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

SCSL-2003-09-PT-2P-031
(307-388)

Before: Judge Bankole Thompson,
Designated Judge

Registrar: Robin Vincent

Date filed: 29 May 2003

THE PROSECUTOR

Against

AUGUSTINE GBAO also known as (aka) AUGUSTINE BAO

CASE NO. SCSL – 2003 – 09 – PT

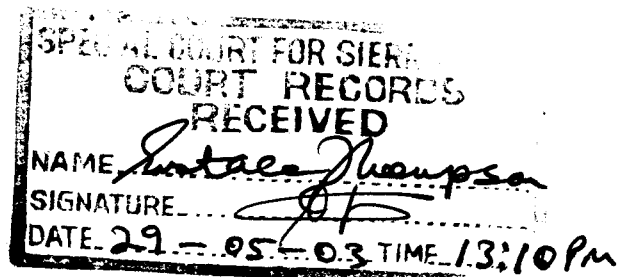
**PROSECUTION REPLY TO RESPONSE OF THE DEFENCE TO THE
PROSECUTION MOTION FOR IMMEDIATE PROTECTIVE MEASURES
FOR WITNESSES AND VICTIMS AND FOR
NON-PUBLIC DISCLOSURE**

Office of the Prosecutor:

Mr Luc Côté, Chief of Prosecutions
Mr Stefan Wehrenberg, Trial Counsel
Ms Sharan Parmar, Assistant Trial Counsel

Defence Counsel:

Mr Girish Thanki, TNT Solicitors
Professor Andreas O'Shea
Mr Kenneth Carr, TNT Solicitors



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INTRODUCTION

The arguments raised in the submission filed by Defence Counsel should be rejected. Defence Counsel's assertions fail to appreciate the difference between Rule 69 (C) of this Court's Rule's of Procedure and Evidence (Rule) and Rule 69 (C) of the ICTY' Rules of Procedure and Evidence (Rule). The assertions fail to realize that it has been accepted by the ICTY, ICTR and the SCSL that the rights of the Accused must be balanced with the need for protective measures for witnesses where they are deemed necessary.

Finally, the assertions are either incorrect or are not supported by the jurisprudence of the international ad hoc tribunals.

ARGUMENT

I. Procedural matters

1. On 26 May 2003, the Defence filed its response (the “**Defence Response**”) to the Prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure dated 7 May 2003 (the “**Prosecution Motion**”). This response was received and certified by the Court Records Office on 26 May 2003 and received by the Office of the Prosecutor on 26 May 2003. According to Rule 7 (C) the Prosecution is allowed to reply within three days.
2. The Defence requests leave of the Court to exceed the requisite page limit within the response itself. It is improper to seek authority and then proceed without a properly filed request for leave. Article 9.5. of the *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003 (the “**Practice Direction**”) states clearly that “A party must seek authorization **in advance** from the Chamber to exceed the page limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing” (Emphasis added.). In fact, any request for leave to file an oversized response must be made separately and sought in advance. The Prosecution submits that the Defence has clearly disregarded the Practice Direction.
3. The Defence also requests that the matter be heard before a sitting of the full Trial Chamber, either orally or in writing. As a pre-trial motion, it is well within the discretion of the Designated Judge of the Trial Chamber to make a determination on the Prosecution Motion for witness protection matters without an oral hearing or the deliberation of the full Trial Chamber. In the interest of efficiency, the Prosecution submits that the Designated Judge decides the matter on written submissions only, as was done in the cases of Prosecutor v. Issa Hassan Sesay, SCSL-2003-05-PT, Alex Tamba Brima, SCSL-2003-06-PT, Morris Kallon, SCSL-2003-07-PT, and Samuel Hinga Norman, SCSL-2003-08-PT.

II. Rights of the Accused

4. The Prosecution fully recognises the rights of the Accused as they are stipulated in Article 17 of this Court’s statute. These rights as guaranteed under the Statute include those fundamental rights of the Accused claimed by the Defence. Of note, the language of Article 17 of this Court’s statute is almost identical to Article 20 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 21 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). Both tribunals

sufficiently provide prevailing jurisprudence as to the foundation and breadth of these rights (*See e.g. Prosecutor v. Tadic*, ICTY-IT-94-A, 15 July 1999, para. 43 f.).

5. According to the prevailing practice of the ad hoc Tribunals and as stipulated in Article 17.2 of the Court's statute, the right of the Accused to a fair trial may be subject to derogation in exceptional circumstances, which include the interest of witness and victim protection. Rule 69 and 75 of the Court's Rules of Procedure and Evidence permit the Judge or the Trial Chamber to balance the rights of the Accused with witness protection by providing for appropriate measures to safeguard the privacy and security of witnesses and victims, which in exceptional circumstances includes the possibility "to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise" (Rule 69 (A)), "provided that the measures are consistent with the rights of the accused" (Rule 75 (A)).

III. Rule 69 (C)

6. The submissions of the Defence characterizing Rule 69 (C) of the ad hoc tribunals does not fully reflect developments at the ad hoc tribunals and their objective of balancing the rights of the Accused with witness protection. At the outset, the ICTY concluded that when considering of the rights of the Accused in relation to witness protection, one must start with the general principle that "the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself" (*See Prosecutor v. Blaskic*, IT-95-14, Decision on the Application of the Prosecution dated 17 October 1996 Requesting of Protective Measures for Victims and Witnesses, 5 November 1996, as cited in *Prosecutor v. Sesay*, SCSL-2003-05-PT, 23 May 2003, para. 14).
7. This principle formed the basis for the above-quoted Rule 69 (A) and its corresponding Rule 69 (C), which states in its original version as ICTR Rule of 1995 that "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence". This precise wording is used within ICTY Rule 69 (C), and is also employed by the Defence in paragraph 21 and request 4 of its Response. However, the response of the Defence fails to reflect the subsequent development of Rule 69 (C) where the Rules of ICTR were amended.
8. After an intense debate over maintaining a balance with the rights of the Accused to prepare their defence and the interests of witness and victim protection, several decisions the ICTR came to recognise that in fact the triggering event for the disclosure of identifying data ought to be the date on which the witness is to be called to testify and **not** the commencement of trial

(See e.g. *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, 27 March 2001, para. 23; *Prosecutor v. Nzirorera*, ICTR-98-44-I, 12 July 2000, para. 16 and other cases cited herein). As a result of this jurisprudence, the ICTR finally amended Rule 69 (C) during their 12th Plenary Session, held on 5-6 July 2002, and replaced the prior language, “shall be disclosed in sufficient time prior to the trial” with “shall be disclosed within such time as determined by the Trial Chamber”. This amendment reflected the common practice of the ICTR and was made in order to afford The Trial Chamber “the discretion to regulate the disclosure of identifying information of protected witnesses as it deems fit and proper” (See *Prosecutor v. Rukundo*, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses, ICTR- 2001-70-I, 24 October 2002, para. 22). In recognition of realising a proper balance and in accordance with the recent jurisprudence and this amendment, the Court adopted the following wording for Rule 69 (C) “the identity of the victim or witness shall be disclosed in sufficient time before the witness **is to be called** to allow adequate time for preparation of the prosecution and the defence” (Emphasis added.).

9. In request 4 of its Response, the Defence seeks “that the Prosecution disclose unredacted witness statements to the Defence at least 60 days before the date set for trial”. As discussed in paragraph 6 of this Reply, Rule 69 (C) of the Court states that the triggering event for the disclosure of identifying data shall be the date on which the witness is to be called to testify. Concerning the question of meeting the requisite of “sufficient time”, the Prosecution has submitted in the Prosecution Motion that “the requirements of Rule 69 (C) are met by disclosure of identifying information 21 days prior to the testimony of the witness at trial” (para. 16). The Prosecution still maintains that this 21 day time period, which was established by the jurisprudence of the ICTR, as a general practice, is a sufficient balance between the rights of the Accused and the need for protective measures for witnesses. The Defence’ claim in para. 21 of its Response that the requested measure under para. 23 (a) of the Prosecution Motion is a violation of the right of the Accused to adequate time and facilities to prepare for trial, fails to consider that the substance of the witnesses’ testimony will have been previously disclosed to the Defence and that only the identifying data will be withheld for a certain period prior to testimony. Since the Defence will be in possession of the substance of anticipated testimonies, the Prosecution submits that 21 days before testimony is sufficient time to allow the Defence to conduct any inquiries relating to remaining issues, such as the credibility of the identified witness (See *Prosecutor v. Zigiranyirazo*, ICTR 2001-73-I, 25 February 2003, para. 17; *Prosecutor v. Muvunyi*, ICTR-2000-55-I, 25 April 2001, para. 26; *Prosecutor v. Rwamakuba*, ICTR 98-44-T, 22 September 2000, para. 15 f.).
10. The Defence seeks an order that the Prosecution disclose all unredacted material and proceed to identify on a case by case basis the specific justifications for witness protection and the extent of protective measures

being sought (requests 2 and 4 of the Defence Response). The Prosecution submits that it has made a reasonable case for measures of confidentiality through withholding identifying data during the pre-trial phase. In matters of such delicacy and sensitivity, as the Court stated in recent decisions (*See e.g. Prosecutor v. Sesay*, SCSL-2003-05-PT, 23 May 2003, para. 14; *Prosecutor v. Brima*, SCSL-2003-06-PT, 23 May 2003, para. 14; *Prosecutor v. Kallon*, SCSL-2003-07-PT, 23 May 2003, para. 15; *Prosecutor v. Norman*, SCSL-2003-08-PT, 23 May 2003, para. 14), “it would be unrealistic to expect ... the Prosecution ... to carry the undue burden of having each witness narrate in specific terms or document the nature of his or her fears as to the actual or anticipated threats or intimidation”. Accordingly, the said request of the Defence should be rejected.

IV. List of Defence team members

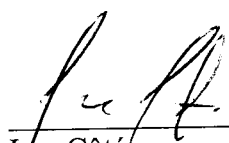
11. The Defence objects the order sought in para. 23 (h) of the Prosecution Motion. The said order is not being suggested to control the identity of the Defence team members. The Prosecution submits that it is in the legitimate interest of the Court and the Prosecution to have precise knowledge of those persons dealing with confidential and sensitive information, such as the identifying data of protected witnesses. The requirement sought-after also provides the Court with the most direct means to exercise oversight regarding the implementation of protective measures, including, if necessary, the means by which to pursue alleged violations of the protective orders.

CONCLUSION

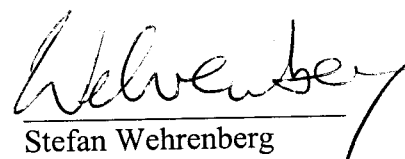
The Court should grant the relief requested in the Prosecution motion for protective measures.

Freetown, 29 May 2003

For the Prosecution,



Luc Côté,
Chief of Prosecutions



Stefan Wehrenberg
Trial Counsel

PROSECUTION INDEX OF AUTHORITIES

1. ICTR Rules of Procedure and Evidence 1995, Rules 69, 75
2. *Prosecutor v. Tadic*, ICTY – IT – 94 – A, 15 July 1999

International Criminal Tribunal for Rwanda

Rules of Procedure and Evidence

(as entered into force 29 June 1995)

Section 3: Production of Evidence

Rule 69

Protection of Victims and Witnesses

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

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 II¹ 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. Drazan 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 1999⁷.

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 matter¹¹, 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

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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

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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 *Moraël 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.

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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 State¹²⁹ 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 McDonald¹³⁴ and the Prosecution¹³⁵ 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'

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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 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 found¹⁷² 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.

(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

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 Italian²⁴⁶ and German²⁴⁷ 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

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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 charges²⁶⁸ 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 (*rappporto 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 rappporto 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 Germany²⁸³ 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 France²⁸⁵ and Italy.²⁸⁶

They also embrace common law jurisdictions such as England and Wales,²⁸⁷ Canada,²⁸⁸ the United States,²⁸⁹ Australia²⁹⁰ 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.

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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 population³¹¹ 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* case³³¹ 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.

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-General³³⁷ 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 Appeals 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 jurisprudence³⁵¹ 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

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 Statute³⁶³ 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 Rights³⁸⁹ 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 97³⁹⁵ 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.

file:///O:\Reference%20Materials\4th%20Edition%20ICTR%20ICTY%20Indictments,%2... 29/05/2003

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

Tadić Decision on Jurisdiction Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Duško Tadić*, IT-94-1AR72, Appeals Chamber, 2 October 1995 (Tadić) (1995) I ICTY JR 353).

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

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

TRNC Turkish Republic of Northern Cyprus.

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

VJ Army of the Federal Republic of Yugoslavia.

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

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