650 - FWS-03 (T 2240); Dr Amir Berberkic (T 3816).
651 - FWS-03 (T 2240-2241).
652 - FWS-03 (T 2241-2242).
653 - Dr Amir Berberkic (T 3816-3817); FWS-104 (T 2175); FWS-113 (T 2556).
654 - *See* par 184, *supra*.
655 - FWS-03 (T 2239).
656 - See Prosecution Final Trial Brief, par 101.
657 - FWS-66 (T 1088); FWS-71 (T 2824-2825); Dr Amir Berberkic (T 3759).
658 - The last sentence of par 5.26 reads: "These incidents [which are described in broad terms in par 5.26] are further described in paragraphs 5.27 through 5.29 and attached Schedule B."
659 - *See* findings in respect of pars 5.27 - 5.29 and beatings listed in Schedule B, *infra*.
660 - *See* findings in respect of pars 5.27 - 5.29 and beatings listed in Schedule B, *infra*.
661 - Safet Avdic (T 483-484); FWS-54 (T 767); FWS-162 (T 1387); FWS-142 (T 1824, 1841); Ahmet Hadzimusic (T 1953); FWS-03 (T 2251); FWS-109 (T 2377-2379); FWS-113 (T 2574-2580); FWS-71 (T 2828); Amir Berberkic (T 3791-3792); FWS-69 (T 4116); FWS-172 (T 4559); FWS-250 (T 5048).
662 - FWS-111 (T 1238); FWS-198 (T 1032-1033); FWS-86 (T 1511-1512); FWS-54 (T 1102); FWS-162 (T 1387-1388); Dzevad Lojo (T 645); FWS-142 (T 1824); Ahmet Hadzimusic (T 1953); FWS-104 (T 2176-2177); FWS-03 (T 2251); FWS-109 (T 2380); FWS-113 (T 2580); FWS-71 (T 2829-2830, 2837-2839); Ekrem Zekovic (T 3479-3480); Dr Amir Berberkic (T 3790-3791); FWS-69 (T 4116); FWS-172 (T 4564); FWS-250 (T 5040-5041). See, however, the testimony of Risto Ivanovic who denied that Nurko Nisic was ever beaten while he was detained at the KP Dom (T 6175). This witness further claimed that nobody was ever beaten at the KP Dom and that no guard was ever involved in such mistreatment (T 6179). The Trial Chamber notes that Risto Ivanovic worked in shift at the KP Dom with two

guards, Zoran Matovic and Milenko Burilo (T 6180); who have been mentioned repeatedly by Prosecution witnesses as being among the worst principal offenders of beatings (*See* par 273, *infra* concerning the finding of the Trial Chamber in respect of those two guards). The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth.
663 - *See* for example FWS-111 (T 1238-1239); FWS-198 (T 1032); Rasim Taranin (T 1725); FWS-86 (T 1511-1512); FWS-54 (T 1102); Dzevad Lojo (T 645); FWS-182 (T 1630); Ahmet Hadzimusic (T 1953-1954); FWS-138 (T 2069-2070); FWS-71 (T 2830); Dr Amir Berberkic (T 3791-3792); FWS-172 (T 4566).
664 - FWS-198 (T 1005); FWS-162 (T 1387-1388); FWS-142 (T 1824); FWS-104 (T 2176); FWS-109 (T 2380); FWS-71 (T 2839-2840); Ekrem Zekovic (T 3479-3480, 3663); FWS-69 (T 4116); FWS-172 (T 4564); FWS-250 (T 5048-5049).
665 - FWS-71 (T 2839-2840); Ekrem Zekovic (3479-3480); FWS-250 (T 5042, 5049).
666 - Ekrem Zekovic (T 3479-3480).
667 - FWS-215 (T 908); FWS-111 (T 1238); FWS-198 (T 1005-1007, 1032-1034); FWS-82 (T 1725); FWS-86 (T 1510); FWS-54 (T 1102); FWS-162 (T 1386-1388); FWS-85 (T 645-646); FWS-139 (T 358); FWS-182 (T 1630); FWS-142 (T 1824); FWS-119 (T 1954); FWS-138 (T 2070); FWS-104 (T 2176); FWS-03 (T 2251, 2254); FWS-109 (T 2379-2380); FWS-113 (T 2580); FWS-71 (T 2830, 2837, 2840); FWS-73 (T 3264); FWS-216 (T 3479); FWS-214 (T 3791-3792); FWS-69 (T 4116); FWS-172 (T 4654, 4566); FWS-250 (T 5040).
668 - FWS-182 (T 1630); FWS-71 (T 2830, 2837); FWS-214 (T 3791-3792); FWS-172 (T 4566).
669 - FWS-66 (T 1097-1098); FWS-111 (T 1241); FWS-86 (T 1526-1527); FWS-66 (T 1148-1149); FWS-182 (T 1616, 1622); FWS-138 (T 2074); FWS-03 (T 2252-2253); Ahmet Hadzimusic (T 1961); FWS-54 (T 767-768); FWS-109 (T 2394, 2432); FWS-113 (T 2581); FWS-71 (T 2829, 2862); FWS-73 (T 3275); FWS-172 (T 4560).
670 - Dzevad Lojo (T 650-651).
671 - FWS-66 (T 1098); FWS-104 (T 2163); Dzevad Lojo (T 638-639, 647); Amir Berberkic (T 3801).
672 - Dzevad Lojo (T 638-639, 647); FWS-71 (T 2829, 2837, 2865).
673 - FWS-111 (T 1237-1239); FWS-215 (T 901); Dr Amir Berberkic (T 3793).
674 - FWS-111 (T 1237-1238); FWS-138 (T 2081); FWS-54 (769); FWS-08 (T 1783); Dr Amir Berberkic (T 3793); FWS-172 (T 4560-4561). The Trial Chamber is satisfied that the pattern demonstrated by the evidence establishes that Bico was beaten. *See* pars 326-327, *infra*, the reference to pattern evidence in the section on murder.
675 - FWS-198 (T 1018); FWS-109 (2377 2380); FWS-109 (T 2430-2431); FWS-71 (T 2864); FWS-69 (T 4122).
676 - *See also* par 263, *infra*, findings in respect of incidents No 5 in Schedule B.
677 - FWS-66 (T 1108); FWS-111 (T 1242); FWS-215 (T 908); Dzevad Lojo (T 644-645); Ahmet Hadzimusic (T 1964-1965); FWS-138 (T 2084-2085); FWS-03 (T 2251); FWS-54 (T 741, 766); FWS-86 (T 1532-1533); FWS-182 (T 1586); FWS-109 (T 2385); FWS-113 (T 2579); FWS-71 (T 2829); Ekrem Zekovic (T 3505-3506); Dr Amir Berberkic (T 3801); Muhamed Lisica (T 4957).
678 - It has been charged as murder. *See* par 339, *infra*.
679 - Ekrem Zekovic (T 3505-3506).
680 - FWS-86 (T 1513); FWS-66 (T 1105); FWS-111 (T 1246-1247); FWS-142 (T 1830); FWS-138 (T 2076-2078); Ahmet Hadzimusic (T 1959); FWS-73 (T 3244); Ekrem Zekovic (T 3473-3474); Dr Amir Berberkic (T 3930-3931); FWS-172 (T 4570); FWS-89 (T 4665).
681 - *See*, in particular, FWS-73 (T 3244). *See also* Ekrem Zekovic (T 3473).
682 - Ekrem Zekovic (T 3473); Salko Mandzo told Ekrem Zekovic about this incident and the Accused's part in it.
683 - T 7680.
684 - FWS-139 (T 359-360); FWS-54 (T 752-757); FWS-111 (T 1252); FWS-142 (T 1826-1830); FWS-138 (T 2081); FWS-03 (T 2251-2253); FWS-58 (T 2702); FWS-71 (T 2825-2828); Ekrem Zekovic (T 3469); Dr Amir Berberkic (T 3817, 3925); Muhamed Lisica (T 4957).
685 - *See*, FWS-71 (T 2826).
686 - Schedule B is annexed to the Indictment.
687 - Ekrem Zekovic (T 3511-3512); FWS-69 (T 4107-4108).
688 - Ekrem Zekovic (T 3511-3512).
689 - FWS-69 (T 4108).
690 - FWS-119 (T1955-1956, 1961-1964).
691 - *Ibid.*
692 - FWS-139 (T 361); FWS-138 (T 2068-2069); Ekrem Zekovic (T 3474, 3651, 3711).
693 - FWS-138 (T 2068-2069); Ekrem Zekovic (T 3474, 3651, 3711).
694 - This incident is not the same incident as that described in par 5.15 of the Indictment which took place prior to incident B 4.
695 - That fact was conceded by the Prosecution in the Prosecution Final Trial Brief, p 2.
696 - FWS-66 stated that he saw Abdurahman Cankusic until sometime in July or August 1992 (T 1106).
697 - Dzevad Lojo (T 640-642); *See also* incidents C 3 and C 4.
698 - FWS-198 (T 1021); FWS-172 (T 4548-4549).
699 - *Ibid.*
700 - FWS-172 (T 4548-4552).
701 - *Ibid.*
702 - FWS-104 (T 2172-2173); FWS-03 (T 2250); FWS-113 (T 2253-2255); FWS-69 (T 4118); FWS-73 (T 3216-3217).

703 - FWS-113 (T 2254-2256).

704 - Dr Amir Berberkic (T 3813-3814).
705 - Prosecution Final Trial Brief, annexed Schedule B, p 6.
706 - *See* pars 239-242, *supra*.
707 - FWS-142 (T 1828); FWS-69 (T 4104-4105).
708 - Dr Amir Berberkic (T 3773-3774).
709 - Dr Amir Berberkic (T 3772-3778).
710 - Dr Amir Berberkic (T 3772).
711 - The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.
712 - Ekrem Zekovic (T 3499, 3614); Dr Amir Berberkic (T 3812); FWS-250 (T 5025-5029).
713 - FWS-66 (T 1106); FWS-111 (T 1233); FWS-215 (T 903-904); FWS-54 (T 769); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3812); FWS-69 (T 4129); FWS-250 (T 5029).
714 - *See* FWS-142 (T 1823-1824); FWS-104 (T 2165-2169); FWS-03 (T 2246-2249); FWS-113 (T 2569-2574); FWS-73 (T 3261-3263); Dr Amir Berberkic (T 3781-3782); FWS-249 (T 4484).
715 - *See* for example Safet Avdic (Ex P 123, pp 483-484, 692-693); FWS-86 (T 1519); FWS-86 (T 1520); FWS-182 (T 1622); FWS-138 (T 2069); FWS-03 (T 2250-2254, 2260-2261); FWS-144 (T 2301-2303); FWS-71 (T 2820, 2822, 2829, 2862, 2889, 2981); FWS-69 (T 4112); FWS-172 (T 4559-4560); Muhamed Lisica (T 4946).
716 - *See* FWS-138 (T 2068, 2084); Rasim Taranin (T 1724); FWS-03 (T 2250-2254, 2260-2261); FWS-144 (T 2303-2304); FWS-109 (T 2396); Dzevad Lojo (T 2584-2587); FWS-71 (T 2829); Ekrem Zekovic (T 3476); Dr Amir Berberkic (T 3811); RJ (T 3861); FWS-69 (T 4110); Muhamed Lisica (T 4957).
717 - *See* for example FWS-73 (T 3286-3289).
718 - *See* for example FWS-54 (T 761-762).
719 - *See* par 317, *infra*.
720 - *See* pars 274-276, *infra*.
721 - *See* pars 274, *infra* and "murder" section at pars 333-335, *infra*.
722 - *See* FWS-71 (T 2858); Muhamed Lisica (T 4963-4965).
723 - *See* FWS-139 (T 357); Safet Avdic (T 482-494, 514-517); FWS-54 (T 758-762, 765, 772); FWS-215 (T 906, 912, 930); FWS-198 (T 1017-1018); FWS-66 (T 1064-1066, 1100-1101); FWS-111 (T 1237-1240, 1256); FWS-162 (T 1401); FWS-86 (T 1514); FWS-142 (T 1826-1827); Ahmet Hadzimusic (T 1955-1957, 1961-1964); FWS-138 (T 2071, 2074, 2081, 2084); FWS-03 (T 2250-2254); FWS-109 (T 2379, 2383, 2394); FWS-113 (T 2576-2580, 2583, 2586); FWS-71 (T 2828-2833, 2840, 2853-2854, 2954, 2958, 2887); FWS-73 (T 3252-3253, 3267-3268, 3369, 3296); Ekrem Zekovic (T 3487, 3499, 3508-3509); Dr Amir Berberkic (T 3789-3791, 3794, 3800, 3802-3803); FWS-69 (T 4111-4112, 4123-4124); FWS-172 (T 4559, 4564-4565); FWS-137 (T 4750, 4802); Muhamed Lisica (T 4947-4960).
724 - *See*, for instance, FWS-54 (T 762); FWS-03 (T 2261); FWS-109 (T 2394-2395).
725 - FWS-71 (T 2829-2830, 2837).
726 - FWS-54 (T 761).
727 - Dr Amir Berberkic (T 3789-3791).
728 - FWS-66 (T 1101); FWS-03 (T 2254); FWS-113 (T 2586). *See also* FWS-142 who thinks that he recognised his voice on that occasion (T 1826-1827). *See also*, FWS-210 (T 4958-4959).
729 - FWS-71 (T 2954).
730 - FWS-71 (T 2840).
731 - FWS-54 (T 762-763). *See also* Ekrem Zekovic (T 3487); FWS-71 (T 2837); Muhamed Lisica (T 4947-4948).
732 - FWS-54 (T 762-763). *See also* FWS-198 (T 1022).
733 - FWS-54 (T 762-763).
734 - In relation to Ramo Dzendusic, *see* Safet Avdic (T 519); FWS-215 (T 904); FWS-66 (T 1107); FWS-182 (T 1638); Ahmet Hadzimusic (T 1961-1964); FWS-104 (T 2184, 2217); FWS-54 (T 770); FWS-138 (T 2076); FWS-109 (T 2377-2378, 2394); FWS-113 (T 2582); FWS-71 (T 2886); Ekrem Zekovic (T 3489, 3495); Dr Amir Berberkic (T 3809); FWS-69 (T 4124-4125); FWS-172 (T 4560-4561). *See also* incident 8 in Schedule C. In relation to Nail Hodzic, see FWS-65 (T 516); FWS-119 (T 1955-1964, 1967); FWS-113 (T 2574-2582); FWS-71 (T 2833-2836); FWS-73 (T 3267); Ekrem Zekovic (T 3503); FWS-66 (T 1107); FWS-86 (T 1516); FWS-69 (T 4118); FWS-137 (T 4750-4756); Muhamed Lisica (T 4960-4961); FWS-250 (T 5078).
735 - *See*, in particular, FWS-65 (T 516); FWS-66 (T 1107); FWS-119 (T 1955-1967); FWS-109 (T 2377-2378, 2394); FWS-113 (T 2574-2576, 2582); FWS-71 (T 2883-2887); Ekrem Zekovic (T 3489-3499); FWS-172 (T 4559-4561); FWS-137 (T 4750-4756).
736 - FWS-66 (T 1107).
737 - The Trial Chamber is satisfied that this incident is different to that considered in the section on murder. *See* par 340, *infra*.
738 - FWS-162 (T 1386-1387); FWS-03 (T 2252-2253; FWS-172 (T 4559-4561). *See also*, FWS-111 (T 1240); FWS-66 (T 1100-1101, 1108); FWS-162 (T 1386-1387); FWS-198 (T 1010-1011); FWS-142 (T 1824); FWS-104 (T 2176-2178); FWS-03 (T 2257, 2261); FWS-54 (T 772); FWS-109 (T 2832); Dr Amir Berberkic (T 3787-3789). FWS-172 mentioned that they may have been taken in July rather than June 1992 (T 4559).
739 - FWS-162 (T 1387-1388).
740 - FWS-162 (T 1387-1388).
741 - FWS-104 (T 2176-2177); Dr Amir Berberkic (T 3789).
742 - FWS-162 (T 1388); FWS-03 (T 2250-2252, 2258); FWS 172 (T 4559-4561).
743 - *See* FWS-66 (T 1107); Safet Avdic (T 519); FWS-111 (T 1241); FWS-215 (T 905); FWS-139 (T 364); FWS-182

(T 1638); FWS-142 (T 1826); FWS-54 (T 770); FWS-86 (T 1539-1541); FWS-109 (T 2385); FWS-113 (T 2583); Ekrem Zekovic (T 3501); Muhamed Lisica (T 4963). 654
744 - *See* Ekrem Zekovic (T 3501-3502); FWS-111 (T 1241); FWS-215 (T 905).
745 - Ekrem Zekovic (T 3501).
746 - FWS-142 (T 1826-1827).
747 - FWS-73 (T 3404); Ekrem Zekovic (T 3502); FWS-66 (T 1107); FWS-111 (T 1241); FWS-182 (T 1638); FWS-142 (T 1826); FWS-86 (T 1542); FWS-109 (T 2385-2395);
748 - FWS-69 (T 4119); FWS-139 (T 354).
749 - FWS-139 seems to suggest that he had been beaten prior to his being brought to the KP Dom (T 355).
750 - FWS-65 (T 524); FWS-104 (T 2185, 2209); FWS- 113 (T 2597-2599); FWS-214 (T 3928); FWS-216 (T 3513-3516).
751 - *Ibid.*
752 - FWS-73 (T 3285-3286).
753 - FWS-65 (T 524-525); FWS-104 (T 2185-2187,2209); FWS- 113 (T 2597-2599); FWS-214 (T 3928).
754 - In respect of Latif Hasanbegovic, *see* FWS-109 (T 2359-2362); FWS-71 (T 2810, 2821-2822). In respect of Aziz Haskovic, *see* FWS-109 (T 2359-2362); FWS-71 (T 2822). In respect of Halim Seljanci (incident B 51), *see* FWS-109 (T 2359-2362); FWS-58 (T 2701); FWS-71 (T 2810, 2821-2822).
755 - FWS-03 (T 2252); FWS-73 (3214-3218); Dr Amir Berberkic (T 3927).
756 - It is alleged in incident B 31 that, sometime in June 1992, Ibro Kafedzic was beaten by guards and/or soldiers including military police on the ground floor of the administration building after lunch or dinner.
757 - Ekrem Zekovic (T 3517); FWS-69 (T 4077-4079).
758 - Ekrem Zekovic (T 3517).
759 - The Trial Chamber did not take into account those injuries which might have been inflicted prior to his arrival at the KP Dom (*see* Ekrem Zekovic, T 3517).
760 - FWS-198 (T 1021); FWS-71 (T 2879, 2886); FWS-73 (T 3284, 3411-3413); Ekrem Zekovic (T 3497); FWS-69 (T 4086); Muhamed Lisica (T 5009).
761 - *See* par 274, *supra*.
762 - FWS-73 (T 3289-3290).
763 - FWS-73 (T 3289-3290).
764 - FWS-214 (T 3760-3763).
765 - FWS-214 (T 3762).
766 - *See* pars 254-255, *supra*.
767 - *See* pars 254-255, *supra* in respect of par 5.28.
768 - FWS-86 (T 1513); FWS-66 (T 1104); FWS-139 (T 360); FWS-182 (T 1629); Ahmet Hadzimusic (T 1959); FWS-138 (T 2076-2079); FWS-104 (T 2166-2169); FWS-03 (T 2248-2249); FWS-113 (T 2569-2571); FWS-73 (T 3261-3263); Dr Amir Berberkic (T 3784-3786); FWS-249 (T 4484-4486).
769 - FWS-03 (T 2250-2252); FWS-182 (T 1630).
770 - Prosecution Final Trial Brief, Schedule B, p 22.
771 - FWS-111 (T 1246); Dzevad Lojo (T 655); FWS-73 (T 3285); Ekrem Zekovic (T 3520); FWS-172 (T 4569-4570).
772 - FWS-111 (T 1246); FWS-73 (T 3285); FWS-172 (T 4569).
773 - *See* FWS-111 (T 1246); FWS-86 (T 1515); FWS-216 (T 3520); FWS-73 (T 3285).
774 - FWS-111 (T 1243); Dzevad Lojo (T 656); FWS-113 (T 2594); Ekrem Zekovic (T 3524); FWS-250 (T 5040-5042).
775 - FWS-85 mentioned that Mesbur may have been beaten before being taken to the KP Dom (T 656).
776 - FWS-03 (T 2252-2253, 2258-2260); Dr Amir Berberkic (T 3808); FWS-69 (T 4124-4125); FWS-172 (T 4561).
777 - FWS-138 (T 2083); FWS-109 (T 2400-2401); Ekrem Zekovic (T 3489); Muhamed Lisica (T 4947).
778 - Dr Amir Berberkic (T 3787).
779 - Dr Amir Berberkic (T 3787-3791). *See also*, FWS-73 (T 3267).
780 - *Ibid.*
781 - *See* par 276, *supra*.
782 - FWS-172 (T 4559-4561).
783 - *Ibid.*
784 - *See* par 274, *supra*.
785 - *See* Prosecution Final Trial Brief, p 27.
786 - *See* pars 239-242, *supra*.
787 - FWS-119 (T 1955-1956); FWS-03 (T 2251).
788 - FWS-119 (T 1955-1961); FWS-03 (T 2250-2253); FWS-69 (T 4119); FWS-250 (T 5077).
789 - *See* par 280, *supra*.
790 - FWS-73 (T 3282); Ekrem Zekovic (T 3525); Dr Amir Berberkic (T 3928); FWS-137 (T 4760).
791 - FWS-73 (T 3282); FWS-137 (T 4760, 4800).
792 - Dr Amir Berberkic (T 3930).
793 - Dr Amir Berberkic (T 3930).
794 - FWS-54 (T 751-754).
795 - *Ibid.*
796 - FWS-54 (T 752).
797 - FWS-54 (T 752): "However, I later heard from some others, *now to what extent you can believe this or not is*

different, that he beat them. I did not see that, but he really did not treat me that way." (emphasis added)
798 - T 2398-2402.
799 - *See* par 301, *supra*; *See also* FWS-69 (T 4085-4086) and FWS-210 (T 4967, 5009) who testified that Sulejman Soro was taken away at some point and never returned. There is no evidence that he was beaten on that occasion.
800 - FWS-111 (T 1258); FWS-139 (T 367); FWS-54 (T 767); FWS-109 (T 2377-2378, 2395-2396); FWS-71 (T 2865-2866); Amir Berberkic (T 3927); FWS-172 (T 4560-4561); FWS-137 (T 4750); Muhamed Lisica (T 4962).
801 - But *See* par 339,*infra*, in relation to his murder on another occasion.
802 - *See* par 301, *supra*; *See also* FWS-69 (T 4085-4086) and FWS-210 (T 4967 and 5009) who testified that Sulejman Soro was taken away at some point and never returned. There is no evidence that he was beaten on that occasion.
803 - FWS-86 (T 1517).
804 - FWS-58 (T 2700).
805 - FWS-159 (T 2442-2454). There is no suggestion that the person named "Milorad" was the Accused.
806 - FWS-159 (T 2457).
807 - FWS-159 (T 2479-2484).
808 - FWS-159 (T 2483-2484).
809 - FWS-159 (T 2483).
810 - *See* par 274, *supra*.
811 - The Accused (T 7677, 8112).
812 - The Accused (T 7681-7682, 8121). *See also* Defence witness Risto Ivanovic (T 6152). The Trial Chamber does not accept the evidence of this witness on that point; nor does his evidence cause the Trial Chamber to have a reasonable doubt that the Prosecution witnesses were telling the truth. *See also* Ekrem Zekovic (T 3574-3575).
813 - *See* pars 228-233, *supra* where the Trial Chamber points out that this beating was not the subject of the charge in the Indictment. However, it remains evidence in the case from which inferences may legitimately be drawn by the Trial Chamber in relation to issues arising out of incidents which *are* the subject of charges in the Indictment.
814 - Ekrem Zekovic (T 3569-3570).
815 - Ekrem Zekovic (T 3569-3570).
816 - The Accused said that he never heard about any beatings (T 7678).
817 - *See* for example RJ (T 3860-3867); Ahmet Hadzimusic (T 1979-1981).
818 - RJ (T 3860-3864).
819 - RJ (T 3860-3866).
820 - RJ (T 3865-3866).
821 - RJ (T 3865-3866). Ahmet Hadzimusic gave evidence of having overheard a conversation between two relatives named Cankusic who discussed the disappearance of the sons of one of them, and that one of the two men had reported it to the Accused. According to Hadzimusic, Cankusic asked the Accused where his sons were. The Accused answered that they had been sentenced and taken away to serve their terms. When Cankusic asked the Accused why they had been beaten so much, the Accused attempted to justify the beatings by saying that they had been beaten in order to obtain a confession. This evidence against the Accused was hearsay and, in the absence of any circumstantial support for the statements made to Hadzimusic, the Trial Chamber does not consider it sufficiently credible to base a finding that the Accused had in fact been made aware of those facts: Ahmet Hadzimusic (T 1979-1981, 2012).
822 - The Accused (T 7677).
823 - Several witnesses mentioned that they saw him at the refectory or on his way to the refectory: see for example Rasim Taranin (T 1706); Ahmet Hadzimusic (T 1981); FWS-249 (T 4497-4498); FWS-250 (T 5056, 5068-5069); FWS-109 (T 2409-2410); RJ (T 3892); Ekrem Zekovic (T 3451); FWS-138 (T 2096-2097).
824 - See FWS-139 (T 381); FWS-111 (T 1276); FWS-162 (T 1403); FWS-69 (T 4130); FWS-172 (T 4590); FWS-249 (T 4497-4498). The Accused said that he did not often go through the yard, only "when the need arose" (T 7660). Further, he said that he "usually went to the furniture factory at the time when there were no detained persons in the yard" (T 7677).
825 - *See* for example Faik Tafro (the Accused, T 7611); Ekrem Zekovic (the Accused, T 7917); Muhamed Lisica (T 7918); RJ (T 7929).
826 - The Accused may also have been told that Cankusic's sons were beaten to obtain a *confession*, but the Trial Chamber is not satisfied beyond reasonable doubt that he was in fact made aware of the facts communicated to Hadzimusic.
827 - Nor was the Accused charged with criminal responsibility for the torture of Cankusic's sons.
828 - *See* par 173, *supra*.
829 - *See* in particular: FWS-54 (T 761-762); FWS-66 (T 1096, 1135-1137); FWS-215 (T 891-893); FWS-139 (T 399-412); FWS-182 (T 1650-1652); FWS-138 (T 2111-2120); FWS-104 (T 2179); FWS-109 (T 2362); RJ (T 3881-3889). *See* par 189ff, *supra*.
830 - Dragomir Obrenovic is No 46 in Ex P 3.
831 - Milenko Burilo is No 56 in Ex P 3.
832 - Milenko Elcic is No 34 in Ex P 3.
833 - Zoran Matovic is No 48 in Ex P 3.
834 - Vlatko Pljevaljcic is No 35 in Ex P 3.
835 - Predrag Stefanovic is No 22 in Ex P 3.
836 - Jovo Savic is No 55 in Ex P 3.
837 - Radovan Vukovic is No 52 in Ex P 3.
838 - Milovan Vukovic is No 45 in Ex P 3.

839 - Milivoj Milic is No 23 in Ex P 3.
840 - Milenko Elcic is No 34 in Ex P 3.
841 - *See* par 273, *supra*.
842 - *See* pars 96-107, *supra*.
843 - *See* pars 231-233, *supra* in respect of the beating of Ekrem Zekovic. *See* pars 254-255, *supra* in respect of the beating of Salko Mandzo where it is unclear whether the Accused saw the actual beating taking place or whether he walked in as the beating had just stopped.
844 - The Accused said that he was aware that outsiders were entering the KP Dom in order to carry out interrogations of the detainees: The Accused, T 7662.
845 - *See*, for instance, Ekrem Zekovic (T 3450) and RJ (T 3862, 3865-3866).
846 - The Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.
847 - In respect of this incident, the Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.
848 - *See* pars 181, 313, *supra*.
849 - The Accused is found responsible only for the acts of his subordinates, not for those acts committed by individuals over which he had no effective control.
850 - In respect of this incident, the Accused is found responsible for his failure to ensure that his subordinates would prevent outsiders from entering the KP Dom and beating detainees. He is not responsible, however, for the actual beatings carried out by those outsiders who were not his subordinates.
851 - Count 8 and Count 10.
852 - *See* pars 51-64, *supra*.
853 - *Kordic and Cerkez* Trial Judgment, pars 236.
854 - *Kordic and Cerkez* Trial Judgment, par 236; *Delalic* Trial Judgment, par 439. Many decisions of this Tribunal and of the ICTR have adopted a definition of murder which refers to only one or two of these alternative states of mind. The relevant states of mind have nevertheless been expressed in this way, sometimes in differing terms but to substantially the same effect, in those decisions: *Akayesu* Trial Judgment, par 589; *Delalic* Trial Judgment, pars 425, 434-435, 439; *Kayishema & Ruzindana* Trial Judgment, pars 150-151; *Rutaganda* Trial Judgment, par 80; *Jelisic* Trial Judgment, par 35; Musema Trial Judgment, par 215; Blaskic Trial Judgment, pars 153, 181.
855 - Juso Dzamalija, listed as victim C 6 (Ex P 55).
856 - T1158-1159. The Defence conceded that it has no reason to question the fact that the persons listed in Schedule C were in fact dead. The Defence contests the circumstances of their deaths and the alleged involvement of the Accused.
857 - This approach is supported by the jurisprudence of the ECHR, the Inter-American Court and national legal systems. See for example *Godinez Cruz v. Honduras*, judgment of 20 January 1989 (Inter-Am.Ct. H. R. (Ser. C no.5) (1989), par.155; *Cakici v Turkey*, Judgment on 8 July 1999, to be published in ECHR 1999. For decisions of national legal systems see for example, *People v Bolinski*, April 1, 1968, 260 Cal.App.2d 705, 714-715, 67 Cal. Rprt. 347, 353; *State of Kansas v Pyle*, Supreme Court of Kansas, March 1, 1975, 216 Kan. 423; 532 P.2d 1309; *People of the State of New York v Lipsky*, Court of Appeals of New York, November 8, 1982, 57 N.Y. 2d 560, 443 N.E.2d 925;457 N.Y.S. 2d 451 (this case expressly lays to rest an earlier jurisprudence which required production of the body of the deceased); *Epperly v Commonwealth of Virginia*, Supreme Court of Virginia, September 9, 1982, 224 Va. 214; 294 S.E.2d 882; *Stocking v The State*, December 21, 1855, 7 Ind. 259, 263; *Commonwealth v Burns*, Supreme Court of Pennsylvania, January 21, 1963, 409 Pa. 619, 630; 187 A.2d 552; *Commonwealth v Lettrich*, March 22, 1943, 346 Pa. 497, 502-503, 31 A.2d 155; *Commonwealth v Homeyer*, February 13, 1953, 373 Pa. 150, 156-157, 94 A.2d 743; *People v. Ray Cullen*, Supreme Court of California, July 27, 1951, 37 Cal. 2d 614, 613, 234 P.2d 1, 15-16; *People v Scott*, Court of Appeal of California, Second Appellate District, Division Three, December 21, 1959, 176 Cal. App. 2d 458 1 Cal. Rptr. 600; *People v Clark*, Court of Appeal of California, Second Appellate district, Decision one, January 8, 1925, 70 Cal. App. 531 233 P.980; *Regina v Onufrejczyk*, Court of Criminal Appeal [1955] 1 QB 388; 1 All ER 247; 2 WLR 273; 39 CR App Rep 1; *Chamberlain v The Queen* (1984) 51 A.L.R. 225; *Regina v Horry* [1952 N.Z.L.R. 111, 122; *Regina v Flynn*, 111 C.C.C. (3d) 521; *Weissensteiner v The Queen* (1993) 178 CLR 217; *Pfenning v The Queen* (1995) 182 CLR 461.
858 - *Prosecutor v Dusko Tadic*, Judgment On Allegations of Contempt Against Prior Counsel, Milan Vujin, IT-94-1-A-R77, 31 Jan 2000, par 91; *Delalic* Appeal Judgment, par 458.
859 - FWS-71 (T 2828-2868, 2829 2869-2873, 2925, 2972); FWS-69 (T 4112); FWS-172 (T 4559-4560); Dr Amir Berberkic (T 3787-3794, 3800-3812); Ahmet Hadzimusic (T 1953); Dzevad S Lojo (T 2575-2587); FWS-111 (T 1235-1259); FWS-215 (T 885, 900); FWS-109 (T 2377); FWS-54 (T 758, 766-769, 772); FWS -73 (T 3400); FWS-142 (T 1824); FWS-172 (T 4459); FWS-162 (T 1387); RJ (T 3860-3869); FWS-3(T 2250-2254); Safet Avdic (T 483-484). FWS-86 (T 1519-1521); FWS-182 (T 1622); FWS-138 (T 2609); FWS-144 (T 2301-2303); Muhamed Lisica (T 4946); FWS-198 (T 1011-1023); FWS-139 (T 352, 368); FWS-66 (T 1099); FWS-137 (T 4746); FWS-104 (T 2182); Dzevad Lojo (T 650); FWS-250 (T 5048).
860 - Indictment, par 5.32.
861 - Prosecution Final Trial Brief, pars 118, ft 401. At par 122 of the Final Trial Brief the Prosecution alleges that other evidence indicates that numerous killings occurred from May 1992 onwards. The only evidence referencing this claim is par 5.32 of the Indictment.
862 - FWS-71 (T 2828-2868, 2925, 2972).
863 - Dzevad S Lojo (T 2574); FWS-109 (T 2377); Dr Amir Berberkic (T 3787); FWS-69 (T 4112, 4124); FWS-172 (T 4559); FWS-71 (T 2828); FWS-142 (T 1824); Ahmet Hadzimusic (T 1953); FWS-54 (T 767).
864 - Ex P 43, Bozo Drakul (T 7220-7227); Milenko Dundjer (T 5379); Ex 92-1 –A, Ex D 90-1-A.

865 - The Prosecution argued that Ex D 92A confirms only that the Accused was authorised to travel to Belgrade for an unspecified amount of time on 24 June 1992. Ex D 92-1-A also does not confirm that the Accused travelled to Belgrade on that particular day. The document refers to a travel authorisation no 55/92 while the number of the travel authorisation is Ex D 92A is 37/92.
866 - Ex D 92A.
867 - Ex D 92-1-A.
868 - Ex D 93A.
869 - Drakul Bozo (T 7224).
870 - Desanka Bogdanovic (T 7103-7105, 7009-7021); Svetozar Bogdanovic (T 7064-7068, 7088).
871 - FWS-109 (T 2377-2378); FWS-172 (T 4631, 4559, 4565); FWS-250 (T 5094); FWS-137 (T 4746); FWS-111 (T 1248); FWS-85 (T 648); FWS-86 (T 1519); Rasim Taranin (T 1724); FWS-119 (T 1955); FWS-144 (T 2301); RJ (T 3860); FWS-03 (T 2251); FWS-182 (T 1622); FWS-162 (T 1384); Ekrem Zekovic (T 3476); FWS-69 (T 4110). Although most of the witnesses identified the beatings as occurring during the evenings, a couple of witnesses claimed that the beatings would begin in the afternoons and continue until late in the evenings: FWS-66 (T 1096); Dr Amir Berberkic (T 3811).
872 - FWS-71 (T 2829, 2862-2866, 2868-2883); FWS-66 (T 766); FWS-172 (T 4559-4560, 4564-4566); FWS-73 (T 3260-3271); FWS-54 (T 753, 758-762, 766); FWS-104 (T 2183-2184); Muhamed Lisica (T 4960-4961); FWS-137 (T 3267, 4746); FWS-215 (T 894, 906); FWS-111 (T 1237); FWS-66 (T 1093-1111); FWS-73 (T 3272-3273); FWS-86 (T 1517-1520); Dzevad S Lojo (T 2574-2575); FWS-66 (T 1093); FWS-69 (T 1097); FWS-137 (T 4746); Safet Avdic (T 483-486); FWS-109 (T 2378); Dr Amir Berberkic (T 3787, 3968-3969); FWS-144 (T 2301); Dzevad Lojo (T 639). The Trial Chamber places no weight upon the statement given by Muhamed Lisica (Ex P 318/A) alleging the involvement of the Accused in the preparation of the lists (T 4910-4913); Ekrem Zekovic (T 3475).
873 - A number of witnesses gave evidence which established that the lists were prepared by the Administration of the KP Dom: FWS-73 (T 3329-3331); FWS-182 (T 1623); Safet Avdic (T 484); Dzevad S Lojo (T 2575). The Trial Chamber does not interpret this evidence as implicating the Accused.
874 - Dzevad S Lojo (T 2575); FWS-66 (T 1093-1095); FWS-144 (T 2301-2302); FWS-109 (T 2380); FWS-71 (T 2837); Ahmet Hadzimusic (T 1956); FWS-54 (T 758-773); FWS-162 (T 1384-1387).
875 - FWS-71 (T 2837, 2865, 2875, 2886); FWS-172 (T 4572); FWS-66 (T 1093-1095); Safet Avdic (T 488)
876 - FWS-54 (T 756-761); FWS-73 (T 3259-3260); FWS-71 (T 2841, 2852-2853); Dr Amir Berberkic (T 3773-3775); FWS-86 (T 1519-1520); FWS-198 (T 1012-1013); Safet Avdic (T 491-492); FWS-182 (T 1683); FWS-119 (T 2005-2006); FWS-138 (T 2087-2088); FWS-109 (T 2360); Ekrem Zekovic (T 3475); RJ (T 3887); FWS-69 (T 4084); FWS-58 (T 2693).
877 - FWS-69 (T 4110, 4125); FWS-172 (T 4559-4560); RJ (T 3860); Ekrem Zekovic (T 3475, 3477-3479, 3481-3482); FWS-86 (T 1526); Rasim Taranin (T 1724-1725); FWS-109 (T 2378); FWS-144 (T 2302); FWS-71 (T 2837); Dzevad Lojo (T 650); FWS-215 (T 886, 896); Safet Avdic (T 489-493); FWS-198 (T 1012-1013); FWS-66 (T 1095).
878 - Ahmet Hadzimusic (T 1957); Dzevad Lojo (T 640-642); FWS-66 (T 1097-1098); Dr Amir Berberkic (T 3789, 3792); FWS-71 (T 2839-2840); Muhamed Lisica (T 4956-4957); FWS-73 (T 3264-3266); FWS-86 (T 1623-1624); FWS-142 (T 1824); FWS-104 (T 2176-2178); FWS-03 (T 2254); FWS-71 (T 2839-2840); FWS-250 (T 5049); FWS-162 (T 1387-1388); FWS-69 (T 4111); Ekrem Zekovic (T 3479-3487).
879 - FWS-71 (T 2841-2854); FWS-54 (T 758-765,803); FWS-66 (T 1096); Dr Amir Berberkic (T 3968-3969).
880 - FWS-69 (T 4087-4088); Muhamed Lisica (T 4963).
881 - FWS-78 (transcript admitted from Kunarac proceedings T 2139); FWS-71 (T 4654-4565); FWS-69 (T 4125, 4191-4192); FWS-109 (T 2379-2380); FWS-66 (T 1100-1101); Muhamed Lisica (T 4950); Ekrem Zekovic (T 3481, 3482, 3487); Dr Amir Berberic (T 3811); FWS-73 (T 3254); FWS-58 (T 2693-2699); FWS-182 (T 1635-1636); FWS-142 (T 1824); FWS-109 (T 2379-2383); Dzevad Lojo (T 641-642, 651-652); FWS-54 (T 758-762); FWS-198 (T 1018); FWS-172 (T 4564); FWS-71 (T 2837-2838, 2866, 2883, 2886).
882 - FWS-138 (T 2088); FWS-69 (T 4087); FWS-71 (T 4654-4565); FWS-109 (T 2384); FWS-66 (T 1096); Ekrem Zekovic (T 3479-3486); FWS-142 (T 1824-1825); FWS-58 (T 2664-2269); FWS-86 (T 1527-1528); Dr Amir Berberkic (T 3809-3810); FWS-172 (T 4565); FWS-71 (T 2838-2839); Muhamed Lisica (T 4898-4899, 4955); FWS-144 (T 2301-2303, 2337).
883 - FWS-111 (T 1248); FWS-71 (T 2838-2839); FWS-249 (T 4426); Ekrem Zekovic (T 3482-34855, 3669).
884 - FWS-58 (T 2695, 2698-2699); Safet Avdic (T 493, 513-514, 555); It is clear that Safet Advic relied upon inferences which he drew from seeing the headlights reflected on the bridge, as it was impossible to see the roadway of the bridge from the room in which he was incarcerated: FWS-144 (T 2302-2306, 2336-2237); FWS-111 (T 1216); Racine Manas (T1897-1898, 1907, 1920).
885 - FWS-86 (T 1527-1528); FWS-58 (T 2694, 2713, 2715); FWS-69 (T 4125, 4191-4192); FWS-37 (T 4792); FWS-138 (T 2069-2090); FWS-109 (T 2377-2386); FWS-66 (T 1100); FWS-182 (T 1635); Dzevad Lojo (T 653-654); FWS-73 (T 3371-3372); Ekrem Zekovic (T 3544-3545); Osman Subasic (T 4101-4134).
886 - Muhamed Lisica (T 4949); FWS-54 (T 762); FWS-71 (T 2855); Ekrem Zekovic (T 3482-3483).
887 - FWS-71 (T 2868); Muhamed Lisica (T 3475-3476).
888 - Muhamed Lisica (T 4899-4903, 4997-4999); Ekrem Zekovic (T 3483, 3369-3071); FWS-109 (T 2384, 2424); FWS-142 (T 1841); FWS-138 (T 2088); FWS-109 (T 2384); FWS-249 (T 4424-4427, 4427-4428). Defence witness Lazar Divljan gave evidence that the vehicle was used to transport fish and meat and had stains as a result (T 5998-5999). The Trial Chamber does not accept this evidence, and does not regard it as creating any doubt as to the truthfulness of the Prosecution case.
889 - FWS-249 (T 4534).

890 - *See* pars 237-306, *supra*.
891 - Muhamed Lisica (T 4967, T 4977); FWS-104 (T 2217-2218); FWS-71 (T 2886-2887); Ekrem Zekovic (T 3520); Dr Amir Berberkic (T 3790, 3810, 3925); FWS-73 (T 3387-3388, 3399, 3402, 3407); FWS-109 (T 2395-2396); Dzevad S Lojo (T 2590-2591); FWS-139 (T 435); Safet Avdic (T 514).
892 - Jussi Kemppainen (T 1162-1171) an investigator with the Office of the Prosecutor gave evidence regarding the results of inquiries in relation to the individuals alleged to have been murdered at the KP Dom. The results of those inquiries were tendered into evidence as Ex P 55/1. Relatives and friends of the alleged victims were contacted and asked to provide documentation about these persons. The Bosnian Government was also contacted to provide documentation. The basic documents within Ex P 55/1 are Bosnian State Commission for Missing Persons certificates, ICRC missing person confirmation and certificates, death certificates, municipal court decisions from Bosnia, newspaper articles and other certificates and documents.
893 - Amor Masovic (T 4209-4399).
894 - Ex P 55/1; Jussi Kemppainen (T 1167-1168, 1170-1171); Amor Masovic (B-12) (T 4233-4237).
895 - Ex P 55/1.
896 - Risto Ivanovic (T 6172-6178). In all other respects the Defence witnesses denied that any of the events occurred: Radomir Dolas (T 5823-5824, 5891-5892); Risto Ivanovic (T 6100, 6167, 6189, 6204); Lazar Divljan (T 6009, 6019); Zoran Mijovic (T 6225, 6228, 6379 ,6381, 63877, 6401); Miladin Matovic (T 6450-6451). The Trial Chamber does not accept this evidence, and does not regard it as creating any doubt as to the truthfulness of the prosecution case.
897 - Risto Ivanovic (T 6171-6186).
898 - Ekrem Zekovic (T 3479).
899 - FWS-111 (T 1249-1250); FWS-54 (T 766); Dzevad S Lojo (T 2584); FWS-71 (T 2866, 2868, 2877); FWS-73 (T 3273); FWS-172 (T 4560-4561); FWS-137 (T 4750, 4759, 4802).
900 - FWS-215 (T 901); FWS-198 (T 1017-1018); FWS-198 (T 2081); FWS-54 (T 768-769); FWS-109 (T 2380-2383, 2430); Dzevad S Lojo (T 2583); FWS-71 (T 2864, 2866); FWS-73 (T 3269); FWS-214 (T 3793); FWS-69 (T 4122); FWS-172 (T 4559-4561).
901 - FWS-66 (T 1105-1106); FWS-111 (T 1250-1251); FWS-215 (T 903); FWS-85 (T 642); FWS-139 (T 357-358); FWS-138 (T 2074); FWS-54 (T 769); FWS-73 (T 3271); FWS-69 (T 4118); FWS-172 (T 4560-4561).
902 - FWS-66 (T 1105-1106); FWS-65 (T 516); FWS-111 (T 1251-1252); FWS-85 (T 642); FWS-139 (T 358); FWS-54 (T 766); FWS-71 (T 2862, 2865); FWS-69 (T 4118); FWS-172 (T 4560- 4561).
903 - FWS-66 (T 1106); FWS-54 (T 753, 766); Muhamed Lisica (T 4958). The proper name of the victim is Elvedin Cedic, his nickname is "Enko" (T 754, 766).
904 - FWS-65 (T 516); FWS-54 (T 759-762); FWS-66 (T 1100-1102); FWS-111 (T 1253); FWS-215 (T 904); FWS-119 (T 1957-1961); FWS-138 (T 2084); FWS-109 (T 2394); Dzevad S Lojo (T 2586); FWS-71 (T 2887); FWS-73 (T 3253); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3802-3803); FWS-69 (T 4123); FWS-137 (T 4750, 4757, 4802); Muhamed Lisica (T 4747, 4967).
905 - FWS-66 (T 1107); FWS-182 (T 1638); FWS-119 (T 1961, 1967); FWS 104 (T 2183-2184); FWS-138 (T 2076); FWS-54 (T 770); Dzevad S Lojo (T 2582); FWS-71 (T 2883, 2886-2887); FWS-73 (T 3406-3407); Ekrem Zekovic (T 3489); Dr Amir Berberkic (T 3809); FWS-69 (T 4559-4561).
906 - FWS-66 (T 1107); FWS-111 (T 1241); FWS-215 (T 905); FWS-182 (T 1638); FWS-142 (T 1826); FWS-54 (T 770); FWS-86 (T 1541); FWS-109 (T 2393); Dzevad S Lojo (T 2583); FWS-73 (T 3273); Ekrem Zekovic (T 3502); Muhamed Lisica (T 4963).
907 - FWS-66 (T 1100-1102); FWS-111 (T 1253); FWS-215 (T 905); FWS-85 (T 643); FWS-139 (T 366); FWS-119 (T 1966); FWS-54 (T 767); FWS-109 (T 2385, 2394); Dzevad S Lojo (T 2579); FWS-71 (T 2862); FWS-73 (T 3271); Ekrem Zekovic (T 3504); Dr Amir Berberkic (T 3807).
908 - FWS-66 (T 1107); FWS-162 (T 1386-1387); FWS-215 (T 906); FWS-139 (T 366); FWS-119 (T 1961); FWS-138 (T 2072); FWS-54 (T 770); FWS-109 (T 2385, 2431); Dzevad S Lojo (T 2584); FWS-71 (T 2836, 2862); Dr Amir Berberkic (T 3811-3812).
909 - FWS-111 (T 1237, 1239-1240); FWS-86 (T 1514); FWS-65 (T 516); FWS-66 (T 1101); FWS-215 (T 906); FWS-85 (T 644); FWS-139 (T 357); FWS-182 (T 1627); FWS-142 (T 1826); FWS-138 (T 2071); FWS-03 (T 2251, 2254); FWS-198 (T 1017); FWS-54 (T 770-771); FWS-109 (T 2383, 2431); Dzevad S Lojo (T 2580, 2586); FWS-71 (T 2830, 2854, 2860); FWS-73 (T 3266, 3391); Dr Amir Berberkic (T 3794); FWS-69 (T 4111-4116, 4185); FWS-172 (T 4564-4565, 4636).
910 - FWS-66 (T 1101); FWS-111 (T 1255); FWS-215 (T 906); FWS-182 (T 1638); FWS-162 (T 1399-1400); FWS-54 (T 769); FWS-71 (T 2868).
911 - FWS-86 (T 1513); FWS-54 (T 759, 811-813); FWS-66 (T 1103-1104); FWS-111 (T 1256); FWS-215 (T 906-907); FWS-85 (T 644); FWS-198 (T 1020); FWS-109 (T 2394); Dzevad S Lojo (T 2583); FWS-71 (T 2830); FWS-73 (T 3268); Ekrem Zekovic (T 3487); Dr Amir Berberkic (T 3803); FWS-69 (T 4124); FWS-172 (T 4561); FWS-137 (T 4750, 4758); Muhamed Lisica (T 4941, 4946-4948).
912 - FWS-86 (T 1513); FWS-66 (T 1100-1104); FWS-111 (T 1256); FWS-215 (T 908); FWS-139 (T 357, 366); FWS-138 (T 2078); FWS-142 (T 1830); FWS-54 (T 767); Dzevad S Lojo (T 2582); FWS-71 (T 2866); FWS-73 (T 3272).
913 - FWS-66 (T 1108); FWS-111 (1242); FWS-85 (T 645); FWS-119 (T 1965); FWS-138 (T 2085); FWS-03 (T 2252); FWS-54 (T 766); FWS-109 (T 2385); Dzevad S Lojo (T 2579); FWS-71 (T 2830); FWS-73 (T 3398- 3399); Ekrem Zekovic (T 3505); Dr Amir Berberkic (T 3800-3801); Muhamed Lisica (T 4957).
914 - FWS-215 (T 908); FWS-111 (T 1237-1238); FWS-82 (T 1511); FWS-65 (T 516); FWS-54 (T 767); FWS-162 (T 1386-1388); FWS-85 (T 646); FWS-139 (T 358); FWS-182 (T 1630); FWS-142 (T 1824-1825); FWS-119 (T 1953); FWS-138 (T 2070); FWS-104 (T 2176); FWS-03 (T 2251-2252); FWS-109 (T 2379-2380); Dzevad S Lojo (T 2580);

FWS-71 (T 2829-2830, 2853-2855); Ekrem Zekovic (T 3479, 3487); Dr Amir Berberkic (T 3792-3793); FWS-69 (T 4116); FWS-172 (T 4559-4561, 4564-4566, 4636); FWS-250 (T 5048-5049).
915 - FWS-54 (T 759); FWS-66 (T 1108); FWS-111 (T 1257); FWS-119 (T 1967).
916 - FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-162 (T 1386-1388); FWS-198 (T 1011); FWS-215 (T 908-909); FWS-119 (T 1964); FWS-142 (T 1824-1825); FWS-138 (T 2081); FWS-104 (T 2178); FWS-54 (T 772); FWS-109 (T 2383, 2431); FWS-171 (T 2830, 2832, 2861); FWS-73 (T 3267); Ekrem Zekovic (T 3507-3508); Dr Amir Berberkic (T 3787-3789); FWS-69 (T 4117); FWS-172 (T 4559-4561).
917 - FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-119 (T 1964); FWS-138 (T 2081); FWS-54 (T 772); FWS-109 (T 2383, 2431, 2861); FWS-73 (T 3267); Ekrem Zekovic (T 3508); FWS-69 (T 4117).
918 - FWS-111 (T 1240); FWS-66 (T 1100-1108); FWS-119 (T 1964); FWS-138 (T 2081); FWS-54 (T 772); FWS-109 (T 2383, 2431); FWS-71 (T 2832); FWS-73 (T 3267); Ekrem Zekovic (T 3507-3508); Dr Amir Berberkic (T 3789); FWS-69 (T 4117).
919 - FWS-111 (T 1258); FWS-139 (T 367); FWS-54 (T 767,769); FWS-109 (T 2862); FWS-73 (T 3272); FWS-172 (T 4560-4561); FWS-137 (T 4750, 4759).
920 - FWS-65 (T 494); FWS-66 (T 1109); FWS-111 (T 1258); FWS-215 (T 911-912); FWS-85 (T 646); FWS-139 (T 367); FWS-144 (T 2306-2308); FWS-119 (T 1957); FWS-73 (T 3276).
921 - FWS-86 (T 1514); FWS-54 (T 759,773); FWS-111 (T 1258); FWS-215 (T 912); FWS-182 (T 1629); FWS-138 (T 2146); Dzevad S Lojo (T 2664); FWS-71 (T 2868); FWS-73 (T 3272-3273); Dr Amir Berberkic (T 3805, 4019); FWS-69 (T 4124); FWS-137 (T 4762).
922 - FWS-66 (T 1109-1110); FWS-111 (T 1258-1259); FWS-139 (T 367); FWS-54 (T 773); FWS-71 (T 2866); FWS-73 (T 3260); FWS-137 (T 4802).
923 - FWS-66 (T 1101); FWS-111 (T 1242-1243); FWS-86 (T 1557); FWS-65 (T 516); FWS-54 (T 759, 765); FWS-66 (T 1100); FWS-162 (T 1401); FWS-215 (T 912); FWS-139 (T 357); FWS-182 (T 1685); FWS-03 (T 2252); FWS-119 (T 1961); FWS-198 (T 1017); FWS-109 (T 2379); Dzevad S Lojo (T 2578); FWS-71 (T 2830); FWS-73 (T 3275-3276); Ekrem Zekovic (T 3509); Dr Amir Berberkic (T 3802, 3810); FWS-69 (T 4123); FWS-172 (T 4560-4561); FWS-137 (T 4797-4799); Muhamed Lisica (T 4947, 4967).
924 - FWS-66 (T 1097-1098); FWS-111 (T 1241-1242); FWS-86 (T 1518, 1526-1527); FWS-215 (T 912-913); FWS-85 (T 638-639, 647, 649); FWS-139 (T 357); FWS-182 (T 1616); FWS-03 (T 2252-2253); FWS-119 (T 1961); FWS-54 (T 767); FWS-109 (T 2395); Dzevad S Lojo (T 2581); FWS-71 (T 2862, 2866); FWS-73 (T 3270, 3275-3276); FWS-69 (T 4123); FWS-172 (T 4560-4561).
925 - FWS-54 (T 758-766); FWS-71 (T 2854-2855); FWS-69 (T 4111).
926 - FWS-54 (T 758-766); FWS-71 (T 2839-2840); FWS-69 (T 4111); FWS-66 (T 1096, 1137); FWS-85 (T 659); FWS-139 (T 404-406); FWS-182 (T 1652); FWS-138 (T 2116-2117); FWS-104 (T 2179); FWS-109 (T 2362); RJ (T 3881, 3888).
927 - Ex P 55/1.
928 - The Prosecution claimed that the certificate was requested by the victim's wife for the purpose of establishing the death of her husband. The Prosecution could not explain the basis for the finding made in the certificate but suggested that the certificate was formulated in such a way to console Mrs Hod`ic. They referred the Trial Chamber to the decision of the Cantonal Court in Sarajevo, dated 3 June 1998, which found that Nail Hod`ic was killed on 26 June 1992 in the KP Dom. That decision was based on eyewitness accounts, among them the account of FWS-182 and as such the Prosecution said that evidence should be accepted by the Trial Chamber (T 8281-8282).
929 - FWS-66 (T 1107); FWS-86 (T 1516-1517); Safet Avdic (T 516); FWS-215 (T 905); FWS-119 (T 1961); FWS-54 (T 766-767); FWS-109 (T 2394); Dzevad S Lojo (T 2582); FWS-71 (T 2833-2836); FWS-73 (T 3267, 3396); Ekrem Zekovic (T 3503); FWS-172 (T 4560); FWS-137 (T 4750, 4756, 4802); Muhamed Lisica (T 4960- 4961); FWS-69 (T 4118); FWS-250 (T 5078). The Trial Chamber has not taken his death into account.
930 - Amor Masovic (T 4282).
931 - FWS-111 (T 1256-1257).
932 - FWS-69 (T 4085-4086).
933 - FWS-215 (T 908).
934 - FWS-111 (T 1233); FWS-250 (T 5026-5031, 5099); FWS-66 (T 1106-1107); Ekrem Zekovic (T 3499); Dr Amir Berberkic (T 3812-3813).
935 - *See* pars 328-329, *supra*.
936 - *See* pars 308-313, *supra* regarding the Accused's knowledge of beatings.
937 - RJ (T 3867-3871).
938 - RJ (T 3871-3876).
939 - RJ (T 3871-3874); FWS-139 (T 391-392); FWS-54 (T 771); FWS-69 (T 4114-4115).
940 - The Accused (T 7678, 8114-8115).
941 - The Trial Chamber is unable to establish the exact date upon which Halim Konjo died.
942 - Muhamed Lisica gave evidence that he heard the interrogation and beating of Halim Konjo. This occurred right at the beginning when the camp was just established and the boss there was still Slavko Koroman. His evidence was that the beating could have occurred on a Friday or a Saturday. On the Sunday he went out to work with Slavko who told him that Konjo had suffered a stroke and died. The doctors had established that he would have died regardless of the beating. He was working at the hospital, building something to do with the morgue and was told by a guard that Konjo was lying in the morgue and that he had died from a heart attack and not the beating. He went to the morgue and saw the body for himself. He did not look closely to try and identify the body any further (T 4959-4960). The Trial Chamber is not satisfied that this evidence takes the issue any further.

943 - T 7678, 8114-8115.
944 - The Accused (T 7678). The Accused has been found not responsible for that suicide; *See* par 342, *supra.*
945 - Prosecution Pre-Trial Brief, par 49.
946 - *See* par 107, *supra.*
947 - *Delalic* Appeal Judgment, pars 229-241.
948 - Indictment, Count 18.
949 - *Kunarac* Trial Judgment, par 539.
950 - *Kunarac* Trial Judgment, par 540.
951 - *See* par 52, *supra.*
952 - The two preliminary requirements for the application of Article 3 are met: *See* par 61, *supra*
953 - The Statutes of the ICTY (Article 5(c)) and the ICTR (Article 3(c)) give to the Tribunals jurisdiction in relation to enslavement as a crime against humanity.
954 - In the light of this finding, it is unnecessary to decide whether the 1926 Slavery Convention, as treaty law, can serve as a basis for a slavery charge under Article 3. There are also no binding agreements between the relevant parties purporting to vary the customary international law on slavery for the purposes of this case.
955 - *See Kunarac* Judgment, pars 515-543. The time relevant to the charges in the *Kunarac* proceedings – July 1992 to February 1993 – are included in the time relevant to the charges in the present case – May 1992 to August 1993.
956 - Sandoz *et al* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), p 1376 (emphasis added). Article 1 of the Slavery Convention provides in relevant part: "(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. (2) [...]." Yugoslavia ratified the Slavery Convention on 28 Sept 1929.
957 - In the *Akayesu* case it was held that: "Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II [footnote 158: Save for [Article] 4(2)(f) slavery and the slave trade in all their forms]. *All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.*" (*Akayesu* Trial Judgment, par 610 (emphasis added)). The Trial Chamber in the *Rutaganda* case, with reference to the Akayesu Trial Judgment, confirmed that "although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof [...] form part of existing international law." (*Rutaganda* Trial Judgment, par 87 (also confirmed in the Musema Trial Judgment, par 240)). Article 4 of the ICTR Statute provides for the Prosecution of serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II. The non-exhaustive, enumerated list of violations repeats Art 4(2) of Additional Protocol II almost verbatim but excludes slavery. The ICTY Appeals Chamber has held that certain customary rules have developed to govern internal armed conflicts, including rules with respect to the protection of all those who do not or no longer take active part in hostilities (*Tadic* Jurisdiction Decision, par 127). In particular, many provisions of Additional Protocol II "can now be regarded as declaratory of existing rules, as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles." (*ibid*, par 117).
958 - *Tadic* Jurisdiction Decision, par 134; *Delalic* Appeal Judgment, pars 160, 164, 171, 174.
959 - Article 6(1) of Additional Protocol II applies to "the Prosecution and punishment of *criminal offences related to the armed conflict.*" Thus, although the Protocol does not obligate states to criminalise violations – unlike certain provisions of the Geneva Conventions and Additional Protocol I – the Protocol regards certain violations of its provisions as criminal offences and entitles states to prosecute and punish such *criminal offences* in accordance with Article 6.
960 - *Kunarac* Trial Judgment, par 523.
961 - Indictment, pars 5.41-5.46 and counts 16 and 18. Schedule E to the Indictment (attached to the second amended indictment, but incorporated by reference to the third amended indictment) lists 60 KP Dom detainees who were allegedly forced to work.
962 - Prosecution Final Trial Brief, par 562.
963 - Indictment, par 5.41. The sub-heading of that Schedule is "Detainees who were forced to work".
964 - *Kunarac* Trial Judgment, par 542.
965 - *Kunarac* Trial Judgment, par 542.
966 - Involuntariness is the fundamental definitional feature of "forced or compulsory labour" of the ICCPR (Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 167). Article 8 of the ICCPR prohibits, *inter alia*, slavery, servitude and forced or compulsory labour.
967 - *Kunarac* Trial Judgment, pars 542-543.
968 - *Kunarac* Trial Judgment, par 542.
969 - The Trial Chamber considers that, with respect to the matter of forced labour, reference must be made to Additional Protocol II for the relevant principles and rules applying to non-international armed conflicts, instead of to the Geneva Conventions and customary international law relating to international armed conflicts. Furthermore, in the absence of any indication that the customary law, if any, with respect to labour exacted from protected persons in conflicts as defined in Additional Protocol II differs from the provisions relating to labour of the Protocol, the Trial Chamber considers the Protocol's provisions as laying down the applicable standards.
970 - Certain provisions of, for example, Geneva Convention IV also stipulate that certain categories of persons may be made to work under certain conditions (Geneva Convention IV, Articles 95, 40, 51).
971 - *See* par 352, *supra.*
972 - The Accused (T 7915); Bozo Drakul (T 7161, 7178).

973 - The Accused (T 7911).
974 - Bozo Drakul (T 7202).
975 - Bozo Drakul (T 7202-7203). However, from 1 January to 15 September 1992, the KP Dom received only ten percent of its regular state budget: Bozo Drakul (T 7203-7204); Ex P 84.
976 - Bozo Drakul (T 7236-7237). The DEU, for example, continued to invoice the KP Dom for eggs and milk delivered to it (Exs D 101 and 101A, 102 and 102A, 103 and 103A, 104 and 104A) but the money was never collected because the KP Dom had insufficient funds: Bozo Drakul (T 7237). The DEU also paid wages into personal accounts of KP Dom convicts who worked in the DEU: Bozo Drakul (T 7237, 7266). During the war, only the remaining Serb convicts who worked in the DEU were paid in some form: Bozo Drakul (T 7237, 7266-7267, 7281-7283, 7342).
977 - Bozo Drakul (T 7161-7162); Radomir Dolas (T 5812-5814).
978 - The Accused (T 7915, 7922).
979 - The Accused (T 7910); Ex P 46A, p 14.
980 - The Accused (T 7911, 7826-7827).
981 - The Accused (T 7911, 7827). He asked for a head of the varnishing shop and an upholsterer.
982 - The Accused (T 7692, 7914-7915). *See also* Ex P 46A, p 14.
983 - The Accused (T 7912). Attending the meeting were, amongst others, the heads of the furniture factory, the metal and mechanical workshop, the farm, the commercial department and the accountant. Savo Todovic did not attend.
984 - The Accused (T 7692, 7912); Ex P 46A, pp 14, 18.
985 - The Accused (T 7692).
986 - The Accused (T 7692, 7913-7914); Ex P 46A, p 14.
987 - Based on a rough calculation of the number of different detainees who worked whilst being detained in the KP Dom. *See also* Dzevad Lojo (T 674-676, 680); Muhamed Lisica (T 4860); Risto Ivanovic (T 6099).
988 - FWS-66 (T 1144 ff, 1153); Dzevad Lojo (T 672); FWS-249 (T 4500 ff); FWS-73 (T 3222 ff); Risto Ivanovic (T 6146-6147). The work duties were not approved by Savo Todovic for all detainees (T 6161-6143). There was a rehabilitation officer for a while, Aleksander Cecevic, who was in charge (T 6142) (evidence of Risto Ivanovic); FWS-198 (T 984). One Prosecution witness, Muhamed Lisica, testified that the Accused approved the lists (T 4910-4913); Divljan Lazar, the warehouse clerk, never addressed Todovic but always the guard on duty when he needed detainees to work for him (T 6056).
989 - The Accused (T 7829). Pavlovic may have received his assignment-to-work order around May 1992 (T 6890).
990 - Dzevad Lojo (work started very soon after 19 April 1992) (T 673).
991 - The Accused (T 7692); Ex P 46A, pp 14, 17; Ex 50A, p16.
992 - Ex P 50A, p 16.
993 - Indictment, par 5.41; *See also* The Accused's Position as Warden, par 96ff, *supra.*
994 - Muhamed Lisica (T 4972-4977); FWS-249 (T 4480-4482); Ekrem Zekovic (T 3490-3491, 3615); The Accused (T 7917-7918).
995 - Lisica is also the only witness who claimed that Goljanin said something to the effect that he would have to go and see the Accused and the command about the matter. There is no evidence that Goljanin actually did so. According to FWS-249 and Zekovic's testimony, Todovic helped in preparing a list.
996 - Indictment, par 5.42.
997 - FWS-198 (T 984); Muhamed Lisica (T 4865, 4867); FWS-249 (T 4419-4420); The Accused (T 7696).
998 - FWS-250 (T 5058).
999 - Muhamed Lisica (T 4865, 4868-4869); FWS-249 (T 4420-4421).
1000 - For example, Risto Ivanovic (T 6143-6144); Muhamed Lisica (T 4865); FWS-249 (T 4418-4419); FWS- 144 (T 2321-2322).
1001 - Indictment, par 5.42.
1002 - The Accused (T 7696-7698); FWS-198 (T 985); FWS-89 (T 4707); Risto Ivanovic (T 6099). According to the Accused (T 7698) and Bozo Drakul (T 7281, 7283), the KP Dom did not have to pay for the work done by the Muslim detainees as they were under military jurisdiction.
1003 - The Accused (T 7698).
1004 - *See* findings with respect to the specific work done by the detainees.
1005 - Initially he was sent to solitary confinement for twenty days, but after three or four days he was released and started working again (T 4880).
1006 - Muhamed Lisica (T 4880-4881).
1007 - FWS-198 made a reference to Muhamed Lisica ending up in solitary confinement for refusing to work. He used that alleged incident to explain his testimony why one could not refuse to work, citing the fear for solitary confinement. However, FWS-189's testimony throws no light on when this alleged incident might have taken place (T 984-985).
1008 - FWS-73 (T 3224).
1009 - FWS-73 (T 3224).
1010 - FWS-198 (T 983-984).
1011 - FWS-71 (T 2912-2913).
1012 - Prosecution Final Trial Brief, par 177.
1013 - FWS-249 (T 4523).
1014 - FWS-144 (T 2316, 2335).
1015 - Rasim Taranin (T 1701-1702).
1016 - Dzevad Lojo (T 680-681).
1017 - Dzevad Lojo (T 681).

1018 - Safet Avdic (T 474-475).
1019 - Safet Avdic (Ex P 123, p 689).
1020 - FWS-182 (T 1647).
1021 - FWS-249 (T 4431-4433).
1022 - FWS-249 (T 4433).
1023 - *See* par 153, *supra.*
1024 - FWS-142 (T 1831-1832).
1025 - Indictment, par 5.43.
1026 - Prosecution Final Trial Brief, par 160, fn 521.
1027 - A number of detainees did such tasks: FWS-65 swept the canteen and carried firewood from the cauldron to the kitchen. There is no indication that he was forced to do it (T 471); Rasim Taranin worked in the kitchen for about 10 months (T 1712); FWS-182 cleaned the kitchen and later cleaned the compound (T 1647).; FWS-73 worked on and off in the kitchen for a few months (T 3322-3223); FWS-89 worked in the heating room (T 4660); Muhamed Lisica cleaned chimneys (T 4906-4907); FWS-77 worked in the kitchen: FWS-249 (T 4450); Mujo Dudic worked mainly as a cleaner in the administrative building: FWS-249 (T 4453); Muhamed Lisica (T 4916); FWS-198 (T 1019); Taib Reko worked in the compound: FWS-249 (T 4457, 4459); Ekrem Zekovic sealed off an area where a door had been broken (T 3449); FWS-86 cleaned carpets (T 1486); FWS-54 distributed food in the kitchen (T 746-747); FWS-142 did some work around the compound (T 1831).; FWS-71 cleaned rooms (T 2896, 2973-2974); Safet Avdic cleaned the dining area and prepared firewood for the kitchen: P 123, (T 689); FWS-250 did cleaning jobs in the kitchen (T 5056); Krsto Krnojelac, a cook, supervised the detainees in the kitchen (T 5939-5940).
1028 - The only detainee who is alleged to have worked solely in the kitchen, distributing food for three days: FWS-54 (T 746).
1029 - Indictment, par 5.43.
1030 - Dzevad Lojo (T 676); Miladin Matovic testified that the Muslim detainees started working there around perhaps mid-June 1992 (T 6432).
1031 - Dzevad Lojo (T 672); FWS-86 (T 1487); Risto Ivanovic (T 6099); Miladin Matovic (T 6433); The Accused (T 7693).
1032 - FWS-198 (T 976); FWS-66 (T 1123-1125).
1033 - The evidence is only that he "worked": FWS-249 (T 4451); He worked in the carpentry shop: Muhamed Lisica (T 4915).
1034 - Miladin Matovic (T 6433-6434).
1035 - Dzevad Lojo (T 676, 678); FWS-198 (T 976, 987-979).
1036 - FWS-198 (T 978-979); Miladin Matovic (T 6434).
1037 - Miladin Matovic (T 6432-6433, 6437). He established and was in charge of the fire protection unit in the furniture factory and he also guarded detained Muslims and convicted Serbs working at the furniture factory (T 6433).
1038 - Bozo Drakul (T 7278-7279).
1039 - Dzevad Lojo (T 672-673). He worked there for about a year: Dzevad Lojo (T 672).
1040 - Ekrem Zekovic (T 3443). It lasted until mid-December 1993.
1041 - FWS-71 (T 2896).
1042 - FWS-71 (T 2896). He testified that all the work that he did in those years was forced, and that he would never have volunteered to work (T 2896).
1043 - FWS-215 (T 878-879).
1044 - FWS-66 (T 1123-1125).
1045 - FWS-198 (T 976).
1046 - FWS-198 (T 976).
1047 - FWS-198 (T 984-985).
1048 - FWS-198 (T 984-985).
1049 - *See* par 375, *supra.*
1050 - Indictment, par 5.43.
1051 - Dzevad Lojo (T 676).
1052 - Ekrem Zekovic (T 3443); FWS-144 (T 2314-2315); FWS-78 (Ex P 161, p 2122); Muhamed Lisica (T 4870-4871); Muhamed Lisica (T 4862, 4873-4874).
1053 - Dzevad Lojo (T 673); Rasim Taranin (T 1727); FWS-144 (T 2314, 2331); FWS-249 (T 4423, 4425, 4426, 4433); Ex P 161; Muhamed Lisica (T 4874, 4898).
1054 - FWS-249 (T 4423, 4425, 4426, 4433); Ex P 46A, p 19.
1055 - Dzevad Lojo (T 673-674); Ekrem Zekovic (T 3448-3449); FWS-144 (T 2314); Muhamed Lisica (T 4865).
1056 - FWS-249 (T 4420, 4430); FWS-144 (T 2314); Muhamed Lisica (T 4865, 4876-4877, 4896, 4903-4905, 4972).
1057 - Bozo Drakul (T 7278-7279).
1058 - Muhamed Lisica (T 4859); FWS-249 testified that there was a permanent group of metal workers working in the metal workshop consisting of about ten to twelve people, and a changing group, varying in numbers depending on the work required (T 4415-4416); FWS-86 (T 1487); Risto Ivanovic (T 6099); The Accused (T 7693).
1059 - FWS-249 (T 4411, 4414, 4417, 4423); Ekrem Zekovic (T 3443); FWS-78 (Ex P 181, p 2116); Rasim Taranin (T 1727).
1060 - The Accused (T 7915); FWS-249 (T 4414); Ex P 161, p 2116; FWS-78 (Ex P 161, p 2116); Muhamed Lisica (T 4820).
1061 - Ekrem Zekovic (T 3443); Muhamed Lisica (T 4861, 4871); FWS-249 (T 4421); Milosav Krsmanovic (T 6686);

FWS-78 (Ex P 161, T 2120); The Accused (T 7915).
1062 - FWS-249 (T 4423); Ekrem Zekovic (T 3654).
1063 - FWS-249 (T 4433-4434); Muhamed Lisica was also guarded by the military police once when working at the hotel Zelengora (T 4862, 4873).
1064 - Ekrem Zekovic (T 3652-3653, 3671).
1065 - Muhamed Lisica (T 4860-4861); FWS-249 (T 4430); Rasim Taranin (T 1728).
1066 - FWS-249 (T 4430).
1067 - Ekrem Zekovic (T 3444-3446); Muhamed Lisica (T 4872).
1068 - Ekrem Zekovic (T 3444-3446).
1069 - Rasim Taranin (T 1710, 1712, 1727).
1070 - Rasim Taranin (T 1727).
1071 - Rasim Taranin (T 1728).
1072 - Rasim Taranin (T 1728).
1073 - FWS-249 (T 4411, 4414). He also worked in Miljevina for three or four times, staying there for ten to twenty days, sometimes a month or even more, but it is unclear who authorised or requested him to work there. Whilst there, he worked under the supervision of the local military commander: FWS-249 (T 4434-4439).
1074 - FWS-249 (T 4430).
1075 - FWS-249 (T 4430-4433).
1076 - FWS-249 (T 4414).
1077 - FWS-249 (T 4414).
1078 - FWS-249 (T 4523).
1079 - *See* par 376, *supra.*
1080 - Ekrem Zekovic (T 3443).
1081 - Ekrem Zekovic (T 3496).
1082 - FWS-144 (T 2311).
1083 - FWS-144 (T 2311-2312). The only evidence with respect to his hunger whilst in the KP Dom, is his answer in response to a question whether he suffered physically – he said he was starved and famished: FWS-144 (T 2326-2327).
1084 - FWS-144 (T 2316, 2335).
1085 - *See* par 376, *supra.*
1086 - Muhamed Lisica (T 4833,4854, 4864).
1087 - Muhamed Lisica (T 4860-4863).
1088 - Muhamed Lisica (T 4862-4863).
1089 - Muhamed Lisica (T 4913-4914).
1090 - The incident leading to him being sent to solitary confinement (T 4880-4881) is addressed at par 375, *supra.*
1091 - Muhamed Lisica (T 4915, 4930). This may be E 10.
1092 - Muhamed Lisica (T 4917).
1093 - FWS-249 (T 4453-4454).
1094 - Muhamed Lisica (T 4919). They may be E 42 and/or E43.
1095 - Muhamed Lisica (T 4918); FWS-249 (T 4415, 4454-4455); Ekrem Zekovic (T 3490-3491).
1096 - Muhamed Lisica (T 4918); FWS-249 (T 4415, 4455); Ekrem Zekovic (T 3615). He may be E 31.
1097 - FWS-249 (T 4415, 4427, 4431); Rasim Taranin (T 1727); Milosav Krsmanovic (T 6688); FWS-249 gave evidence that at some point in 1994, and thus after the Accused's administration, Sefko Kubat had an operation on a stomach ulcer. Todovic told not to take long recuperate so that he could return to work (T 4423).
1098 - FWS-249 (T 4423).
1099 - FWS-249 (T 4456).
1100 - FWS-78 (T 2117-2118).
1101 - FWS-78 (Ex P 161, p 2172).
1102 - Indictment, par 5.44.
1103 - Dzevad Lojo (T 676).
1104 - FWS-66 (T 1125); FWS-73 (T 3223); FWS-89 (T 4671-4672); FWS-249 (T 4433); FWS-71 (T 2896); Muhamed Lisica (T 4896); The Accused testified that about twelve to fifteen Muslim detainees worked on the farm from time to time (T 7693).
1105 - Ex P 46A, p 16, Ex D 85, Ex D85A.
1106 - FWS-89 (T 4672).
1107 - FWS-66 (T 1125); FWS-73 (T 3223); FWS-89 (T 4671); FWS-89 (T 4672). There is some evidence that the eggs, milk, meat and other food from the farm went to not only the KP Dom, but also to the people then living in Foca: FWS-89 (T 4673); Zoran Mijovic (T 6236); Milosav Krsmanovic (T 6623).
1108 - *See* findings with respect to these tasks at pars 416-417, *infra.*
1109 - Zoran Mijovic (T 6222); The Accused (T 7694, 7921).
1110 - The Accused (T 7693).
1111 - Bozo Drakul (T 7278-7279).
1112 - P 3, person no 77.
1113 - P 3, person no 39.
1114 - FWS-89 (T 4675-4676).
1115 - FWS-89 (T 4676-4677).
1116 - FWS-89 (T 4679).

1117 - FWS-89 (T 4679-4680).
1118 - FWS-89 (T 4707).
1119 - Muhamed Lisica (T 4897).
1120 - Zoran Mijovic (T 6222, 6237, 6239).
1121 - FWS-89 (T 4706-4707). None of the witnesses who worked on the farm as KP Dom detainees gave evidence to corroborate the testimony of Zoran Mijovic (T 6279-6280) that, since the farm was fairly big and difficult to secure, the Serb convicts and KP Dom detainees working there may have been able to play truant and drink at night.
1122 - FWS-66 (T 1125).
1123 - *See* par 394, *supra.*
1124 - FWS-89 (T 4671-4672). He returned to working on the farm in the spring of 1994 (T 4672).
1125 - *See* par 389, *supra.*
1126 - FWS-249 (T 4433).
1127 - Muhamed Lisica (T 4916).
1128 - FWS-198 appears to have worked on the farm only during 1994, or at the earliest from about October 1993, after the Accused has left the KP Dom: FWS-198 (T 982, 1027-1028). *See* finding with respect to the incident when FWS-73 was allegedly kicked to work (T 3224, 3354) at par 375, *supra.* It is unclear when FWS-71 worked on the farm. He testified that he had to do different kinds of work irregularly during 1992 and permanently in 1993, without any further specification: FWS-71 (T 2896).
1129 - Indictment, par 5.44.
1130 - FWS-86 is the only witness who testified that during his time in the KP Dom – mid-April till the end of August 1992 – one of the occasional jobs was performed in a sawmill in Brod: FWS-86 (T 1487). He was not a member of such a group.
1131 - Prosecution Final Trial Brief, par 168.
1132 - Indictment, par 5.44.
1133 - Only the Accused (T 7694) and Bozo Drakul (T 7264, 7285) respectively referred to Muslim detainees cleaning an area around the old school in town and cleaning up the rubble in town.
1134 - Indictment, par 5.44.
1135 - FWS-144 (T 2319).
1136 - Ekrem Zekovic (T 3446); Muhamed Lisica (T 4881-4882); Dzevad Lojo (T 677-678); FWS-250 (T 5056, 5065); Slavica Krnojelac (T 7501); The Accused (T 8056).
1137 - Muhamed Lisica (T 4881-4882).
1138 - FWS-250 (T 5056-5057); FWS-144 (T 2319).
1139 - Ekrem Zekovic (T 3446); FWS-144 (T 2317); Muhamed Lisica (T 4882-4883); FWS-250 (T 5056-5057, 5118); Miladin Matovic (T 6461-6462, 6569); Witness B (T 6736-6737).
1140 - Miladin Matovic (T 6462, 6569-6571); Milosav Krsmanovic (T 6693); Witness B (T 6716-6717); The Accused (T 8055).
1141 - Miladin Matovic (T 6461-6462); FWS-144 (T 2318); Muhamed Lisica (T 4882); FWS-250 (T 5058-5059).
1142 - Dzevad Lojo (T 677); Slavica Krnojelac (T 7501, 7523-7524); The Accused (T 7698-7699); The Accused (T 7700).
1143 - Milosav Krsmanovic (T 6628).
1144 - Milosav Krsmanovic (T 6628, 6694).
1145 - Milosav Krsmanovic (T 6691, 6693). The roof tiles, a gift, were taken from Maglic to the KP Dom and then on to the Accused's house; the wood from Maglic, which was also a present, was taken directly to his house: The Accused (T 8046, 8054).
1146 - Ekrem Zekovic (T 3446); FWS-144 (T 2318); Muhamed Lisica (T 4882).
1147 - FWS-144 (T 2317-2318).
1148 - FWS-250 (T 5058).
1149 - Slavica Krnojelac (T 7524); Miladin Matovic (T 6462); Witness B (T 6732). According to Ekrem Zekovic, a son may have passed by (T 3447).
1150 - FWS-144 (T 2318); Witness B (T 6732); The 30 to 35 year old son of the Accused guarded them: FWS-250 (T 5058-5059, 5064-5065); Miladin Matovic (T 6462, 6569-6571); Milosav Krsmanovic (T 6693-6694).
1151 - FWS-250 (T 5064-5065); FWS-144 (T 2319); Witness B (T 6732).
1152 - FWS-144 (T 2319); Witness B (T 6732).
1153 - Ekrem Zekovic (T 3446-3447); Miladin Matovic (T 6462, 6569-6571); Milosav Krsmanovic (T 6693-6694).
1154 - FWS-144 (T 2319).
1155 - Muhamed Lisica (T 4885); FWS-144 (T 2319); Once according to Ekrem Zekovic (T 3446-3447); FWS-250 (T 5059-5060); Twice according to his own account: The Accused (T 8057-8058).
1156 - Ekrem Zekovic (T 3447).
1157 - FWS-144 (T 2319).
1158 - FWS-250 (T 5059-5060).
1159 - Muhamed Lisica (T 4883-4884).
1160 - FWS-144 (T 2319); Muhamed Lisica (T 4886); FWS-250 (T 5059); Slavica Krnojelac (T 7501, 7524); Witness B (T 6738); Miladin Matovic (T 6461-6462); Milosav Krsmanovic (T 6629); Witness B (T 6717-6718, 6738-6739).
1161 - Witness B (T 6717-6718, 6738-6739).
1162 - Muhamed Lisica (T 4886).
1163 - Miladin Matovic (T 6461-6462); Milosav Krsmanovic (T 6629); The Accused (T 8061).

1164 - Slavica Krnojelac (T 7524-7525); Witness B (T 6738).
1165 - Slavica Krnojelac (T 7524-7525).
1166 - Slavica Krnojelac (T 7501, 7524); Witness B (T 6738); The Accused (T 8061-8062).
1167 - The Accused (T 7699, 7965-7967, 8052).
1168 - The Accused (T 8052).
1169 - The Accused (T 7699, 7965).
1170 - The Accused (T 7699, 8055-8056); Ex P 46A, pp 20-21).
1171 - Slavica Krnojelac (T 7501).
1172 - Miladin Matovic (T 6462, 6569).
1173 - Risto Ivanovic, although he testified that the work done on the Accused's house was approved by the executive committee of Fo~a, could not give any explanation as to how he came to know that (T 6148). He also could not explain why in this instance the executive committee granted approval and Savo Todovic signed the permit approving this work by the detainees, when usually, as he claimed, it was the military command that approved the use of detainees outside the KP Dom, other than saying that for him that those two authorities co-operated in granting war assignments (T 6150). His testimony, at least with respect to this matter, is not credible.
1174 - Witness B (T 6715-6716).
1175 - Slavica Krnojelac (T 7525-7526); Bozo Drakul (T 7286-7287); The Accused (T 7699-7700, 8046-8049, 8054).
1176 - Bozo Drakul (T 7285-7286); The Accused (T 7699, 8055-8056).
1177 - *See* par 387, *supra.*
1178 - *See* par 388, *supra.*
1179 - See T 4860-4861; *See also* par 389, *supra.*
1180 - *See* par 375, *supra.*
1181 - Milosav Krsmanovic (T 6629).
1182 - Indictment, par 5.44.
1183 - He is not listed in Schedule E.
1184 - They were taken to the café by the Accused: FWS-73 (T 3226, 3230).
1185 - The Accused testified that the work involved the straightening and welding of, presumably, the coffee bar counter in the café: The Accused (T 7700); FWS-144 made a metal skeleton for a bar on the ground floor of the house: FWS-144 (T 2317-2318).
1186 - The Accused (T 7700).
1187 - Indictment, par 5.44.
1188 - FWS-73 (T 3227).
1189 - FWS-144 (T 2326).
1190 - Muhamed Lisica (T 4886).
1191 - FWS-144 (T 2326); Muhamed Lisica (T 4886).
1192 - Bozidar Krnojelac (T 7389-7390, 7392).
1193 - Bozidar Krnojelac (T 7390-7391, 7460).
1194 - Bozidar Krnojelac (T 7390-7392, 7461, 7486).
1195 - Bozidar Krnojelac (T 7461).
1196 - He is not listed in Schedule E.
1197 - FWS-73 (T 3226-3227, 3230). The shop used to belong to Saja Sahinpasic: FWS-73 (T 3226-3228).
1198 - FWS-73 (T 3228).
1199 - FWS-73 (T 3231-3232).
1200 - Indictment, par 5.44.
1201 - Rasim Taranin (T 1711-1712).
1202 - A guard took him to join them. He could not refuse: Rasim Taranin (T 1710).
1203 - Rasim Taranin (T 1711).
1204 - Rasim Taranin (T 1710).
1205 - FWS-78 (T 2120).
1206 - FWS-78 (T 2121).
1207 - FWS-78 (T 2121).
1208 - Indictment, par 5.45.
1209 - Dzevad S Lojo (T 2525, 2533).
1210 - Dzevad S Lojo (T 2607).
1211 - Dzevad S Lojo (T 2607). He testified that one of those detainees was "Uzeir Alic, Mehmedalija Lojo from my room.": Dzevad S Lojo (T 2607). Neither of these names appears in Schedule E.
1212 - Dzevad S Lojo (T 2607-2608).
1213 - Muhamed Lisica (T 4914).
1214 - Formerly FWS-110.
1215 - Muhamed Lisica (T 4914).
1216 - Ex P 46A, p 17.
1217 - Indictment, par 5.45.
1218 - Indictment, par 5.45, detainees E 14 and E 38 respectively.
1219 - FWS-109 (T 2404).
1220 - FWS-109 (T 2406).
1221 - FWS-109 (T 2419-2420).

1222 - FWS-109 (T 2406, 2420); FWS-86 also testified that FWS-109 and Goran Kukavica had to do mine clearing work (T 1496-1497).
1223 - FWS-109 (T 2406-2407). He also maintained and repaired vehicles whilst kept at that police station (T 2407).
1224 - FWS-109 (T 2406-2407).
1225 - FWS-109 (T 2407).
1226 - FWS-109 (T 2408).
1227 - Ex P 46A, p 17.
1228 - Formerly FWS-110.
1229 - Indictment, par 5.45.
1230 - FWS-249 (T 4440-4441).
1231 - FWS-249 (T 4441).
1232 - FWS-249 (T 4441): This may or may not have been Ahmet Zametica, listed in Schedule E.
1233 - The Accused (T 7698).
1234 - Indictment, par 5.41.
1235 - See *Kupreskic* Appeal Judgment, pars 88, 114.
1236 - After his release, Islambasic told FWS-109 that he did mine clearing work. No indication as to when this might have happened was given: FWS-109 (T 2404); After their release, Islambasic told FWS-182 that he did mine clearing work. No indication as to when this might have happened was given: FWS-182 (T 1647-1648); After his release, Islambasic told FWS-249 that he did minesweeping work during the war. No indication of when this was supposedly done was given: FWS-249 (T 4449-4450); Islambasic told FWS-86 that he did mine clearing work. No indication as to when this might have happened was given: FWS-86 (T 1496-1497).
1237 - FWS-73 (T 3234-3236); Ekrem Zekovic (T 3534-3536). No indication as to when this might have happened was given. FWS-249's testimony in this regard is equivocal (T 4441-4442).
1238 - Ekrem Zekovic (T 3535-3536).
1239 - The Accused (T 7698).
1240 - Ekrem Zekovic (T 3535-3536).
1241 - The evidence with respect to Muhamed Alikadic is conflicting, one account being that he did mine clearing work by driving in front of other vehicles: FWS-73 (T 3234-3236) and another being that he was tied to the driver's seat of a truck and made to drive on a certain road to expose the firing positions of Muslim snipers: FWS-249 (T 4446-4450). No indication as to when this might have happened was given.
1242 - FWS-198 (T 976-978); FWS-66 (T 1123-1125); FWS-73 (T 3223); FWS-249 (T 4450).
1243 - *See* pars 375, 382, 395, *supra.*
1244 - FWS-66 (T 1123-1125).
1245 - Reference was made to FWS-77 having been involved in working in the kitchen, at the metal workshop, in the forest, at the farm, cutting grass and in the laundry: FWS-249 (T 4450); Rasim Taranin (T 1727).
1246 - FWS-66 (T 1125); FWS-89 (T 4679-4680, 4706-4707); Muhamed Lisica (T 4920).
1247 - *See also* findings with respect to allegation that detainees were forced to do work on the front lines par 412, *supra.*

1248 - FWS-198 (T 985).
1249 - *See* pars 375, 382, 395, *supra.*
1250 - FWS-198 (T 985).
1251 - FWS-71 (T 2896).
1252 - FWS-73 (T 3223).
1253 - FWS-249 (T 4450, 4455).
1254 - Muhamed Lisica (T 4920).
1255 - FWS-89 (T 4679-4680, 4706-4707).
1256 - Rasim Taranin (T 1701-1702); FWS-86 testified that during his time in KP Dom – mid-April 1992 until the end of August 1992 – one of occasional jobs performed by others was the transfer of flour from the silos in Ustikolina to Perucica and Gornje Polje (T 1487).
1257 - Rasim Taranin (T 1702).
1258 - Rasim Taranin (T 1702).
1259 - FWS-182 (T 1647).
1260 - FWS-71 (T 2896).
1261 - FWS-73 (T 3225).
1262 - FWS-89 (T 4708).
1263 - Slobodan Solaja (T 5514, 5516).
1264 - Slobodan Solaja (T 5516).
1265 - He approached the then president of the executive committee or head of the municipal government, Radojica Mladjenovic, to organise the adaptation: Bo`idar Krnojelac (T 7383-7384).
1266 - Bozidar Krnojelac (T 7383-7384).
1267 - Muhamed Lisica (T 4887, 7457-7458).
1268 - Muhamed Lisica (T 4887-4888).
1269 - Bozidar Krnojelac (T 7456-7457, 7465-7466).
1270 - Slavica Krnojelac (T 7525).
1271 - Lazar Divljan (T 6008).
1272 - Lazar Divljan (T 6056).

1273 - FWS-172 (T 4596-4597).
1274 - FWS-73 (T 3224).
1275 - Prosecution Final Trial Brief, Schedule E.
1276 - Prosecution closing argument (T 8296-8298).
1277 - He was in the working group: FWS-249 (T 4451).
1278 - He "worked" and was a member of the working group: FWS-249 (T 4451-4452).
1279 - He "worked": FWS-249 (T 4452).
1280 - He "worked": FWS-249 (T 4453).
1281 - He was a member of the "working group": FWS-249 (T 4457).
1282 - He was in the "work platoon": FWS-249 (T 4457).
1283 - FWS-249 thought that Izet "Zibac" Causevic was one of more people who "were pulled out to do odd jobs [...]" (T 4452). Muhamed Lisica also testified that Izet "Zibac" Causevic "worked", that he was a jack of all trades without a specific job (T 4916).
1284 - FWS-249 thought that Enver Cemo "was known to go out to work as well." (T 4452-4453). Muhamed Lisica also testified that Enver Cemo worked, that he was a jack of all trades, that he "worked at the farm and in the compound, different things." (T 4916).
1285 - He "also worked a bit around the compound": Muhamed Lisica (T 4916).
1286 - A Hosic Asam, which may or may not be Asim Hadzic, was told to go and work in the mine: FWS-198 (T 976); thus after the Accused's administration.
1287 - Asim Gogalija may have been one of two Gogalijas in the KP Dom, one of whom worked at the furniture factory: Muhamed Lisica (T 4916-4917).
1288 - *See* pars 60-64, *supra.*
1289 - The elements of the actus reus and the mens rea set out in this paragraph and the gravity test set out in par 434, *infra*, represent a consolidation of the requirements set out in *Tadic* Trial Judgment, par 715; *Kupreskic* Trial Judgment, par 621; *Kordic and Cerkez* Trial Judgment, pars 189, 195.
1290 - In addition, the accused must have the requisite mens rea for crimes against humanity, set out in par 436, *infra*. With respect to the requirement of intent to discriminate on one of the listed grounds, see *Kordic and Cerkez* Trial Judgment, par 211; *See also Tadic* Appeal Judgment, par 305, which found discriminatory intent to be an indispensable ingredient of persecution. Although the Statute refers to the listed grounds in the conjunctive, it is settled in the jurisprudence of the Tribunal that the presence of discriminatory intent on any one of these grounds is sufficient to fulfil the mens rea requirement for persecution: see *Tadic* Trial Judgment, par 713.
1291 - The *Tadic* Trial Judgment requires "the occurrence of a *persecutory act or omission* and a discriminatory basis for that act or omission on one of the listed grounds" (emphasis added), par 715; the *Kupreskic* Trial Judgment requires that the *act* of persecution be done "on discriminatory grounds", par 621, as distinct from the requirement of discriminatory intent detailed later in that judgment, par 633; the *Kordic and Cerkez* Trial Judgment requires the occurrence of a "*discriminatory* act or omission" (emphasis added), par 189, and expressly incorporates the requirement "on discriminatory grounds" into the *actus reus* of the offence, par 203.
1292 - "[I]f a person was targeted for abuse because she was suspected of belonging to the Muslim group, the discrimination element is met even if the suspicion proves inaccurate", par 195. The existence of a mistaken belief that the intended victim will be discriminated against, together with an intention to discriminate against that person because of that mistaken belief, may in some circumstances amount to the inchoate offence of *attempted* persecution, but no such crime falls within the jurisdiction of this Tribunal.
1293 - The crime of persecution, the only crime in the Statute which must be committed on discriminatory grounds (*see Tadic* Appeal Judgment, par 305), has as its object the protection of members of political, racial and religious groups from discrimination on the basis of belonging to one of these groups. If a Serb deliberately murders someone on the basis that he is Muslim, it is clear that the object of the crime of persecution in that instance is to provide protection from such discriminatory acts to members of the Muslim religious group. If it turns out that the victim is not Muslim, to argue that this act amounts nonetheless to persecution if done with a discriminatory intent needlessly extends the protection afforded by that crime to a person who is not a member of the listed group requiring protection in that instance (Muslims).
1294 - The argument in the *Kvocka* Trial Judgment at par 197 that "discriminatory grounds form the requisite criteria, not membership in a particular group" would appear to deny the interests protected by the crime. Even the relevant discriminatory intent necessarily assumes that the victim is a member of a political, racial or religious group.
1295 - *Kupreskic* Trial Judgment, par 568; *Blaskic* Trial Judgment, par 218.
1296 - *Kupreskic* Trial Judgment, par 626.
1297 - Tadic Trial Judgment, par 694; Kupreskic Trial Judgment, par 567; Blaskic Trial Judgment, par 219; Kordic and Cerkez Trial Judgment, par 192.
1298 - *Kupreskic* Trial Judgment, par 605; *Kvocka* Trial Judgment, par 185.
1299 - *Tadic* Trial Judgment, par 703; *Kupreskic* Trial Judgment, pars 581, 614; *Blaskic* Trial Judgment, par 233; *Kordic and Cerkez* Trial Judgment, pars 193-194; *Kvocka* Trial Judgment, par 185.
1300 - *Blaskic* Trial Judgment, par 233.
1301 - *Kupreskic* Trial Judgment, par 624.
1302 - *Kupreskic* Trial Judgment, par 618; *Kordic and Cerkez* Trial Judgment, par 196; *Kvocka* Trial Judgment, par 185.
1303 - *Kupreskic* Trial Judgment, par 621. The Trial Chamber does not concur with the view expressed in the *Kordic and Cerkez* Trial Judgment, at par 195, that the "gross or blatant" quality of the denial amounts to a distinct requirement with respect to seriousness.

1304 - *Kupreskic* Trial Judgment, pars 615(e), 622.
1305 - *Kvocka* Trial Judgment, par 186.
1306 - *Kordic and Cerkez* Trial Judgment, par 217; *Blaskic* Trial Judgment, par 235; *Tadic* Appeal Judgment, par 305. The *Tadic* Appeal Judgment, par 305, and the *Akayesu* Appeal Judgment, par 469, both state that not all crimes against humanity require discriminatory intent. Although this jurisprudence states that it is discriminatory intent that makes the crime of persecution unique, this Chamber finds that it is the discriminatory elements of both the *actus reus* and the *mens rea* which achieve this result.
1307 - *Kordic and Cerkez* Trial Judgment, par 217.
1308 - *Kupreskic* Trial Judgment, par 625. In this respect, the Trial Chamber agrees with the submission in the Prosecution Final Trial Brief, par 567.
1309 - *See* par 431, *supra.*
1310 - *Blaskic* Trial Judgment, par 260.
1311 - See *Tadic* Trial Judgment, par 652; *Kvocka* Trial Judgment, par 195. Although arising in the context of a genocide charge, the *Jelisic* Trial Judgment also appears to support this approach to proving discriminatory intent, par 73.
1312 - The latter possibility is acknowledged in the *Kvocka* Trial Judgment, par 203.
1313 - Par 203 in the *Kvocka* Trial Judgment ("In instances in which an accused has raised a question as to whether an act was committed on discriminatory grounds or without the knowing or wilful participation of the accused, the Trial Chamber will consider whether the Prosecution has established that the grounds were discriminatory.") is unfortunately worded, as it may be misinterpreted as placing some onus of proof upon the accused. It appears to mean that, where there arises on the evidence an issue as to whether the act was done for reasons other than the discriminatory ones apparent from the attack upon a particular group within the civilian population, the Trial Chamber must determine whether the Prosecution has established that the intent with which the act was done was the discriminatory one alleged.
1314 - Par 5.2 of the Indictment.
1315 - Par 5.2(a) of the Indictment.
1316 - Count 11.
1317 - *See* pars 118-124, *supra.*
1318 - FWS-250 (T 5022); FWS-33 (Ex P 106, p 483); Safet Avdic (Ex P 123, pp 680-681); FWS-249 (Ex P 161, p 2111); FWS-104 (T 2193, 2200); FWS-73 (T 3206-3207).
1319 - Par 5.2(e) of the Indictment.
1320 - Count 15.
1321 - Count 13.
1322 - *See* pars 133-143, *supra.*
1323 - *See* par 144, *supra.*
1324 - FWS-138 (T 2062); FWS-159 (T 2467-2469); FWS-73 (T 3219-3221, 3352); Ekrem Zekovic (T 3527); Dr Amir Berberkic (T 3749); FWS-69 (T 4065-4066); FWS-89 (T 4661-4662).
1325 - FWS-139 (T 330); FWS-162 (T 1360-1361); FWS-109 (T 2369); Dzevad S Lojo (T 2557, 2562); Ekrem Zekovic (T 3528, 3621); FWS-69 (T 4066); FWS-89 (T 4662).
1326 - FWS-215 (T 885); FWS-162 (T 1360-1361); FWS-69 (T 4662).
1327 - FWS-215 (T 885); FWS-162 (T 1360-1361); FWS-69 (T 4066).
1328 - FWS-109 (T 2368).
1329 - Dzevad S Lojo (T 2562).
1330 - Dzevad S Lojo (T 2557).
1331 - Zoran Vukovic (T 5783).
1332 - FWS-215 (T 885); FWS-182 (T 1616); FWS-08 (T 1772); FWS-138 (T 2065); Dzevad S Lojo (T 2562); Ekrem Zekovic (T 3528).
1333 - *See* par 139, *supra.*
1334 - Lazar Stojanovic (T 5717, 5749); Zoran Vukovic (T 5771, 5784-5785).
1335 - *See* par 139, *supra.*
1336 - FWS-111 (T 1229); FWS-08 (T 1772); FWS-142 (T 1840-1841); FWS-138 (T 2063-2066); FWS-71 (T 2945, 2952); FWS-162 (T 1361); FWS-66 (T 1083-1084); Lazar Stojanovic (T 5738).
1337 - Par 5.2(b) of the Indictment.
1338 - Counts 2 and 4 respectively.
1339 - Count 5.
1340 - Count 7.
1341 - *See* pars 189-306, *supra.*
1342 - *See* pars 433-434, *supra.*
1343 - The jurisprudence of the World War II cases is considered in the *Tadic* Trial Judgment, pars 699-710.
1344 - Prosecution Pre-Trial Brief, par 356.
1345 - *See* par 436, *supra.* The Trial Chamber considers that the same reasons for which it is not safe to rely on the discriminatory nature of the attack to reach conclusions as to the discriminatory nature of individual acts which form part of that attack, also prevent it from deriving conclusions as to the discriminatory nature of acts subsequent to imprisonment from the discriminatory nature of the initial imprisonment.
1346 - *See* pars 193-209, *supra.*
1347 - *See* pars 203-204, *supra.*
1348 - Dzevad S Lojo (T 2565).
1349 - *See* pars 203-204, *supra.*

1350 - Pars 5.8/5.13, 5.10. 5.11 were found not to be serious enough to establish the underlying offences of inhumane acts and cruel treatment; *See* pars 195-196, 199-204, *supra.*
1351 - *See* pars 195-196, *supra.*
1352 - *See* pars 199-200, *supra.*
1353 - *See* par 201-202, *supra.*
1354 - *See* par 445, *supra.*
1355 - *See* par 197, *supra.*
1356 - *See* pars 197-198, *supra.*
1357 - *See* par 205, *supra.*
1358 - *See* pars 206-207, *supra.*
1359 - FWS-69 (T 4082). The Trial Chamber understands that "Alija" is a common Muslim name.
1360 - *See* pars 208-209, *supra.*
1361 - *See* par 213, *supra.*
1362 - *See* par 214, *supra.*
1363 - *See* par 215, *supra.*
1364 - *See* par 211, *supra.*
1365 - *See* pars 216-258, *supra.*
1366 - *See* pars 218-220, *supra*, stating that the beatings amounted to cruel treatment and inhumane acts.
1367 - *See* pars 223-225, *supra.*
1368 - *See* pars 226-236, *supra.*
1369 - *See* pars 221-222, *supra.*
1370 - *See* pars 239-242, *supra.* FWS-03 was questioned whether he was an SDA activist. When he denied this, stating that he was merely a party member, the guards accused him of lying and beat him, later calling on Halim Dedovic to identify FWS-03 as an SDA activist; FWS-03 (T 2237).
1371 - *See* par 432, *supra*, requiring that the act of persecution be discriminatory in fact.
1372 - *See* par 445, *supra.*
1373 - *See* pars 249-253, *supra.*
1374 - Concerning Nurko Nisic, *see* FWS-111 (T 1238); FWS-54 (T 767); FWS-85 (T645); FWS-119 (T 1953). Some witnesses also testified that Nisic had a job connected with the municipal authorities: FWS-215 (T 889); FWS-71 (T 2830); FWS-250 (T 5042); FWS-65 (T516). Concerning Zulfo Veiz, *see* FWS-66 (T 1097-1098); FWS-86 (T 1518); FWS-113 (Dzevad Lojo) (T 2581); FWS-71 (T 2862); FWS-73 (T 3275); Dr Amir Berberkic (T 3810); FWS-69 (T 4123). Concerning Salem Bico, see *FWS*-54 (T 769); FWS-71 (T 2864); FWS-73 (T 3269); FWS-69 (T 4122); Dzevad S Lojo (T 2583); Slobodan Jovancevic (T 6172).
1375 - For Nurko Nisic: *See* par 250, *supra.* For Zulfo Veiz: *See* par 251, *supra.*
1376 - For Nurko Nisic: FWS-119 (T 1953). For Zulfo Veiz: FWS-182 (T 1616).
1377 - *See* par 250, *supra*; FWS-250 heard a guard yell "Get up Nurko, this is no way to defend Bosnia" (T 5049). Without some greater detail, the Chamber is not satisfied that this can be said to establish beyond reasonable doubt an intent to discriminate on political grounds, because it is reasonably open to an innocent interpretation as a jocular but inappropriate remark.
1378 - *See* par 254-255, *supra.*
1379 - FWS-138 (T 2080); FWS-142 (T 1830); FWS-66 (T 1104).
1380 - FWS-66 (T 1104).
1381 - *See* pars 256-258, *supra.*
1382 - FWS-86 (T 1514); FWS-66 (T 1109); FWS-215 (T 888).
1383 - FWS-86 (T 1514).
1384 - FWS-71 (T 2826); Dr Amir Berberkic (T 3925).
1385 - Slobodan Jovancevic (T 5598).
1386 - FWS-66 (T 1110); FWS-111 (T 1258); FWS-139 (T 367); FWS-71 (T 2866); FWS-73 (T 3259); FWS-58 (T 2704); FWS-137 (T 4758).
1387 - *See* par 262 and Ex P 334a, *supra.*
1388 - Ekrem Zekovic (T 3474, 3648).
1389 - *See* par 300, *supra.*
1390 - FWS-73 (T 3282); Ekrem Zekovic (T 3524).
1391 - *See* par 305, *supra.*
1392 - FWS-66 (T 1107); FWS-215 (T 904-905); FWS-138 (T 2076); Dzevad S Lojo (T 2582); FWS-71 (T 2884); Ekrem Zekovic (T 3495).
1393 - Dr Amir Berberkic (T 3809).
1394 - *See* pars 274, 277-278, 290-293, 295, 298, 330-339, *supra.*
1395 - Listed as Kemal under C 7.
1396 - FWS-215 (T 905); Muhamed Lisica (T 4963).
1397 - Ekrem Zekovic (T 3501).
1398 - FWS-66 (T 1103); Ekrem Zekovic (T 3505).
1399 - *See* par 286, *supra.*
1400 - *See* pars 268-269, 272, *supra.* For Hasan Dzano, *See also* FWS-104 (T 2166).
1401 - FWS-66 (T 1106); Dr Amir Berberkic (T 3812-3813) who heard it from Zaim Cedic.
1402 - Ekrem Zekovic (T 3517).

1403 - FWS-109 (T 2359); FWS-58 (T 2701); FWS-71 (T 2810).
1404 - Par 5.2(c) of the Indictment.
1405 - Counts 8 and 10 respectively.
1406 - *See* par 339, *supra.*
1407 - On torture, cruel treatment and inhumane acts as persecution.
1408 - *See* par 339, *supra.*
1409 - FWS-111 (T 1255); FWS-182 (T 162); FWS-71 (T 2876).
1410 - FWS-69 (T 4120).
1411 - FWS-66 (T 1107); FWS-111 (T 1253); FWS-215 (T 905); FWS-139 (T 366); FWS-119 (T 1966); FWS-54 (T 767).
1412 - Ekrem Zekovic (T 3404).
1413 - FWS-66 (T 108); FWS-215 (T 908); FWS-85 (T 644); FWS-138 (T 2085); FWS-109 (T 2385, 2394).
1414 - FWS-03 (T 2251-2254); Dzevad S Lojo (T 2579).
1415 - FWS-66 (T 1108).
1416 - FWS-65 (T 494); FWS-66 (T 1109); FWS-215 (T 911); FWS-139 (T 367); FWS-119 (T 1957); FWS-138 (T 2075).
1417 - FWS-144 (T 2307).
1418 - Ekrem Zekovic (T 3508).
1419 - Par 5.2(d) of the Indictment.
1420 - *See* pars 410-411, *supra.*
1421 - Par 5.2(f) of the Indictment.
1422 - *Krstic* Trial Judgment, par 522; Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); pp 48-49: "[T]he central elements of Article 49(1) such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories stated in Article 49(1) are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices which led to the Rule set forth in Article 49."
1423 - Article 6(b) of the Nuremburg Charter; Article II (1)(b) of Control Council Law No 10; Articles 49 and 147 of Geneva Convention IV; Article 85(4)(a) of Additional Protocol I; Article 20 of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1996) ("ILC Draft Code 1996"); Article 8(2)(a)(vii) of the Statute of the International Criminal Court.
1424 - Article 6(c) of the Nuremburg Charter; Article II (1)(c) of Control Council Law No 10; Article 5(c) of the Tokyo Charter; Nuremburg Judgment in which the defendant Baldur Von Schirach was convicted of deportation as a crime against humanity (pp 317-319); In Article 11 of the International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1954); deportation is an offence against the peace and security of mankind, while it is categorised specifically as a crime against humanity in Article 18 of the ILC Draft Code 1996; Article 7(1)(d) of the Statute of the International Criminal Court.
1425 - Article 5(d).
1426 - Article 6(c) of the Nuremburg Charter prohibits the deportation of "any civilian population" (emphasis added); *See also* Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) p 179.
1427 - Acts of deportation "can be classified as both war crimes and 'crimes against humanity' depending on the location and nationality of the deportees": Bassiouni, Crimes Against Humanity in International Criminal Law (1999), p 315.
1428 - *Blaskic* Trial Judgment, par 234.
1429 - *Krstic* Trial Judgment, par 531; Article 49 of the Fourth Geneva Convention refers to "deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country ..." and Article 70 refers to a prohibition on the deportation of nationals of the occupying power "from the occupied territory". In the Nuremburg Judgment, it was stated that "not only in defiance of well-established rules of international law, but in complete disregard of the elementary dictates of humanity ... [w]hole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected with the war effort" (p 227) and Von Schirach's conviction for deportation as a crime against humanity was for his part in the deportation of Jews from Vienna to the ghettos of the East (pp 317-319); *United States of America v Erhard Milch*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 2, Concurring Opinion by Judge Phillips, p 865; "International Law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime"; *United States of America v Alfried Krupp et al*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 9, part 2, pp 1432-1433; *United States of America v Friedrich Flick et al*, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10 (1952) Vol 6, p 681, ILC Draft Code 1996, Article 18, commentary (13): "Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same state"; Henckaerts, Deportation and Transfer of Civilians in Time of War, *Vanderbilt Journal of Transnational Law*, Vol 26, 1993, p 472 (with respect to Article 49 of Geneva Convention IV); "Presumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory"; Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999) p 312; Hall, Crimes against humanity – para. 1(d) in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p 136, with respect to the two terms used in Article 7 of the Rome Statute: "Unfortunately, the Statute does not expressly distinguish between deportation and transfer. However, given the common distinction between *deportation* as forcing persons to cross a national frontier and *transfer* as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as

surplus, it is likely that the common distinction was intended".
1430 - In the *Nikolic* Rule 61 Decision, it is stated that the transfer of detainees from one camp to another within Bosnia and Herzegovina "could be characterised as deportation and, accordingly, come under Article 5 of the Statute", par 23. No authority is cited for this proposition, and there was no examination of the authorities referred to in the previous footnote.
1431 - Prosecution Pre-Trial Brief, par 349.
1432 - Article 49, Geneva Convention IV; *See also Krstic* Trial Judgment, par 528.
1433 - *Krstic* Trial Judgment, par 529; *See also* Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p 11. The Trial Chamber accepts the argument submitted in the Prosecution Pre-Trial Brief, par 346.
1434 - The Commentary to the Geneva Convention IV, Article 49, states that the Article was drafted in such a way as to authorise voluntary transfers while prohibiting forcible transfers, thus implying that any forcible transfer must be involuntary.
1435 - In this sense it is similar to the crime of rape, where apparent consent induced by force or threat of force is not considered to be real consent: *Kunarac* Trial Judgment, par 453.
1436 - The total or partial evacuation of the population is allowed "if the security of the population or imperative military reasons so demand": (*Krstic* Trial Judgment, par 524, and Article 49 of Geneva Convention IV; *See also* Article 17 of Additional Protocol II, referring to forced displacement within national boundaries). This permission to evacuate is subject to certain qualifications, including *inter alia* that evacuees shall be transferred back to their homes as soon as hostilities in the area in question have ceased (Article 49, Geneva Convention IV).
1437 - This view is supported in Jennings and Watts (eds), *Oppenheim's International Law* (1996) p 940, fn 1: "'Expulsion' is not a technical term, and is often used interchangeably with 'deportation': both involve the removal of a person from a state by its unilateral act". While this definition was advanced within the context of international law during peace time, it would appear that it applies equally during armed conflict. *See* examples of States expelling enemy subjects in Lauterpacht (ed), *International Law and Treaties by Oppenheim* (1952) p 307, fn 7. In the *Kupreskic Others* Trial Judgment, the Trial Chamber referred to the organised expulsion of Bosnian Muslim civilians from Ahmici, which did not appear to entail any movement across a national border: par 629. However, no basis was given for this use of the term expulsion and it was not considered in any detail. This Trial Chamber accordingly does not find this interpretation of expulsion to be persuasive.
1438 - *See* for example Council of Europe, Explanatory Report on Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms 8 (1985) (defining expulsion as "any measure compelling the departure of an alien from the territory"); *Becker v Denmark*, European Commission of Human Rights, Decision as to Admissibility of Application 7011/75, 19 YB EUR CONV on HR (1976) (defining a prohibited collective expulsion of aliens as "any measure of the competent authority compelling aliens as a group to leave the country except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group"); Henckaerts, *Mass Expulsion in Modern International Law and Practice* (1995), p 109 (defining expulsion as "an act, or a failure to act, by an authority of a State with the intention and with the effect of securing the removal of a person or persons against their will from the territory of that State"). The Trial Chamber is mindful of the specificity of international humanitarian law (*Kunarac* Trial Judgment, pars 470-471) and the structural differences that exist between this body of law and human rights law, in particular the distinct role and function attributed to states and individuals in each regime (*Kunarac* Trial Judgment, pars 470-496). It is not precluded from having recourse to human rights law in respect of those aspects which are common to both regimes. In the instant case, the Trial Chamber regards the general definitions of expulsion expressed above as consistent with the concept of expulsion as used in the definition of deportation under international criminal law, insofar as they require that displacement take place across a national border.

1439 - *Krstic* Trial Judgment, pars 531-532; Commentary on the ILC Draft Code, p 122.
1440 - Paragraph 5.2 of the Indictment. These incidents are more extensively described in Annex IV (Exchanges) to the Prosecution Final Trial Brief.
1441 - Ahmet Hadzimusic (T 1974, 1983, 2009, 2014); Rasim Taranin (T 1700, 1737, 1740); FWS-139 (T 412); FWS-111 (T1283); FWS-162 (T 1409); FWS-08 (T 1794); FWS-138 (T 2097); FWS-144 (T 2323); FWS-109 (T 2409); FWS-71 (T 2894, 2916); FWS-146 (T 3083); FWS-73 (T 3291, 3318, 3418); Dr Amir Berberkic (T 3970); FWS-249 (Ex P 161 T 4488); FWS-89 (T 4710); Muhamed Lisica (T 4987); Lazar Stojanovic (T 5711).
1442 - Dzevad Lojo (T 601); FWS-182 (T 1648); FWS-104 (T 2194); FWS-144 (T 2296); Dr Amir Berberkic (T 3970); FWS-69 (T 4148); FWS-137 (T 4750).
1443 - FWS-66 (T 1133); FWS-08 (T 1767); Dzevad S Lojo (T 2591); FWS-146 (T 3079-3080); Lazar Divljan (T 6009).

1444 - In addition to testimony from Prosecution witnesses, witnesses for the Defence acknowledged the existence of exchanges: Lazar Stojanovic (T 5721); Radomir Dolas (T 5823); Risto Ivanovic (T 6136); Zoran Mijovic (T 6284-6285); Miloslav Krsmanovic (T 6698).
1445 - Safet Avdic (Ex P 123, p 522); Ahmet Hadzimusic (T 1970); FWS-159 (T 2472-2473); FWS-146 (T 3078); Ekrem Zekovic (T 3490); RJ (T 3899); FWS-69 (T 4095); FWS-172 (T 4574); FWS-137 (T 4746, 4750); FWS-215 (T 899); FWS-65 (T522); FWS-119 (T 1967). Witnesses for the Defence witnesses state that it was military police that would come for the detainees: *see* Lazar Stojanovic (T 5721) and Radomir Dolas (T 5824), the latter talking of a "military truck with men in camouflage uniforms".
1446 - Radomir Dolas (T 5824, 5878) stated that the list was provided by Savo Todovic; FWS-111 (T 1260); FWS-215 (T 899); FWS-65 (T 522); FWS-119 (T1967) not specifying who drew up the list.

1447 - Ekrem Zekovic (T 3489, 3685); FWS-69 (T 4076).
1448 - FWS-54 (T 775); FWS-215 (T 899) saying that some returned and others did not: FWS-182 (T 1639); FWS-08 (T 1785-1790); Ahmet Hadzimusic (T 1970); FWS-104 (T 2216-2217); FWS-144 (T 2309-2311); FWS-109 (T 2377-2378); Dzevad S Lojo (T 2589-2593); FWS-146 (T 3078); Ekrem Zekovic (T 3490); Dr Amir Berberkic (T 3816); RJ (T 3868, 3900); FWS-69 (T 4121, 4127, 4139); FWS-172 (T 4574, 4577, 4586-4588, 4616); Muhamed Lisica (T 4977); FWS-250 (T 5080); FWS-66 (T 1117); FWS-111 (T 1265); FWS-85 (T 662); FWS-139 (T 371); Rasim Taranin (T 1725).
1449 - Safet Avdic (Ex P 123, p 524); FWS-104 (T 2216-2217); FWS-159 (T 2472, 2507); Dzevad S Lojo (T 2590-2594, 2659-2666); RJ (T 3868); FWS-139 (T 435); Muhamed Lisica (T 4977).
1450 - Dzevad S Lojo (T 2590-2592); RJ (T 3868); FWS-08 (T 1789).
1451 - FWS-144 (T 2311); FWS-08 (T 1785-1788).
1452 - Dzevad S Lojo (T 2592, 2593); Ex P 215, pp 2, 5-6.
1453 - RJ (T 3868).
1454 - Ex P 215, p 2.
1455 - Ex P 215, pp 3, 6; RJ (T 3899-3900); Dzevad S Lojo (T 2597); FWS-172 (T 4574).
1456 - Ex P 215 at pp 3, 6 (date listed as August 29); FWS-69 (T 4132-4139).
1457 - FWS-08 (T 1783-1788) estimating around 18 men; Ahmet Hadzimusic (T 1969-1970) estimating ten men; Dzevad S Lojo (T 2597-2598, 2661-2663).
1458 - Ahmet Hadzimusic (T 1970, 2009); Dzevad S Lojo (T 2597-2598, 2661-2663).
1459 - Dzevad S Lojo (T 2557, 2601) putting the date around 16 December, Ex P 215 at p 7; Nezir Cengic (T 4694-4697) putting the number at around 13 and the date at December 15; Ahmet Hadzimusic (T 1974) referring to eight men taken on December 12,
1460 - FWS-146 (T 3078); Amor Masovic (T 4352-4353); FWS-66 (T 1120); FWS-139 (T 372) saying that he was taken away during the summer of 1993; FWS-138 (T 2075) unable to give a date; Risto Ivanovic (T 6192) no date.
1461 - Ex P 215, pp 3, 7.
1462 - In Annex IV to the Prosecution Final Trial Brief. The incident was not specifically pleaded in the Indictment.
1463 - FWS-144 (T 2309-2311).
1464 - FWS-54 and FWS-172.
1465 - FWS-54 (T 783-785, 811-812); FWS-66 (T 1119-1120, 1150); FWS-86 (T 1535-1542); FWS-08 (T 1807); Dr Amir Berberkic (T 3814-3816); RJ (T 3904, 3907); FWS-69 (T 4095-4096); FWS-172 (T 4575-4578); FWS-109 (T 2425); FWS-119 (T 1968-1969).
1466 - FWS-54 (T 774); FWS-65 (T 523); Rasim Taranin (T 1725); FWS-109 (T 2399); FWS-249 (T 4483); RJ (T 3868).
1467 - Neither was any reason presented by one of those deported as to why the group of 35 were deported while 20 others were separated from the original group: *see* FWS-54 (T 785).
1468 - FWS-139 (T 371) saying between 50-60; Ahmet Hadzimusic (T 1972-1973) saying around 35 men; FWS-08 (T 1791) saying about 36; FWS-104 (T 2185) around 35-40.
1469 - FWS-104 (T 2209, 2184-2185); Ahmet Hadzimusic (T 1970-1974); FWS-139 (T 371); Safet Avdic (Ex P 123, pp 524-525); FWS-182 (T1639); FWS-08 (T 1790-1792); FWS-109 (T2401); FWS-182 (T 1639); Ekrem Zekovic (T 3495-3496, 3513); FWS-69 (T 4085-4086); FWS-137 (T 4770, 4810) stating that it took place in August 1992; Muhamed Lisica (T 4978); FWS-250 (T 5080); Risto Ivanovic (T 6185).
1470 - FWS-08 (T 1791); FWS-138 (T 2094).
1471 - FWS-138 (T 2094); Ahmet Hadzimusic (T 1971-1975); FWS-69 (T 4085-4086); Ekrem Zekovic (T 3495); FWS-08 (T 1791); FWS-08 (T 1807); FWS-139 (T 371); Safet Avdic (Ex P 123, p 524); FWS-86 (T 1531).
1472 - FWS-104 (T 2210); FWS-08 (T 1792); FWS-69 (T 4085-4086); FWS-137 (T 4770); Ahmet Hadzimusic (T 1973).
1473 - Safet Avdic (Ex P 123, p 525); FWS-182 (T 1628); FWS-109 (T 2402); Dzevad S Lojo (T 2584, 2598-2599); FWS-137 (T 4770); FWS-250 (T 5080); FWS-139 (T 371); FWS-08 (T 1792); FWS-104 (T 2187).
1474 - Ekrem Zekovic (T 3497-3498).
1475 - FWS-182 (T 1628); Ekrem Zekovic (T 3497-3498, 3513).
1476 - Ex P 55/2, Section 3 (relating to Halid Konjo and the discovery of his body in a mass grave) and Section 6 relating to Murat Crneta and the discovery of his body in a mass grave); Amor Masovic (T 4235); Ex P 240/1 (map); Ex P 55/1; Jussi Kemppainen gave evidence that Halid Konjo's body was discovered during an exhumation in Podstolac-Ustikolina on 5 November 1997 (T 1167-1168, 1170-1171); Amor Masovic gave evidence of the Commission locating the bodies of Halid Konjo and Murat Crneta (T 4233-4237).
1477 - FWS-249 (Ex P 161, pp 4411, 4414, 4472-4473, 4477-4478).
1478 - *See* pars 438, 439-443, 454, 470, *supra*.
1479 - The Prosecution relied on the evidence of witnesses who claimed to have observed the Accused at SDS rallies and in the company of high level SDS members prior to the outbreak of the conflict: FWS-138 (T 2042-3); Zarko Vukovic (T 6803); FWS-139 (T 379); FWS-71 (T 2902); FWS-139 (T 378); FWS-85 (T 629); Ekrem Zekovic (T 3699). The Prosecution also alleged that the Accused was familiar with the members of the Crisis Staff and, although the Accused denied knowing the names of the Crisis staff members prior to hearing them in Court, he did show familiarity with their names and their functions when cross-examined: The Accused (T 7770-7774), Ex D 73. The Prosecution further asserted that only a person with nationalistic views could be entrusted with the position of warden of the KP Dom during the conflict, and this was supported by the views of the witnesses: FWS-54 (T 779-780); FWS-111 (T 1271); RJ (T 3834-3835). The Prosecution also relied upon the evidence of FWS-86 that, from the end of 1991 until the beginning of 1992,

anti-Muslim songs were sung in the Accused's son's café which was attached to the Accused's house: (T 1493, 1495, 1554). The Accused denied attending any SDS rallies and denied having any involvement at all with the SDS: (T 7583, T 7746). A certificate issued by the Srbinje SDS Municipal Board on 20 October 1998, stating that the Accused has never been a member of the SDS of Republika Srpska, was produced in support of this denial (Ex D 76/1). The Trial Chamber notes that this certificate is of recent origin and, in the absence of any evidence of the basis upon which it was issued, places no weight upon it. However, the Trial Chamber is satisified that there was a certain amount of evidence adduced by both the Defence and Prosecution showing that the Accused treated the non-Serb population in a favourable manner, and that his only political affiliation was with the Communist party: Witness A (T 5524-5528); Slobodan Jovanevic (T 5578-5580); Milomr Mihajlovic (T 5624-5625); Vitomir Drakul (T 5674-5675); Divljan Lazar (T 6012-6013); Drago Vladicic (T 6308-6309); Miladin Matovic (T 6486); Miloslav Krsmanovic (T 6705); Slavica Krnojelac (T 7503-7504, 7530); Zarko Vukovic (T 6741-6748); Arnseije Krnojelac (T 6934-6937); Svetozar Bogdanovic (T 7064); Witness C (T 7132-7142); Witness D (T 7147-7150); Desanka Bogdanovic (T 7014-7021); Svetozar Bogdanovic (T 7062-7066); Miloslav Krsmanovic (T 6705); Desanka Bogdanovic (T 7007); FWS-111 (T 1269-1270); FWS-144 (T 1468-1469, 2331-2332). The Trial Chamber is therefore not satisfied that the Accused consciously intended to discriminate. **673**

1480 - *Imprisonment, See* par 127, *supra; Living conditions constituting inhumane acts, See* par 170, *supra; Beatings, See* pars 313, 346, *supra; Torture, See* pars 313-314, *supra.*

1481 - *See* pars 100, 124,127, *supra.*

1482 - *See* pars 438,443, *supra.*

1483 - *See* pars 169-173, *supra.*

1484 - *See* pars 308-313, *supra.*

1485 - *See* pars 316-321, *supra.*

1486 - *See* pars 312-313, *supra.*

1487 - *See* par 107, *supra.*

1488 - *See* pars 106-107, *supra.*

1489 - *See* par 107, *supra.*

1490 - *See* pars 106-107, *supra.*

1491 - *See* par 173, *supra.* The Trial Chamber was also satisfied that the Accused's responsibility under Article 7(1) of the Statute had been established with respect to the offence of inhumane conditions and, in the exercise of its discretion, chose that head of liability as the more appropriate basis upon which to enter a conviction.

1492 - *See* par 172, *supra.*

1493 - *See* par 173, *supra.*

1494 - *See* par 490, *supra.*

1495 - *See* pars 312-319, *supra.*

1496 - *See* par 313, *supra.*

1497 - Absorbed in this finding are the findings of the Trial Chamber that the Accused was individually responsible for the crimes against humanity of imprisonment (par 489) and of inhumane acts (based upon living conditions, par 490).

1498 - This finding covers the beating of Dzemo Balic (par 5.15 of the Indictment) and FWS-03 (par 5.23 of the Indictment).

1499 - Those incidents which formed the basis of the persecution charge, namely the beating of Dzemo Balic (par 5.15 of the Ind

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA **674**

Case No. IT-99-37-PT

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

SLOBODAN MILOSEVIC
MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
VLAJKO STOJILJKOVIC

SECOND AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("the Statute of the Tribunal"), charges:

SLOBODAN MILOSEVIC
MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
VLAJKO STOJILJKOVIC

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR** as set forth below:

ACCUSED

1. **Slobodan MILOSEVIC** was born on 20 August 1941 in the town of Pozarevac in present-day Republic of Serbia (hereinafter "Serbia"). In 1964, he received a law degree from the University of Belgrade and began a career in management and banking. **Slobodan MILOSEVIC** held the posts of deputy director and later general director at *Tehnogas*, a major gas company until 1978. Thereafter, he became president of *Beogradska banka (Beobanka)*, one of the largest banks in the former Socialist Federal Republic of Yugoslavia (hereinafter "SFRY") and held that post until 1983.

2. In 1983, **Slobodan MILOSEVIC** began his political career. He became Chairman of the City Committee of the League of Communists of Belgrade in 1984. In 1986, he was elected Chairman of the Presidium of the Central Committee of the League of Communists of Serbia and was re-elected in 1988. On 16 July 1990, the League of Communists of Serbia and the Socialist Alliance of Working People of Serbia were united; the new party was named the Socialist Party of Serbia (hereinafter "SPS"), and **Slobodan MILOSEVIC** was elected its President. He continues to hold the post of President of the SPS as of the date of this indictment.

3. **Slobodan MILOSEVIC** was elected President of the Presidency of Serbia on 8 May 1989 and re-elected on 5 December that same year. After the adoption of the new Constitution of Serbia on 28 September 1990, **Slobodan MILOSEVIC** was elected to the newly established office of President of Serbia in multi-party elections held on 9 and 26 December 1990; he was re-elected on 20 December 1992.

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4. After serving two terms as President of Serbia, **Slobodan MILOSEVIC** was elected President of the Federal Republic of Yugoslavia (hereinafter "FRY") on 15 July 1997 and he began his official duties on 23 July 1997. Following defeat in the September 2000 FRY Presidential elections, **Slobodan MILOSEVIC** stepped down from this position on 6 October 2000. At all times relevant to this indictment, **Slobodan MILOSEVIC** held the post of President of the FRY.

5. **Milan MILUTINOVIC** was born on 19 December 1942 in Belgrade in present-day Serbia. **Milan MILUTINOVIC** received a degree in law from Belgrade University.

6. Throughout his political career, **Milan MILUTINOVIC** has held numerous high level governmental posts within Serbia and the FRY. **Milan MILUTINOVIC** was a deputy in the Socio-Political Chamber and a member of the foreign policy committee in the Federal Assembly; he was Serbia's Secretary for Education and Sciences, a member of the Executive Council of the Serbian Assembly, and a director of the Serbian National Library. **Milan MILUTINOVIC** also served as an ambassador in the Federal Ministry of Foreign Affairs and as the FRY Ambassador to Greece. He was appointed the Minister of Foreign Affairs of the FRY on 15 August 1995. **Milan MILUTINOVIC** is a member of the SPS.

7. On 21 December 1997, **Milan MILUTINOVIC** was elected President of Serbia. At all times relevant to this indictment, **Milan MILUTINOVIC** held the post of President of Serbia.

8. **Nikola SAINOVIC** was born on 7 December 1948 in Bor, Serbia. He graduated from the University of Ljubljana in 1977 and holds a Master of Science degree in Chemical Engineering. He began his political career in the municipality of Bor where he held the position of President of the Municipal Assembly of Bor from 1978 to 1982.

9. Throughout his political career, **Nikola SAINOVIC** has been an active member of both the League of Communists and the SPS. He held the position of Chairman of the Municipal Committee of the League of Communists in Bor. On 28 November 1995, **Nikola SAINOVIC** was elected a member of the SPS's Main Committee and a member of its Executive Council. He was also named president of the Committee to prepare the SPS Third Regular Congress (held in Belgrade on 2-3 March 1996). On 2 March 1996, **Nikola SAINOVIC** was elected one of several vice chairmen of the SPS. He held this position until 24 April 1997.

10. **Nikola SAINOVIC** has held several positions within the governments of Serbia and the FRY. In 1989, he served as a member of the Executive Council of Serbia's Assembly and Secretary for Industry, Energetics and Engineering of Serbia. He was appointed Minister of Mining and Energy of Serbia on 11 February 1991, and again on 23 December 1991. On 23 December 1991, he was also named Deputy Prime Minister of Serbia. **Nikola SAINOVIC** was appointed Minister of the Economy of the FRY on 14 July 1992, and again on 11 September 1992. He resigned from this post on 29 November 1992. On 10 February 1993, **Nikola SAINOVIC** was elected Prime Minister of Serbia.

11. On 22 February 1994, **Nikola SAINOVIC** was appointed Deputy Prime Minister of the FRY. He was re-appointed to this position in three subsequent governments: on 12 June 1996, 20 March 1997 and 20 May 1998. **Slobodan MILOSEVIC** designated **Nikola SAINOVIC** as his representative for Kosovo. **Nikola SAINOVIC** chaired the commission for co-operation with the Organisation for Security and Co-operation in Europe (hereinafter "OSCE") Verification Mission in Kosovo, and was an official member of the Serbian delegation at the Rambouillet peace talks in February 1999. **Nikola SAINOVIC** stepped down from his position as Deputy Prime Minister of the FRY on or before 4 November 2000, when a new Federal Government was formed. At all times relevant to this indictment, **Nikola SAINOVIC** held the post of Deputy Prime Minister of the FRY.

12. **Colonel General Dragoljub OJDANIC** was born on 1 June 1941 in the village of Ravni, near

Uzice in what is now Serbia. In 1958, he completed the Infantry School for Non-Commissioned Officers and in 1964, he completed the Military Academy of the Ground Forces. In 1985, **Colonel General Dragoljub OJDANIC** graduated from the Command Staff Academy and School of National Defence with a Masters Degree in Military Sciences. At one time he served as the Secretary for the League of Communists for the Yugoslav National Army (hereinafter "JNA") 52nd Corps, the precursor of the 52nd Corps of the Armed Forces of the FRY (hereinafter "VJ").

13. In 1992, **Colonel General Dragoljub OJDANIC** was the Commander of the 37th Corps of the JNA, later the VJ, based in Uzice, Serbia. He was promoted to Major General on 20 April 1992 and became Commander of the Uzice Corps. Under his command, the Uzice Corps was involved in military actions in eastern Bosnia during the war in the Republic of Bosnia and Herzegovina (hereinafter "Bosnia and Herzegovina"). In 1993 and 1994, **Colonel General Dragoljub OJDANIC** served as Chief of the General Staff of the First Army of the VJ. He was Commander of the First Army between 1994 and 1996. In 1996, he became Deputy Chief of the General Staff of the VJ. On 24 November 1998, **Slobodan MILOSEVIC** appointed **Colonel General Dragoljub OJDANIC** Chief of General Staff of the VJ, replacing General Momcilo Perisic. **Colonel General Dragoljub OJDANIC** was named Federal Minister of Defence on 15 February 2000 and served in this position until 3 November 2000. He was retired from military service by Presidential decree on 30 December 2000. At all times relevant to this indictment, **Colonel General Dragoljub OJDANIC** held the post of Chief of the General Staff of the VJ.

14. **Vlajko STOJILJKOVIC** was born in 1937 in Mala Krsna, in Serbia. He graduated from the University of Belgrade with a law degree, and then was employed at the municipal court. Thereafter, he became head of the Inter-Municipal Secretariat of Internal Affairs in Pozarevac. **Vlajko STOJILJKOVIC** served as director of the PIK firm in Pozarevac, vice-president and president of the Economic Council of Yugoslavia, and president of the Economic Council of Serbia.

15. By April 1997, **Vlajko STOJILJKOVIC** became Deputy Prime Minister of the Serbian Government and Minister of Internal Affairs of Serbia. On 24 March 1998, the Serbian Assembly elected a new Government and **Vlajko STOJILJKOVIC** was named Minister of Internal Affairs of Serbia. He is also a member of the main board of the SPS. **Vlajko STOJILJKOVIC** resigned from his post as Minister of Internal Affairs of Serbia on 9 October 2000. He is a deputy in the Federal Assembly's Chamber of Republics. At all times relevant to this indictment, **Vlajko STOJILJKOVIC** held the post of Minister of Internal Affairs of Serbia.

INDIVIDUAL CRIMINAL RESPONSIBILITY

Article 7(1) of the Statute of the Tribunal

16. Each of the accused is individually responsible for the crimes alleged against him in this indictment under Articles 3, 5 and 7(1) of the Statute of the Tribunal. The accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing" in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia,* the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.

17. This joint criminal enterprise came into existence no later than October 1998 and continued throughout the time period when the crimes alleged in counts 1 to 5 of this indictment occurred:

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beginning on or about 1 January 1999 and continuing until 20 June 1999. A number of individuals participated in this joint criminal enterprise during the entire duration of its existence, or, alternatively, at different times during the duration of its existence, including the accused **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown.

18. The crimes enumerated in Counts 1 to 5 of this Indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome of the joint criminal enterprise. Despite their awareness of the foreseeable consequences, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, knowingly and wilfully participated in the joint criminal enterprise. Each of the accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in counts 1 to 5. On this basis, under Article 7(1) of the Statute, each of the accused and other participants in the joint criminal enterprise bear individual criminal responsibility for the crimes alleged in counts 1 to 5.

Article 7(3) of the Statute of the Tribunal

19. **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC** and **Vlajko STOJILJKOVIC,** while holding positions of superior authority, are also individually criminally responsible for the acts or omissions of their subordinates, pursuant to Article 7(3) of the Statute of the Tribunal. A superior is responsible for the criminal acts of his subordinates if he knew or had reason to know that his subordinates were 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.

20. **Slobodan MILOSEVIC** was elected President of the FRY on 15 July 1997 and assumed office on 23 July 1997. At all times relevant to this indictment, he held the post of President of the FRY.

21. As President of the FRY, **Slobodan MILOSEVIC** was President of the Supreme Defence Council of the FRY. The Supreme Defence Council consists of the President of the FRY and the Presidents of the member republics, Serbia and Montenegro. The Supreme Defence Council decides on the National Defence Plan and issues decisions concerning the VJ. As President of the FRY, **Slobodan MILOSEVIC** had the power to order implementation of the National Defence Plan and commanded the VJ in war and peace pursuant to decisions made by the Supreme Defence Council. **Slobodan MILOSEVIC**, as Supreme Commander of the VJ, performed these duties through commands, orders and decisions.

22. Under the FRY Law on Defence, as Supreme Commander of the VJ, **Slobodan MILOSEVIC** also exercised command authority over republican police units subordinated to the VJ during a state of imminent threat of war or a state of war. A declaration of imminent threat of war was proclaimed on 23 March 1999, and a state of war on 24 March 1999.

23. In addition to his *de jure* powers, at all times relevant to this indictment, **Slobodan MILOSEVIC** exercised extensive *de facto* control over numerous institutions essential to, or involved in, the conduct of the offences alleged herein. **Slobodan MILOSEVIC** exercised extensive *de facto* control over federal institutions nominally under the competence of the Assembly or the Government of the FRY. **Slobodan MILOSEVIC** also exercised *de facto* control over functions and institutions nominally under the competence of Serbia and its autonomous provinces, including the Serbian police force. **Slobodan MILOSEVIC** further exercised *de facto* control over numerous aspects of the FRY's political and economic life, particularly the media. Between 1986 and the early 1990s, **Slobodan MILOSEVIC** progressively acquired *de facto* control over these federal,

republican, provincial and other institutions.

24. **Slobodan MILOSEVIC's** *de facto* control over Serbian, SFRY, FRY and other state organs stemmed, in part, from his leadership of the two principal political parties that ruled in Serbia from 1986 to 2000, and in the FRY from 1992 to 2000. From 1986 until 1990, he was Chairman of the Presidium of the Central Committee of the League of Communists in Serbia, then the ruling party in Serbia. In 1990, he was elected President of the Socialist Party of Serbia, the successor party to the League of Communists of Serbia and the Socialist Alliance of the Working People of Serbia. Throughout the period of his Presidency of Serbia, from 1990 to 1997, and as the President of the FRY, from 1997 to 2000, **Slobodan MILOSEVIC** was also the leader of the SPS.

25. Beginning no later than October 1988 and at all times relevant to this indictment, **Slobodan MILOSEVIC** exercised *de facto* control over the ruling and governing institutions of Serbia, including the MUP. Beginning no later than October 1988, he exercised *de facto* control over Serbia's two autonomous provinces - Kosovo and Vojvodina - and their representation in federal organs of the SFRY and the FRY. From no later than October 1988 until mid-1998, **Slobodan MILOSEVIC** also exercised *de facto* control over the ruling and governing institutions of the Republic of Montenegro (hereinafter "Montenegro"), including its representation in all federal organs of the SFRY and the FRY.

26. In significant international negotiations, meetings and conferences since 1989 and at all times relevant to this indictment, **Slobodan MILOSEVIC** was the primary interlocutor with whom the international community negotiated. He negotiated international agreements that were subsequently implemented within Serbia, the SFRY, the FRY, and elsewhere on the territory of the SFRY. Among the conferences and international negotiations at which **Slobodan MILOSEVIC** was the primary representative of the SFRY and FRY are: The Hague Conference in 1991; the Paris negotiations of March 1993; the International Conference on the Former Yugoslavia in January 1993; the Vance-Owen peace plan negotiations between January and May 1993; the Geneva peace talks in the summer of 1993; the Contact Group meeting in June 1994; the negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the bombing by the North Atlantic Treaty Organisation (NATO) in Bosnia and Herzegovina, 14-20 September 1995; and the Dayton peace negotiations in November 1995.

27. As the President of the FRY, the Supreme Commander of the VJ, and the President of the Supreme Defence Council, and pursuant to his *de facto* authority, **Slobodan MILOSEVIC** is criminally responsible for the actions of his subordinates within the forces of the FRY and Serbia, which included, but were not limited to, the VJ, the Serbia Ministry of Interior (hereinafter "MUP"), military-territorial units, civil defence units and other armed groups operating under the authority, or with the knowledge, of the five accused or their subordinates who committed the crimes alleged in counts 1 to 5 of this indictment.

28. **Slobodan MILOSEVIC**, as President of the FRY, Supreme Commander of the VJ and President of the Supreme Defence Council, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, members of the VJ and the aforementioned personnel of other forces of the FRY and Serbia, for the crimes alleged in counts 1 to 5 of this indictment. In addition, **Slobodan MILOSEVIC**, pursuant to his *de facto* authority, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, members of the VJ and employees of the MUP, for the crimes alleged in counts 1 to 5 of this indictment.

29. **Milan MILUTINOVIC** was elected President of Serbia on 21 December 1997 and remains President as of the date of this indictment. As President of Serbia, at all times relevant to this indictment, **Milan MILUTINOVIC** was the head of State. He represents Serbia and conducts its relations with foreign states and international organisations. He organises preparations for the

defence of Serbia. **679**

30. As President of Serbia, at all times relevant to this indictment, **Milan MILUTINOVIC** was a member of the Supreme Defence Council of the FRY and participated in decisions regarding the use of the VJ.

31. As President of Serbia, at all times relevant to this indictment, **Milan MILUTINOVIC**, in conjunction with the Republic of Serbia Assembly, had the authority to request reports both from the Government of Serbia, concerning matters under its jurisdiction, and from the MUP, concerning its activities and the security situation in Serbia. As President of Serbia, **Milan MILUTINOVIC** had the authority to dissolve the Republic of Serbia Assembly, and with it the Government, "subject to the proposal of the Government on justified grounds," although this power applies only in peacetime.

32. During a declared state of war or state of imminent threat of war, **Milan MILUTINOVIC**, as President of Serbia, could enact measures normally under the competence of the Republic of Serbia Assembly, including the passage of laws; these measures could include the reorganisation of the Government and its ministries, as well as the restriction of certain rights and freedoms.

33. In addition to his *de jure* powers, at all times relevant to this indictment, **Milan MILUTINOVIC** exercised extensive *de facto* influence or control over numerous institutions essential to, or involved in, the conduct of the crimes alleged herein. **Milan MILUTINOVIC** exercised *de facto* influence or control over functions and institutions nominally under the competence of the Government of Serbia and Assembly of Serbia and its autonomous provinces, including but not limited to the MUP.

34. In significant international negotiations, meetings and conferences since 1995 and at all times relevant to this indictment, **Milan MILUTINOVIC** was a principal interlocutor with whom the international community negotiated. Among the conferences and international negotiations at which **Milan MILUTINOVIC** was a primary representative of the FRY are: preliminary negotiations for a cease fire in Bosnia and Herzegovina, 15-21 August 1995; the Geneva meetings regarding the Bosnian cease fire, 7 September 1995; further negotiations for a cease fire in Bosnia and Herzegovina, 9-14 September 1995; the negotiations to end the NATO bombing in Bosnia and Herzegovina, 14-20 September 1995; the meeting of Balkan foreign ministers in New York, 26 September 1995; and the Dayton peace negotiations in November 1995. **Milan MILUTINOVIC** was also present at the negotiations at Rambouillet in February 1999.

35. Under the FRY Law on Defence, **Milan MILUTINOVIC,** as a member of the Supreme Defence Council, also exercised command authority over republican police units subordinated to the VJ during a state of imminent threat of war or a state of war. A declaration of imminent threat of war was proclaimed on 23 March 1999, and a state of war on 24 March 1999.

36. **Milan MILUTINOVIC**, as President of Serbia and a member of the Supreme Defence Council, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7 (3) of the Tribunal Statute, including, but not limited to, members of the VJ and the aforementioned personnel of other forces of the FRY and Serbia, for the crimes alleged in counts 1 to 5 of this indictment. In addition, **Milan MILUTINOVIC,** pursuant to his *de facto* authority, is criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, members of the VJ and employees of the MUP, for the crimes alleged in counts 1 to 5 of this indictment.

37. **Nikola SAINOVIC** was re-appointed Deputy Prime Minister of the FRY on 20 May 1998. As such, he was a member of the Government of the FRY, which, among other duties and responsibilities, formulated domestic and foreign policy, enforced federal law, directed and coordinated the work of federal ministries, and organised defence preparations.

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38. Prior to December 1998, **Slobodan MILOSEVIC** designated **Nikola SAINOVIC** as his representative for Kosovo. A number of diplomats and other international officials who needed to speak with a government official regarding events in Kosovo were directed to **Nikola SAINOVIC.** He took an active role in negotiations establishing the OSCE verification mission for Kosovo and he participated in numerous other meetings regarding the Kosovo crisis. At all times relevant to this indictment, **Nikola SAINOVIC** acted as the liaison between **Slobodan MILOSEVIC** and various Kosovo Albanian leaders. Pursuant to both his position as Deputy Prime Minister of the FRY and his role as **Slobodan MILOSEVIC**'s designated representative for Kosovo, **Nikola SAINOVIC** exercised effective control over numerous individuals and institutions essential to, or involved in, or responsible for, the conduct of the offences alleged herein.

39. **Nikola SAINOVIC,** pursuant to his *de facto* authority, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, members of the VJ and employees of the MUP, for the crimes alleged in counts 1 to 5 of this indictment.

40. **Colonel General Dragoljub OJDANIC** was appointed Chief of the General Staff of the VJ on 24 November 1998. At all times relevant to this indictment, he held the post of Chief of the General Staff of the VJ. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** commanded, ordered, instructed, regulated and otherwise directed the VJ, pursuant to acts issued by the President of the FRY and as required to command the VJ.

41. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** determined the organisation, plan of development and formation of commands, units and institutions of the VJ, in conformity with the nature and needs of the VJ and pursuant to acts rendered by the President of the FRY.

42. In his position of authority, **Colonel General Dragoljub OJDANIC** also determined the plan for recruiting and filling vacancies within the VJ and the distribution of recruits therein; issued regulations concerning training of the VJ; determined the educational plan and advanced training of professional and reserve military officers; and performed other tasks stipulated by law.

43. As Chief of the General Staff of the VJ, **Colonel General Dragoljub OJDANIC** - or other officers empowered by him - assigned commissioned officers, non-commissioned officers and soldiers, and promoted non-commissioned officers, reserve officers, and officers up to the rank of colonel. In addition, **Colonel General Dragoljub OJDANIC** nominated the president, judges, prosecutors, and their respective deputies and secretaries, to serve on military disciplinary courts.

44. **Colonel General Dragoljub OJDANIC** carried out preparations for the conscription of citizens and mobilisation of the VJ; co-operated with the MUP and the Ministry of Defence of the FRY in mobilising organs and units of the MUP; monitored and proposed measures to correct problems encountered during, and informed the Government of the FRY and the Supreme Defence Council about, the implementation of the mobilisation.

45. **Colonel General Dragoljub OJDANIC,** as Chief of the General Staff of the VJ, under the FRY Law on Defense, also exercised command authority over republican police units subordinated to the VJ 3rd Army during a state of imminent threat of war or a state of war. A declaration of imminent threat of war was proclaimed on 23 March 1999, and a state of war on 24 March 1999.

46. **Colonel General Dragoljub OJDANIC**, as Chief of the General Staff of the VJ, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute,

including, but not limited to, members of the VJ and the aforementioned personnel of other forces of

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the FRY and Serbia, for the crimes alleged in counts 1 to 5 of this indictment. In addition, **Colonel General Dragoljub OJDANIC,** pursuant to his *de facto* authority, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, members of the VJ and employees of the MUP, for the crimes alleged in counts 1 to 5 of this indictment.

47. **Vlajko STOJILJKOVIC** was named Minister of Internal Affairs of Serbia on 24 March 1998. At all times relevant to this indictment, **Vlajko STOJILJKOVIC** held the post of Minister of Internal Affairs of Serbia. As head of a Serbian government ministry, **Vlajko STOJILJKOVIC** was responsible for the enforcement of laws, regulations and general acts promulgated by Serbia's Assembly, Government or President.

48. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** directed the work of the MUP and its personnel. He determined the structure, mandate and scope of operations of organisational units within the MUP. He was empowered to call up members of the MUP reserve corps to perform duties during peacetime, and to prevent activities threatening Serbia's security. The orders which he and MUP superior officers issued to MUP personnel were binding unless they constituted a criminal act.

49. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** had powers of review over decisions and acts of agents for the MUP. He considered appeals against decisions made in the first instance by the head of an organisational unit of the MUP. Moreover, he was empowered to decide appeals made by individuals who were detained by the police.

50. On 8 April 1999, as Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC**'s powers during the state of war were expanded to include transferring MUP employees to different duties within the MUP for as long as required.

51. As Minister of Internal Affairs of Serbia, **Vlajko STOJILJKOVIC** was responsible for ensuring the maintenance of law and order in Serbia.

52. **Vlajko STOJILJKOVIC**, as Minister of Internal Affairs of Serbia, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, employees of the MUP and the aforementioned personnel of other forces of the FRY and Serbia, for the crimes alleged in counts 1 to 5 of this indictment. In addition, **Vlajko STOJILJKOVIC**, pursuant to his *de facto* authority, is also, or alternatively, criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute, including, but not limited to, employees of the MUP, for the crimes alleged in counts 1 to 5 of this indictment.

CHARGES

53. Following the commencement of the joint criminal enterprise, beginning on or about 1 January 1999 and continuing until 20 June 1999, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, planned, instigated, ordered, committed or otherwise aided and abetted in a deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo in the FRY.

54. The deliberate and widespread or systematic campaign of terror and violence directed at the Kosovo Albanian population was executed by forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown. Forces of the FRY and Serbia undertook the operations targeting the Kosovo Albanians

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with the objective of expelling a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian control over the province. To achieve this objective, forces of the FRY and Serbia, acting in concert, engaged in well-planned and coordinated operations as described in paragraphs 55 through 61 below.

55. Forces of the FRY and Serbia, in a deliberate and widespread or systematic manner, forcibly expelled and internally displaced hundreds of thousands of Kosovo Albanians from their homes across the entire province of Kosovo. To facilitate these expulsions and displacements, forces of the FRY and Serbia intentionally created an atmosphere of fear and oppression through the use of force, threats of force, and acts of violence.

56. Throughout Kosovo, forces of the FRY and Serbia engaged in a deliberate and widespread or systematic campaign of destruction of property owned by Kosovo Albanian civilians. This was accomplished by the widespread shelling of towns and villages; the burning and destruction of property, including homes, farms, businesses, cultural monuments and religious sites; and the destruction of personal property. As a result of these orchestrated actions, villages, towns, and entire regions were made uninhabitable for Kosovo Albanians.

57. In addition to the deliberate destruction of property owned by Kosovo Albanian civilians, forces of the FRY and Serbia committed widespread or systematic acts of brutality and violence against Kosovo Albanian civilians in order to perpetuate the climate of fear, create chaos and a pervading fear for life. Forces of the FRY and Serbia went from village to village and, in the towns and cities, from area to area, threatening and expelling the Kosovo Albanian population. Kosovo Albanians were frequently intimidated, assaulted or killed in public view to enforce the departure of their families and neighbors. Many Kosovo Albanians who were not directly forcibly expelled from their communities fled as a result of the climate of terror created by the widespread or systematic beatings, harassment, sexual assaults, unlawful arrests, killings, shelling and looting carried out across the province. Forces of the FRY and Serbia persistently subjected Kosovo Albanians to insults, racial slurs, degrading acts and other forms of physical and psychological mistreatment based on their racial, religious, and political identification. All sectors of Kosovo Albanian society were displaced including women, children, the elderly and the infirm.

58. Thousands of Kosovo Albanians who fled their homes as a result of the conduct of the forces of the FRY and Serbia and the deliberate climate of terror that pervaded the territory of Kosovo joined convoys of persons that moved toward Kosovo's borders with the Republic of Albania (hereinafter "Albania") and the former Yugoslav Republic of Macedonia (hereinafter "Macedonia"). Along the routes to the border crossings, forces of the FRY and Serbia manned checkpoints where the displaced Kosovo Albanians were subject to further beatings, extortion, robbery, harassment, assaults, illegal arrests and killings. At other times, forces of the FRY and Serbia escorted groups of expelled Kosovo Albanians to the borders. By these methods, the forces of the FRY and Serbia maintained control over the movement of displaced Kosovo Albanians to the borders. Displaced Kosovo Albanians often arrived at the borders of Kosovo on foot in convoys of several thousand persons, or carried by tractors, trailers and trucks, as well as on trains, buses or trucks which were organised and provided by forces of the FRY and Serbia.

59. In addition, thousands of Kosovo Albanians who fled their homes and were thereby forcibly transferred as a result of the conduct of the forces of the FRY and Serbia and the deliberate climate of terror that pervaded the territory of Kosovo, were forced to seek shelter for days, weeks or months in other towns and villages, and/or in forests and mountains throughout the province. Some of these internally displaced persons remained inside the province of Kosovo throughout the time period relevant to this indictment and many persons died as a consequence of the harsh weather conditions, insufficient food, inadequate medical attention and exhaustion. Others eventually crossed over one of the Kosovo borders into Albania, Macedonia, Montenegro, or crossed the provincial boundary between Kosovo and Serbia. Forces of the FRY and Serbia controlled and coordinated the

movements of many internally displaced Kosovo Albanians until they were finally expelled from Kosovo.

60. Throughout Kosovo, in a deliberate and widespread or systematic effort to deter expelled Kosovo Albanians from returning to their homes, forces of the FRY and Serbia looted and pillaged the personal and commercial property belonging to Kosovo Albanians. Forces of the FRY and Serbia used wholesale searches, threats of force, and acts of violence to rob Kosovo Albanians of money and valuables, and in a widespread or systematic manner, authorities at FRY border posts stole personal vehicles and other property from Kosovo Albanians being deported from the province.

61. In addition, throughout Kosovo, forces of the FRY and Serbia systematically seized and destroyed the personal identity documents and licenses of vehicles belonging to Kosovo Albanian civilians. As Kosovo Albanians were forced from their homes and directed towards Kosovo's borders, they were subjected to demands to surrender identity documents at selected points *en route* to border crossings and at border crossings into Albania and Macedonia. These actions were undertaken in order to erase any record of the deported Kosovo Albanians' presence in Kosovo and to deny them the right to return to their homes.

COUNT 1
DEPORTATION

62. The Prosecutor re-alleges and incorporates by reference paragraphs 55 - 61.

63. Beginning on or about 1 January 1999 and continuing until 20 June 1999, forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, perpetrated the actions set forth in paragraphs 55 through 61, which resulted in the forced deportation of approximately 800,000 Kosovo Albanian civilians. To facilitate these expulsions and displacements, forces of the FRY and Serbia deliberately created an atmosphere of fear and oppression through the use of force, threats of force and acts of violence, as described above in paragraphs 55 through 61. Throughout Kosovo, forces of the FRY and Serbia systematically shelled towns and villages, burned homes and farms, damaged and destroyed Kosovo Albanian cultural and religious institutions, murdered Kosovo Albanian civilians and sexually assaulted Kosovo Albanian women. These actions were undertaken in all areas of Kosovo, and these deliberate means and methods were used throughout the province, including the following municipalities:

a. Orahovac/Rahovec: On the morning of 25 March 1999, forces of the FRY and Serbia surrounded the village of Celina/Celinë with tanks and armoured vehicles. After shelling the village, forces of the FRY and Serbia entered the village and systematically looted and pillaged everything of value from the houses, set houses and shops on fire and destroyed the old mosque. Most of the Kosovo Albanian villagers had fled to a nearby forest before the army and police arrived. On 28 March 1999, forces of the FRY and Serbia forced the thousands of people hiding in the forest to come out. After marching the civilians to a nearby village, the men were separated from the women and were beaten, robbed, and all of their identity documents were taken from them. The men were then marched to Prizren and eventually forced to go to Albania.

(i) On 25 March 1999, a large group of Kosovo Albanians went to a mountain near the village of Nogavac/Nagavc, also in Orahovac/Rahovec municipality, seeking safety from attacks on nearby villages. Forces of the FRY and Serbia surrounded them and on the following day, ordered the 8,000 people who had sought shelter on the mountain to leave. The Kosovo Albanians were forced to go to a nearby school and then they were forcibly

dispersed into nearby villages. After three or four days, forces of the FRY and Serbia entered the villages, went from house to house and ordered people out. Eventually, they were forced back into houses and told not to leave. Those who could not fit inside the houses were forced to stay in cars and tractors parked nearby. On 2 April 1999, forces of the FRY and Serbia started shelling the villages, killing a number of people who had been sleeping in tractors and cars. Those who survived headed for the Albanian border. As they passed through other Kosovo Albanian villages which had been destroyed, they were taunted by forces of the FRY and Serbia. When the villagers arrived at the border, all their identification papers were taken from them. In the course of the expulsions, throughout the entire municipality of Orahovac/Rahovec, forces of the FRY and Serbia systematically burned houses, shops, cultural monuments and religious sites belonging to Kosovo Albanians. Several mosques were destroyed, including the mosques of Bela Crkva/Bellacërkvë, Brestovac/Brestovc, Velika Krusa/Krushë e Madhe and others.

b. Prizren: On 25 March 1999 the village of Pirane was surrounded by forces of the FRY and Serbia, tanks and various military vehicles. The village was shelled and a number of the residents were killed. Thereafter, forces of the FRY and Serbia entered the village and burned the houses of Kosovo Albanians. After the attack, the remaining villagers left Pirane and went to surrounding villages. In the town of Landovica/Landovice, an old mosque was burned and heavily damaged by forces of the FRY and Serbia. Some of the Kosovo Albanians fleeing toward Srbica/Sërbica were killed or wounded by snipers. Forces of the FRY and Serbia then launched an offensive in the area of Srbica/Sërbica and shelled the villages of Donji Retimlje/Reti e Ulët, Retimle/Reti and Randubrava/Randobravë. Kosovo Albanian villagers were forced from their homes and sent to the Albanian border. From 28 March 1999, in the city of Prizren, forces of the FRY and Serbia went from house to house, ordering Kosovo Albanian residents to leave. They were forced to join convoys of vehicles and persons travelling on foot to the Albanian border. En route, members of the forces of the FRY and Serbia beat and killed Kosovo Albanian men, separated Kosovo Albanian women from the convoy and sexually assaulted the women. At the border all personal documents were taken away by forces of the FRY and Serbia.

c. Srbica/Skenderaj: Beginning on or about 25 March 1999, forces of the FRY and Serbia attacked and destroyed the villages of Vojnike/Vocnjak, Leocina/Lecine, Kladernica/Klladernicë, Turicevac/Turiçec and Izbica/Izbicë by shelling and burning. Many of the houses, shops and mosques were destroyed, including the mosque in the centre of the village of Cirez/Qirez. Some women and children were taken away by members of the forces of the FRY and Serbia and held in a barn in Cirez/Qirez. The women were subjected to sexual assault, and their money and property were stolen. At least eight of the women were killed after being sexually assaulted, and their bodies were thrown into three wells in the village of Cirez/Qirez. On or about 28 March 1999, at least 4,500 Kosovo Albanians from these villages gathered in the village of Izbica/Izbicë where members of the forces of the FRY and Serbia demanded money from these Kosovo Albanians and separated the men from the women and children. A large number of the men were then killed. The women and children were forcibly moved as a group towards Klina/Klinë, Dakovica/Gjakovë and eventually to the Albanian border.

d. Suva Reka/Suharekë : On the morning of 25 March 1999, forces of the FRY and Serbia surrounded the town of Suva Reka/Suharekë . During the following days, police officers went from house to house, threatening, assaulting and killing Kosovo Albanian

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residents, and removing many of the people from their homes at gunpoint. Many houses and shops belonging to Kosovo Albanians were set on fire and a mosque in Suva Reka/Suharekë was damaged. The women, children and elderly were sent away by the police and then a number of the men were killed by the forces of the FRY and Serbia. The Kosovo Albanians were forced to flee, making their way in trucks, tractors and trailers towards the border with Albania. While crossing the border, all of their documents and money were taken away.

(i) On 31 March 1999, approximately 80,000 Kosovo Albanians displaced from villages in the Suva Reka/Suharekë municipality gathered near Belanica/Bellanicë. The following day, forces of the FRY and Serbia shelled Belanica/Bellanicë, forcing the displaced persons to flee toward the Albanian border. Prior to crossing the border, all of their identification documents were taken away.

e. Pec/Pejë : On or about 27 and 28 March 1999, in the city of Pec/Pejë , forces of the FRY and Serbia went from house to house forcing Kosovo Albanians to leave. Some houses were set on fire and a number of people were shot. Soldiers and police were stationed along every street directing the Kosovo Albanians toward the town centre. Once the people reached the centre of town, those without cars or vehicles were forced to get on buses or trucks and were driven to the town of Prizren. Outside Prizren, the Kosovo Albanians were forced to get off the buses and trucks and walk approximately 15 kilometres to the Albanian border where, prior to crossing the border, they were ordered to turn their identification papers over to forces of the FRY and Serbia.

f. Kosovska Mitrovica/Mitrovicë : Beginning on or about 25 March 1999 and continuing through the middle of April 1999, forces of the FRY and Serbia began moving systematically through the town of Kosovska Mitrovica/Mitrovicë . They entered the homes of Kosovo Albanians and ordered the residents to leave their houses at once and go to the bus station. Some houses were set on fire, forcing the residents to flee to other parts of the town. At least one of the mosques of the town was burned and damaged. Over a three-week period the forces of the FRY and Serbia continued to expel the Kosovo Albanian residents of the town. During this period, properties belonging to Kosovo Albanians were destroyed, Kosovo Albanians were robbed of money, vehicles, and other valuables, and Kosovo Albanian women were sexually assaulted. A similar pattern was repeated in other villages in the Kosovska Mitrovica/Mitrovicë municipality, where forces of the FRY and Serbia forced Kosovo Albanians from their homes and destroyed the villages. The Kosovo Albanian residents of the municipality were forced to join convoys going to the Albanian border via the towns of Srbica/Skenderaj, Pec/Pejë, Dakovica/Gjakovë and Prizren. *En route* to the border, forces of the FRY and Serbia officers robbed them of valuables and seized their identity documents.

g. Pristina/Prishtinë : Beginning on or about 24 March 1999 and continuing through the end of May 1999, Serbian police went to the homes of Kosovo Albanians in the city of Pristina/Prishtinë and forced the residents to leave. During the course of these forced expulsions, a number of people were killed. Many of those forced from their homes went directly to the train station, while others sought shelter in nearby neighbourhoods. Hundreds of ethnic Albanians, guided by Serb police at all the intersections, gathered at the train station and then were loaded onto overcrowded trains or buses after a long wait, during which time no food or water was provided. Those on the trains went as far as Deneral Jankovic/Hani i Elezit, a village near the Macedonian border. During the train ride many people had their identification papers taken from them. After getting off the trains, forces of the FRY and Serbia told the Kosovo Albanians to walk along the tracks

into Macedonia since the surrounding land had been mined. Those who tried to hide in Pristina/Prishtinë were eventually expelled in a similar fashion. During the course of these forced expulsions, a number of people were killed and several women were sexually assaulted.

(i) During the same period, forces of the FRY and Serbia entered the villages of Pristina/Prishtinë municipality where they beat and killed many Kosovo Albanians, robbed them of their money, looted their property and burned their homes. Many of the villagers were taken by truck to the town of Glogovac/Gllogoc in the municipality of Glogovac/Gllogoc. From there, they were transported to Deneral Jankovic/Hani i Elezit by train and buses and walked to the Macedonian border. Others, after making their way to the town of Urosevac/Ferizaj, were ordered by forces of the FRY and Serbia to take a train to Deneral Jankovic/Hani i Elezit, from where they walked across the border into Macedonia.

h. Dakovica/Gjakovë : By March 1999, the population of the town of Dakovica/Gjakovë had increased significantly due to the large number of internally displaced persons who fled their villages to escape deliberate shelling by forces of the FRY and Serbia during 1998, and to escape the armed conflict between these forces and members of the Kosovo Liberation Army. The continual movement of these internally displaced persons increased after 24 March 1999 when, following violent expulsions in the town of Dakovica/Gjakovë , many internally displaced persons returned from the town of Dakovica/Gjakovë to the outlying villages, only to be expelled from these villages again by forces of the FRY and Serbia. Serb forces controlled and coordinated the movement of these internally displaced persons as they travelled from these villages to and from the town of Dakovica/Gjakovë , and finally to the border between Kosovo and the Republic of Albania. Persons travelling on foot were sent from the town of Dakovica/Gjakovë directly toward one of several border crossings. Persons travelling in motor vehicles were routed first towards the town of Prizren before approaching the border and crossing into the Republic of Albania.

(i) From on or about 24 March 1999 through 11 May 1999, forces of the FRY and Serbia began forcing residents of the town of Dakovica/Gjakovë to leave. Forces of the FRY and Serbia spread out through the town and went from house to house ordering Kosovo Albanians from their homes. In some instances, people were killed, and many persons were threatened with death. Many of the houses and shops belonging to Kosovo Albanians were set on fire, while those belonging to Serbs were protected. On 24 March 1999, the old mosque in Rogovo/Rogovë and the old historic quarter of Dakovica/Gjakovë, which included the bazaar, the Hadum Mosque and adjoining Islamic Library, were among the several cultural sites substantially and/or totally destroyed. During the period from 2 to 4 April 1999, thousands of Kosovo Albanians living in the town of Dakovica/Gjakovë and neighbouring villages joined a large convoy, either on foot or driving in cars, trucks and tractors, and moved to the border with Albania. Forces of the FRY and Serbia directed those fleeing along pre-arranged routes, and at checkpoints along the way most Kosovo Albanians had their identification papers and license plates seized. In some instances, Yugoslav army trucks were used to transport persons to the border with Albania.

(ii) In addition, during late March and April 1999, forces of the FRY and Serbia forcibly expelled the Kosovo Albanian residents of many villages in

the Dakovica/Gjakovë municipality, including the villages of Dobros/Dobrosh, Korenica/Korenicë and Meja/Mejë. Many of these residents were subsequently ordered or permitted to return to their communities, only to be expelled again by forces of the FRY and Serbia. On or about the early morning hours of 27 April 1999, forces of the FRY and Serbia launched a massive attack against the Carragojs, Erenik and Trava Valleys (Dakovica/Gjakovë municipality), including the remaining residents of the aforementioned villages, in order to drive the population out of the area. A large number of soldiers and policemen were deployed, and several checkpoints were established. In Meja/Mejë, Korenica/Korenicë and Meja Orize/ Orize, a large, and as yet undetermined, number of Kosovo Albanian civilian males were separated from the mass of fleeing villagers, abducted and executed. Throughout the entire day, villagers under direct threat from the forces of the FRY and Serbia left their homes and joined several convoys of refugees using tractors, horse carts and cars and eventually crossed into Albania. Forces of the FRY and Serbia confiscated the identity documents of many of the Kosovo Albanians before they crossed the border.

i. Gnjilane/Gjilan: Forces of the FRY and Serbia entered the town of Prilepnica/Pë rlepnicë on or about 6 April 1999, and ordered residents to leave, saying that the town would be mined the next day. The townspeople left and tried to go to another village but forces of the FRY and Serbia turned them back. On 13 April 1999, residents of Prilepnica/Pë rlepnicë were again informed that the town had to be evacuated by the following day. The next morning, the Kosovo Albanian residents left in a convoy of approximately 500 vehicles. Shortly after the residents left, the houses in Prilepnica/Pë rlepnicë were set on fire. Throughout the entire municipality of Gnjlane/Gjilan, forces of the FRY and Serbia systematically burned and destroyed houses, shops, cultural monuments and religious sites belonging to Kosovo Albanians, including a mosque in Vlastica/Vlastica. Kosovo Albanians in other villages in Gnjilane/Gjilan municipality were also forced from their homes. Thousands of displaced persons from villages such as Zegra/Zhegër, Nosalje/Nosalë and Vladovo/Lladovë sought shelter in the village of Donja Stubla/Stubëlle E Poshtme, located in the Vitina municipality. Many of these displaced persons from Gnjlane/Gjilan crossed Kosovo's boundary with the province of Serbia, where they suffered similar harassment and mistreatment to that which they experienced in Kosovo, before entering Macedonia. Others travelled directly to Macedonia. When the Kosovo Albanians reached the border with Macedonia, forces of the FRY and Serbia confiscated their identification papers.

j. Urosevac/Ferizaj: During the period between 24 March and 14 April 1999, forces of the FRY and Serbia shelled and attacked villages in the Urosevac/Ferizaj municipality, including Biba/Bibe, Muhadzer Prelez/Prelez i Muhaxherëve, Raka/Rakaj and Staro Selo, killing a number of residents. After the shelling, forces of the FRY and Serbia entered some of the villages, including Papaz and Sojevo/Sojevë, and ordered the residents to leave. Other Kosovo Albanians from Varos Selo/Varosh and Mirosavlje/Mirosalë fled their villages as the Serb forces entered. After the residents left their homes, the soldiers and policemen burned the houses. The displaced persons went to the town of Urosevac/Ferizaj, where most boarded trains which carried them to the Macedonia border crossing at Deneral Jankovic/Hani i Elezit. Serb forces directed the train passengers to walk on the railroad tracks to the border. Others travelled in convoys from Urosevac/Ferizaj to the same border crossing. At the border, Serb forces confiscated all of their documents.

k. Kacanik: Between March and May 1999, forces of the FRY and Serbia attacked

villages in the Kacanik municipality and the town of Kacanik itself. This attack resulted in the destruction of houses and religious sites including, but not limited to, the mosques of Kotlina/Kotlinë and Ivaja/Ivajë.

(i) On or about 8 March 1999, forces of the FRY and Serbia attacked and partially burned the village of Kotlina/Kotlinë. On 24 March 1999, forces of the FRY and Serbia attacked Kotlina/Kotlinë again with heavy weapons systems and soldiers. Many of the male residents of Kotlina/Kotlinë fled into nearby forests during this attack, while forces of the FRY and Serbia ordered the women, children and elderly to board trucks which took them towards the town of Kacanik. Those who could not fit into the trucks were compelled to walk behind them towards Kacanik. A number of male residents of Kotlina/Kotlinë were killed during this attack, including at least 17 men whose bodies were thrown into wells. Before departing Kotlina/Kotlinë, forces of the FRY and Serbia burned the remainder of the village. Many of the survivors fled to Macedonia.

(ii) On or about 27 and 28 March 1999, forces of the FRY and Serbia attacked the town of Kacanik. Forces of the FRY and Serbia harassed, detained, beat, and shot many Kosovo Albanian residents of Kacanik. Thousands of persons fled to nearby forests and eventually walked across the border into Macedonia. Other displaced persons from the town of Kacanik and nearby villages walked to the village of Stagovo/Stagovë, where they boarded trains that took them to the Macedonia border.

(iii) On or about 13 April 1999, forces of the FRY and Serbia surrounded the village of Slatina/Sllatinë and the hamlet of Vata. After shelling the village, infantry troops and police entered the village and looted and burnt the houses. During this action, 13 civilians were shot and killed. Following this attack, much of the population of Slatina/Sllatinë fled to Macedonia.

(iv) On or about 25 May 1999, forces of the FRY and Serbia attacked the village of Dubrava/Lisnaje in the municipality of Kacanik. During the attack, forces of the FRY and Serbia killed several Kosovo Albanian residents of Dubrava/Lisnaje. Many residents of Dubrava/Lisnaje formed a convoy of tractors and trailers and fled to Macedonia. Other residents fled to other villages or into forests before eventually crossing the border into Macedonia.

l. Decani/Deçan: On or about 29 March 1999, forces of the FRY and Serbia surrounded and attacked the village of Beleg, and other surrounding villages in the Decani/Deçan municipality. Forces of the FRY and Serbia went from house to house and told villagers to leave their houses immediately. About 300 men, women and children were moved out of their homes and gathered in a nearby field in the village of Beleg. Forces of the FRY and Serbia ordered all men and women to undress and all their personal property was taken away. Men were separated from women and children and taken to the basement of an unfinished house near the field. Women and children were ordered to go to another house. During the night at least 3 women were sexually assaulted. The next day, forces of the FRY and Serbia told the villagers to leave the village in trucks and tractors and go to Albania.

m. Vucitrn/Vushtrri: On or about 27 March 1999, forces of the FRY and Serbia began to burn houses in the town of Vucitrn/Vushtrri and burned the main mosque in that town. On or about 2 May 1999, forces of the FRY and Serbia attacked a number of villages

north-east of the town of Vucitrn/Vushtrri, including Skrovna/Skromë, Slakovce/Sllakofc, Cecelija/Ceceli and Gornja Sudimlja/Studime e Epërme. The villagers were forced out of their homes, and many of their houses, shops and religious sites were completely burnt. The villagers, as well as persons previously displaced from other communities in the Vucitrn/Vushtrri municipality, were forced to form a convoy of approximately 20,000 people travelling on the "Studime Gorge" road, in the direction of the town of Vucitrn/Vushtrri. During the night of 2-3 May 1999, forces of the FRY and Serbia harassed, beat and killed approximately 104 Kosovo Albanians and robbed the valuables of many others. Thousands of Kosovo Albanians in this convoy were detained by forces of the FRY and Serbia in the agricultural cooperative near the town of Vucitrn/Vushtrri. On or about 3 May 1999, forces of the FRY and Serbia at the agricultural cooperative separated Kosovo Albanian men of military age from women, children and the elderly. The Kosovo Albanian women, children and elderly were directed to travel to Albania and a number of Kosovo Albanian men were forced to drive vehicles that carried the women, children and elderly to the Albanian border. The forces of the FRY and Serbia transported hundreds of Kosovo Albanian men of military age from the agricultural cooperative to a prison in the village of Smrekovrica/Smrakoncë. After several weeks of detention in inhumane conditions where they were subjected to beatings, torture and murder, many of these Kosovo Albanian men were transported to the village of Zur/Zhur, near the Albanian border, and forced to cross the border into Albania.

By these acts and omissions, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of:

Count 1: Deportation, a **CRIME AGAINST HUMANITY**, punishable under Article 5(d) of the Statute of the Tribunal.

COUNT 2
OTHER INHUMANE ACTS (FORCIBLE TRANSFER)

64. With respect to those Kosovo Albanians who were internally displaced within the territory of Kosovo, the Prosecutor re-alleges and incorporates by reference paragraphs 55 - 61 and, in particular, paragraph 59.

By these acts and omissions, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of:

Count 2: Other Inhumane Acts (Forcible Transfer), a **CRIME AGAINST HUMANITY**, punishable under Article 5(i) of the Statute of the Tribunal.

COUNTS 3-4
MURDER

65. The Prosecutor re-alleges and incorporates by reference paragraphs 55 - 63.

66. Beginning on or about 1 January 1999 and continuing until 20 June 1999, forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, murdered hundreds of Kosovo Albanian

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civilians. These killings occurred in a widespread or systematic manner throughout the province of Kosovo and resulted in the deaths of numerous men, women, and children. Included among the incidents of mass killings are the following:

a. On or about 15 January 1999, in the early morning hours, the village of Racak (Stimlje/Shtime municipality) was attacked by forces of the FRY and Serbia. After shelling, the forces of the FRY and Serbia entered the village later in the morning and began conducting house-to-house searches. Villagers, who attempted to flee from the forces of the FRY and Serbia, were shot throughout the village. A group of approximately 25 men attempted to hide in a building, but were discovered by the forces of the FRY and Serbia. They were beaten and then were removed to a nearby hill, where they were shot and killed. Altogether, the forces of the FRY and Serbia killed approximately 45 Kosovo Albanians in and around Racak. (Those persons killed who are known by name are set forth in Schedule A, which is attached as an appendix to this indictment.)

b. On or about 25 March 1999, forces of the FRY and Serbia surrounded and attacked the village of Bela Crkva/Bellacërkë (Orahovac/Rahovec municipality). Many of the residents of Bela Crkva/Bellacërkë fled along the Belaja River outside the village and were forced to seek shelter near a railroad bridge. As the forces of the FRY and Serbia approached the bridge, they opened fire on a number of villagers, killing 12 persons including 10 women and children. A two-year old child survived this incident. The forces of the FRY and Serbia then ordered the remaining villagers out of the streambed, at which time the men and older boys were separated from the elderly men, women and small children. The forces of the FRY and Serbia ordered the men and older boys to strip and then systematically robbed them of all valuables. The women and children were then ordered to leave towards an adjacent village called Zrze/Xërxë. A doctor from Bela Crkva/Bellacërkë attempted to speak with a commander of the attacking forces, but he was shot and killed, as was his nephew. The remaining men and older boys were then ordered back into the streambed. After they complied, the forces of the FRY and Serbia opened fire on these men and older boys, killing approximately 65 Kosovo Albanians. A number of men and older boys survived this incident and other persons hiding in the vicinity also witnessed this incident. In addition, forces of the FRY and Serbia also killed six men found hiding in an irrigation ditch in the vicinity. (Those persons killed who are known by name are set forth in Schedule B, which is attached as an appendix to the indictment.)

c. On or about 25 March 1999, forces of the FRY and Serbia attacked the villages of Mala Krusa/Krusë e Vogël and Velika Krusa/Krushë e Mahde (Orahovac/Rahovec municipality). The villagers of Mala Krusa/Krusë e Vogel took refuge in a forested area outside Mala Krusa/Krusë e Vogel, where they were able to observe the forces of the FRY and Serbia systematically looting and burning their houses. The villagers subsequently took refuge in the house of Sedje Batusha, which is located on the outskirts of Mala Krusa/Krusë e Vogel. During the morning of 26 March 1999, forces of the FRY and Serbia located the villagers. The forces of the FRY and Serbia ordered the women and small children to leave the area and go to Albania. The forces of the FRY and Serbia detained and searched the men and boys and confiscated their identity documents and valuables. Subsequently, the forces of the FRY and Serbia ordered the men and boys, under threat of death, to walk to an unoccupied house in Mala Krusa/Krusë e Vogel. The forces of the FRY and Serbia forced the men and boys to enter the house. When the men and boys were assembled inside, the forces of the FRY and Serbia opened fire with machine guns on the group. After several minutes of gunfire, the forces of the FRY and Serbia set fire to the house in order to burn the bodies. As a result of the shooting and fire, approximately 105 Kosovo Albanian men

and boys died. (Those persons killed who are known by name are set forth in Schedule C, which is attached as an appendix to this indictment.)

d. On or about 26 March 1999, in the morning hours, forces of the FRY and Serbia surrounded the vicinity of the BERISHA family compound in the town of Suva Reka/Suharekë (Suva Reka/ Suharekë municipality). Tanks were positioned close to, and pointing in the direction of, the houses. The forces of the FRY and Serbia ordered the occupants out of one of the houses. Men were separated from women and children and six members of the family were killed. The remaining family members were herded towards a coffee shop by forces of the FRY and Serbia. Those family members were herded, along with three extended BERISHA family groups, into the coffee shop. Forces of the FRY and Serbia then walked into the coffee shop and opened fire on the persons inside. Explosives were also thrown into the shop. At least 44 civilians were killed and others seriously wounded during this action. The bodies of the victims were dragged out of the shop and placed in the rear of a truck, which was then driven in the direction of Prizren. Three injured persons, thrown in among the other bodies, jumped out of the truck *en route* to Prizren. Property pertaining to at least six of the persons killed in the coffee shop was found in a clandestine mass gravesite at a VJ firing range near Korusa/Korisha. In addition, identification documents pertaining to at least five of the persons killed in the coffee shop were found on bodies exhumed from a clandestine mass grave located in Batajnica, near Belgrade, Serbia. (Those persons killed who are known by name are set forth in Schedule K, which is attached as an appendix to this indictment.)

e. On or about the evening of 26 March 1999, in the town of Dakovica/Gjakovë , forces of the FRY and Serbia came to a house at 134a Ymer Grezda Street. The women and children inside the house were separated from the men, and were ordered to go upstairs. The forces of the FRY and Serbia then shot and killed the 6 Kosovo Albanian men who were in the house. (The names of those killed are set forth in Schedule D, which is attached as an appendix to this indictment.)

f. On or about 26 March 1999, in the morning hours, forces of the FRY and Serbia attacked the village of Padaliste/Padalishte (Istok/Istog municipality). As the forces of the FRY and Serbia entered the village, they fired on houses and on villagers who attempted to flee. Eight members of the Beke IMERAJ family were forced from their home and were killed in front of their house. Other residents of Padaliste/Padalishte were killed at their homes and in a streambed near the village. Altogether, forces of the FRY and Serbia killed approximately 20 Kosovo Albanians from Padaliste/Padalishte. (Those persons killed who are known by name are set forth in Schedule E, which is attached as an appendix to this indictment.)

g. On or about 27 March 1999, forces of the FRY and Serbia shelled the village of Izbica/Izbicë (Srbica/Skenderaj municipality) with heavy weapons systems. At least 4,500 villagers from Izbica/Izbicë and surrounding villages took refuge in a meadow in Izbica/Izbicë. On 28 March 1999, forces of the FRY and Serbia surrounded the villagers and approached them, demanding money. After the forces of the FRY and Serbia stole the villagers' valuables, the men were separated from the women and small children. The men were then further divided into two groups, one of which was sent to a nearby hill, and the other was sent to a nearby streambed. The forces of the FRY and Serbia then fired upon both groups of men and at least 116 Kosovo Albanian men were killed. Also on 28 March 1999, the women and children gathered at Izbica/Izbicë were forced to leave the area and walk towards Albania. Two elderly disabled women were sitting on a tractor-trailer unable to walk. Forces of the FRY and Serbia set the tractor-trailer on fire and the two women were burned to death. (Those persons killed at Izbica/Izbicë

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who are known by name are set forth in Schedule F, which is attached as an appendix to this indictment.)

h. On or about the late evening of 1 April 1999 and continuing through the early morning hours of 2 April 1999, forces of the FRY and Serbia launched an operation against the Qerim district of Dakovica/Gjakovë . Over a period of several hours, forces of the FRY and Serbia forcibly entered houses of Kosovo Albanians in the Qerim district, killed the occupants, and then set fire to the buildings. Dozens of homes were destroyed and over 50 persons were killed. For example, in a house located at 157 Milos Gilic/Milosh Gilic Street, forces of the FRY and Serbia shot the occupants and then set the house on fire. As a result of the shootings and the fires set by the forces of the FRY and Serbia at this single location, 20 Kosovo Albanians were killed, of whom 19 were women and children. (The names of those killed at this location are set forth in Schedule G, which is attached as an appendix to this indictment.)

i. On or about the early morning hours of 27 April 1999, forces of the FRY and Serbia launched a massive attack against the Kosovo Albanian population of the Carragojs, Erenik and Trava Valleys (Dakovica/Gjakovë municipality) in order to drive the population out of the area. A large number of forces of the FRY and Serbia were deployed, and several checkpoints were established. Throughout the entire day, villagers under direct threat from the forces of the FRY and Serbia left their homes and joined several convoys of refugees using tractors, horse carts and cars. In Meja/Mejë, Korenica/Korenicë and Meja Orize/Orize, a large, and as yet undetermined, number of Kosovo Albanian civilian males were separated from the mass of fleeing villagers and abducted. Many of these men were summarily executed, and approximately 300 persons are still missing. Identity documents pertaining to at least seven persons who were last seen at Meja/Mejë on 27 April 1999 were found on bodies exhumed from a clandestine mass grave located in Batajnica, near Belgrade, Serbia. (Those persons killed who are known by name are set forth in Schedule I, which is attached as an appendix to this indictment).

j. On or about 2 May 1999, forces of the FRY and Serbia attacked several villages north-east of the town of Vucitrn/Vushtrri including Skrovna/Skromë, Slakovce/Sllakofc, Ceceli/Cecelija and Gornja Sudimlja/Studime e Epërme. The villagers were forced out of their homes, and many of their houses, shops and religious sites were completely burnt. They were subsequently forced into a convoy of approximately 20,000 people travelling on the "Studime Gorge" road, in the direction of the town of Vucitrn/Vushtrri. In the course of these actions, forces of the FRY and Serbia harassed, beat and robbed Kosovo Albanians travelling in the convoy and killed approximately 104 Kosovo Albanians. (Those persons killed who are known by name are set forth in Schedule H, which is attached as an appendix to this indictment.)

k. On or about 22 May 1999, in the early morning hours, a uniformed person in the Dubrava/Dubravë Prison complex (Istok/Istog municipality) announced from a watchtower that all prisoners were to gather their personal belongings and line up on the sports field at the prison complex for transfer to the prison in Nis, Serbia. Within a very short time, hundreds of prisoners had gathered at the sports field with bags of personal belongings and lined up in rows to await transport. Without warning, uniformed persons opened fire on the prisoners from the watchtower, from holes in the perimeter wall and from gun emplacements beyond the wall. Many prisoners were killed outright and others wounded.

(i) On or about 23 May 1999, in the afternoon, forces of the FRY and Serbia threw grenades and shot into the drains, sewers, buildings and basements, killing

and wounding many additional prisoners who had sought refuge in those locations after the events of the previous day. Altogether, approximately 50 prisoners were killed. (Many of the murdered prisoners remain unidentified, however, the names of those persons who are known to have been killed are set forth in Schedule J, which is attached as an appendix to this indictment.)

l. During the period between March 1999 and May 1999, forces of the FRY and Serbia launched a series of massive offensives against several villages in the municipality of Kacanik/Kacanik, which resulted in the deaths of more than one hundred civilians.

(i) On or about 24 March 1999, the village of Kotlina/Kotlinë was attacked by forces of the FRY and Serbia. In the course of the attack, most of the houses were burnt down and at least 17 persons were killed. Some of those killed were captured in the woods, executed and then thrown into wells. Explosives were thrown on top of the wells.

(ii) On or about 13 April 1999, forces of the FRY and Serbia surrounded the village of Slatina/Sllatinë and the hamlet of Vata/Vata. After shelling the village, infantry troops and police entered the village and looted and burnt the houses. During this action, 13 civilians were shot and killed.

(iii) On or about 21 May 1999, the village of Stagovo/Stagovë was surrounded by forces of the FRY and Serbia. The population tried to escape toward the mountains east of the village. During this action, at least 12 persons were killed. Most of the village was looted and burnt down.

(iv) On or about 25 May 1999, forces of FRY and Serbia surrounded the village of Dubrava/Lisnaje. As the forces entered the village, the population was ordered to gather at the school and leave the village on tractors. Men were then separated from women and children. During this action 4 men were killed. In addition, 4 members of the Qorri family were killed while trying to escape toward the woods. (Those persons killed in the municipality of Kacanik who are known by name are set forth in Schedule L, which is attached as an appendix to this indictment.)

By these acts and omissions, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of:

Count 3: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) of the Statute of the Tribunal.

Count 4: Murder, 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) (murder) of the Geneva Conventions.

COUNT 5
PERSECUTIONS

67. The Prosecutor re-alleges and incorporates by reference paragraphs 55 - 66.

68. Beginning on or about 1 January 1999 and continuing until 20 June 1999, the forces of the FRY and Serbia, acting at the direction, with the encouragement, or with the support of **Slobodan**

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MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC and others known and unknown, utilised the means and methods set forth in paragraphs 55 through 66 to execute a campaign of persecution against the Kosovo Albanian civilian population based on political, racial, or religious grounds. These persecutions included, but were not limited to, the following means:

a. The forcible transfer and deportation by forces of the FRY and Serbia of approximately 800,000 Kosovo Albanian civilians as described in paragraphs 55 - 64.

b. The murder of hundreds of Kosovo Albanian civilians by forces of the FRY and Serbia as described in paragraphs 65 - 66.

c. The sexual assault by forces of the FRY and Serbia of Kosovo Albanians, in particular women, including the sexual assaults described in paragraphs 57 and 63.

d. The wanton destruction or damage of Kosovo Albanian religious sites. During and after the attacks on the towns and villages, forces of FRY and Serbia systematically damaged and destroyed cultural monuments and Muslim sacred sites. Mosques were shelled, burned and dynamited throughout the province. Included among the incidents are the following: the damage and/or destruction of mosques in Vucitrn/Vushtrii, Suva Reka/Suharekë, Celina/Celinë, Rogovo/Rogovë, Bela Crkva/Bellacërke, Cirez/Qirez, Kotlina/Kotlinë, Ivaja/Ivajë, Brestovac/Brestovc, Velika Krusa/Krushë e Mahde, Kosovska Mitrivica/Mitrovicë, Vlastica/Vlastica, Landovica/Landovice and Dakovica/Gjakovë, as described in paragraph 63.

By these acts and omissions, **Slobodan MILOSEVIC, Milan MILUTINOVIC, Nikola SAINOVIC, Dragoljub OJDANIC, Vlajko STOJILJKOVIC** and others known and unknown, planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of:

Count 5: Persecutions on political, racial and religious grounds, a **CRIME AGAINST HUMANITY**, punishable under Article 5(h) of the Statute of the Tribunal.

GENERAL ALLEGATIONS

69. At all times relevant to this indictment, a state of armed conflict existed in Kosovo in the FRY.

70. All acts and omissions charged as crimes against humanity were part of a widespread or systematic attack directed against the Kosovo Albanian civilian population of Kosovo in the FRY.

ADDITIONAL FACTS

71. The Autonomous Province of Kosovo and Metohija is located in the southern part of the Republic of Serbia, a constituent republic of the FRY. The territory now comprising the FRY was part of the SFRY. The Autonomous Province of Kosovo and Metohija is bordered on the north and north-west by Montenegro, another constituent republic of the FRY. On the south-west, the Autonomous Province of Kosovo and Metohija is bordered by the Republic of Albania, and to the south, by Macedonia. The capital of the Autonomous Province of Kosovo and Metohija is Pristina/Prishtinë.

72. In 1990 the Socialist Republic of Serbia promulgated a new Constitution which, among other things, changed the names of the republic and the autonomous provinces. The name of the Socialist Republic of Serbia was changed to the Republic of Serbia, the name of the Socialist Autonomous Province of Kosovo was changed to the Autonomous Province of Kosovo and Metohija (both

hereinafter "Kosovo"); and the name of the Socialist Autonomous Province of Vojvodina was changed to the Autonomous Province of Vojvodina (hereinafter "Vojvodina"). During this same period, the Socialist Republic of Montenegro changed its name to the Republic of Montenegro.

73. In 1974, a new SFRY Constitution had provided for a devolution of power from the central government to the six constituent republics of the country. Within Serbia, Kosovo and Vojvodina were given considerable autonomy including control of their educational systems, judiciary, and police. They were also given their own provincial assemblies, and were represented in the Assembly, the Constitutional Court, and the Presidency of the SFRY.

74. In the 1981 census, the last census with near universal participation, the total population of Kosovo was approximately 1,585,000 of which 1,227,000 (77%) were Albanians, and 210,000 (13%) were Serbs. Only estimates for the population of Kosovo in 1991 are available because Kosovo Albanians boycotted the census administered that year. General estimates are that the population of Kosovo during the time period relevant to this indictment was between 1,800,000 and 2,100,000, of which approximately 85-90% were Kosovo Albanians and 5-10% were Serbs.

75. During the 1980s, Serbs voiced concern about discrimination against them by the Kosovo Albanian-led provincial government while Kosovo Albanians voiced concern about economic underdevelopment and called for greater political liberalisation and republican status for Kosovo. From 1981 onwards, Kosovo Albanians staged demonstrations, which were suppressed by SFRY military and police forces of Serbia.

76. In April 1987, **Slobodan MILOSEVIC**, who had been elected Chairman of the Presidium of the Central Committee of the League of Communists of Serbia in 1986, travelled to Kosovo. In meetings with local Serb leaders and in a speech before a crowd of Serbs, **Slobodan MILOSEVIC** endorsed a Serbian nationalist agenda. In so doing, he broke with the party and government policy, which had restricted nationalist expression in the SFRY since the time of its founding by Josip Broz Tito after the Second World War. Thereafter, **Slobodan MILOSEVIC** exploited a growing wave of Serbian nationalism in order to strengthen centralised rule in the SFRY.

77. In September 1987, **Slobodan MILOSEVIC** and his supporters gained control of the Central Committee of the League of Communists of Serbia. In 1988, **Slobodan MILOSEVIC** was re-elected as Chairman of the Presidium of the Central Committee of the League of Communists of Serbia. From that influential position, **Slobodan MILOSEVIC** was able to further develop his political power.

78. From July 1988 to March 1989, a series of demonstrations and rallies supportive of **Slobodan MILOSEVIC**'s policies - the so-called "Anti-Bureaucratic Revolution" - took place in Vojvodina and Montenegro. These protests led to the ouster of the respective provincial and republican governments; the new governments were then supportive of, and indebted to, **Slobodan MILOSEVIC**.

79. Simultaneously, within Serbia, calls for bringing Kosovo under stronger Serbian rule intensified and numerous demonstrations addressing this issue were held. On 17 November 1988, high-ranking Kosovo Albanian political figures were dismissed from their positions within the provincial leadership and were replaced by appointees loyal to **Slobodan MILOSEVIC**. In early 1989, the Serbian Assembly proposed amendments to the Constitution of Serbia which would strip Kosovo of most of its autonomous powers, including control of the police, educational and economic policy, and choice of official language, as well as its veto powers over further changes to the Constitution of Serbia. Kosovo Albanians demonstrated in large numbers against the proposed changes. Beginning in February 1989, a strike by Kosovo Albanian miners further increased tensions.

80. Due to the political unrest, on 3 March 1989, the SFRY Presidency declared that the situation in

the province had deteriorated and had become a threat to the constitution, integrity, and sovereignty of the country. The government then imposed "special measures" which assigned responsibility for public security to the federal government instead of the government of Serbia.

81. On 23 March 1989, the Assembly of Kosovo met in Pristina/Prishtinë and, with the majority of Kosovo Albanian delegates abstaining, voted to accept the proposed amendments to the constitution. Although lacking the required two-thirds majority in the Assembly, the President of the Assembly nonetheless declared that the amendments had passed. On 28 March 1989, the Assembly of Serbia voted to approve the constitutional changes, effectively revoking the autonomy granted in the 1974 constitution.

82. At the same time these changes were occurring in Kosovo, **Slobodan MILOSEVIC** further increased his political power when he became the President of Serbia. **Slobodan MILOSEVIC** was elected President of the Presidency of Serbia on 8 May 1989 and his post was formally confirmed on 6 December 1989.

83. In early 1990, Kosovo Albanians held mass demonstrations calling for an end to the "special measures." In April 1990, the SFRY Presidency lifted the "special measures" and removed most of the federal police forces as Serbia took over responsibility for police enforcement in Kosovo.

84. In July 1990, the Assembly of Serbia passed a decision to suspend the Assembly of Kosovo shortly after 114 of the 123 Kosovo Albanian delegates from that Assembly had passed an unofficial resolution declaring Kosovo an equal and independent entity within the SFRY. In September 1990, many of these same Kosovo Albanian delegates proclaimed a constitution for a "Republic of Kosovo." One year later, in September 1991, Kosovo Albanians held an unofficial referendum in which they voted overwhelmingly for independence. On 24 May 1992, Kosovo Albanians held unofficial elections for an assembly and president for the "Republic of Kosovo."

85. On 16 July 1990, the League of Communists of Serbia and the Socialist Alliance of Working People of Serbia joined to form the Socialist Party of Serbia (SPS), and **Slobodan MILOSEVIC** was elected its President. As the successor to the League of Communists, the SPS became the dominant political party in Serbia and **Slobodan MILOSEVIC**, as President of the SPS, was able to wield considerable power and influence over many branches of the government as well as the private sector. **Milan MILUTINOVIC** and **Nikola SAINOVIC** have both held prominent positions within the SPS. **Nikola SAINOVIC** was a member of the Main Committee and the Executive Council as well as a vice-chairman; and **Milan MILUTINOVIC** successfully ran for President of Serbia in 1997 as the SPS candidate.

86. After the adoption of the new Constitution of Serbia on 28 September 1990, **Slobodan MILOSEVIC** was elected President of Serbia in multi-party elections held on 9 and 26 December 1990; he was re-elected on 20 December 1992. In December 1991, **Nikola SAINOVIC** was appointed a Deputy Prime Minister of Serbia.

87. After Kosovo's autonomy was effectively revoked in 1989, the political situation in Kosovo became more and more divisive. Throughout late 1990 and 1991 thousands of Kosovo Albanian doctors, teachers, professors, workers, police and civil servants were dismissed from their positions. The local court in Kosovo was abolished and many judges removed. Police violence against Kosovo Albanians increased.

88. During this period, the unofficial Kosovo Albanian leadership pursued a policy of non-violent civil resistance and began establishing a system of unofficial, parallel institutions in the health care and education sectors.

89. In late June 1991, the SFRY began to disintegrate in a succession of wars fought in the Republic

of Slovenia (hereinafter Slovenia), the Republic of Croatia (hereinafter Croatia), and Bosnia and Herzegovina. On 25 June 1991, Slovenia declared its independence from the SFRY, which led to the outbreak of war; a peace agreement was reached on 8 July 1991. Croatia declared its independence on 25 June 1991, leading to fighting between Croatian military forces on the one side and the JNA, paramilitary units and the "Army of the Republic of Srpska Krajina" on the other.

90. On 6 March 1992, Bosnia and Herzegovina declared its independence, resulting in wide scale war after 6 April 1992. On 27 April 1992, the SFRY was reconstituted as the FRY. At this time, the JNA was re-formed as the VJ. In the war in Bosnia and Herzegovina, the JNA, and later the VJ, fought along with the "Army of Republika Srpska" against military forces of the Government of Bosnia and Herzegovina and the "Croat Defence Council." Active hostilities ceased with the signing of the Dayton peace agreement in December 1995.

91. Although **Slobodan MILOSEVIC** was the President of Serbia during the wars in Slovenia, Croatia and Bosnia and Herzegovina, he was nonetheless the dominant Serbian political figure exercising *de facto* control of the federal government as well as the republican government and was the person with whom the international community negotiated a variety of peace plans and agreements related to these wars.

92. Between 1991 and 1997, **Milan MILUTINOVIC** and **Nikola SAINOVIC** both held a number of high ranking-positions within the federal and republican governments and continued to work closely with **Slobodan MILOSEVIC**. During this period, **Milan MILUTINOVIC** worked in the Foreign Ministry of the FRY, and at one time was Ambassador to Greece; in 1995, he was appointed Minister of Foreign Affairs of the FRY, a position he held until 1997. **Nikola SAINOVIC** was Prime Minister of Serbia in 1993 and Deputy Prime Minister of the FRY in 1994.

93. While the wars were being conducted in Slovenia, Croatia and Bosnia and Herzegovina, the situation in Kosovo, while tense, did not erupt into the violence and intense fighting seen in the other countries. In the mid-1990s, however, a faction of the Kosovo Albanians organised a group known as *Ushtria Çlirimtare e Kosovës* (UÇK) or, known in English as the Kosovo Liberation Army (hereinafter the "KLA"). This group advocated a campaign of armed insurgency and violent resistance to the Serbian authorities. In mid-1996, the KLA began launching attacks primarily targeting Serbian police forces. Thereafter, and throughout 1997, Serbian police forces responded with forceful operations against suspected KLA bases and supporters in Kosovo.

94. After concluding his term as President of Serbia, **Slobodan MILOSEVIC** was elected President of the FRY on 15 July 1997, and assumed office on 23 July 1997. Thereafter, elections for the office of the President of Serbia were held; **Milan MILUTINOVIC** ran as the SPS candidate and was elected President of Serbia on 21 December 1997. In 1996, 1997 and 1998, **Nikola SAINOVIC** was re-appointed Deputy Prime Minister of the FRY. In part through his close alliance with **Milan MILUTINOVIC, Slobodan MILOSEVIC** was able to retain his influence over the Government of Serbia.

95. Beginning in late February 1998, the conflict intensified between the KLA on the one hand, and forces of the FRY and Serbia, on the other hand. A number of Kosovo Albanians and Kosovo Serbs were killed and wounded during this time. Forces of the FRY and Serbia engaged in a campaign of shelling predominantly Kosovo Albanian towns and villages, widespread destruction of property, and expulsions of the civilian population from areas in which the KLA was active. Many residents fled the territory as a result of the fighting and destruction or were forced to move to other areas within Kosovo. The United Nations estimates that by mid-October 1998, over 298,000 persons, roughly fifteen percent of the population, had been internally displaced within Kosovo or had left the province.

96. In response to the intensifying conflict, the United Nations Security Council (UNSC) passed

Resolution 1160 in March 1998 "condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo," and imposed an arms embargo on the FRY. Six months later the UNSC passed Resolution 1199 (1998) which stated that "the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region." The Security Council demanded that all parties cease hostilities and that "the security forces used for civilian repression" be withdrawn.

97.In an attempt to diffuse tensions in Kosovo, negotiations between **Slobodan MILOSEVIC** and representatives of NATO and the OSCE were conducted in October 1998. An "Agreement on the OSCE Kosovo Verification Mission" was signed on 16 October 1998. This agreement and the "Clark-Naumann agreement," which was signed by **Nikola SAINOVIC**, provided for the partial withdrawal of forces of the FRY and Serbia from Kosovo, a limitation on the introduction of additional forces and equipment into the area, and the deployment of unarmed OSCE verifiers.

98.Although scores of OSCE verifiers were deployed throughout Kosovo, hostilities continued. During this period, international verifiers and human rights organisations documented a number of killings of Kosovo Albanians. In one such incident, on 15 January 1999, 45 unarmed Kosovo Albanians were murdered in the village of Racak in the municipality of Stimlje/Shtime.

99.In a further response to the continuing conflict in Kosovo, an international peace conference was organised in Rambouillet, France beginning on 7 February 1999. **Nikola SAINOVIC,** the Deputy Prime Minister of the FRY, was a member of the Serbian delegation at the peace talks and **Milan MILUTINOVIC,** President of Serbia, was also present during the negotiations. The Kosovo Albanians were represented by the KLA and a delegation of Kosovo Albanian political and civic leaders. Despite intensive negotiations over several weeks, the peace talks collapsed in mid-March 1999.

100.During the peace negotiations in France, the violence in Kosovo continued. In late February and early March, forces of the FRY and Serbia launched a series of offensives against dozens of predominantly Kosovo Albanian villages and towns. The FRY military forces were comprised of elements of the VJ's 3rd Army, specifically the 52nd Corps, also known as the Pristina Corps, and several brigades and regiments under the command of the Pristina Corps. At all times relevant to this indictment, the Chief of the General Staff of the VJ, with command responsibilities over the 3rd Army and ultimately over the 52nd Corps, was **Colonel General Dragoljub OJDANIC**. At all times relevant to this indictment, the Supreme Commander of the VJ was **Slobodan MILOSEVIC**.

101. The police forces taking part in the actions in Kosovo were members of the MUP. At all times relevant to this indictment, all police forces employed by or working under the authority of the MUP were commanded by **Vlajko STOJILJKOVIC**, Minister of Internal Affairs of Serbia. Under the FRY Law on Defence, those police forces engaged in military operations during a state of war or imminent threat of war are subordinated to the command of the VJ, whose commanders, at all times relevant to this indictment, were **Colonel General Dragoljub OJDANIC** and **Slobodan MILOSEVIC**.

102. During their offensives, forces of the FRY and Serbia acting in concert engaged in a well-planned and co-ordinated campaign of destruction of property owned by Kosovo Albanian civilians. Towns and villages were shelled, homes, farms, and businesses were burned, and personal property destroyed. As a result of these orchestrated actions, towns, villages, and entire regions were made uninhabitable for Kosovo Albanians. Additionally, forces of the FRY and Serbia harassed, humiliated, and degraded Kosovo Albanian civilians through physical and verbal abuse. The Kosovo Albanians were also persistently subjected to insults, racial slurs, degrading acts based on ethnicity and religion, beatings, and other forms of physical mistreatment.

103. The unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their

homes in Kosovo involved well-planned and co-ordinated efforts by the leaders of the FRY and Serbia, and forces of the FRY and Serbia, all acting in concert. Actions similar in nature took place during the wars in Croatia and Bosnia and Herzegovina between 1991 and 1995. During those wars, Serbian military, paramilitary and police forces forcibly expelled and deported non-Serbs in Croatia and Bosnia and Herzegovina from areas under Serbian control utilising the same method of operations as were used in Kosovo in 1999: heavy shelling and armed attacks on villages; widespread killings; destruction of non-Serbian residential areas and cultural and religious sites; and forced transfer and deportation of non-Serbian populations.

104. On 24 March 1999, NATO began launching air strikes against targets in the FRY. The FRY issued decrees of an imminent threat of war on 23 March 1999 and a state of war on 24 March 1999. After the air strikes commenced, forces of the FRY and Serbia intensified their widespread or systematic campaign and forcibly expelled hundreds of thousands of Kosovo Albanians from Kosovo.

105. In addition to the forced expulsions of Kosovo Albanians, forces of the FRY and Serbia also engaged in a number of killings of Kosovo Albanians since 24 March 1999. Such killings occurred at numerous locations, including, but not limited to, Bela Crkva/Bellacërkvë, Mala Krusa/Krushë e Vogel, Velika Krusa/Krushë e Mahde, Dakovica/Gjakovë, Padaliste/Padalishte, Izbica/Izbicë, Vucitrn/Vushtrii, Meja/Mejë, Dubrava prison, Suva Reka/Suharekë, and Kacanik.

106. By June 1999, approximately 800,000 Kosovo Albanians, about one-third of the entire Kosovo Albanian population, had been expelled from Kosovo. Thousands more were believed to be internally displaced. An unknown number of Kosovo Albanians were killed in the operations conducted by forces of the FRY and Serbia.

107. On 3 June 1999, the FRY and Serbia accepted a document of principles towards a resolution of the crisis in Kosovo, which was presented to their representatives by Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the President of the Russian Federation. That document, which was followed by Security Council resolution 1244 (1999), provided for a political solution to the Kosovo crisis, including an immediate end to violence and a rapid withdrawal of FRY and Serbian military, police and paramilitary forces, and the deployment of international civil and security presence in Kosovo, under United Nations auspices.

108. On 9 June 1999, the Military Technical Agreement was signed between NATO, represented by General Sir Michael Jackson, and representatives of the VJ and the MUP, providing for the withdrawal of all forces of the FRY and Serbia from Kosovo. Under the terms of the Military Technical Agreement, the NATO bombing campaign against targets in the FRY would terminate upon the complete withdrawal of forces of the FRY and Serbia. On 20 June 1999, KFOR, the Kosovo Force, announced that the withdrawal of forces of the FRY and Serbia from the territory of Kosovo was complete.

Carla del Ponte
Prosecutor

Dated This Sixteenth Day of October 2001
The Hague
The Netherlands

Schedule A
Persons Known by Name Killed at Racak - 15 January 1999

Name	Approximate	Sex

	Age	
ASLLANI, Lute	30	Female
AZEMI, Banush		Male
BAJRAMI, Ragip	34	Male
BEQIRI, Halim	13	Male
BEQIRI, Rizah	49	Male
BEQIRI, Zenel	20	Male
BILALLI, Lutfi		Male
EMINI, Ajet		Male
HAJRIZI, Bujar		Male
HAJRIZI, Myfail	33	Male
HALILI, Skender		Male
HYSENAJ, Haqif		Male
IBRAHIMI, Hajriz		Male
IMERI, Hakip		Male
IMERI, Murtez		Male
IMERI, Nazmi		Male
ISMALJI, Meha		Male
ISMALJI, Muhamet		Male
JAKUPI, Ahmet		Male
JAKUPI, Esref	40	Male
JAKUPI, Hajriz		Male
JAKUPI, Mehmet		Male
JAKUPI, Xhelal		Male
JASHARI, Jasher	24	Male
JASHARI, Raif	20	Male
JASHARI, Shukri	18	Male
LIMANI, Fatmir	35	Male
LIMANI, Nexhat	19	Male
LIMANI, Salif	23	Male

MEHMETI, Bajram		Male
MEHMETI, Hanumshah		Female
METUSHI, Arif		Male
METUSHI, Haki	70	Male
MUSTAFA, Ahmet		Male
MUSTAFA, Aslani	34	Male
MUSTAFA, Muhamet	21	Male
OSMANI, Sadik	35	Male
SALIHU, Jashar	25	Male
SALIHU, Shukri	18	Male
SHABANI, Bajrush	22	Male
SMAJLAI, Ahmet	60	Male
SYLA, Sheremet	37	Male
SYLA, Shyqeri		Male
XHELADINI, Bajram		Male
ZYMERI, Njazi		Male

Schedule B
Persons Known by Name Killed at Bela Crkva / Bellacërkvë - 25 March 1999

Name	Approximate Age	Sex
BEGAJ, Abdullah	25	Male
BERISHA, Murat	60	Male
GASHI, Fadil	46	Male
MORINA, Musa	65	Male
POPAJ, Abdullah	18	Male
POPAJ, Agon	14	Male
POPAJ, Alban	21	Male
POPAJ, Bedrush	47	Male
POPAJ, Belul	14	Male

POPAJ, Ethem	46	Male
POPAJ, Hazer	77	Male
POPAJ, Hyshi	37	Male
POPAJ, Irfan	41	Male
POPAJ, Isuf	76	Male
POPAJ, Kreshnik	18	Male
POPAJ, Lindrit	18	Male
POPAJ, Mehmet	46	Male
POPAJ, Mersel	53	Male
POPAJ, Nazmi	45	Male
POPAJ, Nisim	35	Male
POPAJ, Rrustem		Male
POPAJ, Sahid	40	Male
POPAJ, Sedat	47	Male
POPAJ, Shendet	17	Male
POPAJ, Vehap	58	Male
POPAJ, Xhavit	32	Male
SPAHIU, FNU (daughter of Xhemal)		Female
SPAHIU, FNU (daughter of Xhemal)		Female
SPAHIU, FNU (daughter of Xhemal)		Female
SPAHIU, FNU (daughter of Xhemal)		Female
SPAHIU, FNU (wife of Xhemal)		Female
SPAHIU, Xhemal		Male
ZHUNIQI, Abein	37	Male
ZHUNIQI, Agim	51	Male

ZHUNIQI, Bajram	51	Male
ZHUNIQI, Biladh	67	Male
ZHUNIQI, Clirim	40	Male
ZHUNIQI, Dardan	6	Male
ZHUNIQI, Dardane	8	Female
ZHUNIQI, Destan	68	Male
ZHUNIQI, Eshref	55	Male
ZHUNIQI, Fatos	42	Male
ZHUNIQI, FNU	4	Male
ZHUNIQI, FNU (wife of Clirim)		Female
ZHUNIQI, FNU (son of Fatos)	16	Male
ZHUNIQI, Hysni	70	Male
ZHUNIQI, Ibrahim	68	Male
ZHUNIQI, Kasim	33	Male
ZHUNIQI, Medi	55	Male
ZHUNIQI, Muhammet	70	Male
ZHUNIQI, Muharrem	30	Male
ZHUNIQI, Qamil	77	Male
ZHUNIQI, Qemal	59	Male
ZHUNIQI, Reshit	32	Male
ZHUNIQI, Shemsi	52	Male

Schedule C
Persons Known by Name Killed at Mali Krusa / Krushë e Vogel -- Velika Krusa / Krushë e Mahde - 26 March 1999

Name	Approximate Age	Sex
ASLLANI, Adem	68	Male
ASLLANI, Asim	34	Male
ASLLANI, Feim	30	Male

ASLLANI, Muharrem	66	Male
ASLLANI, Nexhat	27	Male
ASLLANI, Nisret	33	Male
ASLLANI, Perparim	26	Male
AVDYLI, Bali	72	Male
AVDYLI, Enver	28	Male
BATUSHA, Ahmet	38	Male
BATUSHA, Amrush	32	Male
BATUSHA, Asllan	46	Male
BATUSHA, Avdi	45	Male
BATUSHA, Bekim	22	Male
BATUSHA, Beqir	68	Male
BATUSHA, Burim	18	Male
BATUSHA, Enver	22	Male
BATUSHA, Feim	23	Male
BATUSHA, FNU (son of Ismail)	19	Male
BATUSHA, FNU (son of Zaim)	20	Male
BATUSHA, Haxhi	28	Male
BATUSHA, Lirim	16	Male
BATUSHA, Milaim	32	Male
BATUSHA, Muharrem	69	Male
BATUSHA, Njazi	39	Male
BATUSHA, Osman	65	Male
BATUSHA, Sefer	19	Male
BATUSHA, Sejdi	68	Male
BATUSHA, Skifer	22	Male
BATUSHA, Sulejman	46	Male
BATUSHA, Zaim	50	Male

HAJDARI, Abaz	40	Male
HAJDARI, Abedin	17	Male
HAJDARI, Halil	42	Male
HAJDARI, Halim	70	Male
HAJDARI, Hysni	20	Male
HAJDARI, Marsel	17	Male
HAJDARI, Nazim	33	Male
HAJDARI, Qamil	46	Male
HAJDARI, Rasim	25	Male
HAJDARI, Sahit	36	Male
HAJDARI, Selajdin	38	Male
HAJDARI, Shani	40	Male
HAJDARI, Vesel	19	Male
HAJDARI, Zenun	28	Male
LIMONI, Avdyl	45	Male
LIMONI, Limon	69	Male
LIMONI, Luan	22	Male
LIMONI, Nehbi	60	Male
RAMADANI, Afrim	28	Male
RAMADANI, Asllan	34	Male
RAMADANI, Bajram	15	Male
RAMADANI, FNU (son of Hysen)	23	Male
RAMADANI, Hysen	62	Male
RAMADANI, Murat	60	Male
RAMADANI, Ramadan	59	Male
RAMADANI, Selajdin	27	Male
RASHKAJ, FNU	16	Male
RASHKAJ, FNU	18	Male

RASHKAJ, Refki	17	Male
SHEHU, Adnan	20	Male
SHEHU, Arben	20	Male
SHEHU, Arif	36	Male
SHEHU, Bekim	22	Male
SHEHU, Burim	19	Male
SHEHU, Destan	68	Male
SHEHU, Din	68	Male
SHEHU, Dritan	18	Male
SHEHU, Fadil	42	Male
SHEHU, Flamur	15	Male
SHEHU, FNU (son of Haziz)	20	Male
SHEHU, FNU (son of Sinan)	18	Male
SHEHU, Haxhi	25	Male
SHEHU, Haziz	42	Male
SHEHU, Ismail	68	Male
SHEHU, Ismet	40	Male
SHEHU, Mehmet	13	Male
SHEHU, Mentor	18	Male
SHEHU, Myftar	44	Male
SHEHU, Nahit	15	Male
SHEHU, Nehat	22	Male
SHEHU, Nexhat	38	Male
SHEHU, Sahit	23	Male
SHEHU, Sali	44	Male
SHEHU, Sami	24	Male
SHEHU, Sefer	44	Male
SHEHU, Shani	34	Male
SHEHU, Shefqet	38	Male

SHEHU, Sinan	50	Male
SHEHU, Veli	28	Male
SHEHU, Vesel	19	Male
SHEHU, Xhafer	38	Male
SHEHU, Xhavit	20	Male
SHEHU, Xhelal	13	Male
ZYLFIU, Afrim	22	Male
ZYLFIU, FNU (son of Halim)	18	Male
ZYLFIU, Halim	60	Male
ZYLFIU, Hamdi	62	Male
ZYLFIU, Hamit	22	Male
ZYLFIU, Hysen	50	Male
ZYLFIU, Njazim	24	Male

Schedule D
Persons Killed at Dakovica / Gjakove - 26 March 1999

Name	Approximate Age	Sex
BEGOLLI, Sylejman	48	Male
BYTYQI, Arif	72	Male
BYTYQI, Urim	38	Male
DERVISHDANA, Emin	31	Male
DERVISHDANA, Fahri	37	Male
DERVISHDANA, Zenel	59	Male

Schedule E
Persons Known by Name Killed at Padalishte / Padalishtë - 26 March 1999

Name	Approximate Age	Sex
IMERAJ, Afrim	2	Male

IMERAJ, Ardiana	13	Female
IMERAJ, Arijeta	11	Female
IMERAJ, Avdyl	67	Male
IMERAJ, Beke	53	Male
IMERAJ, Feride	21	Female
IMERAJ, Fetije	42	Female
IMERAJ, Florije	19	Female
IMERAJ, Hasan	63	Male
IMERAJ, Mihane	72	Female
IMERAJ, Mona	72	Female
IMERAJ, Muhamet	19	Male
IMERAJ, Nexhmedin		Male
IMERAJ, Rab	30	Male
IMERAJ, Rustem	73	Male
IMERAJ, Sabahat	21	Male
IMERAJ, Shehide	70	Female
IMERAJ, Violeta	17	Female
IMERAJ, Xhyfidane	14	Female

Schedule F
Persons Known by Name Killed at Izbica / Izbicë - 28 March 1999

Name	Approximate Age	Sex
ALUSHI, Jetullah	93	Male
AMRUSHI, Asllan (Q)		Male
BAJRA, Asslan	60	Male
BAJRA, Bajram	62	Male
BAJRA, Bajram C.		Male

BAJRA, Bajram S.	68	Male
BAJRA, Brahim	81	Male
BAJRA, Fazli	60	Male
BAJRA, Ilaz	70	Male
BAJRA, Sami		Male
BAJRAKTARI, Bislim		Male
BAJRAKTARI, Hajdar		Male
BEHRAMI, Demush	60	Male
BEHRAMI, Muhamet	76	Male
BEHRAMI, Nuredin	85	Male
DAJAKU, Asllan		Male
DANI, Dibran (A)		Male
DERVISHI, Sali	61	Male
DERVISHI, Bajram		Male
DERVISHI, Ilaz	73	Male
DOCI, Musli		Male
DOQI, Hamdi	42	Male
DRAGA, Ali	65	Male
DRAGA, Cen	68	Male
DRAGA, Hajriz	43	Male
DRAGA, Ismet		Male
DRAGA, Murat	68	Male
DRAGA, Rahim	70	Male
DRAGA, Rrustem	81	Male

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DRAGAJ, Zade		Male
DURAKU, Avdullah	55	Male
DURAKU, Bel (A)	81	Male
DURAKU, Dibran	65	Male
DURAKU, Rexhep	87	Male
EMRA, Muhamet		Male
FETAHU, Lah	67	Male
GASHI, Ibrahim	70	Male
GASHI, Ram		Male
HAJDARI, Halil		Male
HAJRA, Mehmet	65	Male
HALITI, Haliti		Male
HAXHA, Fejz	75	Male
HOTI, Hazir	67	Male
HOTI, Qerim	42	Male
HOTI, Rifat	54	Male
HOTI, Rrustem	70	Male
HOTI, Tahir		Male
HOTI, Muhamet		Male
HOTI, Sadik	66	Male
HOTI, Shefqet (A)		Male
HOTI, Vehbi		Male
ISUFI, Zenel		Male
JETULLAHU, Beqir	27	Male
KAJTAZDI,		Male

Kajtaz Z		
KELMENDI, Bajram		Male
KELMENDI, Jetullah		Male
KOTOORI, Ram		Male
KOTOORI, Brahim		Male
KOTOORI, Hajzer		Male
KRASNIQI, Deli	77	Male
KRASNIQI, Mustaf		Male
KRASINIQI, Rrahim	69	Male
KUQICA, Azem		Male
LOSHI, Sami		Male
LOSHI, Jashar		Male
LOSHI, Selman		Male
MORINA, Halil	38	Male
MURSELI, Sokol (H)		Male
MUSLIU, Beqir	45	Male
MUSLIU, Ilaz	73	Male
MUSLIU, Shaban	87	Male
MUSLIU, Halit	62	Male
MUSLIU, Naim	23	Male
MUSLIU, Mehmet	46	Male
MUSTAFA, Hasan	70	Male
OSMANI, Azem	75	Male

OSMANI, Fatmir		Male
OSMANI, Hetem	70	Male
OSMANI, Muharrem	90	Male
QAKA, Pajazit (D)		Male
QALLAPEKU, Sabit		Male
QELAJ, Ismajl		Male
QELAJ, Rexhep	72	Male
QELAJ, Metush	68	Male
QUPEVA, Hamz	49	Male
RACI, Ramadan	56	Male
RAMAJ, Halit	60	Male
REXHEPI, Muj		Male
SEJDIU, Mustaf		Male
SHABANI, Azem		Male
SHALA, Hysen A	65	Male
SHALA, Idriz		Male
SHALA, Isuf		Male
SHALA, Isuf		Male
SHALA, Muj	62	Male
SHALA, Sali		Male
SHALA, Zymer	63	Male
SHALA, Halim	63	Male
SHALA, Hijraz		Male
SHERIFI, Sadik		Male
SHPATI, Zeqir		Male
SPAHIU, Rizah		Male

SYLA, Ram		Male
TAHIRI, Brahim	83	Male
TEMAJ, Gani		Male
TEMAJ, Hamdi		Male
THAQI, Hamit B.	70	Male
THAQI, Ram H.		Male
THAQI, Ajet (D)		Male
THAQI, Sheremet		Male
UKA, Uke	80	Male
VELIQI, Zenel	75	Male
XHEMAJLI, Idriz	73	Male
XHEMAJLI, Qazim		Male
ZEKA, Jahir		Male
ZEKA, Milazim		Male
Unidentified Male		Male

Burned To Death at Izbica / Izbicë - 28 March 1999

FEJZA, Zyre	61	Female
OSMANI, Zoje	70	Female

Schedule G
Persons Killed at Dakovica / Gjakovë - 2 April 1999

Name	Approximate Age	Sex
CAKA, Dalina	14	Female
CAKA, Delvina	6	Female
CAKA, Diona	2	Female

CAKA, Valbona	34	Female
GASHI, Hysen	50	
HAXHIAVDIJA, Doruntina	8	Female
HAXHIAVDIJA, Egzon	5	
HAXHIAVDIJA, Rina	4	Female
HAXHIAVDIJA, Valbona	38	Female
HOXHA, Flaka	15	Female
HOXHA, Shahindere	55	Female
NUÇ I, Manushe	50	Female
NUÇ I, Shirine	70	Female
VEJSA, Arlind	5	Male
VEJSA, Dorina	10	Female
VEJSA, Fetije	60	Female
VEJSA, Marigona	8	Female
VEJSA, Rita	2	Female
VEJSA, Sihana	8	Female
VEJSA, Tringa	30	Female

Schedule H
Persons Known by Name Killed at Vucitrn / Vushtrii - 2 May 1999

Name	Approximate Age	Sex
ABAZI, Musa	55	Male
ADEMI, H. Rrahman	26	Male
ALIU, Z. Ramadan	38	Male
ALIU, B. Remzi	55	Male
BEKTESHI, M. Afrim	23	Male
BEQIRI, Nezir	54	Male

BUNJAKU, M. Hysni	21	Male
FEJZULLAHU, Qamile	84	Female
FERATI, Xh. Istref	27	Male
FERATI, Milazim	20	Male
FERATI, Rifat	36	Male
FERIZI, M. Bislim	63	Male
FERIZI, B. Mihrije	63	Male
FERIZI, B. Ruzhdi	35	Male
GERGURI, B. Agim	38	Male
GERGURI, Sh. Enver	50	Male
GERGURI, S. Musli	45	Male
GERXHALIU, Fahri		Male
GERXHALIU, A. Haki	39	Male
GERXHALIU, H. Kadri	42	Male
GERXHALIU, H. Shaban	49	Male
GERXHALIU, I. Skender	43	Male
GERXHALIU, H. Zejnullah	42	Male
GERGURI, A Shukri	44	Male
GERGURI, M. Skender	26	Male
GERGURI, Sh. Naman	39	Male
GERGURI, N. Ramush	63	Male
GERXHALIU, B. Avdyl	43	Male
GERXHALIU, F. Avdyl	47	Male

GERXHALIU, B. Bajram	40	Male
GERXHALIU, A. Fatmir		Male
GERXHALIU, U. Fatmir	35	Male
GERXHALIU, I. Imer	42	Male
GERXHALIU, Sh. Nuhi	25	Male
GERXHALIU, H. Sejdi	39	Male
GERXHALIU, N. Xhevdet	18	Male
GJATA, Meriton	23	Male
GJATA, Sevdije	48	Female
GJATA, Tefik	44	Male
HAXHAJ, Bahri	28	Male
HAZIRI, Nafije	27	Female
HYSENI, R. Agim	38	Male
HYSENI, B. Ali		Male
HYSENI, K. Beqir	40	Male
HYSENI, Kada	86	Female
HYSENI, Q. Hysen	26	Male
HYSENI, Q. Hysen	25	Male
HYSENI, D. Qazim	24	Male
HYSENI, Ramadan	18	Male
HYSENI, Rrahman	61	Male
HYSENI, Q. Xhevdet	24	Male
IBISHI, H. Selman	63	Male
IBISHI, I. Sylejman		Male
IBISHI, Rahim	72	Male
IBISHI, Tafil	55	Male

KURTI, Bajram	43	Male
KONJUHI, B. Afrim	29	Male
KONJUHI, Z. Rexhep	40	Male
KRASNIQI, B. Shaban64Male	64	Male
KRASNIQI, R. Syle	70	Male
LUSHAKU, A. Ibadete	26	Female
LUSHAKU, H. Shehide	89	Female
MAXHUNI, Z. Driton	32	Male
MAXHUNI, F. Sabri	34	Male
MERNICA, Sh. Ali	49	Male
MORINA, Sh. Remzi	35	Male
MULAKU, A. Ekrem	32	Male
MULAKU, L. Xhavit	30	Male
MULI, I. Gani	21	Male
MULI, N. Asllan	49	Male
MULI, N. Hazir	52	Male
MULIQI, I.. Bajram		Male
MUSA, F. Islam	56	Male
MUSA, Kadrush	37	Male
MUSA, H. Nexhmi	54	Male
MUSLIU, M. Mehdi	24	Male
MUSLIU, Ragip		Male
MUZAQI, I. Besim	32	Male
MUZAQI, H. Salih	37	Male
PARDUZI, Shehide	84	Female
PECI, MuratMale		Male

POPOVA, A. Ismajl	29	Male
PRRONAJ, Sh. Enver	32	Male
PRRONAJ, Sh. Zymer	35	Male
RASHICA, I. Ali	45	Male
RASHICA, I. Deli	48	Male
RASHICA, S. Eshref	38	Male
REXHEPI, I. Ahmet		Male
REXHEPI, Ilaz		Male
REXHEPI, Ismet	38	Male
SADIKU, H. Agim	23	Male
SHALA, R. Hamdi	26	Male
SFARQA, Shehide		Female
SFARQA, Sh. Sherif	43	Male
SFARQA, S. Skender	39	Male
TAHIRI, Fetah	39	Male
TERNAVA, Fehmi	39	Male
TIKU, A. Sahit	68	Male
VERSHEVCI, Azemine	75	Male
VIDISHIQI, Faik	35	Male
XHAFA, Driton		Male
XHAFA, Nazif	55	Male
XHAFA, S. Veli	45	Male
ZHEGROVA, R. Naser	34	Male

Schedule I
Persons Known by Name Killed at Meja / Mejë - 27 April 1999

Name	Approximate Age	Sex

719

DEDA, Linton	16	Male
DEDA, Mark	47	Male
DEDA, Pashk	42	Male
DUZHMANI, Kole		Male
GAXHERRI, Brahim	38	Male
KABASHI, Andrush	18	Male
KABASHI, Arben	14	Male
KABASHI, Nikoll	32	Male
MALAJ, Blerim	15	Male
MALAJ, Vat	37	Male
MARKAJ, Bekim	23	Male
MARKAJ, Mark	65	Male
MARKAJ, Pashuk	38	Male
MARKAJ, Petrit	27	Male
MARKAJ, Prend	60	Male
NDREJAJ, Pashk	44	Male
PJETRI, Skender	27	Male
SELMANI, Sherif	66	Male

Schedule J
Persons Known by Name Killed at Dubrava / Dubravë Prison – 22 to 23 May 1999

720

Name	Sex
ADEMAJ, Hysen	Male
AGUSHI, Zahir	Male
AZEMI, Xhevet	Male
BRAHMI, Sahit	Male
BISTRICA, Xhevdid	Male
DOMONAGA, Ilir	Male
ELSHANI, Agim	Male
GASHI, Avni	Male
GJINI, Gjon	Male
GUTA, Napolon	Male
GUTA Muhedin	Male
HASAN RAMAJ, Zek	Male
(KCIRAJ), Zef	Male
KRASNIQI, Januz	Male
LEKAJ, Gani	Male
MEMIJA, Ramiz	Male
MULAJ, Mete	Male
NIKOLL BIBAJ, Valentin	Male
PAQARIZI, Besim	Male
PROJAGJI, Lush	Male
QAMPUZ, Bashkim	Male
ZOSJA, Shaban	Male
RAMUSHI Zahir	Male
SPAHIA, Fejz	Male
SYLAJ, Dervish	Male
TAFILAJ, Muse	Male

Schedule K
Persons Known by Name Killed at Suva Reka / Suharekë - 26 March 1999

Name	Approximate Age	Sex
BERISHA, Afrim	24	Male
BERISHA, Altin	11	Male
BERISHA, Arta	18	Female
BERISHA, Avdi	43	Male
BERISHA, Besim	26	Male
BERISHA, Bujar	40	Male
BERISHA, Dafina	15	Female
BERISHA, Dorentina	4	Female
BERISHA, Drilon	13	Male
BERISHA, Edon	12	Male
BERISHA, Eron	1	Male
BERISHA, Fatime	37	Female
BERISHA, Fatime	48	Female
BERISHA, Fatmire	22	Female
BERISHA, Faton	27	Male
BERISHA, Flora	38	Female
BERISHA, Hajbin	37	Male
BERISHA,	54	Male

Hamdi		
BERISHA, Hanumusha	9	Female
BERISHA, Hanumusha	81	Female
BERISHA, Hava	63	Female
BERISHA, Herolinda	13	Female
BERISHA, Ismet	2	Male
BERISHA, Kushtrin	11	Male
BERISHA, Lirije	24	Female
BERISHA, Majlinda	15	Female
BERISHA, Merita	10	Female
BERISHA, Mevlude	26	Female
BERISHA, Mihrije	26	Female
BERISHA, Mirat	7	Male
BERISHA, Musli	63	Male
BERISHA, Nefije	54	Female
BERISHA, Nexhat	43	Male
BERISHA, Nexhmedin	37	Male
BERISHA, Redon	1	Male
BERISHA, Sait	83	Male

723

BERISHA, Sebahate	25	Female
BERISHA, Sedat	45	Male
BERISHA, Sherine	17	Female
BERISHA, Sofia	58	Female
BERISHA, Vesel	61	Male
BERISHA, Vlorjan	17	Male
BERISHA, Zana	13	Female
BERISHA, Zelihe	50	Female

Schedule L
Persons Known by Name Killed at Kacanik - March to May 1999

Kotlina / Kotlinë - 24 March 1999

KUQI, Idriz	55	Male
KUQI, Ismail	21	Male
KUQI, Nexhadi	31	Male
KUQI, Xhemjal	22	Male
LOKU, Agim	31	Male
LOKU, Atan	28	Male
LOKU, Garip	47	Male
LOKU, Ibush	20	Male
LUKU, Ismajl	28	Male
LOKU, Izijah	19	Male
LOKU, Milaim	34	Male
LOKU, Naser R.	17	Male
LOKU, Sabit	20	Male

LOKU, Zymer	67	Male
REXHA, FNU	16	Male
VLASHI, SaliM.	42	Male
VLASHI, Vesel	55	Male
Slatina / Sllatinë 13 April 1999		
CAKA, Ilir Osman	15	Male
CAKA, Jakup Mustaf	37	Male
CAKA, Mahmut Hasan	45	Male
DEDA, Qemajl	47	Male
ELEZI, Nazmi	29	Male
ELEZI, Vesel	41	Male
LAMA, Brahim	52	Male
LAMA, Hebib	18	Male
LAMA, Ibrahim	52	Male
SALIHU, Izahir Ilaz	22	Male
SALIHU, Kemajl Ilaz	40	Male
SALIHU, Sabri Ilaz	38	Male
SHIQERIBER, Haliali	46	Male
Stagovo / Stagovë - 21 May 1999		
BELA, Baki	72	Male
DASHI, Hamdi	53	Male
DASHI, Ibrahim Avdi	31	Male
DASHI, Ramadan	58	Male
ELEZI, Bahrije R.	56	Female
GUDAQI, Fitim	7	Male
GUDAQI, Hanife	77	Female
GURI, Sevdije	54	Female
JAHA, Elife	83	Female
JAHA, Ramush	75	Male

MANI, Fahri	56	Male
RRUSHI, Ibush	59	Male
Dubrava / Lisnaje 25 May 1999		
QORRI, Arton Hajrush	17	Male
QORRI, Fatije Hajrush	7	Female
QORRI, Hajrush Mehmet		Male
QORRI, Rexhep Zejnulla		Male
TUSHA, Ali	17	Male
TUSHA, Xhemajl	39	Male
VISHI, Rrahim Beqir		Male
VISHI, Milaim Misim		Male

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 February 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON THE DEFENCE PRELIMINARY MOTION ON THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. Milorad Krnojelac ("the accused") is charged on eighteen counts arising out of events at the Foca Kazneno-Popravni Dom ("KP Dom" or "KPD FOCA") – said to be one of the largest prisons in the former Yugoslavia – of which he is alleged to have been the commander and in a position of superior authority. The charges against him allege:

> 1.1 grave breaches of the Geneva Conventions of 1949, consisting of torture (Count 3), wilfully causing serious injury to body or health (Count 6), wilful killing (Count 9), unlawful

confinement of civilians (Count 12), wilfully causing great suffering (Count 14) and inhuman treatment (Count 17);[1]

1.2 violations of the laws and customs of war, consisting of torture (Count 4), cruel treatment (Counts 7 and 15), murder (Count 10) and slavery (Count 18);[2] and

1.3 crimes against humanity, consisting of persecution on political, racial and/or religious grounds (Count 1), torture (Count 2), inhumane acts (Counts 5 and 13), murder (Count 8), imprisonment (Count 11) and enslavement (Count 16).[3]

2. On 8 January 1999, the accused filed a Defence Preliminary Motion on the Form of the Indictment ("Motion"). On 22 January, the prosecution filed its Response to the Motion ("Response"). Leave was granted to the accused to file a Reply to that Response ("Reply"), and such Reply was filed on 10 February. The prosecution was given leave to file a further Response to two new matters raised in the Reply ("Further Response"), and this was done on 17 February.

II Nature of Accused's Responsibility

3. As to all counts, the accused requires the prosecution to identify, in relation to each count, whether the charge laid in that count is based on the accused's individual responsibility (Art 7(1) of the Statute) or on his responsibility as a superior (Art 7(3) of the Statute).[4] However, paras 4.9 and 4.10 of the indictment assert that the accused has both individual responsibility and responsibility as a superior, as well as (in the alternative) responsibility as a superior only. These assertions are

clearly intended to be read distributively as applying to all the counts in the indictment. This indictment may not be the most stylish of pleadings, but this particular complaint as to form is rejected.

4. The next complaint is that, by pleading in this way, the prosecution does not know whether the accused is being charged "cumulatively or alternatively" which, the accused says, makes the indictment imprecise.[5] As paras 4.9 and 4.10 are to be read distributively, there is no such imprecision, and this complaint is also rejected.

III Different charges based upon the same facts

5. It is also submitted that, because these different responsibilities are based upon the same factual grounds, the indictment is nevertheless defective because "[r]esponsibility may not be accumulated".[6] Such a pleading is said to be contrary to the laws of the former Yugoslavia, but the Statute and the Rules of Procedure and Evidence of the International Tribunal ("Rules") are not to be read down so as to comply with those laws. This pleading issue has already been determined by the International Tribunal in favour of the prosecution: previous complaints that there has been an impermissible accumulation where the prosecution has charged such different offences based upon the same facts – as it has here – have been consistently dismissed by the Trial Chambers, upon the basis that the significance of that fact is relevant only to the question of penalty.[7] More importantly, the Appeals Chamber has similarly dismissed such a complaint.[8]

6. Two specific arguments are nevertheless put by the accused. The first is that the same act or omission cannot support both a charge of individual responsibility and a charge of responsibility as a superior. Whether or not that is so (and it is unnecessary in this case to resolve that issue), that is not the way in which the indictment here has been pleaded. What the prosecution has done is to assert in fairly general terms that the accused is guilty of a particular offence without identifying any specific acts or omissions of the accused which would demonstrate whether his responsibility is alleged to be individual (either by way of personal participation or as aiding and abetting those who did so participate) or as a superior. For example, par 5.2 says (in part):

> **MILORAD KRNOJELAC** persecuted the Muslim and other non-Serb males by subjecting them to prolonged and routine imprisonment and confinement, repeated torture and beatings, countless killings, prolonged and frequent forced labour, and inhumane conditions within the KP Dom detention facility.

Such an allegation is consistent with either type of responsibility, and the nature of the alleged responsibilities of the accused are spelt out in paras 4.9 and 4.10, in the way already stated.

7. This somewhat clumsy style of pleading appears to have been adopted because this accused was indicted with a number of others whose names remain under seal. There appears to have been an attempt to state the charge in general terms against all of the accused and then to assert that different accused have different responsibilities for the matters so charged. A pleading is not defective because its style is clumsy provided that, when taken as a whole, the indictment makes clear to each accused (a) the nature of the responsibility (or responsibilities) alleged against him and (b) the material facts – but not the evidence – by which his particular responsibility (or responsibilities) will be established. In the present case, the first of those matters has been made clear, as already stated. Something will be said later about the failure of the prosecution to give sufficient (and, in many cases, any) particulars of the material facts by which his different responsibilities will be established. At this stage, it is sufficient to say that there is no basis for this first specific argument put by the accused.

8. The second specific argument put is that crimes against humanity (Art 5 of the Statute), grave breaches of the Geneva Conventions (Art 2 of the Statute) and violations of the laws and customs or war (Art 3 of the Statute) are mutually exclusive, and that the prosecution is not permitted to rely upon them all in relation to the same facts.[9] But each Article is designed to protect different values, and each requires proof of a particular element which is not required by the others.[10] It therefore does not follow that the same conduct cannot offend more than one of those values and thus fall within more than one of those Articles.

9. This submission by the accused may be the product of a confusion with the principle of double jeopardy which, in very general terms, states that a person should not be prosecuted for an offence where he has already been prosecuted and either convicted or acquitted of a different offence arising out the same or substantially the same facts. This principle has found expression in the Constitution of the United States of America:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb [...].[11]

The International Covenant on Civil and Political Rights also reads:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[12]

The former has been interpreted as saying, and the latter states expressly, that it is concerned with *successive* prosecutions upon different charges arising out of the same (or substantially the same) facts, and not with the prosecution of such charges in the *same* trial.[13]

10. The prosecution must be allowed to frame charges within the one indictment on the basis that the tribunal of fact may not accept a particular element of one charge which does not have to be established for the other charges, and in any event in order to reflect the totality of the accused's criminal conduct, so that the punishment imposed will do the same. Of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges. But there is no breach of the double jeopardy principle by the inclusion in the one indictment of different charges arising out of the same or substantially the same facts.

IV Particularity in pleading – individual responsibility

11. However, the only specific facts alleged in the indictment in the present case relevant to the accused's *individual* responsibility in relation to any of the charges are to be found in para 3.1 of the indictment, where it is alleged in general terms (and without any particularity) that the accused was present when detainees arrived and that he appeared during beatings. Even so, para 3.1 is directed only to showing that the accused had responsibility as a superior, not that he personally participated in any beatings. It may be that – differently expressed, and in a distinct, separate and more detailed allegation – these facts would go at least some way to support a finding that the accused had aided and abetted in the beatings and that he was therefore individually responsible for those beatings,[14] but para 3.1 does not provide particulars of the individual responsibility of the accused.

12. The accused therefore complains, with some justification, that he has not been informed of the facts upon which the prosecution relies to establish his individual responsibility.[15] The extent of the prosecution's obligation to give particulars in an indictment is to ensure that the accused has "a concise statement of the facts" upon which reliance is placed to establish the offences charged,[16] but only to the extent that such statement enables the accused to be informed of the "nature and cause of the charge against him"[17] and in "adequate time [...] for the preparation of his defence".[18] An indictment must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed.[19] However, these obligations in relation to what must be pleaded in the indictment are not to be seen as a substitute for the prosecution's obligation to give pre-trial discovery (which is provided by Rule 66 of the Rules) or the names of witnesses (which is provided by Rule 67 of the Rules).[20] There is thus a clear distinction drawn between the material facts upon which the prosecution relies (which must be pleaded) and the evidence by which those material facts will be proved (which must be provided by way of pre-trial discovery).

13. But, even recognising that distinction, the indictment as presently drafted gives the accused no idea at all of the nature and cause of the charges against him so far as they are based upon his individual responsibility – either by way of personal participation or as aiding and abetting those who did so participate. It is not sufficient that an accused is made aware of the case to be established upon only one of the alternative bases pleaded.[21] What must clearly be identified by the prosecution so far as the individual responsibility of the accused in the present case is concerned are the particular acts of the accused himself or the particular course of conduct on his part which are alleged to constitute that responsibility.[22]

14. The prosecution has already given pre-trial discovery of all the supporting material which accompanied the indictment when confirmation was sought.[23] It has not yet provided the accused with translated witness statements.[24] It submits that the supporting material "should" supply all necessary details as to the nature of the case to be made against the accused sufficient to enable him to prepare his defence, so that there is no need to amend the indictment.[25] Reliance is placed upon the decision of the ICTR in *Prosecutor v Nyiramashuko*[26] as supporting that proposition. What the ICTR said was:

> "Whilst it is essential to read the indictment together with the supporting material, the indictment *on its own* must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance."[27]

15. It is true that, in a limited class of case, less emphasis may be placed upon the need for precision in the indictment where complete pre-trial discovery has been given. For example, if all of the witness statements identify uniformly and with precision the circumstances in which the offence charged is alleged to have occurred, it would be a pointless technicality to insist upon the indictment being amended to reflect that information. That is, however, a rare situation. It has not been shown to be the case here. Indeed, the lack of particularity in the indictment strongly suggests that the prosecution does not have statements which fall within that limited class of case. It is not clear from the judgment of the ICTR in *Prosecutor v Nyiramashuko* whether that case fell within such a limited class, but this Trial Chamber does not accept any interpretation of the ICTR decision which suggests that the supporting material given during the discovery process can be used by the prosecution to fill any gaps in the material facts pleaded in the indictment, except in the limited class of case to which reference has already been made.

16. Where the discovered material does not cure the imprecision in the indictment, the dangers of an imprecise indictment remain – such as in relation to subsequent pleas of *autrefois acquit* and *autrefois convict*.[28] The prosecution has not established that the discovered material does cure these imprecisions.

17. The prosecution is therefore required to amend the indictment so as to identify, *in relation to each count or group of counts*, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged. The complaints by the accused in relation to the particulars of his responsibility as a superior will be dealt with separately.

V Particularity in pleading – responsibility as a superior

18. In relation to the allegation that the accused was in a position of superior authority,[29] the accused requires the prosecution to identify with precision the "grounds" for the allegations made that, "at the critical time", he was "the head of the KPD FOCA and in a superior position to everybody in the detention camp" and "the person responsible for the functioning of the KPD FOCA as a detention camp".[30] The indictment identifies the relevant time as being from April 1992 until at least August 1993. The statements quoted by the accused are to some extent inaccurately transcribed, and in one aspect significantly so. They are also taken out of context. Paragraph 3.1 in its entirety is in the following terms:

> SUPERIOR AUTHORITY
>
> 3.1 From April 1992 until at least August 1993, MILORAD KRNOJELAC was the commander of the KP Dom and was in a position of superior authority to everyone in the camp. As commander of the KP Dom, MILORAD KRNOJELAC was the person responsible for running the Foca KP Dom as a detention camp. MILORAD KRNOJELAC exercised powers and duties consistent with his superior position. He ordered and supervised the prison staff on a daily basis. He communicated with military and political authorities from outside the prison. MILORAD KRNOJELAC was present when detainees arrived, appeared during beatings, and had personal contact with some detainees.

19. The accused's argument fails once the actual wording of the paragraph itself is considered. To describe the accused as the "commander" of a camp – the word "commander" is significantly omitted in the statements quoted by the accused – is sufficient "ground" for asserting that he was superior to everyone else and that he was responsible for the functioning of the camp. Even if it were not, the allegations made in the remainder of the paragraph provide sufficient "ground" for asserting that the accused was in a position of superior authority as part of the basis for making him criminally responsible in accordance with Art 7(3). The manner in which these material facts are to be proved is a matter of evidence and thus for pre-trial discovery, not pleading.

20. The accused's second argument is that particular precision is required in relation to these assertions because, he says, at the relevant time the Foca KP Dom in fact consisted of two institutions – one which was under the control of the army and used for detaining war prisoners, and the other a civil correction centre. It is said that the accused will prove that he was the "head" of the second such institution, but that he had "no competence" in relation to the first. This argument also fails. An objection to the form of an indictment is not an appropriate proceeding for contesting the accuracy of the facts pleaded.[31] The prosecution's obligation is to establish the fact alleged in the indictment, that the accused was "the person responsible for running the Foca KP Dom as a detention camp". Its obligation to eliminate any reasonable doubt as to that fact arises only when

the material giving rise to such a doubt appears in the evidence; it does not have to eliminate some possibility merely suggested during the course of argument,[32] still less does it have to plead the evidence by which it will do so.

21. The accused's complaint is rejected.

VI Complaints as to imprecision in the indictment

22. The accused complains of the imprecision of a number of allegations made in the indictment.[33] There is some merit in that complaint, although the details of that complaint provided in his Motion demonstrates at times a misunderstanding of the distinction between the material facts which must be pleaded and the evidence which must be disclosed by way of pre-trial discovery. It is necessary to deal separately with each of these complaints of imprecision.

23. Under the heading "Background", the indictment asserts that "[m]ost, if not all" of the detainees in the Foca KP Dom were "civilians, who had not been charged with any crime".[34] The purpose of this allegation is to demonstrate that such detainees were persons protected by the Fourth Geneva Convention of 1949, an allegation made expressly in para 4.3, and thus relevant to the International Tribunal's jurisdiction to try the charges made under Art 2 of its Statute.

24. The accused complains that he has not been informed of the identity of the detainees who were *not* civilians, which identity, it is said, is an important matter in relation to his responsibility under Art 2.[35] The prosecution, however, does not have to establish who were *not* civilians; it has to establish that the detainees who are alleged to be the victims of the offences charged under Art 2 *were* civilians. The allegations under the heading "Background" are in any event intended only to place in their context the material facts which are alleged in the indictment when dealing with each count or group of counts. It is in relation to those material facts, rather than the background facts of a general nature only, that the accused is entitled to proper particularity.[36]

25. This complaint is rejected.

26. The accused also complains of what is said to be an inconsistency between this assertion that "[m]ost if not all" of the detainees were "civilians, who had not been charged with any crime" (to which reference has already been made) and the assertion (made later in the indictment)[37] that torture had been applied to these detainees in order to obtain a confession from them or to punish them for acts which they had committed.[38] But there is no suggestion in the later assertion that the persons who had been tortured were being detained as a result of some legal process following formal charges laid against them. Indeed, the assertion assumes the absence of any proper legal process.

27. This complaint is also rejected.

28. The accused complains[39] of what is said to be an inconsistency between the allegation that he was the commander of the Foca KP Dom "from April 1992 until at least August 1993" (made in paras 2.1 and 3.1 of the indictment) and that made in para 4.5 of the indictment:

> All acts and omissions alleged in this indictment took place between April 1992 and October 1994, unless otherwise indicated.

If the reference to "at least" August 1993 is intended to permit the prosecution to prove that the accused was such commander at any time after that date, the accused is left without any real assistance as to the nature of the prosecution case upon an important material fact. The prosecution is directed to amend paras 2.1 and 3.1 of the indictment by deleting the words "at least" in each paragraph.

29. Upon the assumption that the words "at least" are deleted, there can be an inconsistency between these allegations only if it is assumed that all the offences charged took place at a time when the accused was the commander of the camp. As a matter of *form*, that assumption cannot be made, as the accused is charged with individual responsibility as well as responsibility as a superior. Nevertheless, para 4.9 of the indictment expressly limits the individual responsibility of the accused to the same period ending August 1993, so that it is clear as a matter of *substance* that, if the accused is being charged in the alternative upon both bases in relation to each count,[40] there is no room for an interpretation of the indictment as alleging *any* responsibility on the part of the accused in relation to events which took place after he ceased to be the commander of the Foca KP Dom.

30. The prosecution says that the references in the indictment to the longer period are intended to reflect the responsibilities of others indicted with the accused but whose names remain under seal. The current redacted form of the indictment is thus unintentionally misleading, but the prosecution has now conceded that, so far as *this* accused is concerned, para 4.5 of the indictment should be treated as having been limited to the period ending August 1993. There are appears to be some similar inconsistencies in the indictment, at paras 5.16, 5.30 and 5.36, and the prosecution is directed to make similar concessions in relation to the periods upon which it relies so far as this accused is concerned.

31. A new complaint by the accused, made for the first time in the Reply, is that the allegation that he was the commander of the Foca KP Dom "from April 1992 until [...] August 1993" (made in paras 2.1 and 3.1 of the indictment, and to which reference was made when dealing with the last complaint) is in any event imprecise because the specific date in April upon which he became such commander is not stated.[41] He draws attention to a particular event which is stated in para 5.6 of the indictment to have occurred on 17 April, and he claims not to know whether he is alleged to be responsible for that event as a superior.

32. That complaint is answered once more by paras 4.9 and 4.10 being read distributively as applying to all counts in the indictment. The prosecution does not have to establish the date upon which the accused became commander of the Foca KP Dom. The only fair interpretation of the allegation in question is that the accused is alleged to have been such commander during the period from the beginning of April 1992 until the end of August 1993. It will be sufficient for the prosecution to establish that he was such commander at the time of the various incidents which are alleged to have taken place during that period and of any other incidents upon which the prosecution may rely to establish his responsibility as a superior. In any event, the prosecution now says[42] that the earliest date upon which its best available evidence shows the accused to be the "head" of the Foca KP Dom is 18 April 1992, so that – unless evidence not currently available to it shows otherwise – it will not attribute to the accused any criminal conduct earlier than that date (including the event described in para 5.6 of the indictment).

33. The accused complains[43] of the inclusion of the words "aiding and abetting" in para 4.9 of the redacted indictment, which falls under the heading "General Allegations" and which alleges:

> 4.9 **MILORAD KRNOJELAC,** from April 1992 until August 1993, and others are individually responsible for the crimes charged against them in this indictment, pursuant to Article 7 (1) of the Statute of the Tribunal. Individual criminal responsibility includes committing, planning, initiating, ordering or aiding and abetting in the planning, preparation or execution of any acts or omissions set forth below.

The accused says that the words "aiding and abetting" do not provide sufficient clarity as to the case which he has to meet.

34. The concept of individual responsibility by way of aiding and abetting in the commission of an offence by others was extensively discussed recently in *Prosecutor v Furundzija*,[44] and the concept itself cannot be said to be unclear. The Trial Chamber has already determined in this present decision that the accused is entitled to particulars of the material facts (but not the evidence) upon which the prosecution relies to establish the individual responsibility of the accused for each offence or group of offences charged.[45] Such particulars must necessarily demonstrate the basis upon which it is alleged that the accused aided and abetted those who personally participated in each of the offences charged.

35. This complaint is rejected.

36. The accused complains[46] that the indictment fails in many instances to identify even the approximate time when the various offences are alleged to have occurred.[47] The prosecution submits that, because the charges concern events which took place over a specified period in the conduct of a detention center, it is not obliged to provide information as to the identity of the victim, the specific area where and the approximate date when the events are alleged to have taken place or (where the accused is charged with responsibility as a superior or as aiding and abetting rather than as having personally participated in those events) the identity of the persons who did personally participate in those events.

37. On the face of it, the stand taken by the prosecution is directly contrary to its obligations as to pleading an indictment as imposed by the Statute and the Rules, to which reference has already been made,[48] as interpreted by the Trial Chamber in *Prosecutor v Blaskic*.[49] The prosecution nevertheless relies upon the decision of the Trial Chamber in *Prosecutor v Aleksovski*[50] as justifying its stand.

38. According to that decision, the indictment charged Aleksovski in relation to certain events which occurred in the Kaonik prison while he was responsible for it. The indictment identified a period of five months during which it was alleged that he was so responsible. It is apparent from the decision that the indictment did not identify either the place or the approximate date of the events which are alleged to have occurred. The Trial Chamber stated:[51]

> The time period – the first five months of 1993 – is sufficiently circumscribed and permits the accused to organise his defence with full knowledge of what he was doing. It follows that, because it specifies the overall period during which the crimes were allegedly committed,

the indictment does not violate the rules governing the presentation of the charges.

Insofar as that decision supports the submission of the prosecution, that it is not obliged to provide the information referred to in the paragraph before last, there are two observations to be made about it. The first is that it is no answer to a request for particulars that the accused knows the facts for himself; the issue in relation to particulars is not whether the accused knows the true facts but, rather, whether he knows what facts are to be alleged against him.[52] It cannot be assumed that the two are the same. The second observation is that what the accused needs to know is not only what is to be alleged to have been his own conduct giving rise to his responsibility as a superior but also what is to be alleged to have been the conduct of those persons for which he is alleged to be responsible as such a superior. Only in that way can the accused know the "nature and cause of the charge against him".[53] With great respect to the Trial Chamber in *Aleksovski*, this Trial Chamber is unable to agree with the decision insofar as it supports the prosecution's submission.

39. In any event, the accused in the present case is also charged upon the alternative basis of his own individual participation in these events. Particulars must be supplied which enable the accused to know the nature of the case which he must meet upon that basis.

40. It may be, of course, that the prosecution is simply unable to be more specific because the witness statement or statements in its possession do not provide the information in order for it to do so. It cannot be obliged to perform the impossible, but in some cases there will then arise the question as to whether it is fair to the accused to permit such an imprecise charge to proceed. The inability of the prosecution to provide proper particulars may itself demonstrate sufficient prejudice to an accused person as to make a trial upon the relevant charge necessarily unfair.[54] The fact that the witnesses are unable to provide the needed information will inevitably reduce the value of their evidence. The absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.

41. In some jurisdictions, a procedure has been adopted of permitting an oral examination and cross-examination of a witness prior to the trial by counsel in the case (who are less restricted in their scope for questioning than police officers or other investigators), in an endeavour to elicit from the witness sufficient information to cure the prejudice which would otherwise exist.[55] But it is necessary first to determine whether the prosecution is able to give better particulars.

42. The complaint by the accused is at this stage upheld, and the prosecution is required to identify in the indictment the approximate time when each offence is alleged to have taken place. Obviously, there will be cases where the identification cannot be of a specific date, but a reasonable range should be specified. The period of April 1992 to August 1993 would *not* be a reasonable period.

43. The accused has also suggested that greater precision than usual will be required in specifying these times in relation to the offences based upon Art 2 of the Statute because the period from April 1992 to August 1993 straddles the period of May 1992 when – so it was found by the Trial Chamber in *Prosecutor v Tadic* – the conflict ceased to be an international

one in the relevant area.[56] However, that finding was one of fact only, made upon the evidence presented in that trial and in proceedings between different parties. It cannot amount to a *res judicata* binding the Trial Chamber in this trial.[57] In the Celebici case, for example, it was held that the conflict in that area continued to be international in character for the rest of 1992.[58] It is clear that it is for the Trial Chamber in each individual trial to determine this issue for itself upon the evidence given in that trial. That is not an issue of fact which can be resolved at this stage.

44. When identifying the facts by which Counts 2 to 7 are to be proved,[59] the indictment, under the general heading "Beatings in the Prison Yard", has alleged as facts:

> 5.4 On their arrival in the prison and/or during their confinement, many detainees of the KP Dom were beaten on numerous occasions by the prison guards or by soldiers in the presence of regular prison personnel.
>
> 5.5 On several occasions between April and December 1992, soldiers approached and beat detainees in the prison yard, among them FWS-137, while guards watched without interfering.

The accused asserts that it is unclear whether the case against him is to be that it was the guards or the soldiers who were the perpetrators, and that, if the former, the reference to regular prison personnel is unclear.[60]

45. It is reasonably clear that the prosecution here is relying upon a number of beatings at different times – some by the prison guards, and some by soldiers in the presence of regular prison personnel. The significance of the presence of the regular prison personnel and their inaction at the time is that the beatings by the soldiers were being at least condoned, and perhaps also encouraged, by the regular prison personnel. This in turn suggests that the infliction of such beatings, either by the prison guards or by the soldiers, was a course of conduct approved by the accused as the person in command of the prison.

46. But, if these two paragraphs were intended to stand alone, the prosecution has failed to give the accused any idea at all of the basis of its case. The accused is entitled to know where and approximately when these beatings occurred and the identity of the prison guards, the soldiers and the regular prison personnel. The accused has very properly conceded that, if the prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their "category" (or their official position) as a group.[61]

47. Paragraphs 5.6 to 5.9 of the indictment go on to allege facts with a reasonable degree of particularity, and it may be that the prosecution intended paras 5.4 and 5.5 to be merely descriptive in general terms of what follows in those paragraphs. If that is so, this should be made clear. Better still, paras 5.4 and 5.5 should be either deleted or incorporated in the later paragraphs.

48. The complaint as to imprecision is upheld, and the prosecution is directed to amend paras 5.4 and 5.5 of the indictment accordingly.

49. Paragraph 5.15 of the indictment, under a general heading of "Torture and Beatings as Punishment", alleges as facts to be proved:

> 5.15 In the summer of 1992, the detainees AM, FM, HT and S, who passed messages to one another, were beaten by guards as a punishment.

The accused complains, again with some justification, that the prosecution should plead with more particularity than this.[62] The period specified is far too wide, and there is no specification as to whether this happened on one occasion or on different occasions, where and approximately when it happened or the identity of the guards concerned (at least by reference to their category or position as a group).

50. The prosecution is therefore ordered to amend the indictment in order to provide such further and better particulars of the allegation in para 5.15.

51. Paragraph 5.16 of the indictment refers in general terms (and without any particularity) to detainees being subjected to collective punishment for the misdeeds of individual detainees. It then identifies one such incident which is alleged to have occurred in June 1994. If the general allegation is intended to stand alone, it gives the accused no idea at all as to the nature of the case against him.[63] If it is intended to be merely be descriptive in general terms of what follows, then the date is outside the period during which the accused is alleged to have been the commander of the

Foca KP Dom and outside the period identified as that during which he is alleged to have an individual responsibility for the offences alleged. One or the other has to be amended so far as this accused is concerned. The prosecution is directed to amend par 5.16 of the indictment.

52. Paragraph 5.17 of the indictment reads:

> 5.17 Policemen from the local or the military police, in concert with the prison authorities, interrogated the detainees after their arrival. [...] During or after the interrogation, the guards and others often beat the detainees.

The accused complains that it is not clear what was intended by the reference to "others" in the second sentence.[64] It seems that it was intended to refer to the policemen from the local or military police who also took part in the interrogations but, if this were not intended, the allegation should be made clear. The prosecution is directed to amend para 5.17 accordingly.

53. Paragraph 5.21 of the indictment alleges that the accused participated in concert with political leaders or military commanders in the selection of detainees to be beaten. Those selected are alleged to have been taken for interrogation and then beaten. The indictment then alleges:

> Some of the detainees returned to their rooms severely injured. Some of the detainees were selected for beatings several times. A substantial number of the selected detainees never returned from the beatings and are still missing.

The accused submits that the last sentence renders his defence impossible, because he is not made aware of the identity of those still missing, when they were beaten up and whether the beating is alleged to have a direct bearing upon their disappearance.[65]

54. The indictment does assert, in the same paragraph, that:

> The selected detainees were mostly prominent inhabitants of Foca, who were suspected of not having told the truth during the official interrogations, who were accused of possessing weapons, or who were members of the SDA.

This assertion provides insufficient information as to the identity of the detainees involved. The prosecution is, however, entitled to ask the International Tribunal to infer that the beatings led directly to the disappearance, and it is not to the point at the pleading stage that, as the accused suggests, there may be the possibility that the detainees were "exchanged" (or, as was probably intended, transferred).

55. The accused is nevertheless entitled to particulars of those beaten, those who disappeared, approximately when the beatings occurred and by whom. In each case, those persons should be identified at least by reference to their category (or position) as a group. The complaint as to imprecision is upheld, and the prosecution is directed to amend the indictment accordingly.

56. Paragraphs 5.27-28 allege:

> 5.27 Between June and August 1992, the KP Dom guards increased the number of interrogations and beatings. During this period, guards selected groups of detainees and took them, one by one, into a room in the administration building. In this room, the guards often would chain the detainee, with his arms and legs spread, before beating him. The guards kicked and beat each detainee with rubber batons, axe-handles and fists. During the beatings, the guards asked the detainees where they had hidden their weapons or about their knowledge of other persons. After some of the beatings, the guards threw the detainees on blankets, wrapped them up and dragged them out of the administration building.
>
> 5.28 An unknown number of the tortured and beaten detainees died during these incidents. Some of those still alive after the beatings were shot or died from their injuries in the solitary confinement cells. The beatings and torture resulted, at least, in the death of the detainees listed in Schedule A to this indictment.

Twenty-nine names are listed in the schedule.

57. The accused says in effect that, by dividing these allegations into two paragraphs, the prosecution fails to link the allegations in para 5.27 with the charge of murder (as a crime against humanity and as a violation of the laws and customs of war), whilst para 5.28 contains no detail in relation to the detainees who died.[66] There is no basis for this complaint. If the accused had complained to the prosecution *before* seeking relief by way of motion, as he should have, the answer would simply have been that the two paragraphs should be read together. That is necessarily self-evident.

58. The accused is, however, justified in his complaint as to the lack of precision even when the two paragraphs are read together. The complaint that, because the prosecution is unable to state the number of detainees who died, the accused cannot defend himself is nevertheless rejected. The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly. If its case is to be that the detainees which it identifies died, and also that a number of other persons died whom it is unable to identify, the charge would nevertheless be sufficiently pleaded in the circumstances of this case once those particulars have been included in the indictment.

59. Counts 11-15 of the indictment allege, *inter alia*, that the conditions under which the detainees were kept at the Foca KP Dom were inhumane. The accused complains that the generality of the allegations in the indictment that "the health of many detainees was destroyed" and that "some became suicidal, while others simply became indifferent as to what would happen to them" denies to him the opportunity of proving, for example, that this was no more than a consequence which typically manifests itself in detainees.[67]

60. There is, of course, no onus of proof upon the accused to prove anything, but even a complaint that the accused has been completely denied the opportunity of investigating the allegations must be rejected when the context in which these two allegations appear in the indictment:

> 5.32 During their confinement, the detainees were locked in their cells, except when they were lined up and taken to the mess to eat or to work duties. After April 1992, the cells were overcrowded, with insufficient facilities for bedding and personal hygiene. The detainees were fed starvation rations. They had no change of clothes. During the winter they had no heating. They received no proper medical care. As a result of the living conditions in the KP Dom, the health of many detainees was destroyed. Due to the lack of proper medical treatment, the 40-year old detainee, Enes Hadzic, died in April or May 1992 from a perforated ulcer.
>
> 5.33 Torture, beatings and killings were commonplace in the KP Dom prison. The detainees could hear the sounds of the torture and beatings. The detainees lived in constant fear that they would be next. The detainees kept in solitary confinement were terrified because the solitary confinement cells were generally known to be used for severe assaults. Because all detainees lived in a constant state of fear, some became suicidal, while others simply became indifferent as to what would happen to them. Most, if not all of the detainees, suffered from depression and still bear the physical and psychological wounds resulting from their confinement at KP Dom.

There is thus a clear causal connection asserted by the prosecution. That said, however, the allegations are insufficiently precise as to where and approximately when the torture, the beatings and the killings took place and who was individually responsible for that conduct (at least by reference to their category or position as a group). If the prosecution is able to do so, particulars as to who (other than Enes Hadzic) were the victims, should be supplied but, if the events themselves are sufficiently identified, the names of the victims are of less importance.

61. The prosecution is ordered to provide such particulars.

62. Both para 5.36 of the indictment expressly, and para 5.37 by implication, assert either individual responsibility or responsibility as a superior on the part of the accused for offences which took place in 1994 – that is, after the period from April 1992 to August 1993 limited by the general allegations in the earlier part of the indictment for such responsibility. The prosecution must concede that, so far as *this* accused is concerned, these allegations are limited to that period ending August 1993.

63. The accused also points to the absence of any identification of time in para 5.39 of the indictment (which falls within the same group of charges alleging enslavement as paras 5.36-37), and requires particulars.[68] The prosecution is directed to amend the indictment so as to provide such particulars.

VII Application for oral argument

64. In his Preliminary Motion on the Form of the Indictment, in his Motion to file a Reply to the prosecution's Response to the Preliminary Motion, and in a separate request following the filing of the prosecution's Further Response, the accused sought leave to make oral submissions. He did so because the Trial Chamber, in its Order for Filing of Motions,[69] ordered that there will be no oral argument on any motion unless specifically requested by counsel for either party and approved by the Trial Chamber, taking into account the need to ensure a fair and expeditious trial.

65. The general practice of the International Tribunal is not to hear oral argument on such motions prior to the trial unless good reason is shown for its need in the particular case. That general practice is soundly based upon the peculiar circumstances in which the International Tribunal operates, in that counsel appearing for accused persons before it invariably have to travel long distances from where they ordinarily practise in order to appear for such oral argument; counsel appearing for the prosecution are often appearing in other trials currently being heard; and the judges comprising the Trial Chamber in question are usually engaged in other trials at the time when the motion has to be determined.

66. Counsel for the accused has not identified any particular issues upon which he wishes to put oral arguments or explained why he was unable to put those arguments in writing. In his most recent request, Counsel for the accused has sought to justify oral submissions upon the basis that the prosecution's Further Response has failed to respond, or has responded in a contradictory and insufficient way, to the submissions which he had put in support of the accused's Motion. Insofar as that very general assertion may be accurate, it is well within the competence of the judges of the International Tribunal to see that fact for themselves.

67. Having regard to the very extensive written submissions already put forward by counsel for the accused, and the need to ensure a fair and expeditious trial, the Trial Chamber is not persuaded of the need for oral argument in this case.

68. The application is refused.

VIII Disposition

FOR THE FOREGOING REASONS, Trial Chamber II decides that –

1. the Motion is granted, with regards to and as set out in paras 17, 28, 30, 39, 42, 46-48, 49-50, 51, 52, 55, 58, 60-61, 62 and 63 of this decision. The Prosecutor is directed to amend the indictment accordingly and to file and serve an amended indictment on or before 26 March 1999; and
2. the Motion is rejected, including the application for oral argument, with regards to and as set out in the remainder of this decision.

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

Done this 24th day of February 1999

At The Hague

The Netherlands

_____

David Hunt

Presiding Judge

[Seal of the Tribunal]

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1. The jurisdiction 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") to try these offences is to be found in Article 2 of the Statute of the International Tribunal ("Statute").

2. Article 3 of the Statute.

3. Article 5 of the Statute.

4. Paragraph 5 of the Motion. See also para 30 of the Motion.

5. *Ibid*, para 18.

6. *Ibid*, paras 5 and 31.

7. See, for example, *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, paras 15-18; *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, 2 Oct 1996, para 24; *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in

the Form Thereof, 4 Apr 1997, para 32; *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of the Indictment, 15 May 1998, p 3. See also *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, 16 Nov 1998, paras 1221-1223. The International Criminal Tribunal for Rwanda ("ICTR") – whose Statute does not differ significantly from this Tribunal's Statute in any way relevant to this issue – has as well held that an accused may properly be convicted of two offences arising from the same facts where the offences have different elements, or the provisions creating the offences protect different interests, or it is necessary to record a conviction for both offences in order fully to describe the true character of what the accused did: *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgment, 2 Sept 1998, para 468.

8. *Prosecutor v Delic*, Case No IT-96-21-AR72.5, Appeal Decision, 6 Dec 1996, paras 35-36.

9. Paragraph 32 of the Motion.

10. *Prosecutor v Tadic*, Case No IT-94-1-T, Opinion and Judgment, 7 May 1997, para 609; *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Decision on Defence Challenges to Form of Indictment, 15 May 1998, p 3.

11. Fifth Amendment to the Constitution.

12. Article 14(7). See also the European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No 7, Art 4(1); and the American Convention on Human Rights, Art 8(4).

13. *Green v United States* 355 US 184 (1957) at 187-188; *United States v Dixon* 509 US 688 (1993) at 704. Such was also the law of ancient Greece: *United States v Jenkins* 490 F 2d 868 (1973) at 870; affd 420 US 358 (1975); and of ancient Rome: *Bartukus v Illinois* 359 US 121 (1959) at 152.

14. See, generally, *Prosecutor v Furundzija*, Case No IT-95-17/1-T, Judgment, 10 Dec 1998, para 249.

15. Paragraph 30 of the Motion.

16. Article 18 of the Statute; and Rule 47(B) of the Rules.

17. Article 21(4)(a) of the Statute.

18. *Ibid*, Art 21(4)(b).

19. *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20. An oft quoted statement as to the particularity with which a criminal offence must be pleaded in common law jurisdictions is that of Isaacs J in *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741:

"I take the fundamental principle to be that the opposite party shall always be fairly apprised of the nature of the case he is called upon to meet, shall be placed in possession of its broad outlines and the constitutive facts which are said to raise his legal liability. He is to receive sufficient information to ensure a fair trial and to guard against what the law terms 'surprise', but he is not entitled to be told the mode by which the case is to be proved against him."

A valid indictment must identify the essential factual ingredients of the offence charged; it must specify the approximate time, place and manner of the acts or omissions of the accused upon which the prosecution relies, and it must provide fair information and reasonable particularity as to the nature of the offence charged: *Smith v Moody* [1903] 1 KB 56 at 60, 61, 63; *Johnson v Miller* (1937) 59 CLR 467 at 486-487, 501; *John L Pty Ltd v Attorney General (NSW)* (1987) 163 CLR 508 at 519-520; *R v Saffron* (1988) 17 NSWLR 395 at 445.

20. *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, paras 9-10.

21. The prosecution has suggested that the decision in *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 32,

has said to the contrary, but that is not correct. That decision makes it clear that the accused must be able to prepare his defence on "either or *both* alternatives" (emphasis added).

22. *Prosecutor v Tadic*, Case No IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, para 12; *Prosecutor v Djukic*, Case No IT-96-20-T, Decision on Preliminary Motion of the Accused, 26 Apr 1996, para 18.

23. Rule 66(A)(i).

24. Rule 66(A)(ii).

25. Paragraph 15 of the Response. The proposition is repeated in para 6 of the Further Response.

26. Case ICTR-97-21-I, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of the Indictment, 4 Sept 1998.

27. (Paragraph 13). The emphasis has been supplied.

28. See, generally, *Connelly v DPP* [1964] AC 1254 at 1301-1302, 1339-1340, 1364, 1368; *Rogers v The Queen* (1994) 181 CLR 251 at 256; and *R v Beedie* [1998] QB 356 at 361.

29. Paragraph 3.1 of the indictment.

30. Paragraph 9 of the Motion.

31. *Prosecutor v Delalic*, Case No IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, paras 7-8; *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20; and *Prosecutor v Kupreškic*, Case No IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatko Kupreškic, 11 Aug 1998, p 2.

32. *R v Youssef* (1990) 50 A Crim R 1 at 2-3 (NSW CCA).

33. Paragraph 14 of the Motion.

34. Paragraph 1.3 of the indictment.

35. Paragraph 15 of the Motion.

36. cf *Prosecutor v Kunarac*, Case No IT-96-23-PT, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 Oct 1998, p 1.

37. Paragraph 4.6 of the indictment.

38. Paragraph 15 of the Motion.

39. Paragraph 16 of the Motion.

40. See paras 3-4, *supra*.

41. Paragraph 12 of the Reply.

42. Paragraph 4 of the Further Response.

43. Paragraph 23 of the Reply. This complaint replaces that originally made in para 17 of the Motion.

44. Case No IT-95-17/1-T, Judgment, 10 Dec 1998, paras 190-249. The legal ingredients to be established by the prosecution are stated in para 249.

45. Paragraphs 13 and 17, *supra.*

46. Paragraph 19 of the Motion.

47. See *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20, referred to in para 12, *supra.*

48. See para 12, *supra.*

49. Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 20.

50. Case No IT-95-14/1-PT, Decision of Trial Chamber I on the Defence Motion of 19 June 1997 in Respect of Defects in the Form of the Indictment, 25 Sept 1997, para 11.

51. Paragraph 11.

52. This is a matter of fairness, and has been recognised in many cases in common law jurisdictions: *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413; *Turner v Dalgety & Co Ltd* (1952) 69 WN (NSW) 228 at 229; *Philliponi v Leithead* (1959) SR (NSW) 352 at 358-359; *Bailey v FCT* (1977) 136 CLR 214 at 219, 220.

53. Article 21(4)(a) of the Statute.

54. See, for example, *S v The Queen* (1989) 168 CLR 266 at 275 (that case was primarily concerned with the situation where there had been sexual assaults over a long period of time, and where the prosecution had failed to identify from that course of conduct the particular assaults upon which the three counts had been based, but the principle remains the same); *R v Kennedy* (1997) 94 A Crim R 341 (NSW CCA).

55. The procedure is examined in some detail in two New South Wales cases: *R v Basha* (1989) 39 A Crim R 337 at 339-340 (NSW CCA); *R v Sandford* (1994) 33 NSWLR 172 at 180-181 (NSW CCA).

56. Case No IT-94-1-T, Judgment, 7 May 1997, para 607.

57. *Prosecutor v Delalic*, Case No IT-96-21-T, Judgment, 16 Nov 1998, para 228. See also *Prosecutor v Blaškic*, Case No IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, para 28.

58. *Prosecutor v Delalic*, Case IT-96-21-T, Judgment, 16 Nov 1998, par 234.

59. They charge crimes against humanity (torture and inhumane acts), grave breaches of the Geneva Conventions (torture and wilfully causing serious injury to body or health) and violations of the laws or customs of war (torture and cruel treatment).

60. Paragraphs 20-21 of the Motion.

61. Paragraphs 20 and 22 of the Reply.

62. Paragraph 22 of the Motion.

63. Paragraph 23 of the Motion.

64. Paragraph 24 of the Motion.

65. Paragraph 25 of the Motion.

66. Paragraph 26 of the Motion.

67. Paragraph 27 of the Motion.

68. Paragraphs 28-29 of the Motion.

69. The order is dated 17 June 1998.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

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Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

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II. Historical Context of the 1994 Events in Rwanda

31. It is necessary to address the historical context within which the events unfolded in Rwanda in 1994, in order to understand fully the events alleged in the Indictment and the evidence before the Trial Chamber. We will not engage in a lengthy examination of the geo-political or historical difficulties faced by Rwanda as a number of reports and other publications have been written on these issues to which interested persons can refer.

32. The Trial Chamber is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be futile. It is impossible to simplify all the ingredients that serve as a basis for killings on such a scale. Therefore, the account presented below is a brief explanation of issues related to the division of ethnic groups in Rwanda, a brief history of Rwanda's post-independence era, including a look at the 1991 Constitution, the Arusha Accords, and the creation of militias.

33. The Trial Chamber has chosen to relay the events using neutral language and, where necessary, to discuss the cross-examination of the Prosecution witnesses. The summary is based exclusively on the evidence presented to this Trial Chamber and no reference has been made to sources or materials that do not constitute a part of the record of the present case.

The Question of Ethnicity in Rwanda

34. In 1994, apart from some foreign nationals, there were three officially recognised ethnic groups living in Rwanda, the Hutus, the Tutsis and the Twas. The Hutus constituted the overwhelming majority of the population. The Rwandan use of the term "ethnicity" requires some explanation because according to Prosecution witness, André Guichaoua, Professor of Sociology and Economics at the University of Lille, France, all Rwandans share the same national territory, speak the same language, believe in the same myths and share the same cultural traditions. The Trial Chamber opines that these shared characteristics could be tantamount to a common ethnicity. Thus, it is recognised that prior to the colonisation of Rwanda, by Germany and later Belgium, the line separating the Hutus and Tutsis was permeable as the distinction was class-based. In other words, if a Hutu could acquire sufficient wealth, he would be considered a Tutsi.

35. This begs the question of how it became possible permanently to seal a person into one category after the Belgian colonisation. The Belgians instituted a system of national identification cards bearing the terms Hutu, Tutsi and Twa, under the category of ethnicity, which were used for administrative purposes in 1931. Although prior to the arrival of the European colonisers the Rwandans had referred to themselves as Hutus, Tutsis or Twas, it was after this point that the group identity solidified and this former sociological categorisation became a means of ethnic identification. From its inception, the identification card has been used to facilitate discrimination against one group or another in Rwanda, be it in the implementation of an ethnic based quota system

in educational and employment opportunities or in implementing a policy of genocide as was done in 1994.

36. For decades some claimed that Hutus and Twas were the original inhabitants of Rwanda and that Tutsis were "people from the Nile."[1] During cross-examination Guichaoua deposed that this idea has never been proven scientifically and that no one "category of occupants has more legitimacy than others."[2] Nonetheless, certain Hutu politicians have periodically used this concept to legitimise their call for "Hutu Power" and to incite hatred and division amongst the Rwandan population, as outlined below.

A Brief Glance at the Post-Independence Era

37. In 1959, shortly prior to gaining independence, Rwanda witnessed the beginnings of intense ethnic tensions. During that year a number of Tutsi chiefs, farmers and other persons were massacred and their houses were set ablaze. Thousands of other Tutsis were forced to flee to neighbouring countries. Guichaoua stated that the deterioration of ethnic relations could be attributed to the legacy of Tutsi favouritism by the colonial powers.

The First Republic

38. The country's first President, Gregoire Kayibanda, was elected in 1962 at which time the Hutu movements began to display their radicalisation more openly. Professor Guichaoua testified that anti-Tutsi movements had become so hostile that by 1963, 200,000 to 300,000 Tutsis sought refuge in neighbouring countries. Between 1962 and 1966 there were repeated attempts by armed Tutsi groups (labelled *Inyenzi* -- cockroach) to regain power through incursions organised from neighbouring countries, mainly from Burundi. According to Professor Guichaoua, because an incursion in December 1963 reached the gates of Kigali, a hunt for Tutsis ensued throughout the country thereafter. The worsening tensions led to the consolidation of power by "the radical Hutu elements and helped to suppress the deep divisions within the regime in power which was increasingly marked by the personal and authoritarian style of government of President Kayibanda."[3]

39. President Kayibanda's attempt to maintain his hold on power is evident from the institution of a *de facto* single-party system in Rwanda in 1965. His party, the Republican Democratic Movement (MDR-PARMEHUTU) eliminated the Tutsi parties as well as other Hutu parties such as the Association for the Social Advancement of the Masses (APROSOMA). Factional political divisions, based on regions of origin from within the country, added further strain on the ethnic-base difficulties at that time. A new sense of supremacy, based on the existence of a legitimate majority population was fostered and contributed to the massacres of the Tutsis that occurred in Rwanda and Burundi in 1972-73. Thus, the inability of the First Republic to overcome ethnic tensions lead to its downfall and the assassination of President Kayibanda.

The Second Republic

40. On 5 July 1973, the Chief of Staff, Major Juvenal Habyarimana, a native of Gisenyi *Prefecture*, seized power in a *coup d'etat*. His then Chief of Security, Alexis Kanyarengwe "implemented a strategy of political and ethnic tension, aimed at making the *coup d'etat*" seem necessary for restoring order to the country. Although the 1973 coup was interpreted as "simply settling scores between rival factions"[4] and having nothing to do with ethnic tensions, those in power encouraged the Hutus to chase away their Tutsi friends and colleagues from educational establishments and places of employment. Again, like in 1959, many Tutsis died at the hands of Hutu assailants and thousands of others fled the country. This brought about the advent of Rwanda's Second Republic.

41. Two years later, in 1975, the National Revolutionary Movement for Development (MRND) was created to replace the MDR. At its helm was President Habyarimana. This party controlled the country until the time of the tragic events in 1994. In 1978, President Habyarimana declared that the Hutu-Tutsi problem would be solved by ensuring that all Rwandans, from birth, were members of the MRND. Compulsory and exclusive membership in this party effectively erased any distinction between the party and the State. Habyarimana also promised that all segments of society would be ensured representation in high ranking government posts, taking into account its percentage in the total population. Of course this idea inherently contained a quota system that would further frustrate the efforts in reconciling ethnic difficulties.

42. For the next few years the Habyarimana government focused its efforts on issues of development. According to Professor Guichaoua, throughout the late 1970s and a part of the 1980s this government's efforts met with undeniable success in terms of low national debt, maintaining macroeconomic balances, monetary stability, food self-sufficiency, etc. Also during this time, the government re-introduced the system of *umuganda* -- the Rwandan concept of communal work -- meant to promote the value of organised or spontaneous solidarity (mutual help among neighbours) among the people living in the hills.[5] Additionally, "the social cohesion of this peasant state and the submission of the peasantry to an extremely authoritarian and constraining order was due largely to a policy which succeeded in establishing a weakly differentiated social system."[6] Thus the misplaced belief and confidence the Rwandans had in their leadership, that existed during the colonial era, was put to use once again in 1994.

43. Despite this economic success and the government's ability to bring its citizens together to engage in community work, the largely agrarian population of Rwanda did not benefit. Rwandans began to protest the inequities, noticing the nepotism and widespread corruption in the government. The quota system mentioned above was another source of difficulties for the population. As gross social inequalities persisted and with other economic problems and food shortages that arose in 1988-89, the time was ripe for Tutsis outside the country to attempt to regain power once more.

44. On a number of occasions members of the Tutsi diaspora had attempted to return to Rwanda, only to be stopped at the boarder by claims that the small country could not absorb the returnees. For example, in 1982, when Uganda expelled various categories of refugees, Rwanda responded by closing its borders, refusing assistance to the thousands in need and only later allowing a small fraction of the Tutsi refugees to enter and resettle. Following these incidents, the thousands of Rwandans that remained in the neighbouring countries of Burundi, Tanzania, Uganda and Zaire began to pressure the world community and these governments to find a solution to their plight.

45. The Rwandan Patriotic Front (the RPF) was created as a response to the Tutsi Diaspora's frustration with the international community's minimal attention to the emotionally charged refugee problem. In October 1990, the RPF launched an attack into northeastern Rwanda from Uganda. This attack was supported by, *inter alia*, the majority of Tutsis living abroad and brought an intense period of diplomatic negotiations which produced some noticeable results. For instance, by November 1990, the system of ethnic based scholastic and professional quotas was officially abolished and in December the Rwandan government declared an amnesty for certain prisoners. By March 1991 a cease-fire was called. Certain elements of the then Rwandan government however, were not eager to begin the process and therefore ensured that some of the more significant promises made were not implemented with due haste. Additionally, the extreme violence targeting the Tutsi population, especially in rural areas, continued unabated. Therefore, the RPF continued its strategy of a protracted war. Nevertheless, attempts were made at a democratic transition between 1991 and 1993.

The 1991 Constitution and Multi-Partism

46. Francois Nsanzuwera, a Rwandan scholar, testified that the 1991 Rwandan Constitution replaced the single party system with a multiparty system. It entrusted the National Assembly and the President of the Republic with legislative and executive power, respectively. The Constitution however did not render the President of the Republic accountable to the National Assembly.

47. The officially recognised parties were forbidden to use paramilitary forces (Article 26) and were granted access to the official media. Thereafter, the following parties were created: the *Mouvement Democratique Républic* (MDR), the *Parti Libéral* (PL), the *Parti Social-democrate* (PSD), the *Parti Democrate-chrétien* (PDC) and the *Coalition pour la Défense de la République* (CDR).

48. With the advent of multi-party politics, a very distinctive constitutional and administrative *status quo* would have purportedly manifested itself in Rwanda. This was the view of Professor Guibal, a titular Professor of constitutional and administrative law, Montpellier University, France. He was commissioned by the Defence to produce a report on the constitutional landscape of Rwanda, based upon the laws promulgated and in effect during and prior to the events of 1994.[7]

49. It was Professor Guibal's opinion that as a result of the multi-partyism that emerged after the 1991 Constitution, the traditional delineation of the branches of Government was not discernible. Thus, there was no clear separation of powers between the executive, judiciary and central and regional administration. Rather, the witness testified, the constitutional framework that existed after 1991 was one that was delineated on a party-political basis also. Consequently, a dichotomy of hierarchies and relationships would have emerged throughout, and even transcended the branches of Government – one on an administrative level and one on a party political basis.

50. Professor Guibal then went on to describe the theoretical consequence of the system that existed in Rwanda, when faced with the events and turmoil of 1994. He was of the opinion that such a paradigm of multi-partyism, when confronted with these chaotic and unstable times, would have become a system of *crisis* multi-partyism. The Chamber was informed that such crisis multi-partyism would arise as pivotal governmental figures were moved to resolve the turmoil and conflicts upon party-political lines, rather than by the delineated constitutional means.

The Arusha Accords

51. Nsanzuwera testified that the Rwandan government and the RPF signed the Arusha Accords on 4 August 1993 in Arusha, Tanzania in order to bring about a peaceful settlement to the political and military crisis in Rwanda. The Accords constituted a compilation of several agreements and protocols previously signed, concerning notably cease-fire and power sharing between the warring factions. 47 articles of the 1991 Constitution were replaced by the provisions of the Arusha Accords, including articles on power sharing and the entrusting of additional power to the Prime Minister and certain organs of the government.

The Creation of Militias

52. While the negotiations for peace and power sharing were underway in Arusha, the MRND and the CDR stepped up their efforts to recruit members, especially from the youth segment of the population. Both the MRND and the CDR, two Hutu based parties, intensified their efforts to fortify membership in their youth organisations known as the *Interahamwe* and the *Impuzamugambi*, respectively. Within a short period of time these recruits were converted to paramilitary forces. The parties ensured that the young recruits, made up mostly of former soldiers, gendarmes and prisoners, were militarily trained and indoctrinated. All these activities were carried out in direct violation of Article 26 of the 1991 Constitution and with the knowledge of the then Minister of Internal Affairs who was entrusted with the duty to suspend the activities of any political party for such activities.

53. By the end of 1993 CDR speeches, broadcast from government owned radio stations, referred to the Tutsis and Hutus from the opposition parties as collaborators of the RPF. These speeches encouraged the militias to target Tutsis in their daily acts of vandalism. Between 1992 and 1994 there were claims that the militias were supported by certain member of the military and the Presidential Guard. During this period many members of the judiciary were said to have turned a

blind eye to the criminal acts of the militias either because they supported their activities or out of fear of reprisals. Assassination attempts, some of which were successful, were made on the lives of certain judges or magistrates who sought to carry out their duties faithfully. According to Nsanzuwera, by that time some claimed that members of the militias had become more powerful than members of the armed forces. As indicated in the parts that follow, the militias did in fact play a substantial role in the 1994 Genocide that occurred in this country.

Conclusion

54. The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that of thousands of people were slaughtered and mutilated in just three short months.

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[1] Pros. exh. 103A, p. 8.

[2] *Ibid.*

[3] Pros. exh. 103A, p. 12.

[4] *Ibid.*, p. 15. Professor Guichaoua cited to a proclamation following the coup by commander Theoneste Lizinde, which made no reference to the ethnic confrontations.

[5] *Ibid.*, p. 16.

[6] *Ibid.*, p. 18.

[7] What follows is a synopsis of this report and Professor Guibal's testimony on 27 and 28 May 1998.

III. EVIDENTIARY MATTERS

3.1 Equality of Arms

55. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20(2) states, ". . . the accused shall be entitled to a fair and public hearing. . . ." Article 20(4) also provides, ". . . the accused shall be entitled to the following minimum guarantees, in full equality. . . ," there then follows a list of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence.

56. Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20(2) and 20(4).[1] The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence.

57. On the first two points raised by the Defence (request for information on the Prosecutor's resources), the Prosecution submitted that the information requested by Defence was not public and was intrinsically linked to the exercise of the Prosecutor's mandate, in accordance with Article 15 of the Statute.[2]

58. On the third point (request to limit the number of assistants to the Prosecutor), the Prosecution submitted that Article 20 of the Statute establishes an equality of *rights*, rather than an equality of *means and resources*.

59. The Chamber considered that the Defence did not prove any violation of the rights of the accused as laid down in Article 20(2) and 20(4).[3] The Chamber considered that the Defence should have addressed these issues under Article 17(C) of the Directive on Assignment of Defence Counsel (Defence Counsel Directive). This provision clearly states

> the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal *to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.* [emphasis added]

60. This provision should be read in conjunction with Article 20(4)(d) of the Statute which stipulates that legal assistance shall be provided by the Tribunal, ". . . *if* he or she does not have sufficient means to pay for it." [emphasis added]. Therefore, at this juncture, the Trial Chamber would reiterate its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.

61. The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *Prefecture* submitted by the Prosecution.[4] However, the Trial Chamber is aware that investigators, paid for by the Tribunal, was put at the disposal of the Defence. Furthermore, Article 17(C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. The Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber.

62. Counsel for Kayishema also raised the issue of lack of time afforded to the Defence for the preparation of its case.[5] In this regard the Trial Chamber notes that Kayishema made his initial appearance before the Tribunal on 31 May1996, Counsel having been assigned two days prior. The trial began on 11 April 1997 and the Defence did not commence its case until 11 May 1998, almost two years after the accused's initial appearance. As such, the Trial Chamber is satisfied that sufficient time was accorded to both Parties for the preparation of their respective cases.

63. Specifically, on the time designated for the preparation of the closing arguments, the Defence expressed further dissatisfaction.[6] Having expressed his opinion that "the trial has been fair," Counsel for Kayishema however went on to submit that the eight days allowed him to prepare for his closing arguments was inequitable in light of the one month time frame afforded to the Prosecution. However, the Chamber pronounced itself on this issue from the bench when it was declared,

> . . . for the record, I think the parties . . . agreed that the presentation of oral argument and filing of the relevant documents will be done within a time frame . . . So the concept of either one party being given one month does not arise . . [I]t was discussed openly with the understanding that each and every respective party had some work to do . . . That is the defence could prepare its own case . . . right from the word go . . . (President of the Chamber) [7]

64. Moreover, were any particular issues of dispute or dissatisfaction to have arisen, the Trial

Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber.

3.2 Reliability of Eyewitnesses

65. Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.

66. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye *Prefecture* (survivor witnesses), in which both accused allegedly participated. As such the Defence presented Dr. Régis Pouget to address the Trial Chamber on the credibility of eyewitness testimonies generally and, more specifically, upon the reliability of testimony from persons who had survived attacks having witnessed violent acts committed against their families, friends and neighbours. [8]

67. The Prosecution contested the submission of the report, submitting that it was unnecessary and without probative value.[9] Nevertheless, the Trial Chamber, in exercising its discretion on this issue, received the report and heard the testimony of Dr. Pouget between 29 June and 2 July 1998.

Eyewitness Testimonies Generally

68. The issue of identification is particularly pertinent in light of the defence of alibi advanced by the accused. The report prepared by Dr. Pouget and submitted on behalf of the Defence suggests that eyewitnesses often are not a reliable source of information.

69. In order to support such a conclusion, Dr. Pouget proffered a number of reasons. It was his opinion, for example, that people do not pay attention to what they see yet, when uncertain about the answer to a question, they often give a definite answer nonetheless. He went on to describe various other, common-place factors that may affect the reliability of witness testimony generally. He observed, *inter alia*, that the passage of time often reduces the accuracy of recollection, and how this recollection may then be influenced either by the individual's own imperfect mental process of reconstructing past events, or by other external factors such as media reports or numerous conversations about the events.

70. The Chamber does not consider that such general observations are in dispute. Equally, the Chamber concurs with Dr. Pouget's assertion that the corroboration of events, even by many witnesses, does not necessarily make the event and/or its details correct. However, the Trial Chamber is equally cognisant that, notwithstanding the foregoing analysis, all eyewitness testimony cannot be simply disregarded out-of-hand on the premise that it *may* not be an exact recollection. Accordingly, it is for the Trial Chamber to decide upon the reliability of the witness' testimony in

light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.

71. Similarly, prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness testimonies. For example, in the Tanzanian case of *Waziri Amani v. Republic*[10] the accused called into question his identification by witnesses. The Court of Appeals held that,

> if at the end of his (the witness') examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could in those circumstances safely convict on the evidence of identification.

The case of *United States v. Telafaire*[11] also offers persuasive guidance on the other factors which may be taken into account. Firstly, the court in *Telafaire* held that the trier of fact must be convinced that the witness had the capacity and an adequate opportunity to observe the offender. Secondly, the identification of the accused by the witness should be the product of his own recollection and, thirdly, the trier of fact should take into consideration any inconsistency in the witness's identification of the accused at trial. Finally, it was held that the general credibility of the witness – his truthfulness and opportunity to make reliable observations – should also be borne in mind by the trier of fact.

72. The Trial Chamber, in its examination of the evidence, has been alive to these various approaches and, where appropriate, has specifically delineated the salient considerations pertinent to its findings.

Survivors as Witnesses

73. The report of Dr. Pouget, an expert in the field of psychology, address the reliability of testimony from those who have witnessed traumatic events. It was his opinion that strong emotions experienced at the time of the events have a negative effect upon the quality of recollection. During traumatic events, he expounded, the natural defensive system either prevents the retention of those incidents or buries their memories so deep that they are not easily, if at all, accessible.

74. This is the view of the expert Defence witness. However, as the Prosecutor highlighted, other views do exist. She produced, for example, other academic views which stated that stressful conditions lead to an especially vivid and detailed recollection of events.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

SEPARATE AND DISSENTING OPINION OF JUDGE TAFAZZAL HOSSAIN KHAN REGARDING THE VERDICTS UNDER THE CHARGES OF CRIMES AGAINST HUMANITY/MURDER AND CRIMES AGAINST HUMANITY/EXTERMINATION

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pas

I. INTRODUCTION

1.1 The Tribunal and its Jurisdiction

1. This Judgement is rendered by Trial Chamber II of the International Tribunal for the prosecution of persons responsible for the 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 and 31 December 1994 (the Tribunal). The Judgement follows the Indictment and the joint trial of Clement Kayishema and Obed Ruzindana.

2. The Tribunal was established by the United Nations Security Council's Resolution 955 of 8 November 1994.[1] After official investigations, the Security Council found indications of wide spread violations of international humanitarian law and concluded that the situation in that country in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter, thus giving rise to the establishment of the Tribunal.

3. The Tribunal is governed by its Statute (the Statute), annexed to the Security Council Resolution 955, and by its Rules of Procedure and Evidence (the Rules), adopted by the Judges on 5 July 1995 and amended subsequently.[2] The Judges of the Tribunal, currently fourteen in all, are selected by the General Assembly and represent the principal legal systems of the world.

4. The *ratione materiae* jurisdiction of the Tribunal is set out in Articles 2, 3 and 4 of the Statute. Under the Statute, the Tribunal is empowered to prosecute persons who are alleged to have committed Genocide, as defined in Article 2, persons responsible for Crimes Against Humanity, as defined in Article 3 and persons responsible for serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 on the Protection of Victims of War, and of Additional Protocol II thereto of 8 June 1977, a crime defined under Article 4 of the Tribunal's Statute.[3] Article 8 of the Statute provides that the Tribunal has concurrent jurisdiction with national courts over which, however, it has primacy. The temporal jurisdiction of the Tribunal is limited to acts committed from 1 January 1994 to 31 December 1994.

5. Finally, the Statute stipulates that the Prosecutor, who acts as a separate organ of the Tribunal, is responsible for the investigation and prosecution of the perpetrators of such violations. The Prosecutor is assisted by a Deputy Prosecutor, a team of senior trial attorneys, trial attorneys, and investigators based in Kigali, Rwanda.

1.2 The Indictment

The amended Indictment, against the accused persons, is reproduced, in full, below.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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CASE NO: ICTR-95-1-1 (sic)

THE PROSECUTOR OF THE TRIBUNAL

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-

AGAINST

-

-

CLEMENT KAYISHEMA
OBED RUZINDANA

-

[Registry date stamped
11 April 1997]

First Amended Indictment

Richard J. Goldstone, Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (Tribunal Statute), charges:

1. This indictment charges persons responsible for the following massacres which occurred in the *Prefecture* of Kibuye, Republic of Rwanda:

   1.1 The massacre at the Catholic Church and the Home St. Jean complex in Kibuye town, where thousands of men, women and children were killed and numerous people injured around 17 April 1994.

   1.2 The massacre at the Stadium in Kibuye town, where thousands of men, women and children were killed and numerous people injured on about 18 and 19 April 1994.

   1.3 The massacre at the Church in Mubuga, where thousands of men, women and children were killed and numerous people injured between about 14 and 17 April 1994.

   1.4 The massacres in the area of Bisesero, where thousands of men, women and children were killed and numerous people injured between about 10 April and 30 June 1994.

THE MASSACRES SITES

2. The Republic of Rwanda is divided into eleven *Prefectures*. These eleven *Prefectures* are further divided into communes. The *Prefecture* of Kibuye consists of nine communes. The

massacres which form the basis of the charges in the indictment occurred in the *Prefecture* of Kibuye, in Gitesi, Gishyita and Gisovu communes.

3. The first massacre site addressed in this indictment, namely, the Catholic Church and Home St. Jean complex, is located in Kibuye town, Gitesi commune, on a piece of land which is surrounded on three sides by Lake Kivu. A road runs past the entrance to the Catholic Church and Home St. Jean complex. The Catholic Church is visible from the road. The Home St. Jean is behind the Church and is not visible from the road.

4. The second massacre site addressed to in this indictment, the Stadium, is located near the main traffic circle in Kibuye town, Gitesi Commune. The town's main road runs past the Stadium. Immediately behind the Stadium is a high hill.

5. The third massacre site addressed in this indictment, the Church of Mubuga, is located in Gishyita Commune. Gishyita Commune is located in the southern part of Kibuye *Prefecture*. The Church in Mubuga is located approximately 20 kilometres from Kibuye town.

6. The fourth massacre site addressed in this indictment is the area of Bisesero. The area of Bisesero extends through two communes in the *Prefecture* of Kibuye: Gishyita and Gisovu. Bisesero is an area of high rolling hills, located in the southern portion of Kibuye *Prefecture*. The hills are very large, and are often separated by deep valleys.

BACKGROUND

7. The structure of the executive branch, and the authority of the members therein, is set forth in the laws of Rwanda. In the *Prefecture*, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. The Prefect has control over the government and its agencies throughout the *Prefecture*.

8. In each commune within a *Prefecture* there exists the council of the commune, which is led by the *Bourgmestre* of that Commune. The *Bourgmestre* of each commune is nominated by the Minister of the Interior and appointed by the President. As representative of the executive power, the *Bourgmestre* is subject to the hierarchical authority of the Prefect, but, subject to this authority, the *Bourgmestre* is in charge of governmental functions within his commune.

9. The Prefect is responsible for maintaining the peace, public order, and security of persons and goods within the *Prefecture*. In fulfilling his duty to maintain peace, the Prefect can demand assistance from the army and the *Gendarmerie Nationale*. The *Bourgmestre* also has authority over those members of the *Gendarmerie Nationale* stationed in his *commune*.

10. The *Gendarmerie Nationale* is an armed force established to maintain the public order and execute the laws. It is lead by the Minister of Defence, but can exercise its function of safeguarding the public order at the request of the competent national authority, which is the *Prefect*. The *Gendarmerie Nationale* has an affirmative duty to report to the *Prefect* information which has a bearing on the public order, as well as a duty to assist any person who, being in danger, requests its assistance. From January - July 1994, there were approximately 200 gendarmes in the *Prefecture* of Kibuye.

11. The members of the executive branch also have control over the communal police. Each commune has Police Communale, who are engaged by the *Bourgmestre* of the commune. Normally the *Bourgmestre* has exclusive authority over the members of the Police Communale. In case of public calamities, however, the *Prefect* can claim the policemen of the Police Communale and place them under his direct control.

12. The Interahamwe, an unofficial paramilitary group composed almost exclusively of

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extremist Hutus, had significant involvement in the events charged in this indictment. The National Revolutionary Movement for Development (MRND) party created the members of the Interahamwe as a military training organisation for MRND youth and based the members of the Interahamwe's leadership on the MRND's own structure, with leaders at the national, prefectoral, and communal levels. There was no official link between the Interahamwe and the Rwandan military, but members of the Army and Presidential Guard trained, guided and supported the Interahamwe. Occasionally, members of the Army or Presidential Guard participated in Interahamwe activities.

13. On 6 April 1994, the airplane carrying then-president of Rwanda Juvenal Habyarimana crashed during its approach into Kigali airport in Rwanda. Almost immediately, the massacre of civilians began throughout Rwanda. During that time, individuals seeking Tutsis were able to focus their activities on specific locations because Tutsis, who believed themselves to be in danger, often fled in large numbers to perceived safe areas such as churches and communal buildings. This practice, which was widely known, was based on the fact that in the past Tutsis who had sought refuge in such places had not been attacked. Thus, during the period of time relevant to this indictment, groups of people seeking refuge in the same area were most likely predominantly Tutsis.

14. Also, during the times relevant to this indictment, the Rwandan government required all Rwandans to carry, at all times, identity cards that designated the bearer's status as Hutu, Tutsi, Twa or "naturalised". Individuals seeking Tutsis could identify their targets simply by asking individuals to show their identification card.

GENERAL ALLEGATIONS

15. All acts of (sic) omissions by the accused set forth in this indictment occurred during the period of 1 January 1994 to 31 December 1994 and in the territory of the Republic of Rwanda.

16. In each paragraph charging genocide, a crime recognised by Article 2 of the Tribunal Statute, the alleged acts or omissions were committed with intent to destroy, in whole or in part, an ethnic or racial group.

17. In each paragraph charging crimes against humanity, crimes recognised by Article 3 of the Tribunal Statute, the alleged acts or omissions were part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

18. At all times relevant to this indictment, the victims referred to in this indictment were protected under Article 3 common to the Geneva Conventions and by the Additional Protocol II thereto.

19. At all times relevant to this indictment, there was an internal armed conflict occurring within Rwanda.

20. At all times relevant to this indictment, Clement Kayishema was Prefect of Kibuye and exercised control over the *Prefecture* of Kibuye, including his subordinates in the executive branch and members of the Gendarmerie Nationale.

21. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 6 (1) of the Tribunal Statute. Individual responsibility includes planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of any of the crimes referred to in Articles 2 to 4 of the Tribunal Statute.

22. In addition, Clement Kayishema is also or alternatively individually responsible as a superior for the criminal acts of his subordinates in the administration, the Gendarmerie Nationale, and the communal police with respect to each of the crimes charged, pursuant to Article 6 (3) of the Tribunal Statute. Superior individual responsibility is the responsibility of a superior for the acts of his subordinate if he knew or had reasons to know that his subordinate was about to commit such criminal acts or had done so and failed to take the necessary and reasonable measures to prevent such acts, or to punish the perpetrators thereof.

THE ACCUSED

23. **Clement Kayishema** was born in 1954 in Bwishyura Sector, Gitesi Commune, Kibuye *Prefecture*, Rwanda. Kayishema's father was Jean Baptiste Nabagiziki, and his mother was Anastasie Nyirabakunzi. He was appointed to the position of Prefect of Kibuye on 3 July 1992, and assumed his responsibility as Prefect soon after. **Clement Kayishema** acted as Prefect of Kibuye until his departure to Zaire in July 1994. He is believed to be currently in Bukavu, Zaire.

24. **Obed Ruzindana** is believed to have been borne around 1962 in Gisovu Sector, Gisovu Commune, Kibuye Prefecture, Rwanda. **Ruzindana's** father was Elie Murakaza. **Obed Ruzindana** was a commercial trader in Kigali during the time period in which the crimes alleged in this indictment occurred. He is believed to be currently somewhere in Zaire.

The Massacre at the Catholic Church and Home St. Jean

COUNTS 1-6

25. By about 17 April 1994, thousands of men, women and children from various locations had sought refuge in the Catholic Church and Home St. Jean complex (the Complex) located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the complex seeking protection from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

26. Some of the people who sought refuge in the Complex did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to the Complex, he knew or had reason to know that an attack on the complex was going to occur.

27. After people gathered in the Complex, the Complex was surrounded by persons under Clement Kayishema's control, including members of the *Gendarmerie Nationale*. These persons prevented the men, women and children within the Complex from leaving the Complex at a time when Clement Kayishema knew or had reason to know that an attack on the Complex was going to occur.

28. On about 17 April 1994, Clement Kayishema ordered members of the Gendarmerie Nationale, communal police of Gitesi *commune*, members of the *Interahamwe* and armed civilians to attack the Complex, and personally participated in the attack. The attackers used guns, grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex.

29. The attack resulted in thousands of deaths and numerous injuries to the people within the complex. (Attachment A contains a list of some of the individuals killed in the attack, members of the Gendarmerie Nationale, the Interahamwe and armed civilians searched for and killed or injured survivors of the attack.

30. Before the attack on the Complex, Clement Kayishema did not take measures to prevent an attack, and after the attack Clement Kayishema did not punish the perpetrators.

31. By these acts and omissions, Clement Kayishema is criminally responsible for:

Count 1: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 2: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 3: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 4: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 5: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 6: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Stadium in Kibuye Town

COUNTS 7 – 12

32. By about 18 April 1994, thousands of men, women and children from various locations had sought refuge in the Stadium located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the Stadium seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

33. Some of the people who sought refuge in the Stadium did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to go to the Stadium, he knew or had reason to know that an attack on the Stadium was going to occur.

34. After people gathered in the Stadium, the Stadium was surrounded by persons under Clement Kayishema's control, including members of the Gendarmerie Nationale. These persons prevented the men, women and children within the Stadium from leaving the Stadium at a time when Clement Kayishema knew or had reason to know that an attack on the Complex (sic) was going to occur.

35. On or about 18 April 1994, Clement Kayishema, went to Stadium and ordered the Gendarmerie Nationale, the communal police of Gitesi Commune, the members of the Interahamwe and armed civilians to attack the Stadium. Clement Kayishema initiated the attack himself by firing a gun into the air. In addition, Clement Kayishema personally participated in the attack. The attackers used guns, grenades, pangas, machetes, spears, cudgels and other weapons to kill the people in the Stadium. There were survivors of the attack on 18 April 1994. During the night of 18 April 1994 and the morning of 19 April 1994 gendarmes surrounding the Stadium prevented the survivors from leaving. The attack on the Stadium continued on 19 April 1994. Throughout the attacks, men, women and children attempting to flee the attacks were killed.

36. The two days of attacks resulted in thousands of deaths and numerous injuries to the men,

women and children within the Stadium (Attachment B contains a list of some of the individuals killed in the attacks). 768

37. Before the attacks on the Stadium Clement Kayishema did not take measures to prevent an attack from occurring, and after the attacks Clement Kayishema did not punish the perpetrators.

38. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 7: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 8: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 9: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 10: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 11: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 12: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Church in Mubuga

COUNTS 13 - 18

39. By about 14 April 1994, thousands of men, women and children congregated in the Church in Mubuga, Gishyita Commune. These men, women and children were predominantly Tutsis. They were in the church seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

40. After the men, women and children began to congregate in the Church, Clement Kayishema visited the Church on several occasions. On or about 10 April Clement Kayishema brought gendarmes, under his control, to the Church. These gendarmes prevented the men, women and children within the church from leaving.

41. On or about 14 April 1994 individuals, including individuals under Clement Kayishema's control, directed members of the Gendarme Nationale, communal police of Gishyita commune, the Interahamwe and armed civilians to attack the Church. In addition, each of them personally participated in the attacks. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the people in the Church. Not all the people could be killed at once, so the attacks continued for several days. Both before and during these attacks persons under Clement Kayishema's control, including members of the Gendarmerie Nationale and communal police, prevented the men, women and children within the church from leaving.

42. The attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the Church (Attachment C contains a list of some of the victims killed in the attacks).

43. Before the attacks on the Church in Mubuga, Clement Kayishema did not take measures to

prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators. **769**

44. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 13: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 14: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 15: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 16: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 17: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 18: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacres in the Area of Bisesero

COUNTS 19-24

45. The area of Bisesero spans over two communes of the Kibuye *Prefecture*. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in the area of Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

46. The area of Bisesero was regularly attacked, on almost a daily basis, throughout the period of about 9 April 1994 through about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks with stones, sticks and other crude weapons.

47. At various locations and times throughout April, May and June 1994, and often in concert, Clement Kayishema and Obed Ruzindana brought to the area of Bisesero members of the Gendarmerie Nationale, communal police of Gishyita and Gisovu communes, Interahamwe and armed civilians, and directed them to attack the people seeking refuge there. In addition, at various locations and times, and often in concert, Clement Kayishema and Obed Ruzindana personally attacked and killed persons seeking refuge in Bisesero.

48. The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero (Attachment D contains a list of some of the individuals killed in the attacks).

49. Throughout this time, Clement Kayishema did not take measures to prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators

50. By these acts and omissions Clement Kayishema and Obed Ruzindana are criminally responsible for:

Count 19: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 20: CRIMES AGAINST HUMANITY, a violation of Articles 3(a) (murder) of the Tribunal Statute;

Count 21: CRIMES AGAINST HUMANITY, a violation of Article 3(b) (extermination) of the Tribunal Statute;

Count 22: CRIMES AGAINST HUMANITY, a violation of Article 3(1) (other inhumane acts) of the Tribunal Statute;

Count 23: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 24: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

1996
Arusha, Tanzania

Signed
Richard J. Goldstone
Prosecutor

This rearranged version conforms to the Order of Trial Chamber II in its decision of 10 April 1997 on the indictment of 28 November 1995 confirmed by the Honourable Judge Pillay and amended on 29 April 1996, to serve as the Indictment for the accused Clement Kayishema and Obed Ruzindana in the case ICTR 95-1-I.

1.3 The Accused

Clement Kayishema

6. According to Clement Kayishema's (Kayishema), own testimony, he was born into a Hutu family in the Bwishyura Sector, Kibuye *Prefecture* in Rwanda, in 1954. His father was a teacher and later worked as a janitor in a hospital. Subsequently, he was hired as the commune secretary and was finally appointed judge at the Canton Tribunal. His mother and seven siblings were uneducated farmers.

7. In 1974, Kayishema was appointed registrar in Kagnagare Canton Tribunal. The following year he was granted a scholarship to attend the faculty of medicine of the National University of Rwanda, in Butare. Upon graduation, he practiced general medicine and surgery. In 1984, he was sent by the Rwandan Government to work as a doctor in an Ugandan refugee camp. From 1986 to 1991, he held the position of medical director of the hospital of Nyanza. He was then transferred to the Kibuye hospital.

8. Kayishema married a Rwandan woman by the name of Mukandoli, in 1987 with whom he had two children. Mukandoli holds a degree in education science from the National University of Rwanda, with a specialization in psychology.

9. Kayishema joined the Christian Democratic Party (PDC), whose motto was "work, justice and fraternity," in April 1992. On 3 July 1992, Kayishema was appointed the *Prefect* of Kibuye *Prefecture*. This occurred at a time when the multiparty system came into effect in Rwanda. He was re-appointed to his post, after the death of the President in 1994, by the Interim Government.

Obed Ruzindana

10. According to the testimony of witnesses, Obed Ruzindana (Ruzindana) was born in 1962 into a wealthy Hutu family in Gisovu Commune, Kibuye *Prefecture*, Rwanda. His father, Elie Murakaza, had been a *Bourgmestre* in the Mugonero Commune, where the family resided. Murakaza and, by extension, his family were well known and respected in the community.

11. Ruzindana left his home in Kibuye for Kigali in 1986-1987 and engaged in transporting merchandise out of Rwanda and importing goods into the country. He employed four drivers and by all accounts became a successful businessman in his own right.

12. In 1991 he married a woman whom he had known since childhood. Mrs. Ruzindana testified that although both her parents were Tutsi, her father's identity card indicated that he was a Hutu. According to Mrs. Ruzindana it was possible to "pay" to change one's ethnicity on the identity card. Two children were born from this union in 1991 and 1993. Ruzindana and his family lived in Remera, Kigali until the tragic events of 1994 when they returned to Ruzindana's parents'

home in Mugonero.

1.4 Procedural Background of the Case

Pre-trial

13. Kayishema and Ruzindana were initially charged in the original Indictment submitted by the Prosecutor, Richard Goldstone,[4] on 22 November 1995 together with six other suspects. The charges included conspiracy to commit genocide, Genocide and Crimes Against Humanity and violations of Common Article 3 and Additional Protocol II. The Indictment was confirmed by Judge Navanethem Pillay on 28 November 1995. Judge Pillay ordered that the Indictment be amended on 6 May 1996 to remove the conspiracy charges. It should be noted that a second Indictment was brought against Ruzindana on 17 June 1996, the trial of which is still pending. That Indictment was confirmed by Judge Tafazzal H. Khan on 21 June 1996.

14. Kayishema was arrested on 2 May 1996 in Zambia and transferred to the United Nations Detention Unit Facility (the UNDF) in Arusha, on 26 May 1996. His initial appearance was held on 31 May 1996 before Trial Chamber I. Kayishema, represented by Mr. André Ferran, of the bar of Montpellier, France, and Philippe Moriceau of the bar of Montpellier, France, pleaded not guilty to all of the charges.

15. Ruzindana was arrested on 20 September 1996 in Nairobi, Kenya and transferred to the UNDF on 22 September 1996. His initial appearance was held on 29 October 1996 before the Trial Chamber II. Ruzindana, represented by Mr. Pascal Besnier, of the bar of Paris, France, and Mr. Willem Van der Griend of the Bar of Rotterdam, the Netherlands, pleaded not guilty to all of the charges. The Chamber set a date for trial for 20 February 1997 while reserving the right to join with Kayishema.

16. At the pretrial stage, the Trial Chamber received and decided many written motions from the Parties. Some of the more pertinent ones are detailed below.

17. Kayishema filed a preliminary Motion on 26 July 1996 in which he requested the annulment of the proceedings, and consequently, his provisional release. The Parties were heard on 5 November 1996 and the Defence request was rejected. Kayishema filed a further Motion on 23 October 1996 for postponement of the trial in order to enable him to prepare his case. The Prosecutor did not oppose the Motion but on 5 November 1996, filed a Motion for joinder of Kayishema and Ruzindana. The Tribunal ordered the joinder of the two accused. The trial date for Kayishema consequently was postponed to the trial date set for Ruzindana, which as mentioned above was 20 February 1997.[5]

18. On 30 December 1996 Ruzindana filed a preliminary Motion objecting to the form of the Indictment and against joinder of his case with that of Kayishema based on various alleged procedural difficulties with the Indictment and the warrant of arrest. The request for annulment of

the two Indictments and for his release was rejected as was the objection to the joinder.

19. On 27 March 1997, the Prosecution brought a Motion for leave to sever and to join in a superseding Indictment and to amend the superseding Indictment in the cases against Kayishema, Gérard Ntakirutimana, and Ruzindana on the grounds of involvement in a same transaction. The Chamber rejected the Motion because the Prosecutor did not offer any evidence that demonstrated the nature of the common scheme.

20. Kayishema brought another Motion on 7 March 1997 calling for the application of Article 20 (2) and (4)(b) (Rights of the accused) of the Statute of the Tribunal by the Prosecution. The Defence further requested the Prosecution to divulge and limit its number of lawyers, consultants, assistants and investigators working on the case. The Chamber ruled[6] that the rights of the accused and equality between the parties should not be confused with the equality of means and resources. The Chamber concluded that the Defence had not proved any violation of the rights of the accused as provided in Article 20(2) and (4)(b) of the Statute.

Trial

21. On 11 April 1997 the trial of Kayishema and Ruzindana commenced before Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan, based on the First Amended Indictment filed with the Registry on that day. The Prosecution team consisted of Mr. Jonah Rahetlah, Ms. Brenda Sue Thornton, and Ms. Holo Makwaia. Kayishema was represented by Mr. Andre Ferran and Mr. Philippe Moriceau. Mr. Pascal Besnier and Mr. Van der Griend formed the Defence team for Ruzindana. The Prosecution completed its case on 13 March 1998, having called a total of 51 witnesses and having tendered into evidence over 350 exhibits.

22. The Prosecution filed a Motion on 18 February 1998, pursuant to Rule 73 of the Rules, requesting the Trial Chamber to order the uninterrupted continuation of the trial of the accused and the consultation of both Parties in respect of the scheduling of this continuation. The Chamber was of the view that pursuant to Article 20(4)(b) of the Statute, the accused should be accorded adequate time and facilities for the preparation of their case.[7]

23. The Defence commenced their case on 11 May 1998 and closed on 15 September 1998. It should be noted that at the conclusion of the Prosecution's case, the Defence requested an adjournment in order to prepare its case. In the interest of justice, the Trial Chamber granted the Defence Teams a generous two-month adjournment to prepare. The Defence presented a total of twenty-eight witnesses, sixteen of whom testified on behalf of accused, Ruzindana, seven for Kayishema and five for both accused persons. Kayishema testified on his own behalf. Over 59 Defence exhibits were admitted.

24. The Prosecutor presented closing argument from 21 October to 28 October 1998, Ruzindana's Defence from 28 October to 2 November 1998 and Kayishema's Defence from 3 to 16 November 1998. The Prosecutor presented the argument in rebuttal on 17 November 1998. The case was adjourned the same day for deliberation by the Trial Chamber.

25. During the trial, numerous written and oral motions were heard. On 17 April 1997, the Defence challenged the credibility of a witness, where the oral testimony varied from the previous written statement taken by the prosecutor's investigators. The Chamber opined that variation may occur at times for appreciable reasons without giving cause to disregard the statement in whole or in part. [8] The Chamber ordered that when counsel perceives there to be a contradiction between the written and oral statement of a witness, Counsel should raise such question by putting to the witness the exact portion in issue to enable the witness to explain the discrepancy before the Tribunal. Counsels should then mark the relevant portion and submit it as an exhibit if they find that the contradiction or discrepancy raised was material to the credibility of the witness concerned.

26. On 9 July 1997, Ruzindana filed a Motion pursuant to Rule 75 of the Rules seeking protective measures for potential witnesses noting that this protection should not extend to providing immunity from prosecution by an appropriate authority. The Trial Chamber[9] granted the Motion. A Motion filed by Kayishema seeking general protective measures for witnesses who would testify on his behalf was also granted by the Chamber in its Decision on 23 March 1998.[10]

27. On 12 March 1998 the Prosecutor filed a Motion requesting the Trial Chamber to order the Defence to comply with the provisions of rules 67(A)(ii) and 67(C) of the Rules of Procedure and Evidence. The Prosecutor submitted that if the Defence intended to offer the defence of alibi, it should notify the Prosecution as early as practicable but in any event prior to the commencement of the trial. The Chamber opined that Kayishema should make the necessary disclosure immediately if they intend to rely upon the defence of alibi or special defence. However, the Defence filed a joint Motion on 30 April 1998 requesting the Trial Chamber to interpret the notion of 'defence of alibi' and 'special defence' as stipulated in Rule 67 of the Rules of Procedure and Evidence. The Chamber dismissed the Defence Motion on the ground that it can not define rule 67 of the Rules in an abstract form without a specific problem to address. [11]

28. Due to the Defence's continued non compliance with Rule 67(A)(ii) of the Rule of Procedure and Evidence, the Prosecution filed another Motion on 11 August 1998, seeking, *inter alia*, an order prohibiting the Defence of Kayishema from invoking the Defence of alibi or any special Defence. The Defence responded that, under Rule 67(B), failure of the Defence to notify the Prosecutor of the Defence of alibi or any special Defence as required by rule 67(A)

(ii), does not limit the right of the accused to raise the Defence of alibi or special Defence. The Trial rejected the Defence's reasons for not providing details noting that the accused himself could have provided at least some details. The Chamber therefore reiterated its previous decision on this matter.[12]

29. On 22 June 1998, the Prosecution filed a Motion, seeking for a ruling that evidence of a Defence expert witness, a psychiatrist, be ruled inadmissible. The Chamber noted that it is important to observe the rights of the accused to a fair trial guaranteed under the provisions of Article 20 of the Statute in particular 20(4)(e) which provides that the accused shall have the rights to obtain the attendance of witnesses on his or her behalf. The expert was heard.[13]

30. On 19 August 1998, the Chamber dismissed a Motion filed by the Defence requesting to re-examine witness DE. The Trial Chamber found that the case of Kayishema would not suffer prejudice in the absence of additional evidence from this witness and rejected the Motion. [14]

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1 UN Doc. S/RES/955 of 8 Nov. 1994.

[2] The Rules were successively amended on 12 Jan. 1996, 15 May 1996, 4 Jul. 1996, 5 Jun. 1997 and 8 Jun. 1998.

[3] The provisions of these offences are detailed in Part IV of the Judgement, entitled The Law.

[4] On 1 October 1996, Louise Arbour succeeded Richard Goldstone as Prosecutor of the Tribunal.

[5] Decision on the joinder of the Accused and Setting the Date for Trial, the Prosecutor v. ClJment Kayishema, Case No. ICTR-95-1-T, 6 November 1996.

[6] Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of the Statute of the International Tribunal for Rwanda, the Prosecutor v. ClJment Kayishema, Case No. ICTR-95-1-T, Obed Ruzindana, Case No. ICTR-96-10-T, 5 May 1997.

[7] Decision on the Prosecution Motion for Directions for the Scheduling of the Continuation of the Trial of ClJment Kayishema and Obed Ruzindana on the Charges as Contained in the Indictment No. ICTR-95-1-T, 12 March 1998.

[8] Order on the Probative Value of Alleged Contradiction between the Oral and Written Statement of A Witness During Examination, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 17 April 1997.

[9] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 6 October 1997.

[10] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 23 February 1998.

[11] Decision on the Prosecution Motion for An Order Requesting Compliance by the Defence with Rules 67 (A)(ii) and 67(C) of the Rules, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, 15 June 1998.

[12] Decision on the Prosecution Motion for A Ruling on the Defence Continued non Compliance with Rule 67 (A) (ii) and with the Written and Oral Orders of the Trial Chamber, the prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 3 September 1998.

[13] Decision on the Prosecution Motion Request to Rule Inadmissible the Evidence of Defence Expert Witness, Dr. Pouget, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 29 June 1998.

[14] Decision on the Defence Motion for the Re-examination of Defence Witness DE, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 19 August 1998.