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

IN THE APPEALS CHAMBER

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

Registrar: Mr. Robin Vincent

Date filed: 21 November 2003

THE PROSECUTOR

Against

CHARLES GHANKAY TAYLOR also known as
CHARLES GHANKAY MACARTHUR DAPKPANA TAYLOR

CASE NO. SCSL – 2003 – 01 – PT

POST-HEARING ADDITIONAL WRITTEN SUBMISSIONS OF THE PROSECUTION

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

Defence Counsel:
Mr Terence Terry

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I. THE PROSECUTION PRELIMINARY OBJECTION

1. The Prosecution submits that as a general proposition, an accused does not have standing to file motions before the Special Court until he or she has been transferred to the custody of the Special Court or has appeared before it. (See paragraphs 4 to 10 below.)

2. The question in this case is whether there is any exception to this general principle in a case where the accused claims to have an immunity from the jurisdiction of the Special Court on the ground of head of State immunity. The Prosecution submits that the answer is no, for the reason that a person's status as a head of State or former head of State does not give that person any immunity from the jurisdiction of the Special Court. (See paragraphs 11 and following below.) Accordingly, the position of a head of State or former head of State is no different from that of any other accused.

3. The Prosecution therefore accepts that the Appeals Chamber must, in order to deal with this motion, decide the substantive issue relating to head of State immunity. Once the Appeals Chamber has decided that the Accused in this case cannot plead immunity from the jurisdiction of the Special Court on grounds of head of State immunity, the Appeals Chamber should reject the Motion. However, it should not do so by dismissing the Motion on the merits. Rather, it should dismiss the Motion on the basis that the Accused has no standing to bring it, having not yet appeared before the Special Court.

4. In the oral hearings, the Prosecution relied on a number of authorities of the ICTY in support of its position that an accused does not have standing to file motions before the Special Court until he or she has been transferred to the custody of the Special Court or has appeared before it:

   - *Prosecutor v. Bobetko, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge*, Case Nos. IT-02-62-AR54*bis* and IT-02-62-AR108bis, Appeals Chamber, 29 November 2002
   - *Prosecutor v. Karadzic and Mladic, Decision Rejecting the Request Submitted by Mr Medevene and Mr Hanley III Defence Counsels for Radovan Karadzic*, Case Nos. IT-95-5-R61 and IT-95-18-R61, Trial Chamber, 5 July 1996
   - *Prosecutor v. Karadzic and Mladic, Decision Partially Rejecting the Request Submitted by Mr Igor Pantelic Counsel for Radovan Karadzic*, Trial Chamber, 27 June 1996

5. Thus, the general principle invoked by the Prosecution is established in the case law of the ICTY, even at the Appeals Chamber level. The Prosecution submits that unless there are compelling reasons to do so, the Appeals Chamber of the Special Court should follow the established case law of the Appeals Chamber of the ICTY and the ICTR, as mandated by Article 20(3) of the Statute of the Special Court. The Special Court is not a tribunal that exists in isolation—it is not a legal "island". The Statutes and Rules of Procedure and Evidence of the ICTY, the ICTR and the Special Court, despite certain differences, all follow a common model and are materially similar. It is submitted that all of these courts and tribunals apply, and contribute to the development of, a common corpus of law. This common corpus includes not only

rules of substantive law, but also of procedural law and the law of evidence. Just as the Special Court should be guided by precedents of the ICTY and ICTR on matters of substantive and procedural law, it should be expected that the ICTY and ICTR (and in due course, the ICC) will in turn be guided also by the case law of the Appeals Court of the Special Court.

6. Even where an issue may not appear to be of great practical importance in the context of the Special Court, it may be of weighty significance to other international criminal tribunals. In addressing any issue, it is therefore submitted that the Special Court should bear in mind their significance to the corpus of international criminal law as a whole, and not just its significance to the Special Court. Throughout its existence, the ICTY has faced the difficulty of securing the arrest of many of its indictees, and significant fugitives from the ICTY are still at large after many years. A precedent of the Special Court suggesting that such fugitives could, while continuing to evade justice, file motions before the ICTY attacking its legality, integrity and impartiality, would have significant implications for the ICTY.[1] Such a precedent may in the future prove also to have significant implications for other international criminal courts, such as the ICC.

7. The Prosecution submits that it would undermine public confidence in the administration of justice to allow an accused, who is evading the jurisdiction of the court and refusing to answer to the charges against him or her, to be permitted to launch challenges to the court and its processes from afar, and expect the court to answer to those challenges. An accused should not be permitted to invoke the processes of the court to his or her benefit while at the same time flouting its authority. An accused that appears before an international criminal court to answer the charges brought against him or her is entitled to raise any appropriate matter in his or her defence, including challenges to jurisdiction. However, an accused who refuses to appear before an international court or tribunal, and who refuses to answer

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1 In this connection, the Prosecution refers to the attached letter signed on behalf of Carla del Ponte, Prosecutor of the ICTY.

to the charges against him or her, cannot from afar be permitted to invoke the processes of the court for his or her benefit.

8. The Prosecution submits that in the legal system of the Special Court (as in the ICTY and ICTR), the approval of an indictment and the issuing of a warrant of arrest under Rule 47 are inherently *ex parte* proceedings (that is, proceedings to which only the Prosecutor is a party). The Prosecution relies on the authorities referred to in paragraph 8 of the Prosecution Response to the Defence Motion.[2] It is only when the accused is transferred to the Special Court or otherwise appears before it that the proceedings become *inter partes* (that is, proceedings to which both the Prosecution and the Defence are parties). At that point, the accused, as a party to the proceedings, is entitled to file appropriate preliminary motions and other motions in the proceedings, including any motion challenging the legality of any aspect of the proceedings, or challenging the court's jurisdiction.

9. Just as an accused cannot be tried *in absentia* (that is, without being physically present before the court), an accused cannot invoke the procedures of the court *in absentia*. The jurisdiction of the court to determine preliminary motions and other motions is an *incidental* jurisdiction, which can only be exercised incidentally to an exercise of the court's primary jurisdiction. The primary jurisdiction of the court is to try accused for crimes within the jurisdiction of the Special Court. Unless there is an accused before the court to be tried in the exercise of the court's primary jurisdiction, there is no basis for the exercise of any incidental jurisdiction.

10. For the reasons given in paragraphs 5-7 of the Prosecution Response, the Prosecution also submits that the Defence Motion is not a "preliminary motion" under Rule 72, but a motion under Rule 73. Pursuant to Rule 72(A), such a motion may only be brought after the initial appearance of the accused.

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2 "Prosecution Response to Defence Motion to Quash the Indictment Against Charles Ghankay Taylor", filed by the Prosecution on 28 July 2003 (Registry page nos. 113-254) (the "**Prosecution Response**").

II. THE HEAD OF STATE IMMUNITY ISSUE

A. The Special Court is a "*certain*" international criminal court

11. For the reasons given in the oral hearings, the Prosecution submits that there can be no doubt that the Special Court is an international court. The principal issue to emerge in oral argument is whether it is a "*certain*" international criminal court of the type referred to in the last subparagraph of paragraph 61 of the *Yerodia* judgement of the International Court of Justice.[3] The Prosecution submits that the Special Court does satisfy the criteria of a "certain" international criminal court, for this purpose.

12. In the *Yerodia* judgement, the International Court of Justice affirmed the general principle that a minister for foreign affairs (and, by implication, other high-ranking State officials, including a head of State) enjoys certain immunities from the criminal jurisdiction of the courts *of other States*. Such immunities have in the past often been explained by reference to traditional international law principles, such as the principle of the sovereign equality of States, and the principle that "one sovereign cannot exercise sovereignty over another sovereign" (*par in parem non habet imperium*). However, the International Court of Justice did not rely on these traditional principles in its judgement, and referred instead to more pragmatic considerations: in relation to incumbent ministers for foreign affairs, the International Court of Justice said that the immunities exist "to ensure the effective performance of their functions on behalf of their respective States".[4] It is evidence that if such immunities did not exist, States of opposing and antagonistic ideologies or political systems could purport to indict each others' senior officials in the exercise of universal jurisdiction, and could issue corresponding international arrest warrants. For instance, in the absence of such immunities, during the Cold War, courts in the Soviet Union might have purported to bring international criminal proceedings against the President of the United States, while at the same time United States courts might have sought to prosecute the leadership of the Soviet Union for crimes under international law. International order

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[3] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002 (the "***Yerodia* judgement**"), filed as Annex 10 in the Prosecution Response.

[4] *Yerodia* judgement, para. 53.

could collapse into international anarchy if all States had an unrestricted jurisdiction to indict high level officials of any other States for alleged crimes under international law.

13. However, the danger of such anarchy does not arise where jurisdiction is exercised over a high-ranking State official by an international court created with the involvement of the entire international community to try crimes committed against the entire international community. Such jurisdiction is distinct from the national jurisdiction of any one State, and is not subject to any one State's political, ideological or legal values.

14. The Special Court clearly satisfies the criteria of such an international criminal court. The Special Court Agreement was concluded with the Government of Sierra Leone by the Secretary-General of the United Nations, acting pursuant to a request by the United Nations Security Council expressed in Security Council resolution 1315 (2000). In that resolution, the Security Council determined that "the situation in Sierra Leone continue[d] to constitute a threat to international peace and security in the region", that "a credible system of justice and accountability for the very serious crimes committed [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace" and that there was a "pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone". In response to that resolution, the Secretary-General produced a report containing a draft Statute of the Special Court, which contained the present Article 6(2), providing that "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment".[5] In none of the subsequent correspondence between the President of the Security Council and the Secretary-General was the inclusion of this provision ever questioned by the Security Council.

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[5] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, filed as Annex 8 in the "Prosecution Rule 72(G)(ii) Response Relating to the Defence Motion to quash the indictment" (Registry page nos. 636-1394).

15. Article 24(1) of the UN Charter provides that "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf". It is therefore clear that the Special Court was established with the imprimatur and approval given on behalf of the international community as a whole.

16. Furthermore, the Special Court offers the guarantees of a fair trial embodied in relevant international human rights instruments (see Article 17 of the Special Court Statute). Its Rules of Procedure and Evidence are modelled on, and are substantially similar to those of other international criminal tribunals. Thus, it applies rules which are derived from a corpus of substantive and procedural law, and rules of evidence, that are common to a number of international criminal tribunals. It is not subject to any one State's political, ideological or legal values. As the Appeals Chamber of the ICTY has said:

> "Sovereign rights of states cannot and should not take precedence over the right of the international community to act appropriately as [these crimes] affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."[6]

17. Finally, there is no inconsistency with traditional concepts such as the sovereign equality of States for a head of State to be tried by an international court, as opposed to a court of *another State*.[7]

B. The position of the Government of Liberia on the issue of immunity is immaterial

18. One question which arose in oral argument was whether the Prosecution had ever sought confirmation from the Government of Liberia whether it would be willing to

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6 *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 59, quoting the Trial Chamber below in that case.

7 See paragraph 12 above.

waive the immunity of its former head of State. The Prosecution has not sought any such confirmation from the Government of Liberia, and indeed, the Prosecution submits that it would be inappropriate for the Prosecution or any other organ of the Special Court to do so.

19. If the Accused, contrary to the submissions of the Prosecution, did enjoy an immunity from the jurisdiction of the Special Court, then of course it would be necessary to ascertain whether the Government of Liberia is willing to waive that immunity. However, the Prosecution submission is that the Accused does *not* have any immunity that he can invoke before the Special Court. Accordingly, there is no immunity that the Government of Liberia could waive. The ability of the Special Court to prosecute the Accused therefore does not in any way depend on the attitude of the Government of Liberia. In the circumstances, it would be contrary to the independence of the Special Court under Article 13(1) of the Special Court Statute, and contrary to the independence of the Prosecutor under Article 15(1) of the Special Court Statute, for the Chamber or the Prosecutor to seek the views of the Government of Liberia on whether or not the prosecution of the Accused can or should proceed.

C. The question whether the alleged crimes were committed in a personal capacity is immaterial for the purposes of this motion

20. Another question to arise in oral argument was whether the crimes with which the Accused is charged are alleged to have been committed by him in an official capacity or in a private capacity. The Prosecution informed the Appeals Chamber at the oral hearings that the acts are alleged to have been committed by the Accused in a private capacity.

21. The Prosecution notes that the International Court of Justice found, in the *Yerodia* judgement, that after a foreign minister (and, by implication, a head of State) ceases to hold office, he or she has no immunity from the criminal jurisdiction of courts of other States in respect of acts committed during his or her term of office in a private capacity (as opposed to an official capacity).[8] Thus, even if, contrary to the

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8 *Yerodia* judgement, para. 61, second last sub-paragraph (beginning "Thirdly, …").

Prosecution's submissions, the Special Court were *not* an international criminal court within the meaning of paragraph 61 of the *Yerodia* judgement, the Accused, as a *former* head of State, would presently have no immunity from the jurisdiction of the Special Court in respect of acts committed during his term of office in a private capacity.

22. However, the Prosecution submits that it is *not* possible for the present motion to be disposed of on the basis (1) that the Accused is a former head of State; (2) that the acts of the Accused are alleged by the Prosecution to have been committed in a private capacity; and (3) that it therefore unnecessary to decide whether or not the Special Court is an international criminal court within the meaning of paragraph 61 of the *Yerodia* judgement. This is because it is not the *essence* of the Prosecution's allegation that the crimes were committed by the Accused in a private capacity. In these circumstances, the Prosecution submits that the Accused should be convicted, even if the Trial Chamber were subsequently to decide on the basis of the evidence presented at trial that the crimes were in fact committed by the Accused in an official capacity.

23. For instance, where an indictment alleges that a crime was committed on a particular day, the accused can be convicted of the crime even if the evidence shows that the crime was committed on a different day without any need to amend the indictment, where time is not the essence of the allegation and the defendant is not prejudiced as a result of the failure of the indictment to plead these details.[9] The situation is analogous here. The Prosecution is only required to prove the "essential" elements of an offence and not those that are incidental thereto. This will vary depending on the nature of the offence charged and the surrounding circumstances. In relation to the

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[9] Cases in England and Wales supporting this proposition include: *Department of Social Security* v *Cooper*, 158 JP 990; and *R* v *L*, [1999] 1 Cr App Rep 117. Cases in Canada supporting this proposition include: *R.* v *Labine*, 23 C.C.C. (2d) 567 (1975); and *R.* v *Pangman*, 43 W.C.B. (2d) 474 (1999). Cases in Australia supporting this proposition include: *R.* v *VHP*, (Unreported Judgement of the Supreme Court of New South Wales Court of Criminal Appeal, 1997); and *R.* v *Rodney John Stringer*, [2000] NSWCCA 239. See also *Prosecutor v. Kunarac et al., Judgement,* Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002, para 217, in which the Appeals Chamber of the ICTY said that "minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant that the events charged in the Indictment did not occur."

Accused in this case, the essential elements of the offence are the elements of the substantive crimes with which he has been charged. The question whether or not the crimes were committed in a private capacity cannot in any sense be considered an essential element of the offences charged, in view of the express provision in Article 6(2) of the Special Court Statute that "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment".

24. Accordingly, even though the Prosecution alleges that the Accused's crimes were committed in a personal capacity, the Accused can be convicted of these crimes even if the Trial Chamber were subsequently to decide, on the basis of the evidence at trial, that the crimes were committed in a private capacity, without any need to amend the indictment. However, in the event of a finding that the crimes were committed in an official capacity, it would be necessary before entering a conviction to determine that the Special Court is an international criminal court within the meaning of paragraph 61 of the *Yerodia* judgement. The Prosecution therefore submits that it is essential for the Appeals Chamber to determine this question in disposing of the present motion.

III. OTHER ARGUMENTS OF THE ACCUSED

25. The Prosecution preliminary objection applies equally to the Defence argument relating to the alleged violation of the sovereignty of Ghana. In the event only that the Appeals Chamber were to decide the merits of this argument, the Prosecution relies on paragraph 19 of the Prosecution Response and on paragraphs 28-29 of the Prosecution Rule 72(G)(ii) submissions.[10]

26. Paragraphs 30-53 of the Defence Rule 72(G)(i) submissions raise a number of new substantial issues relating to the jurisdiction of the Special Court. The Prosecution's

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[10] "Prosecution Rule 72(G)(ii) Response Relating to Defence Motion to Quash the Indictment", filed by the Prosecution on 14 October 2003 (Registry page nos. 636-1640) (the "**Prosecution Rule 72(G)(ii) submissions**").

preliminary objection applies equally to these other challenges. However, these other challenges must be dismissed in any event, on the ground that they formed no part of the original Defence motion filed before the Trial Chamber, and accordingly, form no part of the matter that has been referred to the Appeals Chamber pursuant to Rule 72. As a matter of procedure, the Defence cannot raise new challenges to jurisdiction in a Rule 72(G)(i) submission. The Defence Motion before the Trial Chamber, which has been referred to the Appeals Chamber, was concerned solely with the claim of head of State immunity, and a related argument concerning an alleged violation of the sovereignty of Ghana.

IV. CONCLUSION

27. The Court should therefore dismiss the Defence Motion in its entirety.

Freetown, 21st/11/2003.

For the Prosecution,

Desmond de Silva, QC

Walter Marcus-Jones

Christopher Staker

Abdul Tejan-Cole

INDEX OF AUTHORITIES

1. Letter addressed to Mr. David Crane, Prosecutor of the Special Court for Sierra Leone, dated 30 October 2003, signed on behalf of Carla del Ponte, Prosecutor of the ICTY.
2. *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995.
3. *Department of Social Security* v *Cooper*, 158 JP 990.
4. *R* v *L*, [1999] 1 Cr App Rep 117.
5. *R.* v *Labine*, 23 C.C.C. (2d) 567 (1975).
6. *R.* v *Pangman*, 43 W.C.B. (2d) 474 (1999).
7. *R.* v *VHP*, (Unreported Judgement of the Supreme Court of New South Wales Court of Criminal Appeal, 1997).
8. *R.* v *Rodney John Stringer*, [2000] NSWCCA 239.
9. *Prosecutor v. Kunarac et al., Judgement,* Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, 12 June 2002.

ANNEX 1:

Letter addressed to Mr. David Crane, Prosecutor of the Special Court for Sierra Leone, dated 30 October 2003, signed on behalf of Carla del Ponte, Prosecutor of the ICTY.

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United Nations Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

OFFICE OF THE PROSECUTOR BUREAU DU PROCUREUR

Thursday, 30 October 2003

Ref: OTP/O/6650

Dear Mr. Crane,

Please accept this letter as official expression of support for the position taken by the Office of the Prosecutor for the Sierra Leone Special Court in the matter of *Prosecutor v. Charles Ghankay Taylor*. I am aware that your office has set forth its opposition to the relief sought by the fugitive accused. The issues raised by your office in its filings are of grave significance to the appropriate enforcement of international humanitarian law both procedurally and substantively. Unfortunately the short time available does not allow me to seek leave of your court to appear as an Amicus Curiae in support of your position as I would otherwise have done. In the absence of a more formal intervention, you are fully authorised to express the position of the Prosecutor for the ICTY in your submissions before the SCSL Appeals Chamber. On this matter the OTP for the ICTY has always been consistent with the position taken by your office in the Taylor matter.

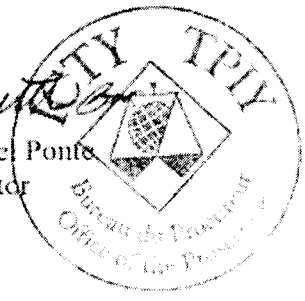
In this regard it is my understanding that the procedural history of the Taylor matter is that: On 19 September 2003, the SCSL Trial Chamber issued an order in which it ruled that the motion filed on behalf of the accused Charles Ghankay Taylor "is deemed to have been filed as a preliminary motion pursuant to Rule 72 of the Rules of Procedure and Evidence." The Trial Chamber further considered that the Defence Motion "objects to the jurisdiction of the Special Court to try the Accused on all the charges contained in the Indictment." On that basis, the Trial Chamber referred the Defence Motion to the Appeals Chamber for determination, pursuant to Rule 72(E) of the Rules of Procedure and Evidence. The Prosecution has essentially objected on the grounds of standing.

The Honorable David Crane
Prosecutor, Special Court for Sierra Leone

The ICTY has addressed similar issues in at least three cases; namely, *Prosecutor v. Karadžić* Prosecutor v. *Bobetko,* and *Prosecutor v. Milošević,*. In Prosecutor v. Karadžić, in the context of the ICTY's Rule 61 proceedings – frequently referred to (erroneously) as a variant of a trial *in absentia* – the ICTY Trial Chamber did not cede standing to an absent accused. In Prosecutor v. Bobetko in which the Republic of Croatia attempted to quash the indictment issued against the accused before his surrender the Court would not entertain submissions made by an accused person or by counsel who seek to speak on behalf of the accused prior to his appearance before the Tribunal. In *Prosecutor v. Milošević,* the accused purported to challenge the jurisdiction of the ICTY against him on numerous grounds, including immunity on the basis of his being a Head of State. However, the accused was nevertheless by this point present before the Trial Chamber and filed motions before it.

Please be assured of the cooperation and support of my office in further matters of mutual interest.

Carla Del Ponte
Prosecutor



ANNEX 2:

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-94-1-AR72

IN THE APPEALS CHAMBER

Before: Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab
Judge Sidhwa

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 October 1995

PROSECUTOR

v.

DU[KO TADI] a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:
Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis
Mr. William Fenrick

Counsel for the Accused:
Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simi}

I. INTRODUCTION

A. The Judgement Under Appeal

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 Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae*.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal
>
> HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

> "The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.
The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

> "There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae* and *materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is

visible from the Latin origin of the word itself. *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the Termes de la ley provide the following definition:

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (STROUD'S JUDICIAL DICTIONARY, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." BLACK'S LAW DICTIONARY, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others.
In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
>
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (*id.* at 12-14).

The Trial Chamber approved this line of argument.
This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

> "[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal." (Decision at Trial, at para. 8.)

Both the first and the last sentences of this quotation need qualification. The first sentence assumes a subjective stance, considering that jurisdiction can be determined exclusively by reference to or inference from the intention of the Security Council, thus totally ignoring any residual powers which may derive from the requirements of the "judicial function" itself. That is also the qualification that needs to be added to the last sentence.

Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function.

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (*see* United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal.

16. In treating a similar case in its advisory opinion on the *Effect of Awards of the United Nations Administrative Tribunal*, the International Court of Justice declared:

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

> "In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (*Id.* at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (*see*, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

> "[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.
As no such limitative text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its "*compétence de la compétence*" and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

20. It has been argued by the Prosecutor, and held by the Trial Chamber that:

> "[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim*.)

There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own "creator." It was not established for that purpose, as is clear from the definition of the ambit of its "primary" or "substantive" jurisdiction in Articles 1 to 5 of its Statute.

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

21. The Trial Chamber has sought support for its position in some dicta of the International Court of Justice or its individual Judges, (*see* Decision at Trial, at paras. 10 - 13), to the effect that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (*Id.* at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia*, in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (*See* Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue. On this question, the International Court of Justice declared in its advisory opinion on *Certain Expenses of the United Nations*:

> "[I]t has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." (Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (Advisory Opinion of 20 July).)

This dictum applies almost literally to the present case.

25. The Appeals Chamber does not consider that the International Tribunal is barred from examination of the Defence jurisdictional plea by the so-called "political" or "non-justiciable" nature of the issue it raises.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (*See* Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an *ad hoc* criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of

individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of *ad hoc* tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?

2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?

3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

"In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (*Id.*, Art. 24(2).)

The Charter thus speaks the language of specific powers, not of absolute fiat.

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (*i.e.*, opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering *measures* to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can

thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (*see* para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are coercive *vis-à-vis* the culprit State or entity. But they are also mandatory *vis-à-vis* the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

32. As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant's contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that "in the particular circumstances of the former Yugoslavia", the establishment of the International Tribunal "would contribute to the restoration and maintenance of peace" and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;

b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of

Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can *a fortiori* undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux*, or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards*, the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter *ECHR*))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter *ACHR*).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (*See* Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (*See* G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (*See* General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See, e.g.*, Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the

Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

> "Concurrent jurisdiction
>
> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. *The International Tribunal shall have primacy over national courts.* At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: " [The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

Appellant's Brief in support of the motion before the Trial Chamber went into further details which he set down under three headings:

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadi}, that the said Du{ko Tadi} is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadi}, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

> "What is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal [. . .]" (Rules of Procedure, Rule 9 (iii).)

After the Trial Chamber had found that that condition was satisfied, the request for deferral followed automatically. The conditions alleged by Appellant in his Brief were irrelevant.

Once this approach is rectified, Appellant's contentions lose all merit.

53. As pointed out above, however, three specific arguments were advanced before the Trial Chamber, which are clearly referred to in Appellant's Brief in appeal. It would not be advisable to leave this ground of appeal based on primacy without giving those questions the consideration they deserve.

The Chamber now proposes to examine those three points in the order in which they have been raised by Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

> "From the moment Bosnia-Herzegovina was recognised as an independent state, it had the competence to establish jurisdiction to try crimes that have been committed on its territory." (Defence Trial Brief, at para. 5.)

Appellant added that:

> "As a matter of fact the state of Bosnia-Herzegovina does exercise its jurisdiction, not only in matters of ordinary criminal law, but also in matters of alleged violations of crimes against humanity, as for example is the case with the prosecution of Mr Karad`i} et al."(Id. at para. 5.2.)

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in I*srael v. Eichmann*:

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 International Law Reports 5, 62 (1961), affirmed by Supreme Court of Israel, 36 International Law Reports 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega*:

> "As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

56. That Appellant be recognised the right to plead State sovereignty does not mean, of course, that his plea must be favourably received. He has to discharge successfully the test of the burden of demonstration. Appellant's plea faces several obstacles, each of which may be fatal, as the Trial Chamber has actually determined.

Appellant can call in aid Article 2, paragraph 7, of the United Nations Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State [. . .]." However, one should not forget the commanding restriction at the end of the same paragraph: "but this principle shall not prejudice the application of enforcement measures under Chapter VII." (United Nations Charter, art. 2, para. 7.)

Those are precisely the provisions under which the International Tribunal has been established. Even without these provisions, matters can be taken out of the jurisdiction of a State. In the present case, the Republic of Bosnia and Herzegovina not only has not contested the jurisdiction of the International Tribunal but has actually approved, and collaborated with, the International Tribunal, as witnessed by:

a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));

b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);

c) Letter from Vasvija Vidovi}, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

As to the Federal Republic of Germany, its cooperation with the International Tribunal is public and has been previously noted.

The Trial Chamber was therefore fully justified to write, on this particular issue:

> "[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.
As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in Rivista Penale 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).[1]

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

"[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]

Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.

[. . .]

[T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 International Law Reports 277, 291-93 (Isr. S. Ct. 1962).)

58. The public revulsion against similar offences in the 1990s brought about a reaction on the part of the community of nations: hence, among other remedies, the establishment of an international judicial body by an organ of an organization representing the community of nations: the Security Council. This organ is empowered and mandated, by definition, to deal with trans-boundary matters or matters which, though domestic in nature, may affect "international peace and security" (United Nations Charter, art 2. (1), 2.(7), 24, & 37). It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. In the Barbie case, the Court of Cassation of France has quoted with approval the following statement of the Court of Appeal:

"[. . .]by reason of their nature, the crimes against humanity [. . .] do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign. (*Fédération Nationale de Déportés et Internés Résistants et Patriotes And Others v. Barbie*, 78 International Law Reports 125, 130 (Cass. crim.1983).)[2]

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused", or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

"Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

C. Jus De Non Evocando

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried — and having an equally fair trial (*see* Statute of the International Tribunal, art. 21) — before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

"Art. 13: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, (1991).)

The other constitutional provisions cited are either similar in substance, requiring only that no person be removed from his or her "natural judge" established by law, or are irrelevant to Appellant's argument.

62. As a matter of fact — and of law — the principle advocated by Appellant aims at one very specific goal: to avoid the creation of special or extraordinary courts designed to try political offences in times of social unrest without guarantees of a fair trial.

This principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations. No rights of accused are thereby infringed or threatened; quite to the contrary, they are all specifically spelt out and protected under the Statute of the International Tribunal. No accused can complain. True, he will be removed from his "natural" national forum; but he will be brought before a tribunal at least equally fair, more distanced from the facts of the case and taking a broader view of the matter.

Furthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.

63. The objection founded on the theory of jus de non evocando was considered by the Trial Chamber which disposed of it in the following terms:

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.

64. For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict — either internal or international — at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

> "*[i]n the territory of Parties to the conflict*, the application of the present Convention shall cease on the general close of military operations."
> (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions — particularly Conventions III and IV — dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter *Protocol II*). Article 2, paragraph 1, provides:

> "[t]his Protocol shall be applied [. . .] to all persons *affected* by an armed conflict as defined in Article 1."(*Id.* at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

> "[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

B. Does The Statute Refer Only To International Armed Conflicts?

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are

widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (*See* Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (*See* Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovi} (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karad'i} (President of the Serbian Democratic Party), and Mr. Miljenko Brki} (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter *Agreement No. 1*).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. *See, e.g.*, S.C. Res. 752 (15 May 1992); S.C.Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the

> "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (*See* statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;
>
> (c) wilfully causing great suffering or serious injury to body or health;
>
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
>
> (h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (*see*, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadi}*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict.
The Trial Chamber has held that Article 2:

> "[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."
>
> [. . .]
>
> [T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.
>
> [. . .]
>
> [T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation

on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (*see* paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above*, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (*see* id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

> "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (*Id.*, at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

> "[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

> "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:
>
> Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (*Id.*, at p. 15.)

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

"the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law (on this point *see below*, para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "serious violations" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

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

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua Case*). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

> "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law.

(ii) The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts

a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions

when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

> "[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:
>
> (1) The intentional bombing of civilian populations is illegal;
> (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
> (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence." (League of Nations, O.J. Spec. Supp. 183, at 135-36 (1938).)

102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. In 1947, instructions were issued to the Chinese "peoples' liberation army" by Mao Tse-Tung who instructed them not to "kill or humiliate any of Chiang Kai-Shek's army officers and men who lay down their arms." (*Manifesto of the Chinese People's Liberation Army*, in Mao Tse-Tung, 4 Selected Works (1961) 147, at 151.) He also instructed the insurgents, among other things, not to "ill-treat captives", "damage crops" or "take liberties with women." (*On the Reissue of the Three Main Rules of Discipline and the Eight Points for Attention - Instruction of the General Headquarters of the Chinese People's Liberation Army*, in *id.*, 155.)

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (Nicaragua Case, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [*sic*]. It also expects the rebels — and makes an urgent appeal to them to that effect — to act in the same manner.

> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [*sic*] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in American Journal of International Law (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (*See* A.H.M. Kirk-Greene, 1 CRISIS AND CONFLICT IN NIGERIA, A DOCUMENTARY SOURCEBOOK 1966-1969, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (*see* New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (*See* Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

This attitude of the Nigerian authorities confirms the trend initiated with the Spanish Civil War and referred to above (see paras. 101-102), whereby the central authorities of a State where civil strife has broken out prefer to withhold recognition of belligerency but, at the same time, extend to the conflict the bulk of the body of legal rules concerning conflicts between States.

107. A more recent instance of this tendency can be found in the stand taken in 1988 by the rebels (the FMLN) in El Salvador, when it became clear that the Government was not ready to apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:

> "The FMLN shall ensure that its combat methods comply with the provisions of common Article 3 of the Geneva Conventions and Additional Protocol II, take into consideration the needs of the majority of the population, and defend their fundamental freedoms." (FMLN, *La legitimidad de nuestros metodos de lucha*, Secretaria de promocion y proteccion de lo Derechos Humanos del FMLN, El Salvador, 10 Octobre 1988, at 89; unofficial translation.)[3]

108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously[4] adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was

"declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (*See* 67 American Journal of International Law (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously[5] adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
>
> 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
>
> 3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
>
> 4. Civilian populations as such should not be the object of military operations.
>
> 5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
>
> 6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
>
> 7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
>
> 8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

> "In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, *see* Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the

large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

The appeal was reiterated on 23 January 1995, when the European Union made the following declaration:

"It deplores the serious violations of human rights and international humanitarian law which are still occurring [in Chechnya]. It calls for an immediate cessation of the fighting and for the opening of negotiations to allow a political solution to the conflict to be found. It demands that freedom of access to Chechnya and the proper convoying of humanitarian aid to the population be guaranteed." (Council of the European Union-General Secretariat, Press Release 4385/95 (Presse 24), at 1 (23 January 1995).)

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to "international humanitarian law", thus clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.
This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (*see*, e.g., 43 Annuaire Suisse de Droit International, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"[6] (*See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987*, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

"[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (*Humanitarian Law Conference, Remarks of Michael J. Matheson*, 2 American University Journal of International Law and Policy (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN - HANDBUCH, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)[7]

119. So far we have pointed to the formation of general rules or principles designed to protect civilians or civilian objects from the hostilities or, more generally, to protect those who do not (or no longer) take active part in hostilities. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare. As the Appeals Chamber has pointed out above (*see* para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

"The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including

> the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (*See* U.N. GAOR, 1st Comm., 43rd Sess., 4th Mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988)(statement of 18 October 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 November 1988 in meeting of First Committee of the General Assembly to the effect *inter alia* that "The Twelve [. . .] call for respect for the Geneva Protocol of 1925 and other relevant rules of customary international law"); U.N. GAOR, 1st Comm., 43rd Sess., 49th Mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 November 1988 in Third Committee of the General Assembly); *see also Report on European Union [EPC Aspects]*, 4 European Political Cooperation Documentation Bulletin (1988), 325, at 330; *Question No 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq*, 4 European Political Cooperation Documentation Bulletin (1988), 187 (statement of the Presidency in response to a question of a member of the European Parliament).)

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 British Yearbook of International Law (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"[8] . (50 Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> "Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz*, 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year, Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (*See* Department of State Bulletin (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (*See* State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (*See* New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals — a matter on which this Chamber obviously cannot and does not express any opinion — there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.

125. State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (*See* Pius Nwaoga v. The State, 52 International Law Reports, 494, at 496-97 (Nig. S. Ct. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become

applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 Annuaire Suisse de Droit International (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

(iv) Individual Criminal Responsibility In Internal Armed Conflict

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (*See* THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (*id.*, at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

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

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (*see* paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"[9] . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. *See* KRIEGSVÖLKERRECHT - ALLGEMEINE BESTIMMUNGEN DES KRIEGFÜHRUNGSRECHTS UND LANDKRIEGSRECHT, ZDv 15-10, March 1961, para. 12; KRIEGSVÖLKERRECHT - ALLGEMEINE BESTIMMUNGEN DES HUMANITÄTSRECHTS, ZDv 15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "INTERIM LAW OF ARMED CONFLICT MANUAL" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, INTERIM LAW OF ARMED CONFLICT MANUAL, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", *i.e.*, "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (*infractions graves*) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (*[c]onstituent des crimes de droit international*)

within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge, (5 August 1993).)

133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (*See* S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force."
> (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) Conclusion

137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.

(c) Article 5

138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

As noted by the Secretary-General in his Report on the Statute, crimes against humanity were first recognized in the trials of war criminals following World War II. (Report of the Secretary-General, at para. 47.) The offence was defined in Article 6, paragraph 2(c) of the Nuremberg Charter and subsequently affirmed in the 1948 General Assembly Resolution affirming the Nuremberg principles.

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege*. Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*.

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).).

144. We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute. As the defendant in this case has not been charged with any violations of any specific agreement, we find it unnecessary to determine whether any specific agreement gives the International Tribunal jurisdiction over the alleged crimes.

145. For the reasons stated above, the third ground of appeal, based on lack of subject-matter jurisdiction, must be dismissed.

V. DISPOSITION

146. For the reasons hereinabove expressed
and
Acting under Article 25 of the Statute and Rules 72, 116 bis and 117 of the Rules of Procedure and Evidence,

The Appeals Chamber

(1) By 4 votes to 1,

Decides that the International Tribunal is empowered to pronounce upon the plea challenging the legality of the establishment of the International Tribunal.

IN FAVOUR: *President* Cassese, *Judges* Deschênes, Abi-Saab and Sidhwa

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

IN FAVOUR: *President* Cassese, *Judges* Li, Deschênes, Abi-Saab

AGAINST: Judge Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber.

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow

Notes

[1] "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale...
Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno

combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).

[2] "...[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

[3] "El FMLN procura que sus métodos de lucha cumplan con lo estipulado per el artículo 3 comun a los Convenios de Ginebra y su Protocolo II Adicional, tomen en consideración las necesidades de la mayoría de la población y estén orientados a defender sus libertades fundamentales."

[4] The recorded vote on the resolution was 111 in favour and 0 against. After the vote was taken, however, Gabon represented that it had intended to vote against the resolution. (U.N. GAOR, 23rd Sess., 1748th Mtg., at 7, 12, U.N.Doc. A/PV.1748 (1968)).

[5] The recorded vote on the resolution was 109 in favour and 0 against, with 8 members abstaining. (U.N. GAOR, 1922nd Mtg., at 12, U.N.Doc. A/PV.1922 (1970).)

[6] "Dentro de esta línea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que aún no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, común a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."

[7] "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."

[8] "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."

[9] "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere;
-Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (I 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."

ANNEX 3:

Department of Social Security v *Cooper*, 158 JP 990.

158 JP 990

Department of Social Security v Cooper

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

158 JP 990

HEARING-DATES: 16 November 1993

16 November 1993

CATCHWORDS:
Social security -- making a false statement to obtain benefit -- whether date or place of offence was material to charge.

HEADNOTE:
The respondent was charged on three summonses each of which alleged that he made a false declaration to obtain benefit, contrary to s 55 of the Social Security Act 1986. The date of offence in each summons was stated to be the date on which the claim form had been received by the Department of Social Security -- ie, the day after the form had been signed and posted. At the close of the prosecution case the respondent's counsel submitted that there was not case to answer because it was not shown that any of the statements or representations were made on the dates or at the places alleged in the informations. The prosecutor invited the court to permit amendment of the dates to those on which the forms were signed but following a submission on behalf of the respondent that they should first deal with the submission that there was no case to answer, the justices adjourned the matter for further consideration. At the adjourned hearing the justices decided that there was no case to answer and dismissed the charges.

Held: 1. The justices at the outset should have considered whether it would have been helpful to amend the word "declaration" in each summons (that word not being used in s 55) to make it clear whether it was a representation or a statement which the respondent was alleged to have made.

2. The submission of no case to answer should have been rejected on the basis that neither the date nor place of each offence was a material issue.

Accordingly the appeal would be allowed and the case remitted to the justices with a direction to continue the hearing.

INTRODUCTION:
Appeal by the Department of Social Security by way of case stated against a decision of the Tonbridge and Malling justices.

COUNSEL:
P Kilcoyne for the appellant; W McCormick for the respondent.

PANEL: Kennedy LJ, Ebsworth J

JUDGMENTBY-1: KENNEDY LJ

JUDGMENT-1:
KENNEDY LJ: This is a prosecutor's appeal by way of case stated from a decision of the justices for the Petty Sessional division of Tonbridge and Malling, sitting at Tonbridge on January 11, 1993. The court was then considering three summonses, each of which allege that the respondent, Mr Cooper, had for the purposes of obtaining benefit for himself under the benefit Acts on three different dates, namely July 9, 1991, August 20, 1991 and October 1, 1991 at Tonbridge, contrary to s 55(1) of the Social Security Act 1986, made a declaration which he knew to be false, namely that the circumstances of his dependents were and had remained as last stated in writing. That is to say his wife, Noleen Mary Cooper, was not working, whereas, in fact, she was working for the International Rectifier Company (GP) Ltd, and was in receipt of earnings.

Section 55(1) of the Social Security Act 1986 so far as material provides that:

"If a person for the purpose of obtaining any benefit . . . under any of the benefit Acts, whether for himself for some other person . . .

(a) makes a statement or representation which he knows to be false, . . . he shall be guilty of an offence."

Since July 1, 1992, s 55(1) of the 1986 Act has been repealed, but the provisions are now to be found in s 112 of the Social Security Administration Act 1992.

On December 31, 1992 the justices began to hear the prosecution case. Two statements were admitted under s 9 of the Criminal Justice Act 1967, and Mrs Hindley, a fraud officer with the Department of Social Security, gave oral evidence. She was not cross-examined, and the prosecution concluded its case. The respondent's counsel then submitted that there was no case to answer. The evidence showed, and the justices say that they found, first of all, that the respondent, Mr Cooper, had made three postal claims for benefit, which he signed and dated July 8, 1991, August 19, 1991 and September 30, 1991.

Secondly, the justices found that the department received those claims on July 9, August 20, and October 1, 1991, and then the department proceeded to issue payment to the respondent, Mr Cooper. In other words the dates in the charges were the day after each form had been signed, and reflected the dates when forms reached the department. Also it seems, although it is not clear on the face of the case stated, that the forms were received by the department at Tonbridge. Of course, that is something which would have been clear to the justices, because they would have had the forms themselves.

The respondent, Mr Cooper contended that for the purposes of s 55(1) it was not shown that any of the statements or representations were made on the dates, or at the place alleged in the informations. Of course, in making the submission on behalf of the respondent, counsel rightly referred to statements or representations because that is what appears in the Act. It is unfortunate that the wording of the information used the word "declaration", which is not a word used in the Act.

The prosecution's response to the submission made on behalf of Mr Cooper was that the offences were correctly charged, because the representations (and the prosecution appear at that time to have treated this matter as a representation), were only made when the forms were received by the department. In my judgment

the magistrates at that stage should have considered whether it would be helpful to amend the wording of each of these summonses so far as the word "declaration" was concerned, so as to make it clear whether it was a representation or a statement which Mr Cooper was alleged to have made. That course was, however, not followed. The justices retired to consider the submission, and one of them raised with the clerk the possibility of the summons being amended in respect of the date or the place. That possibility having been discussed, the prosecution in open court was invited to consider that possibility and, not surprisingly took up the challenge.

The prosecution invited the court, if need be, to permit amendments of the dates in the information so that those dates could be the dates on which the forms were signed, but on behalf of the respondent, Mr Cooper, it was submitted that the court should decide first on the submission that there was no case to answer before considering any application to amend. In fact, the justices at that point decided to adjourn the matter to enable the parties and their own clerk to see if any assistance could be obtained from decided cases.

On January 11, 1993 at the adjourned hearing the prosecution contended that, for the purposes of s 55(1), a statement is made when it is received and acted upon by the department. If money is not paid, then the offence is only, it was suggested, an attempt, and the court was invited to consider s 15 of the Theft Act 1968, which, of course, is the section which makes it an offence by deception dishonestly to obtain property belonging to another.

On behalf of Mr Cooper it was contended that the cases decided under s 15 of the Theft Act cannot assist, because there the essence of the offence is the obtaining of the property which is the result of the false statement operating on the mind of the recipient under s 55 of the 1986 Act by contrast, the offence is complete when, submitted by Mr Cooper's representative, the statement is made, and in the context of this case that must mean when the forms were signed.

Three authorities were placed before the magistrates. First, R v Laverty (1970) 134 JP 699; [1970] 54 Cr App R 495; a case under s 15(1) of the Theft Act which simply stressed the need to prove that the deception operated on the mind of recipient. Secondly, and perhaps more significantly, Tolfree v Florence [1971] 1 All ER 125, a decision of this court in relation to a prosecution under s 93(1)(c) of the National Insurance Act 1965; the wording which was reflected in s 55(1) of the 1986 Act. But there the claimant, who had initially made an honest claim to obtain the money, when he knew he would no longer be entitled to money signed the payable order under the words: "Received the sum to which I am entitled".

Lord Parker, CJ at p 126J said:

"A proper reading of the subsection shows that the false representation in question is for the purpose of obtaining any benefit or other payment."

In that context "benefit" clearly means not the decision to pay the benefit, but the payment of the benefit. That payment he could not get without filling out the receipt form on the postal order: "Received the sum in question to which I am entitled". That was a false representation. Accordingly, a prima facie case was made out.

The third case to which the attention of the magistrates was invited was Etim v Hatfield [1975] Crim LR 234. In that case an applicant for benefit moved after

making his application and managed to obtain payments in two different locations. He was charged under s 15 of the Theft Act, and so, in my judgment, the case is of limited assistance because of the difference in the wording of the two statutes.

In the event, the magistrates in the present case decided that, in justice to both parties, they must deal first with the submission of no case to answer, and upheld that submission because they concluded that:

". . . there was no evidence produced to the court that the respondent made a false statement or representation on the dates and place alleged in the informations."

Three questions are now posed for our consideration, namely:

"1. Whether an offence under s 55(1) of the Social Security Act 1986 is committed, in respect of postal claim forms, on the date when the false declaration is:

(a) made and/or signed and/or posted by the claimant;

(b) received and dealt with by the relevant governmental agency.

"2. Whether on the facts of this case we were correct in deferring the application to amend the informations until we had decided the defence submission.

"3. Whether on the facts of this case we should have considered, of our own motion, whether to amend the date and place of the offences alleged in the information and if so, when; and in either event whether we should have allowed the amendment."

Before us Mr Kilcoyne for the department submits that, in answer to the first question, we should say that an offence alleging a representation is committed only when a postal claim form is received and/or dealt with by a relevant government agency. He points out, in his skeleton argument, that a representation is by definition not complete until it is communicated to a third party, but he concedes that if a statement is relied upon, then the offence must be found to have been committed when the statement is made, which in the context of a claim form means when the form is signed with the necessary mens rea.

As to the second question, Mr Kilcoyne submits that the justices were wrong to defer consideration of the application to amend until they had ruled on the submission. Both applications related to the same issue, namely the alleged defect in the informations, and the justices should have considered first the application to amend to see if it would cure the defect, otherwise they effectively deprived themselves of any opportunity to consider that application. The justices should, if necessary, of their own motion, he submits, have invited the prosecution to apply to amend and to allow the application.

On behalf of the respondent Mr McCormick submits that under s 55(1) an offence is committed (if a statement is relied upon, at any rate) when the statement is made (in the context of the present case when the form was signed), with the necessary intent. In his skeleton argument he invited our attention to the decisions in this court in Clear v Smith [1981] 1 WLR 399, and Barrass v Reeve [1981] 1 WLR 408.

As to the second question (application to amend) he submits that the justices in the exercise of their discretion were entitled to pursue the course which they did, and

that there should be no interference from this court with that discretion. In any event, he submits that it is not clear from the case stated that the justices found that the statements in the postal claim were false, and in saying that, he is clearly right. However that, as it seems to me, is not in issue before us, having regard to the questions which are posed at the end of the case stated. If it was thought appropriate on behalf of the respondent to put that matter in issue, that is to say whether the justices made such a finding or not, and, if so, on what basis they made that finding, the appropriate way in which to tackle the matter would have been, if necessary, to come to this court in order to obtain an order of mandamus directed to the justices to amend the case stated, and that was not done.

Accordingly, I would proceed on the basis, which appears to be an inference from the case stated, that the justices for the purpose of dealing with this submission were proceeding upon the basis that the claim forms did contain apparent falsehoods.

Mr McCormick further submits that so far as the date and the place are concerned, the point not having been taken before the justices that the date and the place were, in the event not material averments, it would have been open, nevertheless, for the justices to come to the conclusion that they were material averments, and this court should be slow to interfere with their ultimate discretion, which is to decide whether or not the submission which is made to them should be allowed.

The difficulty, as I see it, is that in my judgment the justices were misled as to the importance of the date and place specified in the informations, because neither was of the essence of the offence. Sometimes the date is of importance, because it is necessary to show that the victim of the offence was, for example, under a certain age, or that some time limit has been complied with. (See by way of example, R v Radcliffe [1990] Crim LR 524). But otherwise, as Atkin, J said in the Court of Criminal Appeal in R v Dossi [1918] 13 Crim AR 158:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence . . . the jury were entitled . . . to find the appellant guilty of the offence charged . . . even though they found that it had not been committed on the actual date specified in the indictment."

Similarly the place of the offences is not normally material (see R v Walbrook [1958] 42 Cr App R 153 in which incest was alleged "in the County of Sussex or elsewhere"). The approach of the court should be the same, whether it is considering the wording of an indictment or of an information (see Wright v Nicholson (1970) 134 JP 85; [1970] 54 Cr App R 38). Of course, if the evidence shows that the offence was committed on a date other than the date specified in the information or in the indictment, it will often be better if the information or indictment is amended, and if that causes embarrassment to the defence because, for example, the defence has come prepared to establish an alibi in relation to the date originally charged, then the court should be receptive to an application for an adjournment, but that, as Mr McCormick rightly concedes, is not this case. Here the evidence did not in any way alter the respondent's perception of the three charges he had to meet.

In each case the essence of the case for the prosecution was that the respondent first of all had, on a date which was specified within one day, signed and posted a claim form, which contained a statement or a representation which he knew to be false. Secondly, that the respondent upon each occasion made the false statement or representation for the purpose of obtaining benefit, a fact which the prosecution

sought to establish by showing that on the dates alleged the forms were received by the department.

For my part, I am inclined to accept that the respondent on each occasion made the statement (if, using the words of the statute, a statement was what was relied upon), when he signed the form with the necessary intent and then posted it. But having regard to the need to establish the purpose for which the statement was made, it was in practice essential for the prosecution to call evidence of the receipt of the forms; and if what was relied upon was a representation, that evidence would be an integral part of the proof of the prosecution case.

The respondent was not in any way misled by the way in which these informations were worded, and save for amending the word "declaration", I would not have thought it necessary for the magistrates to permit or to suggest any further amendment.

In the circumstances there was, in my judgment, no need for any amendment beyond that to which I have just referred. The submission of no case to answer should have been rejected on the basis that neither date nor place was material. I would, therefore, allow this appeal, and send the matter back to the justices with a direction that they continue the hearing. The answers to the specific questions which they have posed are to be found in what I have just said and need not, therefore, be repeated.

SOLICITORS:
Department of Social Security Solicitor; Berry and Berry, Tonbridge

ANNEX 4:

R v *L*, [1999] 1 Cr App Rep 117.

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[1999] 1 Cr App Rep 117, The Independent 28 April 1998, The Times 28 April 1998, (Transcript: Smith Bernal)

R v L

COURT OF APPEAL (CRIMINAL DIVISION)

[1999] 1 Cr App Rep 117, The Independent 28 April 1998, The Times 28 April 1998, (Transcript: Smith Bernal)

HEARING-DATES: 7 APRIL 1998

7 APRIL 1998

CATCHWORDS:
Sentence - Indecent assault - Tariff - Effect of change of statutory framework relating to sentences imposed for indecent assaults on women and girls - Sexual Offences Act 1985.

HEADNOTE:
This judgment has been summarised by Butterworths' editorial staff.

The appellant was convicted of the indecent assault of a nine-year-old girl, with whom he stood in a position of trust because of his four-year relationship with the girl's mother. He was sentenced to two years' imprisonment on the basis that the assault had been a single isolated act, but aggravated by the girl's youth and breach of trust. The appellant's appeals against conviction and sentence were both dismissed with the argument being raised in relation to the appeal against sentence, that the case of R v Demel [1997] 2 Cr App Rep (S) 5, held that there was an 'established sentencing tariff' in cases such as the instant one of between 13 and 18 months. The issue arose whether this authority and the authorities cited within it justified the 'established tariff' as suggested.

Held: Sentences in earlier cases had to be viewed against the statutory framework, which was in force at the time when the offences were committed. In cases of indecent assault, the law setting down the maximum penalty for such crimes, in relation to assaults on women and girls was changed by the Sexual Offences Act 1985 to bring it into line with the penalty for the same crime committed on a man. A number of the authorities cited in Demel were in relation to the pre 1985 change and were not helpful in assessing the correct level of sentencing in 1998. In the court's judgment, the authorities reviewed could not, when read in the light of the statutory framework in force at the material time, be said to provide a tariff sentencing bracket at the level referred to in Demel. To that extent, the court disagreed with that decision which might need to be regarded as confined to its own facts. In determining the appropriate sentence in cases of indecent assault, the judge had to tailor the sentence to the particular facts of the case before the court. In most cases the personal circumstances of the offender would have to take second place behind the plain duty of the court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind were to be met with greater severity than might have been the case in former years when the position of the victim may not have been so clearly focused in the public eye. In the instant case, the sentence of two years' imprisonment could not be regarded as manifestly excessive for an offence, which involved a grave breach of trust, and accordingly, the

appeal would be dismissed.

COUNSEL:
JW Richardson for the Crown; JF Harrison (D Bayne) for the Appellant

PANEL: HENRY LJ, KEENE J, JUDGE COLSTON QC (sitting as a Deputy Judge of the Court of Appeal Criminal Division)

JUDGMENTBY-1: HENRY LJ

JUDGMENT-1:
HENRY LJ (reading the judgment of the Court): On 28 January 1998 at the Crown Court at Sheffield before His Honour Judge Mettyear, the appellant was convicted of two counts of indecency with a child contrary to s 1(i) of the Indecency with Children Act 1960. He was sentenced to four months imprisonment on each count concurrent. He now appeals against conviction with the leave of the Single Judge.

There were two complainants - one being aged eleven (C), the other twelve (R) at the date of the offences. The offences did not come to light for a year. Then in May 1997, R's mother came across the girl's diary for 1996, and for 20 April of that year, there was recorded a description of the indecency complained of. Both girls were then interviewed by the police, and as a result of their testimony these proceedings were brought. The indictment described the date of the offence as 20 April 1996. Counsel drafting the indictment had no reason to allege any other date. R, who had made the diary entry, recollected that she had made that entry three days after the event, in the space provided for 20 April. The 20th of April was a Saturday. C, when she came to give her account of it, remembered the event as having taken place on a Friday, but she said that she was not sure.

In interview the appellant denied the offences, but admitted that young girls (including these girls on previous and subsequent occasions) visited him in his house when his wife was not present, and that he was sometimes in a state of undress (with just a dressing gown or a towel wrapped around him) on occasions when they visited.

The complainants gave evidence (on the video-link) in line with their original interviews, and the defendant did the same. He additionally called alibi evidence in relation to Saturday April 20th. He called his wife, to prove that on Saturdays they had a routine of tea and then he would take her to bingo, and while she was at bingo he would go round to see a family friend, another woman called Hilary. Both his wife and Hilary gave evidence in support of the alibi. His wife knew nothing of the fact that children regularly visited him while she was out at bingo, which she went to regularly on Friday, Saturday and Sunday nights.

After all the evidence had been called, and both counsel had made their closing speeches, the judge addressed defence counsel:

"My understanding of the law is that if the jury come to the conclusion that they are sure that this happened on the 19th April [ie on the Friday as C had initially recollected] they could convict and should convict and that is how I propose to direct them . . . unless there has been some agreement between counsel that the Crown are in some way tied to the date. The general law is that a date on the indictment can be important, and it clearly is important in this case, but is not of the essence."

Defence counsel complained that the defence had always been focused on that date because of the indictment and because it was the date specified in the diary. Counsel submitted that if the prosecution had wanted to put it on an open-ended or more open position, then they should have done so by amendment, but they had tied it to this date. The judge replied that it was his view that, as a matter of law, if the jury were sure this had happened on another day they could and should convict.

This raises two questions, first as to the law, and second as to fairness.

The law is clear. As a general rule, if the evidence at trial as to date differs from the date laid in the count, that is not fatal to a conviction (Dossi [1918] 13 Cr App Rep 158). The exception will be where the date may determine the outcome of the case, such as where the age of the victim is part of the charge. It follows from the above that it is not strictly necessary to amend the indictment if the evidence shows that the offence was committed on another date, rather than the actual date specified in the indictment. In Dossi Atkin J said:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence . . . Thus though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows therefore that the jury were entitled, if there was evidence that they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment."

The Indictment Rules 1971 do not alter that position. Rule 5(1) imposes the obligation to give:

"such particulars as may be necessary for giving reasonable information as to the nature of the charge"

and the date is not an essential element of the offence for the purposes of r 6(b).

The good sense behind the law is manifest. When a crime is committed, in the vast majority of cases all that matters is whether it was committed, and not when it was committed. That is especially true of sex crimes. It applies particularly in a crime discovered long after the event, where in most cases it should neither matter nor harm the credit of the complainant if he or she gets the date wrong. There will be cases where the date is essential (such as where the date of the offence is certain, the defendant has a good alibi for that date, and there was no other opportunity around that date for the offence to have occurred). They will be the exception.

But this was not such a case. Inevitably there was some uncertainty in a twelve year old recalling a year after the event when it was that she had made an entry in her diary, and the eleven year old recollecting that it might have been the Friday night and not the Saturday night. This was certainly a case where, as the judge directed the jury, the important issue was whether the events complained of happened, and not when they happened. It was common ground between the complainants and the defendant that the occasion complained of was not the only occasion when they had been visiting at his house. The defence mounted by the defendant obviously went beyond saying that nothing happened on 20 April. It was his case that nothing had

ever happened. Therefore, in our judgment the judge was right as to the law.

We then come to the question of fairness. While no-one may know whether the jury accepted the defendant's alibi evidence as perhaps being true, the complaint is made that at the stage the judge made his intervention, it was too late for the defence to meet the case put on a wider basis. It is suggested that fairness required that the Crown should have applied to amend the indictment so to put it. The Crown's response to that was that first under Dossi amendment was not necessary, and second that they would not have amended, because 20 April was the likely date, and to add to it (say) the day before, Friday, would be confusing to the jury. We asked Mr Harrison for the defence how he had been prejudiced by the view the judge took. He said that while, naturally, he had put it to both girls that no such thing had ever happened, the fact that the Crown were alleging the offence on one day and one day only and that the appellant had what on its face was a good alibi for the day, his cross-examination of the complainants was able to be gentler and less emphatic that otherwise it might have been. He also made the fair point that there was no point in investigating an alibi for another day until such a day was put. He cited two cases where the Court concluded that a late widening of the time when the offence might have happened where it was said that the prosecution should have amended, and the defence given the opportunity to seek an adjournment. (See Wright v Nicholson [1970] 1 All ER 12, 54 Cr App R 38, and R v Robson [1992] Crim LR 655). In relation to the former case, here an amendment was not necessary, and here it was not suggested that, when dealing with prejudice, there would have been alibi evidence available after the passage of time for any day other than Saturday.

In our judgment we do not accept that the defence was handicapped in reality. Certainly, they should not have been, given the state of the law. It must have always been apparent to the defence that there could be no certainty as to the date, that the date was not a material averment in this indictment, and that what mattered was whether the events had happened. While the form of the indictment meant that they could concentrate their evidence and their preparation as to 20 April, the defence should also have addressed themselves to dates immediately surrounding it. We are not persuaded that the defence at any time believed that the Crown had "nailed their colours" to 20 April and would be saying to the jury that they should acquit if the events had happened, but had happened only on, say, 19 April. Nor does the fact that they concentrated on that date render the conviction unsafe. This case will have turned on whether the young girls were believed.

For those reasons, in our judgment, this appeal should be dismissed. But as a matter of general practice, when the judge, after the conclusion of the evidence, thinks that a point should be raised with counsel, a safe course is to do this before final speeches and not after.

DISPOSITION:
Appeal dismissed.

ANNEX 5:

R. v *Labine*, 23 C.C.C. (2d) 567 (1975).

*23 C.C.C. (2d) 567, *; 1975 C.C.C. LEXIS 5747, ***

REGINA v. **LABINE**

23 C.C.C. (2d) 567; 1975 C.C.C. LEXIS 5747

Ontario Court of Appeal

JUDGES: Kelly, Martin and Lacourciere, JJ.A.

March 12, 1975

KEYWORDS-1: [1]** Indictment and information -- Sufficiency -- Charge of trafficking in marijuana -- Evidence disclosing several sales on different dates of varying proximity to dates alleged -- Alleged buyers not named in count -- Whether count uncertain by reason of failure to name buyers and disclosure in evidence of several transactions -- Narcotic Control Act (Can.), ss. 4(1), 2 -- Cr. Code, ss. 512, 529(1), 519(2).

SUMMARY-1:

A charge of trafficking in marijuana between two specified dates contrary to s. 4(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, where the evidence discloses several sales by the accused to various buyers, is not uncertain on the ground that (i) it fails to name any of the persons to whom the accused distributed the drug or (ii) the evidence discloses a number of transactions on various dates with varying proximity to the dates alleged, if the charge otherwise meets the requirements of s. 510 of the Criminal Code. Section 512(g) of the Code provides that no count is insufficient "by reason only that it does not name ... any person ...". Further, the prosecution's evidence of several incidents was properly viewed cumulatively as one continuing offence. Finally, a date specified **[**2]** in an indictment is not a material matter unless it is actually an essential part of the offence or the accused is in some way misled or prejudiced by the variance.

[R. v. Dossi (1918), 13 Cr. App. R. 158; Marino and Yipp v. The King (1931), 56 C.C.C. 136, 4 D.L.R. 530, [1931] S.C.R. 482, apld; R. v. Govedarov, Popovic and Askov (1974), 16 C.C.C. (2d) 238, 3 O.R. (2d) 23, 25 C.R.N.S. 1; R. v. Kozodoy (1957), 117 C.C.C. 315, refd to]

KEYWORDS-2: Drug offences -- Trafficking in marijuana -- Proof of nature of substance by circumstantial evidence -- No certificate of analysis -- Buyers paying $ 1 per cigarette -- Cigarettes having distinctive colour and odour -- Buyer observed in stupor after smoking cigarette -- Marijuana and paraphernalia found in accused's home -- Conviction upheld on appeal -- Sufficient evidence from which trier of fact could find substance was marijuana -- Narcotic Control Act (Can.), s. 4(1).

SUMMARY-2: Trial -- Reasons for judgment -- Evidence against accused involving juveniles

KEYWORDS-3: Trial -- Reasons for judgment -- Evidence against accused involving juveniles -- Trial Judge convicting without expressing caution or desirability of

corroboration -- Appeal from conviction dismissed -- Ample **[**3]** corroboration and strength of independent evidence leaving no necessity for new trial.

SUMMARY-3:

APPEAL by the accused from his conviction by McAndrew, D.C.J., for trafficking in marijuana contrary to s. 4 (1) of the Narcotic Control Act (Can.).

M. A. Wadsworth, for accused, appellant.

H. Schneider, for the Crown, respondent.

The judgment of the Court was delivered orally by

JUDGMENT-BY: MARTIN, J.A.

JUDGMENT:

MARTIN, J.A.:--This is an appeal by the appellant from his conviction after trial before His Honour Judge McAndrew in **[*568]**

the District Court Judges' Criminal Court of the District of Sudbury, on an indictment as follows:

Gerald Randolph Labine stands charged that between August 1st and September 13th, 1972 at the City of Sudbury, in the District of Sudbury, did unlawfully traffic in a narcotic to wit: Cannabis (Marihuana), contrary to the provisions of Section 4, Subsection (1) of the Narcotic Control Act.

Evidence was given on behalf of the prosecution by two children, one of whom was Jeff Marvin Vanhorne, 13 years of age, who gave his evidence unsworn. He testified that he had made a purchase of cigarettes which he believed to be marijuana from the appellant for the sum of $ 1 or $ 1.25 each **[**4]** on a number of occasions. The last occasion was when school started, or just before, in September, 1972. Another child, Gary Bazinet, who gave evidence under oath, said that he, together with Vanhorne, had bought, at the appellant's residence, what he believed to be marijuana cigarettes from the appellant on at least two occasions for $ 1.25 each. He also said he bought what he thought was a marijuana cigarette from the appellant at a church dance, hereinafter more fully referred to. Both these boys were familiar with ordinary cigarettes and both testified that the cigarettes which they purchased from the appellant were different. The cigarettes purchased from the appellant were hand-made and were a "green-brown" in colour. Both children gave evidence as to the effects that these cigarettes had upon them.

There was a dance held in the basement hall of St. Anthony's Church on a Friday, in early September, just after school had started for that term. Father Angelo Oliverio, the parish priest, and Mr. Gerald Bradley, attended the dance to chaperon the children who were attending the dance. Evidence was given by Mr. Bradley that he saw a number of children approach the appellant at the **[**5]** dance. He estimated the number at 12 during the period of an hour or an hour and a half. On those occasions exchanges took place between the children and the appellant. On one occasion Mr. Bradley observed an exchange of money between a girl and the appellant. Father Oliverio testified that the appellant and two boys, one of whom was

Gary Bazinet, left the dance and went outside. Father Oliverio saw an exchange between the boys and the appellant take place outside the church beside a garage.

Mr. Wadsworth has advanced a number of grounds of appeal, in his usual able and attractive manner. The first ground of appeal is that the indictment is void for uncertainty. It was submitted by Mr. Wadsworth that the indictment is uncertain because it does not name any of the persons **[*569]**

to whom the appellant distributed the alleged drug, and moreover it refers to a number of transactions, including a number of transactions which are not proved to have occurred within the period of time specified in the indictment.

In R. v. Dossi (1918), 13 Cr. App. R. 158, the Court of Criminal Appeal held that a date specified in an indictment is not a material matter unless it is actually an essential **[**6]** part of the offence. No argument was advanced that the accused was in any way misled or prejudiced by the variance alleged.

Section 4(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, reads:

4(1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

Section 2 defines "traffic" as follows:

2. In this Act

. . . . .

"traffic" means

(a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or

(b) to offer to do anything mentioned in paragraph (a) otherwise than under the authority of this Act or the regulations.

(Emphasis supplied.)

The definition of "traffic" is to be read into the indictment: R. v. Govedarov, Popovic and Askov, (1974), 16 C.C.C. (2d) 238 at pp. 270-1, 3 O.R. (2d) 23, 25 C.R.N.S. 1.

We are all of the view that in a charge of this nature the failure to name the persons to whom it is alleged that the drug was distributed does not vitiate the count: R. v. Kozodoy (1957), 117 C.C.C. 315 at p. 318. I refer in this connection to s. 512 of the Criminal Code which provides:

512. No count in an indictment is insufficient by reason of the absence of details where, in the opinion **[**7]** of the court, the count otherwise fulfils the requirements of section 510 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

(a) it does not name the person injured or intended or attempted to be injured,

. . . . .

(g) it does not name or describe with precision any person, place or thing, ...

No motion to quash the indictment was made pursuant to s. 529(1) of the Code; nor was an application made under s. 519 (2) of the Code to divide the count.

If the accused required further information to enable him to defend himself it would have been appropriate to require **[*570]**

particulars of the person or persons with respect to whom the alleged trafficking took place. The failure to specify such persons in the indictment does not vitiate the count, if the count otherwise meets the requirements of s. 510 of the Code.

Although the prosecution led evidence with respect to a number of incidents, we are all of the opinion that these incidents may be viewed cumulatively as one continuing offence. I refer in this connection to the judgment of the Supreme Court of Canada, in the case of Marino and Yipp v. The King **[**8]** (1931), 56 C.C.C. 136 at pp. 138-9, 4 D.L.R. 530, [1931] S.C.R. 482 at p. 483, in which Anglin, C.J.C., delivering the judgment of the Court, said:

To contend that, because two separate sales were proved in evidence, two offences are actually charged seems absurd. How could distribution be shown unless more than one sale was proved? A single sale probably does not amount to "distribution" within the meaning of that word, as used in the Criminal Code. There is nothing to restrict what may be proved as evidence of distribution to a single sale.

It is manifest that the defendants had the drugs in question for distribution and the proof shows they did in fact "distribute" them. That seems to be all that is necessary.

Consequently, we are all of the view that the indictment in this case was not susceptible of attack on the grounds of vagueness or uncertainty.

The second ground of appeal advanced by Mr. Wadsworth on behalf of the appellant is that there is no evidence that the substance which the accused sold to Bazinet and Vanhorne was, in fact, cannabis (marijuana), because there was no certificate of analysis that such was the case.

We are of the view, however, that there was **[**9]** sufficient circumstantial evidence to enable the Court to find that the appellant had, in fact, trafficked in cannabis (marijuana) as alleged in the indictment. The circumstances included the following: the price which Vanhorne and Bazinet said that they had paid for the cigarettes in question; the fact that the cigarettes were described as a "green-brown" colour and Mr. Bradley, who was familiar with marijuana, described the marijuana cigarettes as being of that colour; the number of children that approached the appellant, and the exchanges that took place between the appellant and the children, including the one between the appellant and Bazinet, observed by Father Oliverio.

There was also the evidence of Mr. Bradley that after he had seen an exchange take place, between a girl who approached the appellant, and the appellant, whereby the appellant re- **[*571]**

ceived a sum of money, that the girl was later observed in a "stupor" and fell down

several times in the dance hall. Mr. Bradley also said, and he was familiar with the odour of marijuana, that the premises "reeked of marihuana".

There was, in addition, the evidence that the appellant was found in possession, at his residence, **[**10]** of a quantity of marijuana, which was proved to be such by a certificate of analysis. He also had in his possession a pipe for smoking marijuana, and "baggies" of the type that are used for packaging marijuana.

We think that the cumulative effect of this evidence was such that the learned trial Judge was entitled to find that the substance in which the appellant trafficked was cannabis (marijuana).

Mr. Wadsworth, on behalf of the appellant, also contended that the learned trial Judge, in his reasons for judgment, not only failed to indicate that he was aware of the legal requirement of corroboration in respect of the unsworn evidence of Vanhorne, and that he appreciated the duty of weighing with care the evidence of children, even when sworn, but also, that in referring to the evidence of Vanhorne and Bazinet, he appeared to have treated their evidence as being of the same weight as that of adult witnesses. While we think it would have been preferable if the trial Judge had indicated that he was aware of the requirement that Vanhorne's evidence be corroborated, and that Bazinet's evidence be weighed with care, we are all of the view, having regard to the ample corroboration which **[**11]** existed in this case, that the learned trial Judge's failure to clearly show that he appreciated the desirability of weighing the evidence of children with caution, and the requirements of corroboration with respect to Vanhorne, did not vitiate the conviction.

In our view, the evidence of Father Oliverio and Mr. Bradley, afforded ample corroboration of the evidence of Vanhorne and Bazinet, and was of sufficient strength as to be very nearly capable of proving the charge without the evidence of the children, if, indeed, it did not have that strength.

In the circumstances, therefore, we are all of the opinion that the appeal fails, notwithstanding the very able and very full argument of which the Court has had the benefit. The appeal will, therefore, be dismissed.

Appeal dismissed. **[*572]**

ANNEX 6:

R. v *Pangman*, 43 W.C.B. (2d) 474 (1999).

*1999 W.C.B.J. LEXIS 8124, *; 1999 W.C.B.J. 627027, **;*
43 W.C.B. (2d) 474

BETWEEN: HER MAJESTY THE QUEEN, - and - WILLIAM GARY **PANGMAN,** ISADORE MAURICE VERMETTE, ERVIN FREDERICK CHARTRAND, GARRETT DALE COURCHENE, GEORGE JUNIOR ROBINSON, DONNY EDWARD DAIGNEAULT, CRAIG LOUIS THOMAS, KEVIN ARTHUR KIRTON, KEVIN ROY COOK, RONALD BLAIR STEVENSON, MICHAEL GARRETT EDNIE, SHANE WILFRED MYRAN, WESLEY NELSON BUNN, WADE TREVOR COURCHENE, OSAMA OTHMAN ZEID, CHARLES MICHAEL FRIDAY, TREVOR ALLAN BOUBARD, GORDON PELLETIER, GORDON NORMAN YOUNG, DWIGHT DARCY LACQUETTE, ALBERT JAMES DAVEY, SHELDON JOHN LAWRENCE CLARKE, RUSSELL THOMAS, GLEN DAVID BEHNKE, BARRY LALIBERTY, DALE LALIBERTY, DEVON BASIL STARR, JUSTIN BENNET COURCHENE, JOHN ALLAN SCHULTZ, Accused.

R. v. **Pangman**

File No. CR 98-01-20306 Winnipeg

Manitoba Queen's Bench

1999 W.C.B.J. LEXIS 8124; 1999 W.C.B.J. 627027; 43 W.C.B. (2d) 474

September 21, 1999, Decided

KEYWORDS:
[*1]

INDICTMENT AND INFORMATION -- Particulars --Whether particulars of drug trafficking count to be ordered to name alleged purchasers and whether substance sold actually cocaine or held out to be cocaine

INDICTMENT AND INFORMATION -- Sufficiency -- Drug offences --Failure to specify alleged purchasers in drug trafficking count and whether substance sold actually cocaine or held out to be cocaine

SUMMARY: Application by accused inter alia to quash a count of an indictment, dismissed -- (1) The accused, charged with trafficking in cocaine or a substance held out to be cocaine, sought to quash the count on the basis that the time-frame in the count, a period of about 15 months, together with the failure to allege a single transaction and the failure to name the purchaser, among other factors, violated ss. 581(1) and (3) of the Criminal Code -- The Crown sought to call evidence that the accused was a member of a criminal organization and that the accused had distributed cocaine to other members of the organization for sale, as well as selling cocaine himself on an ongoing basis -- Accordingly, it was no single event that underpinned this count but rather a series of events, involving any number **[*2]** of purchasers or number of persons to whom the accused delivered cocaine or a substance held out to be cocaine -- Any of the actions alleged in relation to this

count, if proved, would constitute "trafficking" within the meaning of the Controlled Drugs and Substances Act -- The requirement in s. 581(1), that each count shall in general apply to a "single transaction", did not mean a single event or occurrence, Regina v. Labine, 23 C.C.C. (2d) 567 (Ont.C.A.) -- Moreover, the trend was away from quashing charges for uncertainty, except in the most unusual of situations -- This count, in alleging trafficking in cocaine or a substance held out to be cocaine, was framed in the very wording of s. 5(1) of the Act and s. 590(1) provided that account was not objectionable by reason only that it charged in the alternative or was double or multifarious -- Section 590(2) permitted an accused to apply to the court to divide a count that charged in the alternative, into separate counts and no such application had been made by the accused here -- This count was therefore valid -- (2) The accused argued alternatively that the Crown should be required to particularize **[*3]** the count pursuant to s. 587(1) -- There was, however no suggestion that the charge on its face was vague or confusing, or did not correspond to the disclosure made by the Crown -- The Crown was entitled to rely upon any part of the definition of "traffic" which was applicable to the facts which it may be open to the jury to find as proved, and to require that the Crown particularize the names of purchasers was to limit the definition of "traffic" -- To require that the Crown choose between trafficking in cocaine and in a substance held out to be cocaine was also to limit the definition of "traffic" -- Particulars sought by the accused here would have the effect of fettering the prosecution by depriving the Crown of the right to rely upon the whole of the definition of "traffic" applicable to the facts as found by the jury -- Particulars were therefore refused.

COUNSEL: C.J. MAINELLA for the Crown
S. S. NOZICK for the accused, Isadore Maurice Vermette

JUDGES: Krindle J.

Krindle, J.

[1]** The accused Isadore Maurice Vermette has been directly indicted on the following charge:
10.THAT he, the said ISADORE MAURICE VERMETTE between the first day of August ... One Thousand nine hundred and ninety-seven **[*4]** and the fourth day of November ... One Thousand nine hundred and ninety-eight, both dates inclusive, at or near the City of Winnipeg in the Province of Manitoba did unlawfully traffic in a controlled substance or a substance represented or held out by him to be a controlled substance, to wit: Cocaine contrary to the Controlled Drugs and Substances Act .

[2]** He moves to quash that count and moves alternately for an order of particulars in connection with that count under the Criminal Code, , s. 587.

[3]** In the same indictment Mr. Vermette is charged, jointly with others, that he, between May 1997 and November 4th, 1998, conspired to traffic in cocaine; conspired to possess weapons for a purpose dangerous to the public peace; and conspired to participate in or substantially contribute to the activities of a criminal organization. He is also charged individually with participating in or substantially contributing to the activities of that same organization between dates that

correspond with those set out in count 10.

[4]** Mr. Vermette makes no complaint about the sufficiency of evidentiary disclosure made by the Crown and has brought no motion for severance of counts, **[*5]** although a very general motion for severance of counts has been filed on behalf of all accused. Nor does he suggest that the disclosure made to him is in any fashion inconsistent with count 10 of the indictment.

[5]** The defence argument that the count as framed is a nullity and ought to be quashed, is based upon ss. 581(1) and (3) of the Code .
581.(1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an indictable offence therein specified.
581.(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[6]** Mr. Vermette argues that it is the cumulative effect of the following deficiencies in the count which make quashing the count the appropriate remedy:
(a)the lengthy time frame covered by the charge;
(b)the absence of a single pleaded transaction;
(c)the failure to name the purchasers;
(d)the **[*6]** failure to specify the dates of the sales;
(e)the reference in the count to trafficking in cocaine or in a substance held out by the accused to be cocaine.

[7]** He says that he is unable, by virtue of the cumulative effect of those deficiencies, to reasonably identify the transaction referred to.

[8]** The Crown has stated that it will call evidence at trial to show that Mr. Vermette was, at all relevant times, on the executive of an organization called the "Manitoba Warriors". The Crown intends to prove that the Manitoba Warriors is a criminal organization. The Crown will call evidence that at meetings of the organization at which the accused was present, the sale of cocaine by the organization was discussed. The Crown says that it will prove that the accused distributed cocaine to "strikers" and "patch members" of the organization for sale by them at Winnipeg hotels and that the cocaine was in fact sold by them at Winnipeg hotels. The Crown also intends to call evidence that the accused himself sold cocaine on an ongoing basis and further that on specific dates the accused sold cocaine to a specific purchaser, the name of details having been supplied to the accused in **[*7]** his disclosure package. The accused did not suggest that the Crown's outline of the facts it intended to prove was inconsistent with the evidentiary disclosure made by the Crown.

[9]** Based upon that outline of facts, it is no single event that underpins the count, but a series of events. Based upon that outline of facts, there is no single purchaser of the drugs, but any number of purchasers and any number of persons to whom the accused delivered cocaine. Based upon that outline of facts, the accused aided and abetted others in their sales of drugs. Based upon that outline of facts, the drugs in question may have been cocaine - or they may simply have been held out to have been cocaine. Based upon that outline of facts, the trafficking may have taken a number of different forms - the accused may have sold drugs, may have

transferred drugs, may have distributed drugs, and may have aided and abetted in the trafficking of drugs by others. Any or all of those actions, if proved, would constitute "trafficking" within the meaning of the Controlled Drugs and Substances Act and the "parties" sections of the Code .

[10]** The following provisions of the Code may be of significance **[*8]** in considering this motion to quash:
583. No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that
(a)it does not name the person injured ...
...
(f)it does not specify the means by which the alleged offence was committed;
(g)it does not name or describe with precision any person, place or thing; ...

[11]** Section 581, in addition to containing the provisions referred to by Mr. Vermette, also contains the following subsection:
(2) The statement referred to in subsection (1) may be
...
(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; ...

[12]** The "single transaction" referred to in s. 581 does not mean a single event or occurrence: Marino and Yipp v. The King (1931), 56 C.C.C. 136 (S.C.C.). As was stated in Selles (1997), 116 C.C.C. (3d) 435 at 444, (Ont. C.A. per Finlayson , Weiler and Laskin JJ.A.): **[*9]**
While subsection 581(1) requires that a count relate to a single transaction, a single transaction is not synonymous with a single incident, occurrence or offence. Separate acts which are successive and cumulative and which comprise a continuous series of acts can be considered as one transaction and no objection can be taken to a conviction thereon as the basis of uncertainty: see R v Flynn (1955) 111 C.C.C. 129 (Ont C.A.)

[13]** Of particular relevance to the present case is the decision of the Ontario Court of Appeal, per Kelly, Martin and Lacourciere JJ.A. in Labine (1975) 23 C.C.C. (2d) 567. It was held to be entirely proper, in a case where the essence of the charge lay in distributing, to lay a single count covering an extended period of time, the evidence in support of which consisted of numerous incidents of trafficking. It was held that the charge did not need to specify which form of trafficking was being alleged against the accused or whether the liability of the accused was that of principal or party following upon the earlier decision in Govedarov, Popovic and Askov (1974) 16 C.C.C. (2d) 238. **[*10]** Nor were the dates of the various events held to be material because they were not an essential part of the offence. The Court of Appeal followed the decision in Dossi (1918) 13 Cr. App. R. 158 in respect of the issue of dates. The failure to name the persons to whom it was alleged that the drugs were distributed was held not to vitiate the count, following on the decision of the Ontario Court of Appeal in Kozodoy (1957) 117 C.C.C. 315

[14]** It is clear on a reading of the cases that the trend is away from quashing charges for uncertainty, except in the most unusual of situations. In Rosen (1996) 113 Man R. (2d) 229, the Manitoba Court of Appeal, per Kroft J.A., stated, at 233-234:

The quashing of a charge on the ground that it is a nullity is a somewhat unusual occurrence. An information which refers to an offence not "known to Jaw" or a charge which is so badly drawn as to fail to give the accused notice of the charge which he faces (that is, which is nonsensical) may be an absolute nullity. However, an offence imperfectly described, which may give grounds for the consideration of an amendment, does not fall within **[*11]** that category.

[15]** Although a separate decision was written by Twaddle J.A. in Rosen , it related to another matter in issue in the case. The reasons of Kroft J.A. as cited are those of the Court of Appeal on this point.

[16]** The final matter to be considered on the motion to quash is the fact that the offence charged speaks of cocaine or a drug held out to be cocaine. The offence creating section of the Controlled Drugs and Substances Act reads:
5.(1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

[17]** The offence as charged therefor is framed "in the wording of the enactment that describes the offence", to use the words of s. 581(2)(b).

[18]** For the sake of completeness, reference should be made to the following provision of the Code :
590.(1) A count is not objectionable by reason only that
(a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or
(b) it is double or multifarious. **[*12]**

[19]** Section 590(2) permits an accused to apply to the court at any stage to divide a count that charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or is double or multifarious on the ground that, as framed, it embarrasses him in his defence. No application has been made by the accused to have the count divided.

[20]** Section 4(1) of the Narcotic Control Act , for purposes of the matters in issue in this application, reads identically to s. 5(1) of the Controlled Drugs and Substances Act . It has been held that s. 4(1) of the Narcotics Control Act did not create two separate offences in its reference to trafficking "in a substance or in a substance held out to be a substance". Rather it creates one offence which may be committed in two or more ways: Friesting [1980] 2 W.W.R. 372, Man. Co. Ct.

[21]** The charge complained of here does refer to an offence known to law and is sufficient to meet the requirements of s. 581 of the Code . The motion to quash the charge is dismissed.

[22]** I turn now to the alternate motion to require the Crown to particularize the count. **[*13]** The right of the court to order particulars of a count is set forth at s. 587(1) of the Code , the relevant portions of which are as follows:
587.(1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars
...
(f)further describing the means by which an offence is alleged to have been

committed; or
(g)further describing a person, place or thing referred to in an indictment.

[23]** I have reviewed with care the decision of Maher J. in Thatcher (1984) 42 C.R. (3d) 259 (Sask Q.B.), affd. (1987) 32 C.C.C. (3d) 481 (S.C.C.), relied upon by the Crown and the decision of Salhany J. in Dickson [1996] O.J. No. 4493, relied upon by the defence. I consider it to be significant that there is no apparent difference between the positions taken by Maher J. in Thatcher and that taken by Salhany J. in Dickson . Salhany J. did not require particularization of any aspects of the charge other than those in which the indictment as laid failed to conform to the evidence as disclosed and intended **[*14]** to be adduced.

[24]** In Dickson the accused was charged with conspiring with certain named individuals and certain unknown individuals. Disclosure by the Crown related only to the named individuals. The Crown admitted in argument before Salhany J. that there were no other persons involved in the conspiracy other than the named individuals. Commenting on this Salhany 3. stated, at para 28:
However, if there are no other conspirators involved, then the Crown should be required to say this. Surely the defense is entitled to know whether the Crown intends to lead evidence of other conspirators, justifying such last minute evidence on the basis that there is an allegation "of other persons unknown" in the count, when in fact none are known at this time.

[25]** In Dickson the accused were charged with conspiring "at the City of Kitchener, in the said region and elsewhere in the Regional Municipality of Waterloo, the Regional Municipality of Waterloo, the Regional Municipality of Niagara and elsewhere in the Province of Ontario". Commenting on that Salhany 3. stated, at paras 29 and 30:
29.However, the Crown's memorandum referred to earlier makes no reference to the parties **[*15]** conspiring anywhere other than in the Regional Municipality of Waterloo and the Regional Municipality of Niagara. If the memorandum is the basis of the Crown's case, then I see no reason why the Crown should not say so.
30.During the course of argument, I had the impression that the Crown's theory is not that the parties conspired (ie., the agreement) in the named regions and elsewhere in the Province of Ontario but rather conspired to traffic (ie., the object of the agreement) in the named regions and elsewhere in the Province of Ontario. Again, if this is the basis of the Crown's case, then they should be required to specify it.

[26]** Salhany J. did make an order for particulars. His order was limited to the identity of the conspirators, the place or places where the conspirators are alleged to have conspired, and the place or places where they are alleged to have conspired to traffic in methamphetamine. The order, in other words, was limited to those aspects of the charge where confusion and potential prejudice could result.

[27]** In the case before me there is no suggestion that the charge on its face is vague or confusing. There is no suggestion that the charge on **[*16]** its face does not correspond to the disclosure made by the Crown.

[28]** In Thatcher , supra . the accused was charged with murder. Evidence led at the preliminary inquiry was open to argument either that the accused killed his wife or that the accused was a party to the killing of his wife by another. The defence sought particulars of the means of the commission of the offence in order to know

the case it had to meet. Section 587(1)(n of the Code specifically empowers the court to order particulars of the means by which an offence is alleged to have been committed. Maher 3. refused the application for particulars, stating at p. 265 of the decision:
If there is evidence upon which a properly instructed jury could find that the accused committed the offence or that he was a party to the commission of an offence by a person or persons unknown, it must be left to the jury to make either of such findings and their right to do so may not be restricted by an order for particulars.

[29]** Maher J. relied upon certain appellate decisions in coming to that conclusion. Of particular relevance is the decision of the Ontario Court of Appeal (Gale C.J.O., Jessup, Dubin and Martin **[*17]** JJ.A., Schroeder J.A. dissenting in part) in Govedarov , supra . In that case the accused were convicted of murder arising out of the death of a restaurant worker during a break and enter. The jury were instructed on what was then s. 213 of the Code , the constructive murder section. There were two relevant alternate means by which constructive murder could have been committed - either in the course of a robbery or in the course of a burglary. One of the grounds of appeal from conviction related to the failure of the trial judge to order particulars as to which of the two means the Crown relied upon. The Court of Appeal rejected that ground, per Martin J.A. at 269-70:
The indictment had been preceded by a preliminary hearing lasting several days. Clearly, the purpose of the application for particulars was not to require the prosecution to provide the accused with additional details with respect to matters referred to in the indictment in order that the accused might be more fully informed of the act or omission charged against them but was to restrict the prosecution to reliance on a part only of the definition of murder contained in the Criminal Code . (The italics are mine) **[*18]**

[30]** He concluded, at p. 271:
The accused in the instant case were charged with murder. The Crown was entitled to rely upon any part or parts of the definition of murder which were applicable to the facts which it was open to the jury to find were proved.

[31]** I find that the Crown is entitled to rely upon any part or parts of the definition of "traffic" which is applicable to the facts which it may be open to the jury to find as proved. To require that the crown particularize the names of purchasers is to limit the definition of "traffic". To require that the Crown particularize the dates of sales is to limit the definition of "traffic". To require that the Crown choose between trafficking in cocaine and trafficking in a substance held out to be cocaine is to limit the definition of "traffic".

[32]** The situation presented by this charge is not similar to that confronted by Salhany J. in Dickson , supra . The particulars sought by the defence would have the effect of fettering the prosecution by depriving them of the right to rely upon the whole of the definition of "traffic" that is applicable to the facts which may be open to the jury to find as proved. Accordingly, **[*19]** the application for particulars is denied.

CLB-NO: 099285080

LOAD-DATE: October 23, 2001

ANNEX 7:

R. v *VHP*, (Unreported Judgement of the Supreme Court of New South Wales Court of Criminal Appeal, 1997).

*1997 NSW LEXIS 784, **

REGINA v **VHP**

60733 of 1996

SUPREME COURT OF NEW SOUTH WALES
COURT OF CRIMINAL APPEAL

1997 NSW LEXIS 784; BC9702876

17 June 1997, heard

7 July 1997, delivered

CATCHWORDS: [*1] CRIMINAL LAW - HOMOSEXUAL INTERCOURSE WITH MALE UNDER 18 - PARTICULARS - whether date made of essence of offence - following concession by Crown date mace of essence - trial judge's directions on this point in error - appeal allowed - conviction and sentence quashed.

CRIMINAL LAW - PLEADING PARTICULARS - Appellant charged with homosexual intercourse with male under 18 - Indictment alleges offence between 1 August and 31 December 1987 - Complainant asserts specific date - Whether date made of the essence - HELD - Accepting a concession by the Crown, the date had been made of the essence of the offence and the trial judge's instructions to the jury on the point were in error.

Reg v Dossi (1918) 13 Cr App R158, The King v Dean [1932] NZLR 753, R v Pfitzner (1976) 15 SASR 171 applied.

JUDGES: GLEESON CJ, HANDLEY JA AND STUDDERT J

Gleeson CJ: The appellant was tried, in the District Court, before his Honour Judge Luland QC, and a jury, on a charge that, between 1 August and 31 December 1987, at Audley in New South Wales, he had homosexual intercourse with a male person under the age of 18 years. The appellant was a school teacher. The victim of the alleged offence was a pupil aged 14 years.
[*2]
The trial was a second trial, the jury at the first trial having disagreed.

The appellant was convicted and sentenced to penal servitude for two years and six months, involving a minimum term of fifteen months and an additional term of

fifteen months. He appeals against his conviction.

Two grounds of appeal have been pursued. The first ground complains that the trial judge misdirected the jury in relation to a particular matter. The second ground complains that the verdict was unsafe or unsatisfactory. As will appear, the two grounds are closely related.

In 1987, the complainant, W, was in year 8 at the high school at which the appellant taught. In 1992, there occurred an episode of violence, against the appellant, perpetrated by W and another pupil. The police laid serious charges against W. Ultimately, W pleaded guilty to a charge of assault, and was sentenced to perform a substantial period of community service. In January 1993, whilst the charges against W were pending, he went to the police, and made the allegations against the appellant which became the subject of the charge presently in question. The appellant denied the allegations, and has always maintained that they **[*3]** were false and motivated by spite.

The evidence of the complainant at the trial was that, during 1987, on many occasions, he and his school friends MP, ST, and JP, were taken out late on Friday evenings by the appellant. The appellant was a bachelor, who lived at home with his elderly mother. According to the complainant, whose evidence in this respect was supported by ST and JP, the four school boys would regularly meet, on Friday evenings, at the home of JP. JP's father used to work on Friday nights. The appellant would collect them in his car, at about 10.00pm or later, and take them out for entertainment, buying them alcohol. The parents of the boys did not know of these outings. The complainant said that the appellant would sometimes take them to bars, frequented by homosexual men, at Kings Cross. There was evidence from the complainant, corroborated by ST, that on two occasions the appellant took the boys to his home and showed them pornographic videos which portrayed homosexual activity.

According to the complainant, there was one, but only one, occasion on which the appellant made homosexual advances towards him. The complainant said that, on that occasion, after the appellant **[*4]** had collected W and the other boys from JP's house, he stopped, in accordance with his usual practice, to withdraw money from an automatic teller machine at the Burwood Credit Union. He used the money to purchase alcohol. He took W, ST, and MP to various places at Kings Cross, including a bar of the kind earlier mentioned. The appellant later took ST and MP home, and then drove W to Audley Park. W was affected by alcohol. W said that, when they were at the park, the appellant committed the act of homosexual intercourse the subject of the charge, which involved fellatio. The appellant then drove W home. W arrived home very late, just before sunrise.

In his statement to the police in January 1993, W said that this incident occurred on the evening of 27 November 1987. Presumably, to be more precise, he was referring to the early morning of Saturday, 28 November 1987. In any event, W specified Friday, 27 November 1987, as the occasion on which, after the appellant had taken him and other boys out for an evening's entertainment, the alleged homosexual activity occurred.

The complainant did not suggest that this was the last occasion on which he was ever taken out by the appellant. **[*5]** He said he went out with the appellant frequently, and there were further outings after this one. However, this was the only

occasion on which any sexual activity was said to have occurred between the appellant and the complainant. As was noted, it was reported to the police more than five years later.

The appellant made an unsworn statement at the trial. He admitted that, on a substantial number of occasions during 1987, he collected the complainant and his friends at a late hour on Friday evenings, and took them out in his car to entertain them. He denied that he took them to Kings Cross, and he specifically denied that he took them to bars. He also denied that he ever kept or showed any of the boys pornographic videos. He conceded that it was his practice to buy alcohol for the boys. He said that he regretted that, but explained it as a clumsy attempt to gain their confidence. He denied having engaged in any homosexual activity with the complainant on 27 November 1987, or on any other occasion.

There were tendered in the defence case bank statements of the appellant, which recorded no withdrawals from his Credit Union accounts on the evening of Friday, 27 November 1987. The **[*6]** trial judge pointed out to the jury that, if the Crown had reason to suggest that there might have been other accounts from which he could have withdrawn money on that occasion, then the Crown could have subpoenaed other banking records.

The defence also tendered a personal diary kept by the appellant's elderly mother. There was an entry in the diary for 27 November 1987, which appeared to record that the appellant had gone out at about 10.00pm on that evening, and had returned at about 2.00 am on the following morning. The appellant's mother conceded that this might have been a record of what she was told, rather than of what she herself observed. However, the defence relied upon an alibi, contending that the diary showed the appellant was at home, and not at Audley Park, at the time the offence allegedly occurred.

At the trial, much was made of the specificity with which the complainant alleged that the offence occurred on the evening of 27 November 1987. The indictment simply alleged that the offence occurred between 1 August and 31 December 1987. However, no doubt because of the evidence to be led in the defence case, to which reference was made above, defence counsel was concerned **[*7]** to tie the complainant to the date which he had given the police when he made his statement in January 1993. It should also be noted that, this being a second trial, the details of the Crown and defence cases had already been rehearsed, and the trial judge, and the lawyers, were conscious of the importance attaching to this issue. It is the manner in which the issue was handled at the trial that has given rise to both grounds of appeal.

It is difficult, merely from a reading of the transcript of the complainant's evidence, to form a clear view as to how certain he professed to be about the date of the alleged offence. This is not one of those cases in which a complainant alleges a pattern of sexual behaviour, and acknowledges difficulty in remembering the dates of specific incidents. According to the complainant, there only was one relevant incident of a sexual nature. On the other hand, so far as appears from the evidence, it was not until more than five years after the alleged occurrence that the complainant was first asked to remember the date. Both the trial judge, and senior counsel who represented the appellant at the trial, in the course of various arguments about this matter, **[*8]** repeatedly stated that the complainant in his evidence professed to be clear and specific about the date.

It is difficult for an appeal court to test a statement of the kind just mentioned, because it might have been based, at least to an extent, upon the demeanour of the witness, and the firmness with which he answered particular questions. At the same time, it may be remarked that, insofar as it is possible to judge solely from a reading of the transcript, it is not clear that the complainant was professing the degree of certainty attributed to him. As will appear, this was a problem which worried the jury. In one of the questions which they asked the trial judge they suggested that it seemed to them that the complainant was rather vague about the date.

In his evidence in chief the complainant, having described the general pattern of Friday evenings out with the appellant, which usually began with the appellant withdrawing money from the Burwood Credit Union's automatic teller machine, was then asked to give evidence about the occasion on which the alleged offence occurred. He was asked the date of the occasion, and said 27 November 1987. He said he believed it was a Friday. **[*9]** He said that the appellant picked him and his friends up from JP's house at about 11.00pm, then went to the Credit Union, then to Sydney, "to the normal sort of pubs and nightclubs". He then gave an account of the evening, ending up at Audley National Park, and of the homosexual activity.

He gave the following evidence, still in chief:

"Q. When was it that you ended up with alone at Audley with the accused?

A. On the 27th.

Q. Of?

A. November.

Q. You said you do believe it's a Friday?

A. I do believe it's a Friday.

Q. How is it that you can fix the date 27 November?

A. I do believe it was just before the school holidays.

Q. Do you know now when school holidays were in 1987?

A. 1987. Not particularly, but I know that we had holidays coming up."

The transcript records that there was then "legal argument" following which the trial judge made this remark:

"HIS HONOUR: However he arrives at his knowledge it was 27 November. He says on a number of occasions with a degree with certainty that it was 27 November."

In cross-examination, senior counsel for the appellant, for obvious tactical reasons, encouraged the complainant to commit himself to the date of 27 November **[*10]** 1987, and met with considerable, but, so far as appears from the transcript, not complete, success. The following exchange, for example, occurred:

"Q. Are you l00 per cent certain it was 27 November?

A. I'm pretty sure, yes.

Q. l00 per cent certain?

A. There is no percentages in it. I'm saying yes, I'm possibly sure.

Q. You're sure.

A. Yes."

That exchange exemplifies the point earlier made about the importance that might have attached to demeanour. The manner in which the concluding answer was given could have been significant. The record indicates that there was repeated argument between the Crown Prosecutor and senior counsel for the appellant about the importance and specificity of the date of 27 November 1987. At the conclusion of addresses, counsel for the appellant complained to the trial judge that the Crown Prosecutor had attempted to minimise the e importance of the date, and to invite the jury to concentrate on the range of dates in the indictment, rather than the particular date of 27 November 1987.

When the trial judge came to sum up to the jury he placed a great deal of emphasis upon what he said was the specificity with which the complainant fixed the **[*11]** date of the alleged offence. He said, for example:

"Now you the jury have to be satisfied beyond reasonable doubt as to (the complainant's) truth and the accuracy of his complaints before you can convict the accused.

What do we know about his allegation that may raise in your minds some concern? Well, it is a matter for you. He, in the evidence in this case, specifically says that it occurred on 27 November 1987. He was asked whether that was a Friday and he said he believed it was a Friday, but his evidence has been read to you and I will remind you of it again shortly, was that it was 27 November 1987 and he adhered to that to the Crown Prosecutor and in, cross-examination, he adhered to that. That is a very important point in this case, because as has been pointed out to you, it is very difficult to refute matters generally about allegations of sexual impropriety by a person, but even more so you might think when six years has passed by before you are even aware that there is an allegation and specificity of when an act occurs is sometimes very difficult for the complainant to determine, but (W) in this case says he is able to determine and he knows that it occurred on that **[*12]** specific date and the defence have been able they argue to you, to refute that by virtue of the evidence of the accused's mother's statement."

Then, a little later his Honour said:

"Now, you recall this goes back many, many years, this allegation. What is it, as I say, how difficult it is for an accused to rebut that. But it may be in some cases that there can be rebuttal of surrounding circumstances, that if you found they, were rebutted, that it would cast in your mind a doubt in respect of the overall allegation of the matter, and that is in this case (W) saying .....And he says it with certainty, that it was on 27 November, and that we went to the Credit Union. Well it

has been shown to you by way of bank statements that there is no withdrawal of moneys from the Credit Union on that particular day." Later again his Honour said:

I remind you it is on that Crown case and the other material that ,you have to be satisfied beyond reasonable doubt that (W) was telling you the truth, that he was sexually assaulted on 27 November 1987."

Having regard to some questions subsequently asked by the jury it is material to note that, in the usual way, at an earlier stage of his **[*13]** summing up, Luland DCJ had given the jury standard directions about the approach to be taken to making findings of fact, and, in the course of those directions, he had informed the jury that it was open to them to accept part of what a witness said, and reject some other part, and that they were not obliged either wholly to accept or wholly to reject the evidence of particular witnesses.

At the conclusion of the summing up the jury asked the judge a question, which gave rise to the following exchange:

"FOREMAN: One question before we start, are we bound to 27 November 1987?

HIS HONOUR: The only evidence is that it occurred on 27 November. That is what the indictment said, that it occurred within that range of dates.

FOREMAN: August to December?

HIS HONOUR: Yes. That is what the indictment said, but all of (W's) evidence was that it happened on the 27th November and he is the witness who alleges the event and that is the evidence. FOREMAN: In your guidance to us you told us that not only what they said, but how they said it was to be considered.

HIS HONOUR: Yes.

FOREMAN: Nobody in the wide world could say that (W) was specific or firm in his statements. He was vague, **[*14]** I would have to say.

HIS HONOUR: That is a matter for you to take into account.

FOREMAN: We can consider that?

HIS HONOUR: Of course you car, that is what you have to consider. You have to consider what a witness says, the way in which he says it and whether you find him to be reliable and accurate because in the end result, the test is are you satisfied beyond reasonable doubt that what he says about the commission of the offence occurred. So that is the ultimate question."

The foreman's question to the trial judge was both pertinent and direct. What the jury obviously wanted to know was whether they could convict the appellant even though they were not satisfied that the alleged offence occurred on 27 November 1987. They were addressing the possibility that they might be satisfied beyond reasonable doubt that, within the range of dates set out in the indictment, the homosexual act alleged by the complainant had taken place, but that they might not be satisfied that the act occurred on 27 November 1987.

The jury evidently did not consider that they had been given a clear answer to the question they asked, because they returned to the subject later, with another question.

[*15]

The later question was as follows: "We acknowledge that (W's) inconsistencies greatly weaken the Crown case, but we strongly feel that (W) was somehow pressured at an earlier time to somehow choose the date of 27 November 1987 whether he was really clear about it, or not. We observe how readily he stressed out under the pressure of cross-examination, for example not being able to understand immediately simple questions, and wonder if he was simply pressured into choosing this date. If he were, it would put a totally different complexion of the uncertainty of his evidence. Please comment."

Luland DCJ responded to that question as follows. His Honour seemed to treat the reference to possible pressure as a reference to possible pressure exerted by or on behalf of the appellant. This appears to have been a misunderstanding. The jury were hinting at possible pressure by the police or someone else in authority. At all events, the judge reminded the jury of the terms of the fairly limited evidence that they had before them about the circumstances in which W made his statement to the police in January 1993. He then said:

"It's true that the indictment says it is proffered within a range **[*16]** of dates but although that is being proffered that way, the only evidence before you is from the witness who says it was 27 November 1987. So, what you make of that evidence is a matter for you but again, you can't speculate and you must not speculate. You have got to act upon what you've been told."

In the course of the present appeal counsel for the Crown and the appellant have made contrary submissions as to the effect of what the trial judge told the jury. The Crown has submitted that the jury were given to understand that they could not properly convict the appellant unless they were satisfied beyond reasonable doubt that the complainant was to be accepted when he said that the alleged offence occurred on 27 November 1987. Senior counsel for the appellant, on the other hand, submits that what Luland DCJ said to the jury would have created the opposite impression, and would have given them to understand that it was open to them to convict the appellant even if they concluded that the complainant was, or may have been, mistaken, when he said that the offence occurred on 27 November 1987. (That submission must be understood as referring to an honest mistake. It was not suggested **[*17]** that the jury could reasonably have convicted the appellant if they thought the complainant was deliberately lying to them about the date.)

In my view, neither submission is correct. The learned judge did not give the jury an answer to the question which was troubling them. The nature of the problem with which the jury felt they were confronted was clear enough. They wanted to know whether or not they could convict the appellant even though they were unwilling to accept that the complainant was reliable in assigning 27 November as the date of the offence. The trial judge's response was, in substance, to repeat two facts, both of which the jury already knew. He reminded the jury of the language of the indictment, and he also reminded the jury of the evidence of the complainant. From the jury's point of view that merely restated the problem; it did not solve it. The record shows that the Crown Prosecutor and defence counsel were respectively urging the judge to take different courses. The Crown Prosecutor urged the judge to tell the jury that they were not bound to the date 27 November, and that, in order to

convict, it was only necessary for them to decide that the offence had occurred **[*18]** within the range of dates set out in the indictment. Defence counsel urged the judge to tell the jury that, in the light of the way the case had been conducted, and in the light of the evidence of the complainant, the date 27 November had become of the essence of the charge, and the jury were, in that sense, bound to it.

Luland DCJ did not clearly and unequivocally instruct the jury in either of those two alternative fashions. Instead he repeated to them what the indictment charged, and what the complainant said, and then observed that what they made of the complainant's evidence was a matter for them. That last mentioned expression is one commonly used in court proceedings, but its meaning is not always clear, and in the present case it is unlikely to have been of assistance to the jury. It is possible to point to some things which the learned judge said in his summing up, which, if taken in isolation, could have indicated to the jury that they were, to use their expression, bound to 27 November 1987. It is equally possible to point to other statements which, taken in isolation, have conveyed the opposite impression. Furthermore, as was noted earlier, they were given the instruction **[*19]** that it was always open to them, in considering the reliability of a witness, to accept one part of the witness's evidence, and reject another part. As a general rule, what the Crown needs to establish in order to obtain a conviction are the essential facts alleged in the indictment, and if the Crown fails to establish an inessential fact, or a particular which has been provided before the trial, or which emerged from the evidence of Crown witnesses, that is not fatal. However, that generalisation may, in any given case, need to be qualified. Two examples of possible qualifications are of present relevance. First, in some circumstances the requirements of procedural or substantive fairness may restrict the capacity of the Crown to depart from particulars. Second, the evidence in a case may be such that it would not be open to a jury, acting reasonably, to treat one part of the Crown case as reliable, and another part as unreliable.

The general rule was stated by Atkin J in Reg v Dossi (1918) 13 Cr App R158 at 159-160 in the following terms:

"From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged **[*20]** offence ... Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

There are, however, many examples of cases in which it has been held that time has been made of the essence of the offence, or, to use another expression adopted by judges, has been made vital, by reason of circumstances which give rise to qualifications of the kind mentioned above. (eg The King v Dean [1932] NZLR 753, R v Kringle [1953] Tas SR 52, R v Pfitzner (1976) 15 SASR 171, R v Macdonald (199G) 84 A Crim R 508, R v Westerman (1991) 55 A Crim R 353).

Expressed in legal language, the question which the jury raised with Luland DCJ was whether, by reason of the nature of the complainant's evidence, or the way in which the trial had been conducted, it was of the essence of, or vital to, the Crown case that the offence occurred on 27 November 1987. Was this a case in which a qualification to the general rule, of the kind mentioned above, applied?

It has been conceded by the Crown, in argument in this court, that the answer to

that question is in the affirmative. The precise **[*21]** concession was that, in the way in which the trial was conducted, the jury could not properly have convicted the appellant unless they were satisfied beyond reasonable doubt that the offence occurred on 27 November. That concession, which appears to be contrary to submissions made on behalf of the Crown at the trial, is not one by which we are bound. I have hesitated as to whether we should accept it, or whether we should rely upon our own independent view. The following considerations lead me to the conclusion that we should accept and act upon it. First, it was apparently carefully considered. Second, it involves considerations of fairness to an accused. Third, it relates to matters which occurred at first instance as to which this court is at something of a disadvantage in assessing the evidence. Fourth, on balance it seems to accord more with the trial judge's appreciation of the situation than the alternative view.

On that basis, both of the grounds of appeal have been made out. Although the Crown argued that Luland DCJ, in his directions, and in his responses to the jury's question, made it clear that the date of 27 November 1987 had been made of the essence of the charge, **[*22]** and was vital, for the reasons given above that is not so. The directions on the point were equivocal. It is quite possible, indeed probable, that the jury convicted the appellant on the basis that they were satisfied that an event of the kind described by the complainant occurred at some time between 1 August and 31 December 1987 although they were not satisfied that it occurred on 27 November. Other questions asked by the jury, in addition to those set out above, show that they were, understandably, very suspicious of the appellant. He gave no sworn evidence. He admitted having bought liquor for young school boys. Even on his own account he behaved inappropriately. The jury evidently gained an impression as to the degree of confidence with which the complainant fixed the date of the offence which was different from that formed by the judge. They were unusually open about the tendency of their reasoning, and their questions strongly suggest that they were of a mind to convict the appellant if they could properly do so without being bound to the date of 27 November. It was not made clear to them that they could not properly do so.

Furthermore, on the basis that the date of 27 November **[*23]** was of the essence, as is now conceded, the conviction was unsafe. The complainant's allegations were first made to the police more than five years after the alleged event. They were made in circumstances of manifest hostility relating to the charges which the complainant himself was facing at the instigation of the appellant. The defence case was able to cause considerable damage to the complainant's evidence that money was withdrawn from the Burwood Credit Union, on 27 November 1987, as a prelude to the outing which ended in the alleged offence. As the jury themselves pointed out, the complainant's evidence was in a number of respects unimpressive. It may be inferred that they found the appellant to be even less impressive. That might have been one thing if they were not bound to the date alleged by the complainant; but it is another thing once it is accepted that they were so bound.

The appeal should be allowed and the conviction and sentence quashed. Because of the second ground on which the appellant has succeeded, it is not appropriate to order a third trial.

Handley JA: The issue in this appeal turned on whether the date, 27 November 1987, said by the complainant in evidence **[*24]** to be when the alleged offence occurred, was "of the essence of the offence". See Reg v Dossi (1918) 13 Cr App

R158 at 160. During argument I was provisionally of the opinion that it was not, because the complainant said he "believed" that the offence occurred on a Friday "just before the school holidays". There were a number of such Fridays.

However later in argument learned counsel for the Crown conceded that the date was of the essence of the offence. He was given an opportunity to withdraw this concession, but confirmed it. Although this Court is not bound by concessions of counsel, it is entitled to act upon them. This Court is not a prosecuting agency. In these circumstances I think it is proper for the Court to act on this concession, although it was contrary to my own provisional view. In another case I may not do so. Subject to these remarks, I agree with the Chief Justice.

Studdert J: I agree with the Chief Justice.

ORDER:

1 Appeal allowed.

2 Conviction and sentence quashed.

Counsel for the Appellant: I M Barker QC
Solicitor for the Appellant: Jeffreys & Associates
Counsel for the Respondent: L M B Lamprati
Solicitor for the Respondent: S E O'Connor

ANNEX 8:

R. v *Rodney John Stringer*, [2000] NSWCCA 239.

2650

R v RODNEY JOHN STRINGER 60751/99 BC200004512

NEW SOUTH WALES UNREPORTED JUDGMENTS

R v RODNEY JOHN **STRINGER**

Regina v **Stringer** [2000] NSWCCA 293

60751/99

SUPREME COURT OF NEW SOUTH WALES
COURT OF CRIMINAL APPEAL

BC200004512

8 May 2000, heard

10 August 2000, delivered

CATCHWORDS: Criminal Law and Procedure - Stay of Proceedings - Sexual Offences - Abolition of Offence by Statute - Absence of Retrospective Operation - Charges of Conduct Prior to Legislation - Particulars of Span of Dates in Indictment - Crown and Defence Postulate Ltd Issue at First Instance - Passage of Years Since Alleged Offences - Loss of Corroborating Material Potentially Definitive of Crown or Defence Assertions -

Per Grove J: The specifications of dates in an indictment are immaterial allegations and parties cannot by consent make them so by mere pleading as distinct from dates becoming material in the course of evidence in a trial. A court cannot be required to try an issue which is incompatible with the law as current and applicable at a relevant time. -

Per Adams J (dissenting): At trial the Crown evidence should be limited to the assertions of conduct within the span of its specification. To permit otherwise would render the trial inevitably unfair. The nature of indecency in the context of sexual assault discussed. Comment upon the notion of equal justice with particular reference to gender. The reflection of community standards in legislation and otherwise and the perception of abuse of process considered. -

Per Smart AJ: An applicant for permanent stay of proceedings should be required to verify his position. This did not occur. The assertion that sexual activity took place a year later than alleged but at a time when such activity was unlawful does not provide foundation for exercise of discretion to order permanent stay of proceedings.

Acts Interpretation Act 1901 (Cth)

Anti Discrimination Act 1975

Commonwealth Prisoners Act 1967

Crimes (Sentencing Procedure) Act 1999

Crimes Act 1900

Crimes (Amendment) Act 1984

Criminal Code (Tas)

Human Rights (Sexual Conduct) Act 1994 (Cth)

Judiciary Act 1903 (Cth)

Sexual Offences Act 1956 (Imp)

JUDGES: GROVE, ADAMS JJ AND SMART AJ

Grove J:

This is an appeal pursuant to s5F(2) of the Criminal Appeal Act challenging an order made on 18 November 1999 by Shillington DCJ permanently staying proceedings on an indictment against the respondent charging him with six counts of indecently assaulting a male person and two counts of buggery. Four of the indecent assault counts and one buggery count were charged to have occurred between 19 December 1979 and 30 June 1980 and the other offences between 1 November 1980 and 18 December 1980.

The complainant named in all counts was the same person. He had been born on 19 December 1962 and therefore attained the age of eighteen years on the day after the latest date of any offence specified in the indictment.

In June 1984 significant changes in relevant law were effected by legislation and thereafter acts of sexual intimacy including buggery, between consenting adults (ie those over eighteen years of age) ceased to be punishable offences.

At the hearing below the learned trial judge was informed that the respondent would not deny that he and the complainant had engaged in sexual acts but would assert that the first of these occurred in 1981. His Honour was further told that, if the matter proceeded to trial, the issue, apart from the anticipated to be acknowledged acts, would be whether the complainant was under or over the age of eighteen when those acts occurred. The prosecutor accepted that if the complainant was not under that age, there should be verdicts of not guilty. The motion for stay was dealt with on the basis of this information as common ground between the Crown and the respondent. I will need to return to aspects of these matters but it is convenient first to deal with the appeal in terms of the contest as accepted by the parties.

Since 1987 the complainant has resided outside of Australia. He returned to give evidence at committal proceedings in May 1999. He testified that he had met the respondent at a club in Oxford Street Darlinghurst named Pedros. He later amended his evidence to nominate another club named Patches. He recalled that he was sixteen years of age at the time. Later he became aware that the respondent was operating a pinball parlour in Wollongong named Flashback. He came to frequent it. The respondent offered him a job supplying change for and performing minor repairs to the machines. He thought he started this employment in March 1980. Shortly after he commenced that work he was invited to spend a weekend at a farm (Tara) owned by the respondent. He accepted. He gave evidence of sexual activity there

and on a holiday which they took to Airlie Beach in Queensland. Any activity in Queensland is outside of jurisdiction of New South Wales courts but the complainant recollected that the holiday took place in the winter or spring and it would be significant to establish whether he was referring to the seasons of 1980 or 1981.

It can be mentioned that cross examination of the complainant included exploration of the firmness of his memory for dates. He said that he returned to Australia for Christmas 1995 but agreed that it could possibly have been 1996. He was not sure when he last had sexual contact with the respondent and testified that it could have been 1983 or 1984, or any time up to 1987 when he left the country.

There was no evidence called by the prosecution which was corroborative of the complainant's testimony. There were however a number of matters to which he referred which were potentially supportive of his version of the span of time in which the offences were alleged to have occurred.

The complainant said he was driven to Tara in a silver Alfa Romeo motor car; the respondent owned such a car but both the car and the property were owned during 1981 as well as 1980. A restaurant in Wollongong was in operation during both those years. The complainant remembered it as the venue of a celebration of his eighteenth birthday arranged by the respondent, prior to which there had been acts of sexual intimacy between them. Flashback Pinball Parlour was in operation over both the years mentioned. None of these references is definitive of date, save the birthday which does not of itself demonstrate whether events preceded or followed it.

The case of the respondent for a stay of proceedings was substantially based upon the impossibility of his now obtaining objective material which would verify his contention that the relevant events occurred in 1981. Counsel referred to the handicaps derived from the extreme delay between alleged offence and the charging and the unavailability of potential sources such as bank records and the like. It suffices however to refer to two matters adverted to by the learned trial judge.

The owner of Flashback was the Village Roadshow Corp. His Honour found that employment records for 1980 and 1981 were no longer available. Similarly there were no longer available airline passenger manifests or accommodation details at the Queensland resort hotel which could demonstrate when the holiday was taken by the complainant and the respondent.

It is well established that a permanent stay should not be granted simply because witnesses or evidentiary material have become unavailable or lost: R v Adler unreported CCA 11 June 1992; R v Goldberg unreported CCA 23 February 1993; R v McCarthy unreported CCA 12 August 1994; R v Tolmie unreported CCA 7 December 1994; R v Hatfield [1999] NSWCCA 340.

Every case must nevertheless be determined in the context of its own facts and there is undoubted jurisdiction to stay proceedings to prevent unfair trial. Although the jurisdiction involves the exercise of discretion, the circumstances will usually have to be extreme for such relief to be given; Jago v District Court of New South Wales 1989 168 CLR 23; The Queen v Glennon 1992 173 CLR 592; R v Tolmie supra.

Were the employment or accommodation records or the passenger manifests accessible, it is reasonable to conclude that they would be determinative of the issue

joined between the prosecution and the respondent - did the acts charged occur in 1980 or 1981? I am conscious that this does not exactly recite the dates in the indictment but it is a broadly convenient statement of the substantial issue.

The situation is to be distinguished from those where records simply might be of assistance to an accused. Of course, in this case the records may determine the issue in favour of the prosecutor but there is nothing to suggest that the chances are other than equal, either way.

Shillington DCJ concluded that there was no way in which a jury could be adequately instructed so as to avoid unfairness in the conduct of the trial. It was submitted by the Crown that it would suffice to draw the attention of the jury to the disadvantage suffered by the accused as a result of delay and consequent absence of corroborative record and to caution them to take this into account as a restraining influence against conviction. Such a direction would not adequately focus attention upon the essence of the issue namely whether there is a reasonable possibility that the records, if available, would determine the contested issue in favour of the accused. In the present circumstances, that question would have to be answered in the affirmative. The perception of unfairness is not altered by the necessity of a similar affirmative answer to the congruent question whether there is a reasonable possibility that such records would determine the contested issue in favour of the prosecution.

Subject to the next matter with which I will deal, it is not demonstrated that Shillington DCJ acted on a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, has mistaken facts or has not taken into account some material consideration and his exercise of discretion on the issue presented for his decision was untainted: House v The King 1936 55 CLR 499.

I return to considerations concerning the agreed issue. The Court was informed, as was Shillington DCJ, that there was a policy of prosecution authorities in effect which was to refrain from charging offences of the type now under consideration occurring before June 1984 where, by reason of the ages of the participants, the activity had ceased to constitute an offence after that date. The concession that, if the complainant was not under the age of eighteen when the activity took place, he should be found not guilty apparently derived from it.

The Court raised the question whether the District Court was being asked to try a false issue in respect of the offences charged and the time spans particularized in the indictment. The law making punishable acts such as buggery, irrespective of the age of participants, was current and applicable in both 1980 and 1981. A trial judge could not direct a jury that, if a complainant had turned eighteen, an accused was not guilty of such offence. The implementation of policy cannot alter the law. Undoubtedly prosecutorial discretion may be exercised to refrain from charging in accordance with some adopted policy but once a matter is brought before a court it must be determined according to applicable law which, I repeat, could not involve acquittal of an offence of relevant type committed at any time before June 1984 simply because of the attainment of age by the participants.

The avoidance of potential trial of a false issue became dependent upon the dates specified in the various counts of the indictment being treated as having made time the essence of offence in each case. This would not ordinarily be so. In R v Dossi 1918 13 Cr App R158. Atkin J (as he then was) observed:

"From time immemorial a date specified in an indictment has never been a material matter unless it was actually an essential part of the alleged offence ....."

Although it is usual to insert the date or dates between which offences alleged to have been committed, time has been stated to be of the essence in four situations, namely:

(i) when an act is criminal only when done within a certain time of some other act or event;

(ii) when it is an essential ingredient of a particular offence that certain consequences should follow a particular act;

(iii) when it is an essential ingredient of a particular offence that the act alleged was committed between certain hours of the day or night; and

(iv) when the prosecution for a particular offence must be commenced within a certain time of the commission of the criminal act alleged.

See Halsburys Laws of England 4th Edn Vol 11 para207 n4. The present case is in none of those categories.

Can a prosecutor make time of the essence of offence simply by pleading and submitting to being bound by the time which has been pleaded? In my opinion, a prosecutor cannot. The present matter can be used as an example. Suppose the matter went to trial, I have already observed that the judge could not charge the jury contrary to law that the accused would be not guilty of offence if punishable activity occurred on or after 19 December 1980 (and, of course, before June 1984). Indeed, even if the jury expressly found that an offence occurred after that date (assuming proof of other ingredients) conviction would be inevitable. The circumstances of Dossi were almost parallel. Dossi was charged with indecent assault on March 19 and the jury announced "with regard to the date March 19, not guilty, but if the indictment covers other dates guilty". The trial judge amended the date to read "on some day in March" but this was unnecessary. If a specified date were regarded as a defect in the indictment, it would in any event cured by verdict, its substance being that of an inessential averment.

It may be contemplated that in a particular case, the conduct of the trial and the content of evidence will lead a presiding judge to direct a jury that a Crown case is only made out if an offence occurred on some specific occasion or within an evidenced span of time. There has been no trial. The issue which has arisen is whether an immaterial averment can be made material by pleading.

The exclusive issue before this court is an appeal against an interlocutory order, the effect of which was to prevent any trial taking place at all. The evidence and the concessions made in the court below were directed to seeking that order for stay of proceedings and I would not embark upon analysis of other issues which may be hypothesized to arise upon the indictment until they can be discerned as having emerged in the context of evidence at trial.

My conclusion is that it was not open to the prosecutor, with or without the consent of the respondent, to limit the issues presented for trial upon indictment and the

indictment is required to be tried by the Court according to the law in force and not in accordance with a selective restriction placed upon it by a party.

I emphasize that it is obvious that the conduct of the proceedings below and in this Court has been bona fide and that the matter now in focus was not adverted to until raised by the Court. I would add that nothing which I have stated affects the prosecutorial discretion to refrain from charging in any given case and the ambit of my opinion is confined to cases where the trial process has been invoked. As may be inferred from the foregoing, argument by the Crown on the merits was unsuccessful in the District Court and I would not uphold the appeal against that decision other than on the basis that I have elaborated. The presentation of the Crown appeal was not initially directed to that basis and a decision whether to continue proceedings remains within the scope of prosecution discretion.

The consequence of the finding of error is that the appeal must be allowed.

I propose that the appeal be allowed and the order permanently staying the presentation of indictment be quashed.

Adams J:

I have read the judgment of Grove J in draft and do not need to repeat here his Honour's account of the material circumstances.

The dates of the alleged offences as specified in the indictment, however, need to be stated. The complainant turned eighteen on 19 December 1980. The first five counts (four of indecent assault and one of buggery) in the indictment are alleged to have occurred between 19 December 1979 and 30 June 1980. The complainant's statement makes it clear that the first allegedly occurred in March 1980, well into his seventeenth year. The three remaining counts (two of indecent assault and one of buggery) allegedly occurred between 1 November 1980 and 18 December 1980, the last allegedly one week before the complainant's eighteenth birthday. The complainant's statement unambiguously dates these events as occurring before his eighteenth birthday. The sexual acts allegedly committed here were in every relevant sense consented to and there is no suggestion, let alone evidence, that the complainant was anything other than a voluntary participant in them. The account of the first occasion commences in the following way -

"...I hopped in the shower. A few minutes later Rod came in and he was naked with a towel over his shoulder and asked if he could come in and I said, 'Sure'...He got in and got wet and got a flannel and started washing me down...Then he started sucking my penis for a few minutes. Then I sucked his. We got out of the shower and went to his bedroom...We started making out, kissing, fondling."

The conclusion of the learned District Court Judge was that certain crucial records were no longer available. His Honour relied in that regard upon evidence that had been adduced in the committal proceedings, the fact that the Crown was unable to produce any records of the kind nominated and the implicit concession by the Crown prosecutor in argument before his Honour that the records were, indeed, not available. The argument before this Court proceeded upon the explicit concession by the Crown prosecutor made in written submissions that the material records "no longer exist" and no point was taken that the findings below were incorrect. I am of the view that the learned District Court judge was not in error in his factual

conclusions. It would be most unfair to determine the appeal against the respondent, who has not had an opportunity to submit otherwise in this Court, on the basis that those factual conclusions, conceded by the Crown to be correct, were unjustified.

Nor do I consider that, to provide a factual basis for his application for a stay in the circumstances of this case, the accused should have given evidence that no sexual activity occurred between the complainant and the appellant in 1980. The Crown did not advance a submission to this effect either in this Court or at first instance. The hearing and this appeal have proceeded upon the basis that this is, indeed, the defence case. With respect, I think that it would, again, be unfair to the respondent for this point to raised for the first time at this juncture.

Grove J has concluded that subject to the time element in the indictment, no appealable error was demonstrated in the reasons or order given below. For the reasons Grove J has given, I agree that, on the assumption that the time limits expressed in the indictment were essential to be proved, the orders below were not in error. Moreover, in my view, if this matter went to trial, it would be essential that the trial judge direct the jury that the accused must be acquitted if it is not satisfied beyond reasonable doubt unlawful sexual activity occurred before 18 December 1980.

If the indictment in this case (say, for buggery) did not specify either place or time, it is clear that the accused would have been entitled to require the Crown to particularise the occasion in question. The Crown alleges that the accused committed two such crimes on the particular occasions specified by the complainant, to which the counts in the indictment refer and which occurred, according to the indictment, between 19 December 1979 and 30 June 1980 and between 1 November 1980 and 18 December 1980. The question has arisen whether, even if the jury were satisfied that those occasions did not occur, if it were nevertheless satisfied that buggery occurred on other occasions after the specified dates (presumably, on the basis that the complainant was mistaken, despite his categorical assertions to the contrary) the accused could be convicted of those particular crimes. As the matter has come before us, the Crown does not allege that any such occasions occurred.

For the sake of explaining the terms of the indictment, the prosecutor both below and in this Court indicated that, as a result of the Crimes (Amendment) Act 1984 (the Amendment Act, which commenced on 8 June 1984) the Crown proposed to charge and call evidence only as to events alleged to have occurred prior to the complainant's 18th birthday. The function of the dates in the present indictment, therefore, is deliberately to identify particular alleged acts which constitute the relevant crimes and to exclude all other occasions on which similar acts may have occurred constituting other crimes. The complainant's evidence would be, if asked, that he and the respondent had a sexual relationship that continued for some years. Smart AJ considers that the dates in the indictment were not relevant for reasons other than identifying the incidents in question, such as establishing alibi or casting doubt upon the happening of the events. However, the defence case is that the respondent and the complainant had not met on the dates in question: in every relevant sense this raises alibi and doubts about the happening of the events. There is no relevant difference, in principle, between time and place: they are both merely the coordinates identifying an occasion.

As I understand it, the majority view is that, if the jury thought that the complainant was merely mistaken about dates but considered, nevertheless, that the offences

described in the indictment occurred, then, even if the accused established irrefutably that he had not met the complainant on the dates alleged, they might nevertheless convict. That is to say, the jury might convict the accused if they were satisfied that the offences occurred at any time before repeal of the offence. If this is so, it follows that the indictment might be validly framed alleging the offences occurred at any time between 18 December 1980 and 7 June 1984 and the Crown could not be required to particularise any date in that period or, if it did, would not be bound by it. By parity of reasoning, the same position would arise as to place. Accordingly, the Crown would be entitled to prove any acts of indecency or anal intercourse, limited only by the number of charges in the indictment, that occurred within those dates in New South Wales and the accused would have to establish that he never had committed any such acts. This cannot be right. The trial could not possibly be fair. It follows that, if the respondent established his alibi for the period before 18 December 1980 or the jury was in doubt about it, he must be acquitted on the present indictment.

This is not a case where the indictment falls to be considered in the abstract, in which event it would be correct to say, of the buggery charges but not (for the reasons stated below) of the indecent assault charges, that the dates were not essential elements of the charges in the sense mentioned by Grove J, in particular because a time prescription was not part of the offence itself. Their essential character arises from the case as particularised by the Crown. In this sense the indictment resembles the information that was considered in Johnson v Miller (1937) 59 CLR 467 and must, in my view, be considered in light of the case particularised.

To my mind, the circumstances here are significantly different from those in R v Dossi (1918) 13 Cr App R158. In that case, a particular act on a particular occasion was charged in the indictment although the jury found, as it happened, that it occurred on a date different to that which was alleged. The Court of Criminal Appeal held that the conviction was nevertheless proper and that the date was immaterial. Here, however, the Crown wishes to try the accused for behaviour occurring on a particular occasion falling within specified dates and has eschewed any desire to prosecute him for any other crimes that may have occurred on other dates. This is not a case where one occasion is alleged but there is uncertainty as to its date.

In Regina v VHP (unreported, NSWCCA 7 July 1997), the complainant alleged that the offence had occurred on a particular date, although the indictment had specified a range of dates. The Court accepted that the jury could not have been satisfied that the offence occurred on the date specified by the complainant but the trial judge had given an equivocal direction which may have led them to think that they could nevertheless convict the appellant if they thought the offence had occurred within the range of dates specified in the indictment. Gleeson CJ (with whom the other members of the Court agreed) analysed the evidence to ascertain whether the complainant actually was professing the degree of certainty attributed to him and said (at 15) -

"As a general rule, what the Crown needs to establish in order to obtain a conviction are the essential facts alleged in the indictment, and if the Crown fails to establish an inessential fact, or a particular which has been provided before the trial, or which emerged from the evidence of Crown witnesses, that is not fatal. However, that generalisation may, in any given case, need to be qualified. Two examples of possible qualifications are of present relevance. First, in some circumstances the requirements of procedural or substantive fairness may restrict the capacity of the

Crown to depart from particulars. Second, the evidence in a case may be such that it would not be open to a jury, acting reasonably, to treat one part of the Crown case as reliable, and another part as unreliable."

His Honour referred to the general rule as stated in Atkin J in R v Dossi (1918) 13 Cr App R158 at 159-160, as cited by Grove J, but then went to say -

"There are, however, many examples of cases in which it has been held that time has been made of the essence of the offence, or, to use another expression adopted by judges, has been made vital, by reason of circumstances which give rise to qualifications of the kind mentioned above [citing, amongst other cases, The King v Dean [1932] NZLR 753 and R v Pfitzner (1976) 15 SASR 171]."

It seems to me that, if the proper conclusion was that the complainant's evidence was as specific as was claimed in the trial, accepted by the trial judge and conceded by the Crown prosecutor on appeal, the Court would have unhesitatingly upheld the appeal upon the ground that that date was vital. The Chief Justice pointed out that, although the Court was not bound by the Crown prosecutor's concession, it should be accepted and acted upon because it was carefully considered, involved considerations of fairness to the accused, related to evidence at first instance, in the assessment of which the Court was at something of a disadvantage, and seemed to accord more with the trial judge's appreciation of the situation than the alternative view. It was not suggested that the Crown was not bound, at the least, by the dates specified in the indictment.

As I have said, if the dates here were regarded as immaterial, the respondent here would at least be entitled to know the particular occasions upon which he was being faced with an allegation of a criminal act. This case has been argued by both sides upon the assumption that over a number of years, on the Crown case before as well as after, and on the defence case only after, 18 December 1980, there were a number of occasions of sexual acts capable at the time of comprising criminal offences. So far as the complainant is concerned, it may be assumed that he would give evidence, if asked, of sexual acts performed between the accused and himself not only before but also after 18 December 1980. In the committal proceedings he gave evidence, which exhibited some uncertainty, that he and the respondent visited each other and had sexual relations with varying frequency until 1982 (when, it seems, the complainant "was going out with someone else") or, perhaps, 1987. However, such evidence would not be admissible (for irrelevance) in this trial since it would also be the complainant's evidence, and the Crown case, that those acts were additional to the crimes charged in the indictment.

As the indictment presently stands, if the dates are immaterial, it would be impossible to tell whether acts said by the complainant to have occurred in 1981 or later were the acts alleged in the indictment. Accordingly, although each count in the indictment charged one offence only (as is essential in law: see Johnson v Miller (1937) 59 CLR 467), the evidence would reveal a multiplicity of offences with insufficient particulars to identify any one of them as the offence with which the accused was charged in any particular count. In R v S (1989) 45 A Crim R 221, Dawson J said (at 226-227) -

"As I have said, the three counts in the indictment were framed in a permissible way. Each charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question, there could have been no

complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this, there was what has been called a 'latent ambiguity', in each of the counts: see Johnson v Miller (1937) 59 CLR 467 per Dixon J (at 486). That ambiguity required correction if the applicant was to have a fair trial.

"The material before us does not reveal whether the ambiguity was apparent by reference to the depositions at the time that the applicant made the application for particulars. If it was, it may have been appropriate for the trial judge to have ordered that particulars be given identifying the events as charged, if not by reference to time, by reference to other distinguishing features. If at that stage, such a course was inappropriate and it was necessary for the prosecution to call its evidence for the precise nature of the defect in the proceedings to emerge, the prosecution ought to have been required as soon as the defect became apparent to elect by indicating which of the offences revealed by the evidence were the offences charged."

It follows that, one way or another, the offences charged must be particularised since otherwise the particular occasions cannot be identified to the extent essential to enable a fair trial of the accused.

The Crown case here is that the crimes alleged occurred prior to 18 December 1980. If the trial were permitted to proceed, the accused by his plea would join issue as to whether those, and only those, crimes occurred or not. In the circumstances of this case, if the jury were satisfied that sexual acts otherwise within the description contained in the relevant counts of the indictment occurred, but after 18 December 1980, it would follow that those acts were not those with which the accused was charged and, accordingly, to which he had not pleaded and upon which they could not return verdicts one way or the other. In my opinion, the only verdict which they could give, if they were not satisfied beyond reasonable doubt that the crime alleged occurred between the dates specified in the indictment, is to return a verdict of not guilty.

In R v Pfitzner (1976) 15 SASR 171, Bray CJ said (at 185) -

"Whether the date alleged in an information is vital to the charge must depend on the circumstances. So long as it is clear that the controversy turns on the events of a certain occasion, it may not matter if the date of that occasion is misstated if the occasion itself is clearly identified and both parties have directed their cases towards it: cf Page v Butcher [1957] SASR 165. But obviously if a man is charged with committing an offence on Saturday and comes prepared with an alibi for Saturday, he cannot be convicted of committing the offence on Friday or Sunday, unless perhaps the information is amended and the trial adjourned to enable him to meet the new case. If authority is needed for so obvious a proposition, it will be found in Wright v Nicholson [1970] 1 WLR 142; [1970] 1 All ER 12; (1970) 54 Cr App R38."

In this case, the accused's defence, as foreshadowed, is that he had not met the complainant prior to 18 December 1980. To take count one by way of example, it is consistent with this defence that the accused did have anal intercourse with the complainant on the first occasion that the complainant went to the accused's farm at Kangaroo Valley, if, and only if, that occurred after 18 December 1980, so that, if the occasion identified by the Crown is defined without reference to dates, the accused may have no defence. However, the Crown has chosen not to allege and will not

seek to prove that the accused committed anal intercourse with the complainant on the first occasion that the complainant visited him at his farm at any time but only if that event occurred prior to 18 December 1980, indeed between 19 December 1979 and 30 June 1980.

There have been many cases in which it has been held in this Court that the conduct by the Crown of its case has made the time specified by the complainant in evidence an element of the offence in the particular circumstances: see, for example, in addition to Regina v VHP (unreported NSWCCA 7 July 1997), Regina v Cox [1999] NSWCCA 62, Regina v Hughes [2000] NSWCCA 3. In those cases, there was some uncertainty as to when the occasions giving rise to the offences occurred but the trials proceeded upon the basis that one or more particular dates identified the occasions charged. They were not cases where the legal elements of the crime prescribed any particular time frame. Here, there is no uncertainty about time. The Crown case is, following in this respect the complainant's expected evidence, that the offences occurred after his seventeenth and before his eighteenth birthday. The conduct by the Crown which, it has been held, renders the dates alleged in the charge an essential item of proof, is not confined, in my view, to those cases where the dates crystallise during the course of evidence: the prosecution case may be so conducted from the beginning.

In The King v Dean (1932) NZLR 753, the accused was charged with unlawfully carnally knowing a girl under sixteen in an indictment containing five counts each of which charged the commission of an offence "on or about" a specific date. The prosecutrix, who was the only witness as to the dates of the offences, in respect of three of them, possibly all, swore positively that they were committed on the specific dates mentioned in the indictment. The defence was an alibi in each case. The jury was directed that proof of the exact dates was not material and that proof that the offences occurred within a reasonable time of the dates mentioned in the indictments was sufficient, relying on R v Dossi (supra). Myer CJ considered that there was "a very important distinction" between Dossi and the instant case, noting that the prosecutrix in the case under appeal, alleged specific dates in the evidence and specific alibis were relied on by the accused. His Honour went on to say (at 761) -

"It is to be observed, however, that the girl did not speak of any acts of intercourse - I refer particularly to January - except on the specific dates to which she swore. If she had said that intercourse had taken place a great many times during January and in the neighbourhood of the specific dates mentioned, and, under proper direction, the jury had found a verdict of 'Guilty', the observations in R v Dossi (1) might apply; but where a girl swears positively that an offence was committed on a specific date, and only on that date, if the prisoner is able to establish an alibi as to that date to the satisfaction of the jury, then, unless, at all events, it is shown that the girl has made a mistake in fixing the date, I do not see how a direction that the jury may convict the prisoner of an offence on another date can be justified. All that Mr Justice Atkin says in R v Dossi (1) is that a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. True, the date specified *in the indictment* is not material, but if it is sworn to that the alleged offence took place on a specific date and there is no evidence that other offences took place in the neighbourhood of that date it seems to me that the date sworn to does become essential. In other words, it is the date proved that is material, not the date specified in the indictment."

The other judges of the court, Ostler, Reed, Adams, and Smith JJ, said (at 763) -

"In this case the dates specified in the indictment in the last three counts had become an essential part of the offences charged therein. The times had been made of the essence of the offences by the evidence. Where a female makes a criminal sexual charge against a male, but cannot recall the exact date of the alleged offence, although a date should be specified in the indictment, and although it is the duty of the Crown to ascertain and state that date as exactly as possible, then the rule applies, and (if the charge is laid within nine months) the exact date is not an essential part of the offence, even though the exact date has been specified in the indictment. But whether the charge in such an indictment is laid on an exact date or 'on or about' a date, where the whole of the evidence is that the offence was committed on that date and on no other, then the date has been made an essential part of the offence. If an alibi on that particular date is set up in defence, it is a misdirection for the presiding Judge to inform the jury that they may accept the alibi and yet convict. The proper direction to the jury is that they cannot convict unless they reject the alibi as being false or mistaken. If that were not the law, then an innocent man, who relying on the exact date sworn to the prosecutrix, and brought evidence proving beyond all doubt that he was elsewhere on that date would be liable to be convicted notwithstanding such proof, and although deprived of the opportunity of proving an alibi on any other date on which the jury might be invited to hold that the offence was committed."

It seems to me that this case is in all essential respects comparable to that in Dean. The specific evidence to be adduced by the Crown prosecutor from the witness is limited to acts alleged to have occurred between the dates specified in the indictment. It would be entirely inadmissible, in my view, for the prosecutor to lead evidence of sexual behaviour which occurred outside those dates either in the Crown case or in cross-examination of the respondent, should he give evidence. Accordingly, at the end of the day, the jury would be left with a prosecution case confined to the period before 18 December 1980, with no evidence of other sexual acts covered by the counts in the indictment and, if the accused had proved he had not met the complainant until he was eighteen, or this was reasonably possible on the evidence, an acquittal would be inevitable. The occasion for a direction that the jury could regard the dates specified in the indictment as immaterial would not arise, since no evidence raising the possibility that the offences occurred other than when the complainant asserted was the fact would have been adduced.

A direction that the dates in the indictment were immaterial would be wrong, in my opinion, not only for the same reasons as those expressed in Dean, but because the jury would then be invited to have regard to any offences fitting the description in the indictment occurring at any time. The direction, even if it allowed consideration of occasions not falling within the dates in the indictment must specify some temporal limit or other. This is implicit in all the cases to which I have referred, even Dossi. If the accused had given evidence confined to his not meeting the complainant until 1981, he could not be asked about any events that occurred after 17 December 1980 and, if asked about matters that might tend to incriminate him in respect of that time, could refuse to answer. There would, therefore, be no evidentiary basis for fixing any limit on the possible dates of an offence, though 8 June 1984, the date of repeal of the offences, would provide a legal limit.

There is another substantial practical difficulty facing the Director of Public Prosecutions in the conduct of a trial in this case in which the dates specified in the indictment were not vital, having regard to the decision of this Court that the lapse

of time combined with the significant prejudice to the accused in establishing that he had no relationship with the complainant prior to 18 December 1980 rendered unfair a trial of offences alleged to have occurred before that date. It necessarily follows that it would be unfair for the Crown to seek to put forward the case that the accused did indeed have illicit sexual relations with the complainant before then. The trial, accordingly, must be confined to the issue whether the unlawful acts occurred after 18 December 1980. It would obviously be proper, indeed, necessary, for the indictment to be changed to reflect that case. The consequence would be that the Director would be prosecuting an offence which, for good policy reasons, he did not wish to prosecute. That indictment is not the present indictment. This Court has not been asked to consider an indictment in any form in which such different dates are specified.

The Crown here has declined to amend the indictment to identify other dates and an indictment without dates must be particularised for the reasons I have already mentioned. A refusal to do so must result in quashing the indictment in accordance with Johnson v Miller (supra) and R v S (supra). Thus, whether the proceedings be stayed or the indictment be quashed, a trial cannot be conducted of the indictment in its present form.

There are other matters of significance which also lead to the conclusion that this Court should not allow the present appeal.

S79 of the Crimes Act 1900 (the Act) as it stood in 1981, when the complainant was aged eighteen and hence an adult, was in the following form -

"Whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for fourteen years."

The form of the indictment in Archbold's Criminal Pleading & c for many years up to and including the 21st edition (1910) was as follows -

"The jurors for our lady the Queen upon their oath present, that JS ...in and upon one JN feloniously did make an assault, and then feloniously, wickedly, and against the order of nature, had a venereal affair with the said JN, and then feloniously carnally knew him the said JN, and then feloniously wickedly and against the order of nature with the said JN did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form of the statute & c."

This certainly captured the spirit, if it did not confine itself to the letter, of the law. By 1956 the English provision omitted the invective "abominable" (see s12, Sexual Offences Act 1956), although the 36th edition of Archbold (1966), the last before the offence was repealed in 1967, described the offence in the text as "horrible" (see para2969).

Subject to the application of s61N and s61O of the Act (discussed below), consensual sexual relations in private between adults not in a relevant familial relationship have not been crimes in this State since the enactment of the Amendment Act. S79, as it stood before 8 June 1984, prohibited anal intercourse not only between males but also by a man with a woman, consent being no defence, age being irrelevant and both parties being equally guilty: see, for example, Hamilton & Addison Criminal Law & Procedure 6th edition (1956), citing R v McDonald 1 SCRNS 173. (This view merely

repeated the textbooks and is not controversial.) S78K, which superseded the old s79, created an offence of homosexual intercourse between males, one of whom is less than eighteen years of age. Consent is irrelevant.

The appellant is also charged with offences under s81 of the Act as it stood in 1980. S81, before its repeal in 1984, provided -

"Whosoever commits an indecent assault upon a male person of whatever age, with or without the consent of such person, shall be liable to penal servitude for five years."

It is clear that, although the indecent assault may be committed by a woman, it must have been against the will of the male: R v Mason (1969) Cr App R12, where it was held that an adult woman who had frequent consensual intercourse with boys aged fourteen or fifteen, did not commit any indecent assault because, although consent was not a defence, there was no act which occurred against their will. R v Hare [1934] 1 KB 354, where a woman who induced a boy under sixteen years of age to have sexual intercourse with her, and who contracted gonorrhoea, was convicted of the offence, was distinguished as having dealt only with the question whether a woman could commit the offence. The position of girls was different. In R v McCormack (1969) 2 QB 442, the Court of Appeal held that a man who inserted his finger into the vagina of a girl aged fifteen years, who fully consented, was guilty of indecent assault, however willing she was. Mason (supra) was cited in argument but not referred to in the judgment. That the indecent assault had to be contrary to the will of the other, where the parties were male was decided in R v Wollaston [1872] 12 CCC 180, even where, being minors, the victims could not consent; see also, Beal v Kelley (1951) Cr App R128).

So far as men are concerned, in New South Wales, the word "assault" has no more significance than "act" since it is not necessary for the prosecution, in order to prove the offence, to show that there was any element of compulsion, threat or hostility on the part of the accused. In R v B & L (1954) 71 WN (NSW) 138, which involved two adult men, discovered in flagrante delicto by police torchlight at night under some bushes in a park, the Court of Criminal Appeal held that any indecent "association between...males", even following upon mutual agreement, is prohibited by the section. Though the "association" was arguably in a public place, this was not said to be relevant. The English cases were distinguished on the ground that the English legislation did not specifically state that the "assault" was nevertheless a crime "with or without consent" even though the judgments dealt with precisely that issue under the common law. It must be conceded that it is difficult to discern the relevant difference between an act that is against the will and one to which consent cannot legally be given. However, the New South Wales refusal to give the word "assault" (after all, a legal term) its long standing meaning, which must have been well known to the legislature, seems even more tortured.

S80A was inserted into the Act, in 1955. It made it an offence for a male to commit, or be party, either privately or publicly, to the commission of, an indecent act with another male of any age or procure or attempt to procure any such commission and providing a maximum penalty of two years. There was no reference to assault. This section was also repealed in 1984. Prosecutions of adults under these provisions not infrequently resulted in substantial gaol sentences.

The test of indecency has been variously stated as whether the behaviour was

unbecoming or offensive to common propriety (Harkin (1989) 38 A Crim R 296) or an affront to modesty (Crowe v Graham (1968) 121 CLR 375; [1968] ALR 524) or would offend the ordinary modesty of the average person (Moloney v Mercer [1971] 2 NSWLR 207). In R v Manson and anor (unreported NSWCCA 1993) Gleeson CJ said -

"An indecent act is one which right-minded persons would consider to be contrary to community standards of decency. In [Purves v Inglis (1915) 34 NZLR 1051 at 1053]... the following was said: 'The word indecent has no definite legal meaning and it must be taken therefore in its modern and popular affectation. In the Standard Dictionary indecent is defined to be anything that is unbecoming or offensive to common propriety.' If, as in the present case [a photograph said to have been taken for political purposes of a naked eleven year old girl], the act in question has an unequivocally sexual connotation the Crown does not have to prove that the act was done for the purposes of providing sexual gratification. On the other hand, the purpose for which an act is done may well be regarded by right-minded people as relevant to the question whether it is decent or indecent, depending upon the circumstances of the particular case. The fact that an act was done for artistic or political purposes may lead a jury to conclude that it was not indecent. On the other hand, it would certainly not require such a conclusion."

Accordingly, if the language of s81 was given its ordinary meaning, *all* sexual behaviour committed on an adult male whether by a male or female was capable, in law, of being criminal even if by mutual agreement, depending what might be thought to constitute community standards. In respect of women, however, prosecutions were confined to sexual behaviour with boys. Whilst there is no rule of law that sexual acts in private between adult males *must* be legally indecent, this is assumed to be so. Conversely, it is assumed that sexual acts between men and women in private *are not* relevantly indecent. The section does not, in terms, make any such distinction but, of course, it has never been either understood or applied according to its ordinary meaning. The different assumptions applying to homosexual and heterosexual relations demonstrate the homophobic considerations which were implicit in the law as interpreted in this State. It is, perhaps, ironic that, so far as persons over the age of sixteen years were concerned, only sexual relations between women, if consensual, could not be criminal even if they offended community standards.

The potential reach of s81 of the Act was limited by the implicit assumptions which I have mentioned. If enforced according to its terms, it could not have long survived. It did so only because it was taken to apply only to sexual acts committed on children, sexual acts which were not consented to and, of course, homosexuals. In the first and second cases, prosecution was justified by the reasonable requirement of protection but in the third case the only reason was prejudice.

S81 of the Act was superseded, in part, by s78Q which created the offence of "gross indecency" committed by a male person with or towards another male person who is under the age of eighteen years but provided a maximum penalty of two years imprisonment. S61N(2) of the Act makes it a crime punishable by up to eighteen months imprisonment where any person commits or incites an "act of indecency" with or towards another aged sixteen years or more. Thus, even now, adults who, for example, consensually masturbate in each other's presence in private commit a crime if "right minded" persons might consider their behaviour to be contrary to accepted community standards (to accept the formulation in Manson, supra):

Saraswati v The Queen (1991) 172 CLR 1. This provision might well comprehend consensual adult lesbian sexual behaviour, although it is virtually impossible to suppose that it would be prosecuted. S61O(1A) and (3)(a), of the Act have the combined effect of increasing the penalty for this behaviour to three years where more than two persons are involved. Different provisions apply to victims who are under the authority of the offender or have a serious physical or intellectual disability.

Amongst the changes to the Act brought about by the Amendment Act, consensual sexual relations with persons under the age of sixteen years became criminal offences whether the person committing the acts is male or female. However, if both the parties are male, those acts are nevertheless a crime (subject, where the acts fall short of anal or oral intercourse, to the meaning of "gross indecency", as to which, see below) where one or other of them is sixteen years old but has not reached the age of eighteen years.

This treatment by the criminal law of sexual behaviour has been criticised as discriminatory upon the basis that it is apparently acceptable that a boy over the age of sixteen may have consensual sexual relations with a woman (even if a teacher), however induced, but must be protected from sexual intercourse with any man. Moreover, consensual sexual relations by a male with a sixteen or seventeen year old female are not criminal (unless, she being sixteen, he is a teacher, father or step-father: s73 and subject to the application of s61N and s61O discussed above) but, if done with a male of the same age, is always criminal. This exposes the irrelevance of the argument (which is, at all events, tendentious) that males between sixteen and eighteen are less relevantly mature than females of that age. If it is thought that such males do not need the protection of the criminal law from females, what is the basis for thinking that they need protection from males? What is really being said here is that, even where a male aged sixteen or seventeen is induced or seduced to undertake sexual behaviour, then, if he consents in law, he suffers no harm if the other person is female but only if the other person be male. Indeed, such is the prejudice that, if the other party is female, many would regard the male as fortunate and as having proved his manhood. Even where he is subjected to sexual behaviour at the instance of a woman who is in authority, no criminal offence is committed. If it be appropriate to punish by the criminal law consensual sexual relations procured improperly by adults on persons aged sixteen or seventeen years, the circumstances of the impropriety can and should be specified clearly and should not distinguish between males and females. (See the Report of the Royal Commission into the Police Service (1997) by the Hon Justice JRT Wood AO, especially Vol V, Ch 14 which, if I may say so with respect, is comprehensive and persuasive.)

By s66C of the Act, sexual intercourse with a child aged between ten and sixteen years (where the offender is not in a position of authority) is punishable by up to eight years imprisonment. Having regard to the provisions of s78Q, however, this does not, it seems, apply where both persons involved are male and anal or oral intercourse occurs. Where that is the case, the maximum penalty is increased by two years to ten years.

If the indecency of a sexual act varies according to what a "right-minded" person might consider is the relevant community standard, the issue arises whether the admittedly consensual sexual behaviour (not being anal intercourse) alleged in the present case is criminal under s81 (or for that matter, s81A) of the Act. Drawing the

distinction made by Gleeson CJ in Manson (cited above), the questions requiring determination are whether *it is capable* of being indecent and, if so, whether, *in fact,* it was.

The old authorities, such as R v B & L, supra, which simply assumed but did not decide that the element of indecency was established merely by evidence of sexual acts in private between males (without the elements of minority or lack of consent) cannot, in my opinion, still be regarded as expressing the law. Nor, in my view, did they correctly express the law in 1980.

The textbooks, such as Watson & Purnell, Criminal Law in New South Wales (1970, Law Book Co Ltd) do not advert to sexual acts committed by a female upon an adult male.

In Potter v Minahan (1908) 7 CLR 277, the notorious dictation test (said by the Attorney General of New South Wales to have been designed primarily to preserve "white" Australia from "Asiatics": R v Wilson; Ex parte Kisch (1934) 52 CLR 234 at 239) was used to exclude the appellant who was born in Australia of a Chinese father, from returning from abroad. O'Connor J quoted with approval the following passage from Maxwell of Statutes, 4th ed, p121 -

"It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of the law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

I have not been able to find a case (and I very much doubt that there is one) in which the question whether there is a different standard of decency for homosexuals or heterosexuals has been considered. Since the precise question is devoid of authority and those decisions which assume that homosexual relations are ipso facto indecent predate by a considerable margin the developments of both community standards and the law concerning discrimination, (of which, in New South Wales, the exemplar may be the Anti-Discrimination Act 1975), I consider that the interpretation of s81, so far as it might literally apply to consensual adult homosexual relations in private, should be reconsidered and determined by reference to first principles.

In my opinion, the decency or otherwise of homosexual relations cannot, in law, be any different from those of heterosexual relations. Any such distinction necessarily depends upon arbitrary and capricious considerations which could not be accepted unless the legislation explicitly required it. Moreover, the distinction offends the fundamental principle that all citizens are equal in sight of the law and is an arbitrary interference with privacy. Since consensual heterosexual relations between adults have never been and cannot be relevantly indecent, it follows that consensual homosexual relations between adults cannot be indecent within the meaning of s81 of the Act.

In R v Suckling [1999] NSWCCA 36, this Court considered the application of R v Swaffield and Pavic (1997-1998) 151 ALR 98 where the High Court of Australia applied a community standards test to the admissibility of evidence obtained by subterfuge. The Court pointed out -

"that the reference by the High Court, as by this Court, to community standards in this respect is not to any notion of populist public opinion. Rather, this refers to community standards concerning the maintenance of the rule of law in a liberal democracy, the elements of the proper administration of justice and the due requirements of law enforcement."

The meaning of community standards, in any particular legal context, is a question of law; whether the application to the circumstances of a particular case produces a particular result may be regarded as a matter of fact. Community standards in this context are not the same as popular opinion or vulgar prejudice: they are the expression of standards that reflect the fundamental values of our society so far as the application of the criminal law is concerned, including, as particularly relevant here, the principle of equality before the law or equal justice.

In Siganto v The Queen (1998) 159 ALR 94, at 105, Gaudron J described the principle of equal justice as of "fundamental importance", in referring to one of its consequences, namely, parity in sentencing. The requirement of consistency in punishment was said by Mason J in Lowe v R (1984) 154 CLR 606 at 610 to be "a reflection of the notion of equal justice". In Leeth v The Commonwealth of Australia (1992) 174 CLR 455, Deane and Toohey JJ said (at 485-486, 487) -

"The doctrine of legal equality is in the forefront of ...[every fundamental constitutional doctrine existing and fully recognized at the time the Constitution was passed]. It has two distinct but related aspects. The first is the subjection of all persons to the law...The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts. (See, eg, Holdsworth, A History of English Law (1938) vol 10 p649.) The common law may discriminate between individuals by reference to relevant differences and distinctions, such as infancy or incapacity, or by reason of the conduct which it proscribes, punishes or penalizes. It may have failed adequately to acknowledge or address the fact that, in some circumstances, theoretical equality under the law sustains rather than alleviates the practical reality of social and economic equality. Nonetheless, and putting to one side the position of the Crown and some past anomalies, notably, discriminatory treatment of women, the essential or underlying theoretical equality of all persons under the law and before courts is and has been a fundamental and generally beneficial doctrine of the common law and a basic precept of the administration of justice under our system of government...

"At the heart of...[the obligation of a court to act judicially] is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds."

Gaudron J said (at 502) -

"All are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process."

Their Honours dissented on the constitutionality of s4(1) of the Commonwealth Prisoners Act 1967 (Cth), and it may be doubted whether the doctrine of equality can be found in the Constitution. However, we are not here dealing with a constitutional question but, primarily, with the nature of community standards.

In Kruger & ors v The Commonwealth (1997) 146 ALR 126 (at 157-158), Dawson J (with whom McHugh J agreed on this point) disagreed with the views expressed in the passages above cited, concluding that the "common law...provides no foundation for a doctrine of ...substantive equality". Toohey J emphatically restated his earlier view (146 ALR at 179-182). Gaudron J also adhered to her earlier view, but pointed out that "there is a limited constitutional guarantee of equality before the courts, not an immunity from discriminatory laws" (146 ALR at 194). It is implicit in her Honour's judgment, however, that laws will not be given a discriminatory effect unless this is required expressly or by necessary implication. Gummow J considered that there was no Constitutional doctrine of general equality (146 ALR at 227) and said that "caution is required in dealing with what was said by nineteenth century English legal writers as to equality of persons under or before the law" but it seems to me that his Honour's observation was aimed at statements of suggested constitutional significance (146 ALR at 228). Brennan CJ did not express an opinion whether there was a general common law doctrine of equality.

It seems to me that the doctrine of equal justice, in the sense in which I refer to it, is a fundamental element of the rule of law, if not as a substantive right, then as necessarily informing the content and application of the common law, including the rules applying to the interpretation of statutes. At the very least, it would require quite explicit legislative language to qualify its otherwise appropriate application. In citing the principle of equality, I do not mean to do more than to note its importance as a fundamental element of community standards, though it may have a wider significance. The use by s81 of the Act of the notion of indecency as an essential element of the crime for which it provides, demonstrates the potential for change over time in the applicability of the provision to particular behaviour. It follows that, in principle, no case such as R v B & L can have as its ratio decidendi a determination that adult homosexual behaviour is ipso facto indecent. Thus, the conventional assumptions current when R v B & L was decided cannot be regarded as authoritative at a later time.

In Dietrich v The Queen (1992) 177 CLR 293, Brennan J said (at 318) -

"I do not doubt that the Courts of this country, and especially this Court as the ultimate court of appeal, acting within their respective jurisdictions and in response to the exigencies of particular cases, create new rules of the common law. The common law has been created by the Courts and the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society. Had the Courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time (adaptation from Francis Bacon, The Advancement of Learning, (1605), Bk 2, fol.10b). In modern times, the function of the Courts in developing the common law has been freely acknowledged (see, for example, Myers v Director of Public Prosecutions (1965) AC 1001, per Lord Reid at 1021; Mutual Life and Citizens' Assurance Co Ltd v Evatt (1968) 122 CLR 556, per Barwick CJ at 563; Geelong Harbour Trust Commissioners v Gibbs Bright and Co (1974) AC 810, per Lord Diplock at 820-821). The reluctance of the Courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function of the Legislature to keep the law in a serviceable state. But Legislatures have disappointed the theorists and the Courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for

consideration of the contemporary values of the community. Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby (as in L Shaddock and Associates Pty Ltd v Parramatta City Council (No 1) (1981) 150 CLR 225, or Hawkins v Clayton (1988) 164 CLR 539 or David Securities Pty Ltd v Commonwealth Bank of Australia (unreported, 7 October 1992). And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice (as in Mabo v Queensland (1992) 66 ALJR 408; 107 ALR 1).

"The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community."

In Jago v Judges of District Court of NSW (1988) 12 NSWLR 558, Kirby P thought that "a relevant source of guidance in the statement of the common law of this State maybe the modern statements of human rights found in international instruments, prepared by experts, adopted by organs of the United nations, ratified by Australia and now part of international law" (12 NSWLR at 569; see also Dietrich, supra, per Mason CJ and McHugh JJ, Brennan J, who said that Art 14(3)(d) of the International Covenant On Civil and Political Rights "is a legitimate influence on the development of the common law", and Toohey J at 177 CLR at 306, 321, 360; and Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 287, 315). To adapt his Honour's elaboration of this point, such statements must be at least as relevant to a search for the content of contemporary community standards as to the possible inherent indecency of homosexual relations, as the unexamined social assumptions of judges who were born and largely bred in the nineteenth century and before.

Articles 1, 2, 7, and 12 of the Universal Declaration of Human Rights (1948) respectively state (in part): "All human beings are born free and equal in dignity and human rights"; "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex..."; "All are equal before the law and are entitled without any discrimination to equal protection of the law..."; "No one shall be subjected to arbitrary interference with his privacy...nor to attacks upon his honour and reputation". The International Covenant on Economic, Social and Cultural Rights (1966, adopted by Australia 1976) refers in its preamble to "the inherent dignity and...equal and inalienable rights of all members of the human family" and notes the undertakings by the Parties "to guarantee that the rights enunciated by the Covenant will be exercised without discrimination of any kind" (Art 2), ensure the equal rights of men and women (Art 3), and subject rights provided by the State "only to such limitations as are determined by law only in so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society"; see also the International Covenant on Civil and Political Rights (1966, adopted by Australia 1980), especially the preamble, referring to the "inherent dignity" of all persons, Art 2, excluding discrimination, Art 3, requiring equality between men and women, Art 17, prohibiting arbitrary interference with privacy (and see below), Art 22, requiring freedom of association and forbidding restrictions unless (inter alia) to protect public morals, and Art 26 declaring that all persons are equal before the law and prohibiting discrimination on any ground such as sex or other status. Although there is no reference, in terms, to discrimination by the criminal law against homosexuals, I consider that it is clear that a law which

distinguished between the heterosexual and homosexual behaviour of adults for the purpose of visiting punitive consequences on the latter is contrary to the principles enunciated in these instruments, a fortiori when the content of community standards is being considered in the application of such a law in the context of a repeal of legislation that permitted such consequences and its replacement by legislation that applied only to minors.

In Rodney Croome & anor v Tasmania (1997) 191 CLR 119, the applicants sought declarations that s122 and s123 of the Criminal Code (Tasmania) were inconsistent with s4 of the Human Rights (Sexual Conduct) Act 1994 (the Commonwealth Act) which provided -

"Arbitrary interferences with privacy

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

(2) For the purposes of this section, an adult is a person who is 18 years old or more."

Article 17 of the Covenant provides -

"1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

"2 Everyone has the right to the protection of the law against such interference or attacks."

S122 of the Code made sodomy a criminal offence, whilst s123 punished any male who, whether in public or private, committed an indecent assault upon or other act of gross indecency with another male. The High Court dismissed the application of the State of Tasmania to set aside the writ, holding that the applicants had standing to seek the declarations although there was no pending or likely prosecution. It was not sought to be argued that the Commonwealth legislation had no possible application to the offences in question. It was a necessary assumption of the decision that it did so. S81 of the Act applies even if the relevant acts occurred in private. The Commonwealth Act does not directly make the relevant behaviour lawful. It prohibits the privacy of sexual conduct involving only consenting adults from being subjected to arbitrary interference.

Because the possibility of a trial for conduct falling within the Commonwealth Act arises only if the jury might be invited to convict the respondent even if it had a reasonable doubt that the alleged indecent assaults occurred prior to December 1980, and both parties submitted to the contrary, the applicability of the Commonwealth Act was not raised in argument before us. There was no occasion, therefore, for notice under s78B of the Judiciary Act 1903 to be given. Accordingly, it would not be appropriate for me to express more than a tentative view about the application of the Commonwealth Act in the present circumstances. However, because this legislation is relevant apart from its effect under s109 of the Constitution, it is necessary, in my opinion, to consider the nature and applicability of

its provisions.

Prima facie, the prohibition or punishment of private sexual conduct involving consenting adults and no other rationally relevant feature demonstrating culpability, for example, incestuous relations, contravenes s4 of the Commonwealth Act. In so far as s30 of the Interpretation Act 1987 is concerned, which is the essential foundation for the continuing effect of s79 and s81 of the Act, I think that it may well be inconsistent to that extent with the Commonwealth Act. (S8 and s8A of the Acts Interpretation Act 1901 (Cth) are irrelevant to a consideration of any possible continuing liability as they deal only with the effects of repeal of a Commonwealth Act; the Commonwealth Act does not repeal in any sense State legislation: it prevails by virtue of s109 of the Constitution.) The language of s4 is particularly apt to a trial concerning the relevant conduct. This is especially so having regard to its obvious remedial purpose. At all events, it is clearly directed to effect the reform it embodies so far as all relevant sexual conduct which might be the subject of proceedings is concerned, whenever that sexual conduct occurred. The Commonwealth Act is not aimed at the conduct of the person but at the exercise by the state of its powers of coercion under the criminal law and prohibits any such action occurring after its commencement. In this case, at least, the preferring of a charge in respect of the relevant conduct and the conduct of a trial would seem to be forbidden, subject to the meaning that should be attributed to "arbitrary". (For reasons that are apparent in this judgment, I consider that the prosecution of sexual behaviour involving adult men that is not criminal if performed by women or heterosexuals is arbitrary in the sense that it expresses mere capricious prejudice.) So viewed, the Commonwealth Act would not be applied retrospectively. However, even if this interpretation might be considered to apply the Act retrospectively, in my opinion, having regard to the explicit and peremptory language of the Commonwealth Act and its manifest purpose, this is immaterial.

At the very least, the Commonwealth Act is a most significant matter to be taken into account in determining the content, in law, of the community standard implicit in the element of indecency required to prove an offence under s81 of the Act.

In my view, there is now no distinction, for the purposes of the criminal law, between the concept of indecency as it may be found in heterosexual and homosexual behaviour. That standard must, as it seems to me, apply in the instant trial, if there were to be one, even though the conduct in question here occurred in 1981. It would be strange, to say the least, if the Courts are obliged to apply outdated and offensive notions which have been repudiated because of their conflict with fundamental human rights and the appropriate scope of the criminal law (unless, of course, they are bound to do so by specific and unambiguous legislative mandate) merely because the allegations concerned acts which occurred twenty years ago when (so the argument goes) those notions may have been current. Just as inappropriate would be a direction that invited a jury to consider, not their views of contemporary standards, but their understanding of community standards as they stood in 1981.

These considerations, which are both theoretical and practical, persuade me that it is inappropriate to inquire into the character of community standards as they stood in 1980 or 1981. After all, s81 was repealed in June 1984, only shortly after the events in issue here and the new offence applied only to minors, where the criminal behaviour was required to be grossly, as distinct from simply, indecent. At all events, although community attitudes have no doubt evolved over the ensuing twenty years,

I would not accept that they significantly differ from those of the present day. The result is that, rightly interpreted, neither s81 nor s89A of the Act applied in 1981 to consensual homosexual relations between adults in private.

It follows that the dates in the indictment, so far as they are referred to in counts one, two, four, five, six and seven, are essential elements of the offence since, if the acts alleged occurred when the complainant was an adult, they cannot amount in law to the crime of indecent assault as provided in s81 of the Act. Accordingly, so far as the appeal concerns the alleged offences under s81, it must be dismissed. Independently of this ground, if the Commonwealth Act applies in the present circumstances (as I am inclined to think, although do not determine, that it does) a trial of alleged offences under either s79 or s81 of the Act cannot proceed in respect of conduct that occurred when the complainant was an adult.

It is arguable that the terms of s78K of the Act, in limiting criminality to "*gross* indecency" as distinct from indecency simpliciter, indicate a legislative view that some acts of a sexual character, even if committed by a male with a male of sixteen or seventeen years, are not criminal. This would be analogous, so far as those acts were concerned, to the situation affecting females. However, as s78K is not directly in issue in these proceedings, it is unnecessary to determine this question. For reasons which I consider later, it is my view, however, that the repeal of s79 and s81 and the enactment of s78K and s79Q in their place is also significant for the disposal of this appeal.

If the above interpretation is incorrect and it be accepted that the indictment is not limited to events occurring before 1981, there is an alternative basis upon which, in the circumstances, the trial should be stayed. This ground applies equally to the charges under both s79 and s81 of the Act. In substance, such a trial would be an abuse of process. It is fundamental to this point that the nature of the provisions with which the respondent is charged be appropriately characterised.

S79 (unless qualified as above indicated) and 81 of the Act, so far as they apply to consensual homosexual acts between adults in private, constitute a gross interference by the State in the personal liberty of a minority of its citizens. In this respect, they are not essentially different from laws prohibiting miscegenation. Those laws were motivated by racial prejudice, this law by sexual prejudice. It is impossible now to maintain, and it could not have been rationally maintained at any material time, that it was proper, let alone right, for the State to prohibit or punish homosexual relations in private between adults.

S79 of the Act reveals, in its own terms, its essential character. No other crime, not even murder or rape, as appalling as they are, has ever in New South Wales been described as "abominable". The term, however, is applied to behaviour which includes consenting sexual relations in private between adult men. The indictment in the present case follows the language of the section and charges the respondent with the "abominable crime of buggery". This is the conventional form. It has been conventional for far too long. "Abominable", being surplusage, is not part of the necessary description of the offence. It is mere abuse. It places the thumb of prejudice on the scales of justice.

There is an important question here, although it is, perhaps, a departure from conventional judicial practice to point it out. One is driven to ask how indictments in such terms could have been preferred in our courts, in modern times, without

remark or protest, let alone objection, not only from the bar but from the Bench. Indeed, I have sat in this Court and referred without reflection or concern to language of this kind. It is no answer that such acts, when committed on children or without consent, are abominable. So are many other crimes that are not so described. That is not the matter to which the term refers. It is a characterisation of the particular culpability of homosexual relations. This institutional sanctioning of abuse is part of a pattern of social attitudes, aimed at homosexuals but demeaning the values of the law itself.

The law, in its application to consenting adults, was and is irrational and cruel. It conflicts with basic human rights. S79 and s81 of the Act were unjust when they, or their equivalents, were first enacted and are no less unjust today.

It has been held by this Court that s79 still applies to enable prosecutions to be mounted at the present time against persons who had sexual relations prior to the 1984 amendments and who could not now be prosecuted if those acts occurred after the amendments. In R v Pritchard (1999) 107 A Crim R 88, the complainants were, in the main, resident postulants or novitiates doing training before taking their vows, at a high school of which the appellant was principal. One of them was nineteen years old at the time of the anal intercourse committed (prior to 1984) by the appellant in respect of which he was charged under s79 of the Act. Its repeal was held to be immaterial in the circumstances upon the basis that, at all events, the homosexual intercourse had not been consented to. The Court was of the view that s55(2) of the Interpretation Act 1987 (since repealed by the Crimes Legislation Amendment (Sentencing) Act 1999 and replaced in the by s19 of the Crimes (Sentencing Procedure) Act 1999, with unchanged language; for convenience, I shall continue to refer to s55), which applies where a penalty is reduced after commission of an offence but before sentence, is irrelevant where the offence is repealed. Grove J said (107 A Crim R at 93) that he could "perceive force in the argument that if...the circumstances demonstrated a consensual act unaccompanied by any matter of aggravation, abolition of the criminal sanction might be categorised as extreme reduction of penalty and even if s55 [of the Interpretation Act 1987] be not directly applicable, parity of reasoning from cases like Hartikainan (unreported, NSWCCA 8 June 1993) could result in nominal punishment being appropriate." His Honour did not elaborate on what was meant by "a matter of aggravation" for this purpose. Abadee J, however, considered (107 A Crim R at 95) that even "an act between two ready and willing [*semble*, adult] males" reflected only "*perhaps* criminal culpability of at lower level" (emphasis added) but that where the exercise of authority "secured the participation of the other" (though, as I understand his Honour, nevertheless with consent) this reflected a higher degree of culpability. His Honour was, implicitly at least, of the view that, where the conduct "represented a gross breach of trust", it would be criminally reprehensible even though consented to. Barr J agreed with Abadee J.

With unfeigned respect I consider that, unless the material acts were not consented to in the sense that this requirement is used in the law concerning other sexual assaults, no sexual acts between adults, even if liable to prosecution under the repealed s79 and s81 of the Act, could, since the enactment of the Amendment Act properly be punished, even though, if Pritchard be right, s30 of the Interpretation Act 1970 preserves the offence and its penalty as a matter of statutory interpretation. Although both the trial in Pritchard and the appeal were decided well after the commencement of the application of the Commonwealth Act, no reference was made to the legislation either in argument or the judgments of the Court. If the

views I expressed above concerning the Commonwealth Act be correct, there were three possible bases for quashing the conviction which were not considered. To this extent, the correctness of Pritchard comes into question.

In Regina v Hartikainan (unreported NSWCCA 8 June 1993), the Court considered the effect of an increase in the maximum sentence provided by s61I of the Act. Gleeson CJ (with whom the other members of the Court agreed) said that the action of the Parliament "must be taken by the courts to have reflected community standards" and concluded, "It is incumbent upon the courts to give effect to the concerns manifested by Parliament". There can be no more emphatic declaration by the Parliament of its concerns than the repeal of an offence and the enactment of a new offence omitting the criminality earlier provided, in this case, consenting sexual relations between adult males. In substance, the repeal of s79 and s80 of the Act, so far as they relate to homosexual activity between adults is not only the abolition of the crime (from the date of repeal) but a reduction of the penalty to zero. I note that Smart AJ posits in this case the possibility that the Court might impose a "nominal" penalty or, indeed, not enter a conviction at all under s10 of the Crimes (Sentencing) Procedure Act 1999.

If I were not bound by authority, I would hold that the repeal of a criminal offence such as that which occurred here, would be caught by s30 of the Interpretation Act 1987 only to the extent to which, in substance, its elements were continued by a new or substituted provision. I think that it is obvious that the draftsperson of s30 did not consider its possible application to legislative changes of the kind operative here and I do not think that, taking the clear intention of Parliament as expressed by *both* s30 and s55, it was intended to continue the effect of either s79 or s81of the Act past the date of its repeal. However, in light of Pritchard, this argument cannot be applied to dispose of the present case, so far as conducting a trial is concerned.

Since, as I have said, the Court in Pritchard acted upon the basis that the victim had not consented to the anal sexual intercourse committed upon him, the observations concerning the effect of the repeal of s79, so far as it concerned consensual anal intercourse, are obiter dicta. If, for the reasons adverted to by Grove J, a trial of the respondent on charges arising from events prior to 18 December 1980 would be unfair, the Director of Public Prosecutions is limited, in effect, to proving consensual homosexual acts that occurred when the complainant was an adult. If he is convicted, the respondent might be subjected to more than merely a nominal punishment if the sentencing judge (as I think, in error) took the view that the acts in question, to apply Grove J's observation in Pritchard "were not unaccompanied by any matter of aggravation" or, accepting the view of Abadee and Barr JJ, should be punished "at a lower level", even if he could not have been tried, let alone punished, under s78K or s78Q of the Act had the acts occurred after June 1984. This demonstrates the essential injustice of proceeding against the respondent for any consensual sexual acts which occurred after the complainant's eighteenth birthday. On my view of the matter, only nominal punishment could, at the highest, be imposed in the event of conviction.

In Walton v Gardiner (1992-1993) 177 CLR 378 Mason CJ, Deane and Dawson JJ, said (at 392-393) -

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and

impartiality, may be converted into instruments of injustice or unfairness...The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 536 as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'."

In a passage that has been cited with approval in the High Court of Australia (eg Jago v District Court (NSW) (1989) 168 CLR 23 at 30; Williams v Spautz (1991-1992) 174 CLR 509 at 520), Richardson J of the New Zealand Court of Appeal in Moevao v Department of Labour [1980] 1 NZLR 464 said (at 58) -

"It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

In Jago (supra) Mason CJ, Deane and Gaudron JJ expressed a wide view of what might constitute an abuse of process. They did not confine that principle in a narrow, traditional way. Mason CJ said (168 CLR at 28) -

"The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves, should permit its processes to be employed in a manner which gives rise to unfairness."

The Chief Justice (at 29) stated that there was no reason why the right to a fair trial should not extend to the whole course of the criminal process. Brennan J said (at 47-48) -

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, *is deserving of punishment.* When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process. Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct...When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose." (Emphasis added.)

The jurisdiction to permanently stay a criminal proceeding that is unfair comprehends proceedings that are brought for an improper purpose or which are oppressive, even where a fair trial is possible: Williams v Spautz [1991-1992] 174 CLR 509 at 519-521, 552-553; Walton v Gardiner [1992-1993] 177 CLR 378 at 392-393 (although the latter case concerned disciplinary proceedings). It is clear the jurisdiction is exercised only in exceptional circumstances and that courts should exercise their jurisdiction rather than decline to do so, especially in respect of the trial of criminal charges but the courts should not be deterred from permanently staying such proceedings in appropriate circumstances: Willams v Spautz 174 CLR at 519-520.

It is, therefore, necessary to examine whether proceedings now being brought to seek conviction for offences under s79 and s81 of the Act, as they stood in 1981 in respect of sexual acts in private between consenting adults, are capable of serving the purposes of the criminal law. If not, then they are instituted for an improper purpose, even though there is no ulterior motive in those responsible for their institution and the trial itself may be fair. The same principle applies if the proceedings will result in a weakening of public confidence in the administration of justice (cf Ridgeway, per Gaudron J, (1995) 78 A Crim R 307 at 353). In a case where personal motives underlying the prosecution are immaterial, an abuse of process will not have occurred unless the trial (which, as such, may be fair) and the verdict themselves serve an improper purpose having regard to the functions of the criminal law and the administration of criminal justice.

It has frequently been said that the fundamental purpose of the criminal law is the protection of community from crime: see, eg, Jordan CJ in R v Geddes (1936) 36 SR (NSW) 554 at 555, where his Honour went on to say that, as a consequence -

"...the judge should impose such punishment as, having regard to all the proved circumstances of the particular case, seems, at the same time, to accord with the general moral sense of the community in relation to such a crime committed in such circumstances, and to be likely to be a sufficient deterrent both to the prisoner and to others."

In Channon v The Queen (1978) 33 FLR 433 at 437 Brennan J quoted with approval a passage from the judgment of Herron CJ in R v Cuthbert (1967) 86 WN (Pt1) (NSW) 272 at 274, where he said -

"The function of the criminal law and the purposes of punishment cannot be found in any single explanation, for it depends both upon the nature and type of offence and the offender. But all purposes may be reduced under the single heading of the protection of society, the protection of the community from crime."

Consequently, there is no abstract principle which the criminal law is designed to vindicate. To use the language of Gallop, Mathews and Madgwick JJ, sitting as a Full Court of the Federal Court of Australia in R v P (unreported, FCA, 29 May 1998), criminal sanctions "are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose".

A trial which results in an acquittal will not, for that reason alone, have been an abuse of process although, if it can be seen in advance that acquittal is inevitable, a stay will be granted: Ridgeway (1995) 78 A Crim R 307. Of course, even a finding of

guilt may, in the end, carry no conviction (eg, under s10 of the Crimes (Sentencing Procedure) Act 1999) but subjection to criminal proceedings and a finding of guilt is of itself undoubtedly a penalty and, hence, dismissal of the charge is not treated as an acquittal for the purpose of the rights of appeal: s10(5) Crimes (Sentencing Procedure) Act 1999; R v Luscombe (unreported, NSWCCA, 22 November 1999). This is obviously so where the defendant's liberty is restricted by being placed on a good behaviour bond. Even where the charge is simply dismissed, there will have been a finding of guilt, which involves the denunciation by the Court of the behaviour found to be proved. Where there is a conviction but, for example, the defendant is sentenced to the rising of the court, this will comprise a penalty. As Kirby J observed in Pearce v R (1998) 156 ALR 684 at 715 "entering a conviction is itself part of punishment", and has long been so regarded (see also R v Ingraessia (1997) 41 NSWLR 447 per Gleeson CJ at 449).

None of these examples of possible disposition of a criminal proceeding are inconsistent with the proper purposes of the criminal law or the administration of criminal justice. Rather, they demonstrate that the protection of the community from law breakers may be accomplished in a variety of ways and include undertaking public proceedings and the finding of guilt. Even where there is an acquittal, the purpose of the proceedings is to secure a denunciation, a degree of appropriate punishment and rehabilitation upon the assumption that, if committed, the community must be protected from the crime in question.

In the circumstances of this case, the only proper result of a trial confined to events occurring in or after 1981, if there were a verdict of guilty, is that the trial judge, for the reasons I have mentioned, should not enter a conviction but, rather, exercise the powers of the Court under s10 of the Crimes (Sentencing Procedure) Act 1999 not to do so and dismiss the charge. At most, no more than a nominal punishment could properly be imposed. The only purpose, then, of the prosecution in this event would be to denounce the respondent for having, between 1981 and 1984, committed private acts which were made criminal by a law repealed by the Parliament sixteen years ago in recognition of its discriminatory and unjust character and from which the community has not needed the protection of the criminal law for many years. The only witness against him will be the adult with whom he had consensual relations, who will not be prosecuted. The respondent will have had his liberty restricted by subjection to bail and obligatory attendance at court, and suffered the expense and humiliation of a public trial and the ignominy of a finding (if that be the verdict) that he had committed a crime.

The Parliament effectively declared in 1984 what the relevant community standards were, namely, so far as sexual relations between adults were concerned, that homosexuals and heterosexuals must be treated equally by the criminal law. This was no mere technical adjustment of the system of criminal justice but a substantial repudiation of the previous order. Whatever may have been the situation in 1981, no present public interest is capable of being vindicated by any proceedings against the respondent for sexual acts with the complainant which occurred after 17 December 1980. They can serve no proper purpose of the criminal law. The court would simply have been made the instrument of oppression. It is not surprising that the Director of Public Prosecutions has said that he does not wish to prosecute such a case. The character of the repealed law all the more strongly demonstrates the pointless and oppressive injustice of such proceedings. Can this Court order that it be stayed?

In Connelly v Director of Public Prosecutions [1964] AC 1254, Lord Pearce said

([1964] AC at 1365) that a court has a duty to stop a prosecution which "creates abuse and injustice". Lord Morris of Borth-y-Gest stated ([1964] AC at 1301-1302) that the inherent power of a court "to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice". But his Lordship remarked ([1964] AC at p1304) that it would be "an unfortunate innovation if it were held that the power of a court to prevent any abuse of its process or to ensure compliance with correct procedure enabled a judge to suppress a prosecution merely because he regretted that it was taking place". Lord Devlin posed the question in this way ([1964] AC at 1354) -

"Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."

As Toohey J pointed out in Ridgeway (78 A Crim R 307 at 338), this "passage asserts the power of the courts to act; it does not, and does not purport to, identify the scope of the power". Ridgway concerned the intended prosecution of a person who was party to the illegal importation of heroin by law enforcement officers. Mason CJ, Deane and Dawson JJ rejected the submission that Australian law recognized the defence of entrapment and were able to vindicate the Court's duty to maintain the integrity of its processes by holding that the exclusion of the evidence of importation on public policy grounds rendered inevitable the failure of the trial and, hence, such a trial should be stayed. Their Honours said (78 A Crim R at 322) -

"Once it is concluded that our law knows no substantive defence of entrapment, it seems to us to follow that the otherwise regular institution of proceedings against a person who is guilty of a criminal offence *for the genuine purpose of obtaining a conviction and punishment* is not an abuse of process by reason merely of the circumstance that the commission of the offence was procured by illegal conduct on the part of the police or any other person." (Emphasis added.)

Their Honours noted that there was "a significant distinction in principle between staying criminal proceedings on the ground that the proceedings in themselves constitute an abuse of process and staying further steps in the proceedings on the ground that, due to the effect of evidentiary rulings made in them, they must fail": 78 A Crim R 322-323. However, I do not understand them to be saying that, where the latter course was not available, a stay of the former kind would not be granted. Where allowing a trial to proceed at all would offend the court's sense of justice, it seems implicit that a stay would be granted. The clear implication of their Honours' reasoning was that, if entrapment was indeed a defence in Australian law, a stay may well have been granted (see, also, Toohey J, 73 A Crim R at 340-341, Gaudron J at 353-354, McHugh J at 360-362).

The principle was stated by Lamer J, delivering the judgment of the Supreme Court of Canada in Mack (1988) 44 CCC (3d) 513 at 539 (cited by Toohey J, 78 A Crim R at 339) in the following language -

"[C]entral to our judicial system is the belief that the integrity of the court must be maintained. This is a basic principle upon which many other principles and rules depend. If the court is unable to preserve its own dignity by upholding values that

our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves."

That this observation was made in dealing with an entrapment case does not lessen its force.

Gaudron J, in Ridgeway, considered that a stay should be granted because of the nature of the prosecution itself and thus, to this extent, was in dissent. However, I would respectfully adopt her Honour's pithy expression of the relevant test (78 A Crim R at 352), namely, that a prosecution is an abuse of process that serves "the ends of injustice, rather than justice and might adversely affect public confidence in the courts and in their proceedings".

If I may say so, with respect, the remark of Lord Morris of Borth-y-Gest quoted above sounds an appropriate caution. If this prosecution were taking place prior to the 1984 reforms, I do not think that it would have been right to have stayed it as an abuse of process simply because the judge may have thought that s79 and s81 of the Act were unjust and oppressive (subject to what I said above concerning the proper interpretation of s81). Nor should it now be stayed if the alleged criminal acts are, in substance, still penalised under the substituted offences which are presently operative. That would, indeed, be a triumph of form over substance. Moreover, as was said in Ridgeway, "The function of determining whether, in the circumstances of a particular case, a criminal prosecution should be initiated and maintained is essentially that of the Executive" (per Mason CJ, Deane and Dawson JJ, 78 A Crim R at 316). Their Honours go on, however, to say -

"Nonetheless, it has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances...temporarily or permanently stay the overall proceedings to prevent abuse of its process."

In this case, the applicable rule is that stated by Richardson J in Moevao v Department of Labour [1980] 1 NZLR 464 at 482 (cited with approval in Jago (168 CLR at 30) by Mason CJ) -

"The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor ... that the Court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the *continuation of the prosecution is inconsistent with the recognized purposes of the administration of criminal justice* and so constitutes an abuse of the process of the Court." (Emphasis added.)

In dealing with abuse of process in the context of criminal proceedings, the two fundamental considerations are the public interest in ensuring that the court's processes "are used fairly by State and citizen alike" and the ability of the court to

protect its functions to avoid "an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice": Williams v Spautz (1991-1992) 174 CLR 509, per Mason CJ, Dawson, Toohey and McHugh JJ at 520.

In all the circumstances of this case, I consider that the continuation of any prosecution against this respondent for acts which would not be crimes had they been committed after the 1984 reforms would amount to an abuse of the process of the Court. (I should mention that I consider that, for a variety of reasons, s61N of the Act would not apply to the acts alleged here, had they occurred after 7 June 1984.) Such proceedings would serve the ends of injustice rather than justice and bring the court into disrepute. Accordingly, if the indictment were so interpreted as to permit the jury to convict the respondent in respect of events that occurred after 17 December 1980, the trial should be permanently stayed. For this reason also, the appeal should be dismissed.

Even if the dates in the indictment might not be vital, neither party sought to put this argument before the Court as a reason for disposing of the appeal. Whilst I would not go so far as to say that the Court should never act upon its own view of the law where the parties ask the Court to deal with a matter on a quite different basis, I do not think that in the circumstances of this case we should change the nature of the appeal so fundamentally. Even if it be the law that a prosecution can still proceed for behaviour which has not been criminal for sixteen years, I do not see why, in effect, this Court should exercise its discretion on its own motion to vary the argued grounds of appeal to bring about this result.

For these reasons, even if I am mistaken about the significance of the times specified in the indictment for the offences with which the respondent is charged, and in my view that a trial on the residual basis proposed by Grove and Smart JJ would be an abuse of process, I do not consider that the appeal should be upheld.

Smart AJ:

The background and the facts are set out in the judgment of Grove J. On the hearing of the application for a permanent stay the judge had before him a draft indictment and the affidavit of the solicitor for the accused, the annexures referred to in it, mainly the two statements of the complainant, the transcript of his evidence at the committal proceedings and that of the evidence of a police officer. There was no evidence from the accused.

The draft indictment contained eight counts, four counts alleged that the accused indecently assaulted the complainant, (a male), between 19 December 1979 and 30 June 1980 and one count alleged buggery in the same period. The other three counts related to the period 1 November 1980 to 18 December 1980: two counts alleging indecent assault and one count alleging buggery. Each count related to a specific incident.

The complainant's evidence in the committal proceedings was to the effect that the acts charged took place in 1980 subject to the proviso that some of the earlier acts may have occurred in late 1979. The complainant was sure that the acts charged occurred before his eighteenth birthday on 19 December 1980. Eighteenth birthdays are significant in most families, marking the arrival of adulthood.

In his affidavit the solicitor said,

"I am informed and verily believe that the defence...is that any contact of a sexual nature which may have taken place between the accused and the complainant in fact took place after the complainant had turned 18 years."

This is a guarded and general statement. It does not deal with any of the specific instances of which the complainant gives evidence. Nor does it state the sources of information and belief. It seems to have been assumed that it was the accused. The Crown did not cross-examine the solicitor.

At the hearing before the judge counsel for the accused stated:

"The defence to this case is, as deposed to by my instructing solicitor that sexual contact did, in fact, take place but not during the years 1979, 1980. It in fact commenced after 1980, that is when the complainant was considered in law to be an adult not a child".

Later, counsel for the accused said:

"...there is no dispute that incidents of a sexual nature did occur. The defence is that they did not occur in the year 1980; they occurred, in fact, in the year 1981 at which time the complainant was an adult anyway."

The concession is in very general terms. There is no concession that the particular acts alleged occurred but rather that incidents of a sexual nature did occur.

In essence, the Court was asked to grant a permanent stay of proceedings upon the basis of some instructions given by the accused to his solicitor, the antiquity of the alleged offence and the absence of records for the period 1980-1981. The instructions given are entirely untested. Permanent stays should not usually be granted on the basis of instructions, deposed to by an accused's solicitor or some person other than the accused. Generally, it would be wrong for a Court to act on the accused's instructions when these are unverified by the accused. There may be cases however, where admissible evidence can be given by persons other than the accused which would justify the granting of a permanent stay.

In the present case no point was taken by the Crown that there was no evidence from the accused as to his stated defence, namely that no sexual activity occurred between the complainant and the appellant in 1980. Generally, in a case such as this such evidence should be led. The absence of such evidence does tend to weaken the accused's case for a permanent stay. If an accused wants the benefit of a permanent stay there is nothing unfair as a general principle, requiring him to verify his position.

However, this raised a problem. If the accused said that the incidents alleged happened in 1981 the appellant was guilty of the offences charged. It is the incidents which are the subject of the charges. In the present case, the dates are not critical. If the accused said that no such incidents occurred but that there was other sexual activity in later years then he would not be guilty. He would be entitled to refuse to give details of such other sexual activity on the grounds of self-incrimination.

There is a need for the accused to know the case which he has to meet, to be

supplied with proper particulars and not to be confronted with a new case at the trial. Once it is remembered that it is the identified acts of the accused and the incidents which are important I see nothing unfair in the dates being treated as not being of the essence of the charge. Apart from the point as to whether the offences were committed prior to 19 December 180, it was not suggested that the dates were relevant for any other reason, for example to lead alibi evidence or to cast doubt upon the happening of the incidents alleged.

In amending the Crimes Act 1900 and decriminalising sexual intercourse between consenting adult males, the legislature did not do so retrospectively. It is not for the Crown or the accused to endeavour to step around the terms of the legislation and to involve the Court in such endeavours. It is against the public interest for false issues to be presented and fought. I could understand the prosecution deciding not to prosecute or a Court, if the jury convicted imposing a nominal penalty or exercising its powers under s556 A of the Crimes Act.

It is incorrect for a Court to grant a permanent stay when it appears to be the defence that the sexual activity alleged took place a year later than alleged but when it was still an offence or a number of offences. For these reasons the exercise of the judge's discretion miscarried.

I make some additional comments. It is not reasonably open to a Court to regard the loss or absence of any useful records as usually being sufficient in itself to justify the grant of a permanent stay. This is not a case such as Davis (1995) 81 ALR 156. He was a medical practitioner who had seen thousands of patients and his clinical records had been destroyed in circumstances where no blame had been attributed to anyone. The alleged offence had occurred many years previously. Without his clinical records the doctor would not be able to say what he did and why and to give instructions to his counsel.

It is well established that the loss or absence of documents or records does not of itself mean that a person cannot obtain a fair trial or that the proceedings need to be stayed. The complainant's eighteenth birthday is a notable event. Even if it were correct to limit the counts in the indictment to events occurring before that day, incidents can be related to the period before or after that day as a reference point. Of course, as the dates of the incidents are not critical the absence or loss of the records is not of significance.

I would allow the appeal and quash the order granting the permanent stay.

ORDER:

By majority, appeal allowed.

Counsel for the Crown: C K Maxwell QC
Solicitors for the Crown: S E O'Connor
Counsel for the respondent: W E Flynn
Solicitors for the respondent: Marsdens

ANNEX 9:

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

UNITED
NATIONS

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

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2002**

PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAČ
AND
ZORAN VUKOVIĆ

JUDGEMENT

Counsel for the Prosecutor:

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

Counsel for the Accused:

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

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 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor* v *Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi}*.

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

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

A. Findings

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

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

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

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

1. Dragoljub Kunarac

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

[1] Trial Judgement, para 582.

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

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

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

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

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

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

[3] Trial Judgement, paras 630-745.

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

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

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

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

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

2. Radomir Kova~

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

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

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

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

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

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

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

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

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

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

3. Zoran Vukovi}

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

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

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

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

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

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

B. Appeal

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

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

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

1. Dragoljub Kunarac

(a) Convictions

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

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

(b) Sentencing

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

2. Radomir Kova~

(a) Convictions

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

(b) Sentencing

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

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

3. Zoran Vukovi}

(a) Convictions

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

(b) Sentencing

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

C. Findings of the Appeals Chamber

1. Convictions

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

2. Sentencing

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

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

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

II. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[17] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

1. the argument of the appellant is clearly irrelevant;

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

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

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

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

A. Submissions of the Parties

1. The Appellants

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

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

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

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

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

2. The Respondent

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

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

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

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

B. Discussion

1. The Existence of an Armed Conflict and Nexus therewith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[50] *Ibid.*

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

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

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

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

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

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

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

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

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

[57] *Ibid.*, para 567.

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

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

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

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

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

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

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

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

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

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

A. Submissions of the Parties

1. The Appellants

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

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

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

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

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

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

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

2. The Respondent

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

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

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

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

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

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

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

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

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

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

B. Discussion

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

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

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

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

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

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

2. Legal Requirement of an "attack"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Attack must be Directed against any Civilian Population

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

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

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

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

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

4. The Attack must be Widespread *or* Systematic

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

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

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

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

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

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

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

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

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

[114] There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General* v *Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al.* v *Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, F1994ğ 1 F.C. 298, 14 September 1993; *Sivakumar* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, F1994ğ 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (*Jelisi}* Appeal Judgement, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor* v *Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 *ILR* 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR

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

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

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

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

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

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

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

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

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

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

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

6. *Mens rea* for Crimes against Humanity

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

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

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

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

[120] Trial Judgement, para 434.

[121] *Ibid.*

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellants (Kunarac and Kova~)

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

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

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

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

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

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

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

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

(b) The Respondent

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

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

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Definition of the Crime of Rape

1. Submissions of the Parties

(a) The Appellants

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

(b) The Respondent

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellants (Kunarac and Vukovi})

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

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

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

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

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

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

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

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

(b) The Respondent

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

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

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

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

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

2. Discussion

(a) The Definition of Torture by the Trial Chamber

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

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

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

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

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

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

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

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

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

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

[199] *Furund`ija* Appeal Judgement.

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

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

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

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

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

(b) The Requirement of Pain and Suffering

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

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

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

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

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

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

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

(c) Subjective Elements

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

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

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

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

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

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

(b) The Respondent

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

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

VI. CUMULATIVE CHARGING

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

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

VII. CUMULATIVE CONVICTIONS

A. General Principles

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

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

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

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

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

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

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

[229] *Ibid.*

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

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

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

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

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

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

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

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[233] See *supra* n 226.

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

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

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

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

B. The Instant Convictions

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

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

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

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

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

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[237] Trial Judgement, para 556.

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

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

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

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

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

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

(a) Rape and Torture

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

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

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

[242] See Trial Judgement, para 557.

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

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

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

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

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

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

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

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

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

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

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

[250] *Ibid.*, p 1124.

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

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

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

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

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

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[251] *^elebi}i* Trial Judgement, para 486.

[252] *Aydin* v *Turkey*, Opinion of the European Commission of Human Rights, *supra* n 248, paras 186 (footnote omitted) and 189.

[253] *Aydin* v *Turkey*, European Court of Human Rights, no. 57/1996/676/866, Judgement of 22 September 1997, ECHR 1997-VI, para 86.

(b) Rape and Enslavement

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

3. Article 3 of the Statute

(a) Scope of Article 3 of the Statute

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

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

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

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

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

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

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

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

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

[257] Trial Judgement, para 436.

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

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

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

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

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

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

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

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

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

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

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

4. The Appellant Kovač's Separate Ground of Appeal

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

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

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

[263] Trial Judgement, para 554.

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC)

A. Alibi

1. Submissions of the Parties

(a) The Appellant (Kunarac)

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

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

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

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

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

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

(b) The Respondent

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

2. Discussion

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

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

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

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

B. Convictions under Counts 1 to 4

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

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

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

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

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

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

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

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

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

(ii) The Respondent

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

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

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

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

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

(b) Discussion

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

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

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

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

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

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

2. Rape of FWS-95

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

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

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

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

(ii) The Respondent

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

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

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

(b) Discussion

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

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

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

Furthermore, the Trial Chamber stated that:[299]

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

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

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

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

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

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kunarac)

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

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

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

(b) The Respondent

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

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

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

2. Discussion

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kunarac)

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

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

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

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

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

(b) The Respondent

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

2. Discussion

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

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kunarac)

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

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

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

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

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

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

(b) The Respondent

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

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

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

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

2. Discussion

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

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

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

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

F. Conclusion

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

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

IX. ALLEGED ERRORS OF FACT (RADOMIR KOVA^)

A. Identification

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

(b) The Respondent

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

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

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

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

2. Discussion

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

B. Conditions in Radomir Kova~'s Apartment

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

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

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

(b) The Respondent

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

2. Discussion

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

(b) The Respondent

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

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

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

(b) The Respondent

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

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

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

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

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

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

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

2. Discussion

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

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

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

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

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

E. Outrages upon Personal Dignity

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

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

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

(b) The Respondent

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

2. Discussion

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

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

1. Submissions of the Parties

(a) The Appellant (Kovač)

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

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

(b) The Respondent

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

2. Discussion

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

G. The Rape Convictions

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

H. Conclusion

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

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

X. ALLEGED ERRORS OF FACT (ZORAN VUKOVI])

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

1. Submissions of the Parties

(a) The Appellant (Vuković)

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

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

(b) The Respondent

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

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

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

2. Discussion

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

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

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

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

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

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

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

B. Rape of FWS-50

1. Submissions of the Parties

(a) The Appellant (Vuković)

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

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

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

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

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

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

(b) The Respondent

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

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

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

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

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

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

2. Discussion

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

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

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

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

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

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

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

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

C. Issue of Identification

1. Submissions of the Parties

(a) The Appellant (Vuković)

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

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

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

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

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

(b) The Respondent

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

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

2. Discussion

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

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

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

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

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

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

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

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

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

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

D. Discussion of Exculpatory Evidence

1. Submissions of the Parties

(a) The Appellant (Vuković)

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

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

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

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

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

(b) The Respondent

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

2. Discussion

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

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

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

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

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

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

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

E. Conclusion

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

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

XI. GROUNDS OF APPEAL RELATING TO SENTENCING

A. The Appellant Dragoljub Kunarac's Appeal against Sentence

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

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

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

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

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

(ii) The Respondent

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

(b) Discussion

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

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

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

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

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

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

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

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[475] Prosecution Consolidated Respondent's Brief, para 8.5.
[476] *Ibid.*, para 8.9.
[477] Trial Judgement, para 823, footnote 1406.
[478] *Ibid.*, para 855.

This newer version of Rule 87(C) of the Rules combined the provisions of Rule 87(C) and Rule 101 (C) of the 18th edition of the Rules, in addition to its recognising the power of a Trial Chamber to impose a single sentence. Rule 6(D) of the Rules, the text of which remained unchanged between these two editions, states:

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

341. The Appeals Chamber interprets this ground of appeal as alleging a legal error. The consequence of applying the newer Rule 87(C) of the Rules by the Trial Chamber was clear: the imposition of a single sentence was within the power of the Chamber. The question to be answered by the Appeals Chamber is whether the imposition of a single sentence in accordance with the newer Rule 87(C) of the Rules prejudiced the rights of the accused at the conclusion of his trial.

342. The Appeals Chamber considers that the version of Rule 101(C) contained in the 18th edition of the Rules did not expressly require a Trial Chamber to impose multiple sentences for multiple convictions. It merely required the Trial Chamber to indicate whether multiple sentences, if imposed at all, would be served consecutively or concurrently. This was a rule intended to provide clarity for the enforcement of sentences. This interpretation is also that implicitly adopted in the *Bla{ki}* Trial Judgement.[479] In that Judgement, the Trial Chamber further reasoned that:[480]

> Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. The Trial Chamber further observes that crimes other than [*sic*] the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted... In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.

343. In the disposition of the *Bla{ki}* Trial Judgement, it is clear that the accused was convicted on different counts for the same underlying acts for which he was held responsible. It is clear from this Judgement that, in certain cases, a single, composite sentence may be more appropriate than a set of individual sentences for individual convictions. The fundamental consideration in this regard

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[479] *Bla{ki}* Trial Judgement (currently under appeal), para 805.
[480] *Ibid.*, para 807.

is, according to the *^elebi}i* Appeal Judgement, that "the sentence to be served by an accused must reflect the totality of the accused's criminal conduct".[481]

344. The Appeals Chamber holds that neither Rule 87(C) nor Rule 101(C) of the 18th edition of the Rules prohibited a Trial Chamber from imposing a single sentence, and the precedent of a single sentence was not unknown in the practice of the Tribunal or of the ICTR.[482] The newer version of Rule 87(C) of the Rules, on which the Trial Chamber relied for sentencing purposes in the present matter, simply confirmed the power of a Trial Chamber to impose a single sentence. If the Appellant had no doubt as to the fairness of Rule 101(C) of the 18th edition of the Rules, as is the case here, he could not fault the fairness of Rule 87(C) of the 19th edition of the Rules, which did no more than absorb Rule 101(C) of the earlier edition and codify a precedent in the practice of the Tribunal. This ground of appeal thus fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

345. The Appellant argues that a Trial Chamber must comply with Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules, which means that "the pronounced sentence or sentences can not exceed the general maximum prescribed by the sentencing practice in the former Yugoslavia, as the courts of the former Yugoslavia can not pronounce sentences in excess to the maximum prescribed sentence".[483] He submits that "the Trial Chamber erred and venture [*sic*] outside its discretionary framework given in Article 24 of the Statute, since the par 1 of the Article 24 of the Statute is limiting the authority of the Trial Chambers in the Tribunal to pronounce sentences over 20 years of imprisonment, except in cases where they pronounce explicitly regulated sentence of life imprisonment".[484] The maximum sentence the Appellant could foresee was a 20-year imprisonment for war crimes.[485]

(ii) The Respondent

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[481] *^elebi}i* Appeal Judgement, para 771.
[482] *Kambanda* Appeal Judgement, paras 100-112.
[483] *Kunarac* Appeal Brief, para 153.
[484] *Kunarac* and *Kova~* Reply Brief, para 6.58.
[485] *Kunarac* Appeal Brief, para 154.

346. The Respondent submits that the fact that the Trial Chamber is not bound by the practice of the courts of the former Yugoslavia is "beyond any serious dispute".[486]

(b) Discussion

347. The Trial Chamber states that the wording of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules "suggests that the Trial Chamber is not *bound* to follow the sentencing practice of the former Yugoslavia."[487] In this context, references are made to the existing case-law, which shows a uniform approach of the Chambers in this connection.[488] There is not "an automatic application of the sentencing practices of the former Yugoslavia".[489]

348. Article 24(1) of the Statute requires that:

> The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the court of the former Yugoslavia.

Rule 101(B)(iii) of the Rules (19th edition) requires a Trial Chamber to "take into account" the general practice regarding prison sentences in the courts of the former Yugoslavia.

349. The case-law of the Tribunal, as noted in the Trial Judgement, has consistently held that this practice is not binding upon the Trial Chambers in determining sentences.[490] Further, in the instant case the Trial Chamber did consider the sentencing practice of the courts of the former Yugoslavia by way of hearing a defence expert witness in this respect, and it thus complied with the provisions of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules. The question here is whether the Trial Chamber, while considering the practice of the courts of the former Yugoslavia in relation to the sentencing aspect of the present case, ventured outside its discretion by ignoring the sentencing limits set in that practice. Article 24(1) of the Statute prescribes imprisonment, but no gradation of sentence has been laid down. The Chambers have to weigh a variety of factors to decide on the scale of a sentence. In the present case, the Trial Chamber followed all the necessary steps. The Appeals Chamber considers, therefore, that the Trial Chamber did not abuse its power or make an error in this regard. The ground of appeal is rejected.

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[486] Prosecution Consolidated Respondent's Brief, para 8.12.
[487] Trial Judgement, para 829.
[488] *Ibid.*, citing *^elebi}i* Appeal Judgement, paras 813 and 820.
[489] *Ibid.*
[490] *^elebi}i* Appeal Judgement, paras 813 and 820 and *Kupre{ki}* Appeals Judgement, para 418.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

350. The Appellant asserts that the Trial Chamber should have satisfied itself first that he deserved the maximum penalty under the 1977 Penal Code of the Socialist Federal Republic of Yugoslavia ("the 1977 Penal Code"), which was one of 20 years' imprisonment (in lieu of the death penalty).[491] His reasoning is that, if various aggravating factors had been assessed properly, he would not have received the maximum term of imprisonment. The Appellant claims that the aggravating factors found by the Trial Chamber are erroneous because: 1) the vulnerability of victims is an element of the crime of rape, not an aggravating factor; 2) there is a contradiction between the findings in paragraphs 858 and 863 of the Trial Judgement; 3) the age of certain victims, all but one younger than 19 years, cannot be an aggravating factor; 4) prolonged detention is an element of the crime of enslavement, not an aggravating factor; and 5) discriminatory grounds are an element of Article 5 offences, not an aggravating factor.

(ii) The Respondent

351. The Respondent submits that vulnerability is not an element of the crime of rape, according to the definition given by the Appellant at the trial, and moreover that considering elements of crimes as aggravating factors is anyway not unknown in the practice of the ICTR.[492] She also opines that the Trial Chamber "was probably referring to the status of women and children who are specifically accorded protection under the Geneva Conventions and other international humanitarian law instruments in times of armed conflicts".[493] In that light, "it was reasonable to conclude that the callous attacks on defenseless women merited specific assessment".[494] The Respondent argues that the Appellant has not shown any discernible errors on the part of the Trial Chamber.[495] She does not comment on the issue of the young age of the victims, but states that the Trial Chamber was correct in its approach.[496] Similarly, she merely states that the prolonged period

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[491] *Kunarac* Appeal Brief, para 154.
[492] Prosecution Consolidated Respondent's Brief, paras 8.15 and 8.16.
[493] *Ibid.*, para 8.17.
[494] *Ibid.*
[495] *Ibid.*, para 8.18.
[496] *Ibid.*, para 8.21.

of detention being used to aggravate the sentence was not unreasonable.[497] Further, she argues that discriminatory motives can constitute an aggravating factor.[498] In her view, there are many aggravating factors in Kunarac's case.[499]

(b) Discussion

352. The Appeals Chamber notes that point 1) of this ground of appeal, regarding the factor of vulnerability of the victims, is raised in reference to the consideration of that factor given by the Trial Chamber. In particular, the Trial Chamber stated "[l]astly, that these offences were committed against particularly vulnerable and defenceless women and girls is also considered in aggravation."[500] The Trial Chamber considered the factor of the vulnerability of the victims in terms of the gravity of the offences.[501] Article 24(2) of the Statute requires that Trial Chambers consider the gravity of the offence in imposing sentences. Whether or not the vulnerability of the victim is an element of the crime of rape does not affect its being evidence of the gravity of the crime, which can duly be considered in the course of sentencing as a matter of statutory law. The Trial Chamber committed no error in this regard, and this point of the ground of appeal is thus rejected.

353. As to point 2) of this ground of appeal, the Appellant argues that the Trial Chamber reached contradictory findings with regard to his role in the armed conflict in the former Yugoslavia. In paragraph 858 it makes statements to the effect that none of the accused played relatively significant roles "in the broader context of the conflict in the former Yugoslavia"; whereas it states in paragraph 863 that "the evidence clearly shows that this accused [i.e. Kunarac] played a leading organisational role and that he had substantial influence over some of the other perpetrators". The Appeals Chamber considers that the Appellant has overlooked the different contexts of these two findings. The Trial Chamber found the Appellant not to be in any position of command in the conflict in the former Yugoslavia, thus being low down the hierarchy of power in the territory. This does not, however, contradict the finding of his role in the crimes for which he was held responsible, those crimes being confined to a particular area of the former Yugoslavia. Both paragraphs state clearly that he was not regarded as a commander in relation to the crimes. This particular part of the ground of appeal is thus without merit and is dismissed.

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[497] *Ibid.*, para 8.22.
[498] *Ibid.*
[499] Appeal Transcript, T 326.

354. As to point 3), the Appellant has not elaborated on his argument that girls of 16-17 years of age might be allowed to marry in the former Yugoslavia. A person may still be regarded as young even if he or she is eligible for marriage according to law. In Article 73 of the 1977 Penal Code, a person between 16-18 years old was considered a "senior juvenile", thus to be treated differently from adults in terms of criminal sanction. Article 1 of the 1989 Convention on the Rights of the Child,[502] effective for the former Yugoslavia since 2 February 1991, defines a child to be a human being under the age of 18 years unless national law provides the child with a younger age of majority. Young as they were (the victims concerned in this part of the appeal were aged between 15 and a half and 19 years), there was no provision in the 1977 Penal Code, or more specifically the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, that would aggravate the sentence for a convicted rapist due to the age of a victim who might be under 16 years but older than 14 years. Article 91 of the latter code imposed a heavier sentence for the rape of a juvenile under 14 years of age.

355. The Trial Chamber has considered the defence expert witness's evidence with regard to the sentencing practice of the former Yugoslavia for the offence of rape, which shows that the youth of victims of sexual crimes constituted an aggravating circumstance in that practice.[503] The witness confirmed in court that the rape of young girls under 18 years of age led to aggravated sentences in the former Yugoslavia.[504] In the view of the Appeals Chamber, the expert evidence did not contradict the prevailing practice in the former Yugoslav Republic of Bosnia and Herzegovina and was rightly considered by the Trial Chamber in this regard. There still was an inherent discretion of the Trial Chamber to consider a victim's age of 19 years as an aggravating factor by reason of its closeness to the protected age of special vulnerability. No doubt it was for this reason that the Trial Chamber spoke of these different ages as "relatively youthful".[505] Also, the Trial Chamber was right to distinguish between crimes committed in peacetime and in wartime. Young and elderly women need special protection in order to prevent them from becoming easy targets. The Appeals Chamber finds that the Trial Chamber was not in error by taking into account the young age of victims specified in the Trial Judgement. This part of the ground of appeal therefore fails.

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[500] Trial Judgement, para 867.
[501] *Ibid.*, para 858.
[502] U.N. Doc. A/44/25, adopted 20 November 1989.
[503] Trial Judgement, para 835.
[504] Trial Transcript, T 5392.
[505] Trial Judgement, para 874.

356. Point 4) of this ground of appeal concerns the aggravating factor of enslavement over a prolonged period. The Trial Chamber found, in relation to the count of enslavement, that two victims were subject to abuses over a period of two months.[506] The Appellant contends that duration is an element of the crime of enslavement, and therefore cannot be an aggravating factor. However, as previously stated, the Appeals Chamber agrees with the Trial Chamber that duration may be a factor "when considering whether someone was enslaved".[507] This means that duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence. The Trial Chamber properly exercised its discretion in considering a period of two months to be long enough to aggravate the sentence for the offence. This part of the ground of appeal therefore fails.

357. In point 5) of this ground of appeal it is alleged that the Trial Chamber erred in regarding the discriminatory objective as an aggravating factor, as this constitutes an element of Article 5 crimes. In this context, the Appeals Chamber recalls the *Tadi}* Appeal Judgement, which states that a discriminatory intent "is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution".[508] It is not an element for other offences enumerated in Article 5 of the Statute. This part of the ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

358. The Appellant claims that the fact that none of the witnesses has suffered any severe consequences at his hands should be considered as a mitigating factor. In his view, the fact that he is a father of three young children should likewise be a mitigating factor, as it would in the practice of the courts of the former Yugoslavia.[509]

(ii) The Respondent

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[506] *Ibid.*, para 744.
[507] *Ibid.*, para 542.
[508] *Tadi}* Appeal Judgement, para 305.
[509] *Kunarac* Appeal Brief, paras 158-159.

359. The Respondent makes no submission in this respect, except for a remark that "the Trial Chamber is not bound to accept the testimony of experts and more so in the case where the suffering and harmful consequences are so apparent".[510]

(b) Discussion

360. The part on the sentencing of the Appellant in the Trial Judgement contains no mention of either ground being raised by the Appellant, as the Trial Chamber simply states that "there are no other relevant mitigating circumstances to be considered with respect to" the Appellant.[511] The Appeals Chamber takes this ground of appeal to be based on the complaint that the Trial Chamber did not give consideration to the factors in question.

361. The argument regarding an alleged lack of grave consequences was not included in the sentencing section of the Defence Final Trial Brief. Nor was it asserted during the closing arguments. The Trial Chamber, therefore, committed no error in not mentioning this fact. Under Article 47(2) of the 1977 Penal Code, the grave consequences of an offence such as rape would aggravate the sentence. However, that Code contains no provision entitling perpetrators of crimes without grave consequences to mitigation of their punishment. The Trial Chamber, on the other hand, has found that the offences of which the Appellant is convicted are "particularly serious offences." The inherent gravity of those offences, as the starting point for the sentencing procedure, demands severe punishment, which will not be diminished because the offences are claimed to have produced no serious consequences for the victims. This ground of appeal is therefore dismissed.

362. As to the factor that the Appellant is the father of three young children, the Appeals Chamber notes that the Defence raised this point during trial as a matter "significant for sentencing of the Accused Dragoljub Kunarac", and that the Defence actually submitted the point as a significant mitigating circumstance.[512] This point was raised again at the hearing of closing arguments.[513] It is not clear why the Trial Chamber decided not to consider this issue. The Appeals Chamber considers this factor to be a mitigating factor, following the existing case-law of the Tribunal and having recourse to the practice of the courts of the former Yugoslavia. In the *Erdemovi}* Sentencing Judgement, the fact that the accused had a young child was considered as a

[510] Prosecution Consolidated Respondent's Brief, para 8.23.
[511] Trial Judgement, para 870.
[512] Defence Final Trial Brief, para K.h.4.
[513] Trial Transcript, T 6447.

personal circumstance under the heading of "Mitigating factors".[514] In the *Tadi}* Sentencing Judgement, the personal circumstances of the accused, including his marriage, were considered separately from mitigating factors.[515] Article 24(2) of the Statute requires the Trial Chambers to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. Such circumstances can be either mitigating or aggravating. Family concerns should in principle be a mitigating factor. Article 41(1) of the 1977 Penal Code required the courts of the former Yugoslavia to consider circumstances including the "personal situation" of the convicted person. The Appeals Chamber holds that this should have been considered as a mitigating factor. This ground of appeal is thus partly successful. However, in view of the number and severity of the offences committed, the Appeals Chamber finds that the sentence imposed by the Trial Chamber is the appropriate one and thus upholds the Trial Chamber's decision in this respect.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

363. The Appellant submits that, in this regard, the Trial Chamber "gave an ambiguous formulation" in the last paragraph of the Trial Judgement by recalling Rule 101 of the Rules without explaining which version of the Rule was applied. He further asserts that if credit for time served is to be calculated from the date of 4 March 1998, "there is no error of the Trial Chamber regarding the application of law."[516]

(ii) The Respondent

364. The Respondent agrees with the Appellant that "no order has been made" in the last paragraph of the Trial Judgement as to the credit for time served, and invites the Appeals Chamber to clarify this point.[517] However, she points out that the Trial Chamber orally stated on 22 February 2001 that the time spent in custody should be credited towards all three convicted persons.[518]

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[514] *Erdemovi}* Sentencing Judgement, para 16.
[515] *Tadi}* Sentencing Judgement, para 26.
[516] *Kunarac* Appeal Brief, para 162.
[517] Prosecution Consolidated Respondent's Brief, para 8.19.
[518] Trial Transcript, T 6568, 6572 and 6574.

(b) Discussion

365. The Trial Chamber notes that the Appellant "surrendered to the International Tribunal on 4 March 1998".[519] The Appeals Chamber considers that the issue of credit for time could only be regarded as a ground of appeal if an erroneous reading was made by the Appellant of the Trial Chamber Judgement in this respect. However, the heading of the paragraph of the Trial Judgement in question, "Credit for Time Served", read in conjunction with Rule 101(C) and Rule 102 of the 19th edition of the Rules, referred to in the paragraph in question, is clear enough as to the thrust of the paragraph. The Trial Chamber has already stated clearly in footnote 1406 that it would apply the 19th edition of the Rules in this part of the Judgement. The older version of Rule 101(C) of the Rules would be unrelated to the issue of credit for time served. As the Prosecutor correctly submits, the Trial Chamber did make an oral statement, on 22 February 2001, stating that the time spent in custody should be credited to the sentences of the three convicted persons. If the Appellant had had any doubt, he could have, through his counsel, raised this matter immediately before the Trial Chamber for clarification. That would have been the proper forum. The ground of appeal is thus dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from his surrender into the custody of the Tribunal.

6. Conclusion

366. For the reasons indicated above, the Appeals Chamber dismisses grounds 1 through 5, except for one part of ground 4. Considering, however, the relative weight of the Appellant's family situation as a mitigating factor, the Appeals Chamber decides not to revise the sentence under appeal.

B. The Appellant Radomir Kova~'s Appeal against Sentence

367. The Trial Chamber has sentenced the Appellant Kova~ to a single sentence of imprisonment of 20 years for his convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal against the sentence relies on the following grounds: 1) the retrospective application of the amended Rule 101 of the Rules by the Trial Chamber has prejudiced the Appellant's rights before the Tribunal; 2) the Trial Chamber erroneously applied Article 24(1) of the Statute by disregarding the sentencing practice of the

former Yugoslavia; 3) there is a misunderstanding of aggravating factors by the Trial Chamber; 4) the Trial Chamber erred in considering that there was no mitigating factor in relation to the Appellant's case; and 5) the Trial Judgement is not clear as to the credit given for time served by the Appellant. The Appellant states clearly that he will not ask for a clarification of the finding of the Trial Chamber with regard to the issue of the legality of his arrest.[520]

1. The Issue of a Single Sentence and the Severity of the Sentence

(a) Submissions of the Parties

(i) The Appellant (Kova~)

368. The Appellant submits that the retroactive application by the Trial Chamber of the amended Rule 101 of the Rules "prejudiced" his rights. He argues that "it is unacceptable" and "directly opposed to the principle of legality" for crimes to be punished without "prescribed sentences" being designated for those crimes.[521] He explains that, in allowing the imposition of a single sentence for multiple convictions, the amended Rule 101 of the Rules, "seriously breaches the principle that each criminal offence must have a prescribed penalty (*nullum crimen nulla poena sine lege*)"[522] and has prejudiced his rights.[523] Along the same line of reasoning, he also questions the application of Rule 87(C) of the 19th edition of the Rules.[524] The Appellant further contends that "in view of the sentencing practice of the former Yugoslavia and the past practices" of the Tribunal, the Trial Chamber should not have imposed "such a high and severe sentence" on him.[525]

(ii) The Respondent

369. The Respondent argues that Rule 87(C) of the Rules (19th edition) codified the pre-existing practice of the Tribunal of allowing single sentences to be imposed for several crimes in situations when to do so would better reflect the totality of the convicted person's conduct.[526]

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[519] Trial Judgement, para 890.
[520] *Kova~* Appeal Brief, para 179.
[521] *Ibid.*, para 172 and Appeal Transcript, T 183.
[522] *Kova~* Appeal Brief, para 174. See also Appeal Transcript, T 90 and 179.
[523] Appeal Transcript, T 97-98.
[524] *Ibid.*, T 92.
[525] *Kova~* Appeal Brief, para 171.
[526] Prosecution Consolidated Respondent's Brief, para 8.4.

(b) Discussion

370. As to the propriety of applying Rule 101 and in particular Rule 87(C) of the 19th edition of the Rules, the Appeals Chamber refers to its discussion in paragraphs 339-344, above.

371. As to the argument that Rule 87(C) of the 19th edition of the Rules, in allowing a single sentence to be imposed for multiple convictions, breaches the principle of legality, the Appeals Chamber considers that this argument is premised on a misconception that the Statute should function as a penal code, with prescribed minimum and maximum sentences for specific offences.

372. Ultimately, the Appellant is not challenging the Trial Judgement on the ground of the maxim *nullum crimen sine lege* but that of *nulla poena sine lege*. The former is not in dispute, following the *Tadić* Jurisdiction Decision and the *Aleksovski* Appeal Judgement. However, the latter principle, as far as penalty is concerned, requires that a person shall not be punished if the law does not prescribe punishment.[527] It does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and minimum sentences. Within the range, judges have the discretion to determine the exact terms of a sentence, subject, of course, to prescribed factors which they have to consider in the exercise of that discretion.

373. The Statute does not set forth a precise tariff of sentences. It does, however, provide for imprisonment and lays down a variety of factors to consider for sentencing purposes. The maximum sentence of life imprisonment is set forth in Rule 101(A) of the Rules (correctly interpreting the Statute) for crimes that are regarded by States as falling within international jurisdiction because of their gravity and international consequences. Thus, the maxim *nulla poena sine lege* is complied with for crimes subject to the jurisdiction of the Tribunal. As the Permanent Court of International Justice once stated in relation to the principles of *nullem crimen sine lege* and *nulla poena sine lege*:[528]

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[527] *Cf. S.W.* v *the United Kingdom*, European Court of Human Rights, no. 47/1994/494/576, Judgement of 22 November 1995, ECHR 1995-A/335-B, para 35.

[528] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Permanent Court of International Justice, Advisory Opinion, 4 December 1935, Series A/B, Judgments, Orders and Advisory Opinions, 1935, Vol 3, No. 65, p 41 at p 51.

> The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case.

374. Moreover, the Statute requires the Trial Chambers to have recourse to the sentencing practice of the former Yugoslavia. In each sentencing matter, parties are given sufficient time to make their submissions. A sentence is reached only after all relevant factors are considered by the Trial Chamber. Such a procedure leaves little risk of the rights of the accused being disrespected. In practice, the Trial Chamber does not, therefore, wield arbitrary powers in the sentencing process, and there is always the safeguard of appeal. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kova~)

375. The Appellant submits that the Trial Chamber cannot disregard the sentencing practice of the former Yugoslavia, and that "the maximum sentence to be pronounced, notwithstanding the life sentence, is 20 years of imprisonment".[529]

(ii) The Respondent

376. The Respondent asserts that the *Tadi}* Appeal Judgement has settled the question as to whether "the sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute".[530] In the instant case, the Respondent notes, the Trial Chamber took into account the practice of the former Yugoslavia, but it selected a higher sentence because of the gravity of the Appellant's offences.[531]

(b) Discussion

377. As previously stated,[532] a Trial Chamber must consider, but is not bound by, the sentencing practice in the former Yugoslavia. It is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own. In the *Tadi}* Sentencing Appeal Judgement, it is stated that "the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial

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[529] *Kova~* Appeal Brief, para 175 and Appeal Transcript, T 181.
[530] Prosecution Consolidated Respondent's Brief, para 8.35.
[531] *Ibid.*, paras 8.36, 8.38 and 8.39 and Appeal Transcript, T 327.

Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system".[533] This statement is even more persuasive given that it was made in considering the appeal of Tadi} in that case against his 20-year jail term, which is equivalent to what the Appellant has received as punishment. Furthermore, the Trial Chamber in the instant case did take into account the sentencing practice of the former Yugoslavia.[534] This ground of appeal is thus dismissed.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

378. The Appellant argues that "the absence of all elements of grave physical or mental torture which would be the substance of the criminal offence, indicate that not one single aggravating circumstance could be found in the case of the accused Radomir Kova~ which would be of significance in the sentencing decision justifying the pronounced sentence in the duration of 20 years of incarceration of the accused".[535] This ground of appeal consists of the following points: 1) the relatively young age of certain victims; 2) the duration of mistreatment of certain victims; 3) the vulnerability of victims; 4) the fact of multiple victims; and 5) that retribution as a sentencing purpose is outdated.

379. As to point 1), the Appellant argues that the age of one of the victims, A.S., 20 years, should not have been considered as an aggravating factor.[536] As to point 2), the Appellant submits that, during the period of about four months, FWS-87 and A.S. "practically had the [*sic*] protection", and that during about one month, FWS-75 and A.B. were not in contact with the Appellant.[537] The Appellant argues in relation to point 3) that vulnerability or defencelessness is an element of the criminal offences of enslavement, rape and outrages upon personal dignity, and is therefore not an aggravating factor.[538] As to point 4), the Appellant contends that "[t]he involvement of more than

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[532] *Supra*, paras 347-349.
[533] *Tadi}* Sentencing Appeal Judgement, para 21.
[534] Trial Judgement, paras 829-835.
[535] *Kova~* Appeal Brief, para 181.
[536] *Ibid.*, para 180.
[537] *Ibid.*
[538] *Ibid.*

one victim in the offences of the accused is also considered in aggravation".[539] He submits under point 5) that the Trial Chamber accepted retribution as one of the purposes of sentencing, whereas the international trend is "to consider punishment as general prevention, which ultimately must lead to global prevention".[540]

(ii) The Respondent

380. The Respondent submits in respect of point 1) that even if this argument had some truth in it, the fact would remain that several other victims were younger than 18 years and one, A.B., was only 12 years old.[541] With regard to point 3), the Respondent submits that vulnerability is not an element of the crime of enslavement, rape or outrages on personal dignity. In relation to point 5), she submits that this is a "main, general sentencing factor" in the practice of the Tribunal,[542] and that the Trial Chamber did not place undue weight on this factor.[543]

(b) Discussion

381. Concerning point 1), the Appeals Chamber recalls what it stated in paragraphs 354-355, above. The Trial Chamber was not in error in considering the age of the victim, 20 years, as an aggravating factor. This aspect of the ground of appeal thus fails.

382. As regards point 2), the Appeals Chamber agrees with the Trial Chamber in considering as aggravating factors the duration of the crimes of enslavement, rape and outrages upon personal dignity entered, namely, from about one to four months. The Appeals Chamber finds it absurd to argue that FWS-87 and A.S., both having been subjected to rape, enslavement and outrages upon personal dignity for a long period of time, were in fact being protected. Further, the Appeals Chamber finds that it is not clear why the Appellant claims that he had no contact with the victims over the period in which they were detained at his apartment,[544] or when he visited them from time to time at the other places to which they were moved temporarily.[545] This part of the ground of appeal thus fails.

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[539] *Ibid.*
[540] *Ibid.*
[541] Prosecution Consolidated Respondent's Brief, para 8.41.
[542] *Ibid.*, para 8.43.
[543] *Ibid.*, para 8.44.
[544] Trial Judgement, para 759.
[545] *Ibid.*, para 754.

383. As regards point 3), the Appeals Chamber repeats what it stated in paragraph 352, above. This ground of appeal is therefore dismissed.

384. The Appellant offers no arguments to substantiate point 4). The Appeals Chamber considers that there is no need to pass on this point and rejects this part of the ground of appeal.

385. In respect of point 5), the Trial Chamber relies on the *Aleksovski* Appeal Judgement in considering retribution as a general sentencing factor.[546] The case-law of both this Tribunal and the ICTR is consistent in taking into account the factor of retribution,[547] retribution being "interpreted by Fthe Trialg Chamber as punishment of an offender for his specific criminal conduct".[548] The Appellant has failed to substantiate his claim of an alleged trend in international law which speaks differently from the one followed by this Tribunal and the ICTR. This ground of appeal is therefore rejected.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

386. The Appellant argues that the Trial Chamber should have taken the following mitigating factors into account: 1) the Appellant had no prior intention to harm Muslims nor the knowledge that his actions formed part of a widespread and systematic attack; 2) the presence of the Appellant "when any harm could be done to any Muslims";[549] and 3) the Appellant's relationship with FWS-87 and the protection he extended to her and to A.S..

(ii) The Respondent

387. The Respondent dismisses the above arguments, stating that either they are "encompassing litigated facts and rejected by the Trial Chamber or they do not constitute mitigating factors".[550]

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[546] *Ibid.*, para 841, citing *Aleksovski* Appeal Judgement, para 185.
[547] *Aleksovski* Appeal Judgement, footnotes 353-355.
[548] Trial Judgement, para 857.
[549] *Kova~* Appeal Brief, para 184.
[550] Prosecution Consolidated Respondent's Brief, para 8.46.

(b) Discussion

388. The Trial Chamber has found that all three accused, "in their capacity as soldiers, took an active part" in the conflict that broke out between the Serb and Muslim forces in Fo~a.[551] It states that the Appellant "was fully aware of the attack against the Muslim villages and aware of the fact that his acts were part of the attack",[552] that he knew that the four women in his control were civilians,[553] and that he "abused them and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population".[554] The Appeals Chamber finds that these factors should have been argued in relation to the elements of the offences. Before the sentencing proceedings, the Trial Chamber had already accepted these factors as being proved beyond reasonable doubt, resulting in a conviction. The Appellant thus cannot re-litigate this issue in the course of the sentencing appeal. This part of the grounds of appeal is thus dismissed.

389. The second factor is unclearly pleaded and without reasoning. The Appeals Chamber merely notes that the four women the Appellant kept in his apartment and abused were Muslims.[555] This part of the grounds of appeal therefore fails.

390. In relation to the third factor, the Trial Chamber has found that the relationship between the Appellant and FWS-87 was not one of love, "but rather one of cruel opportunism on Kova~'s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old".[556] The Trial Chamber also finds that the Appellant "substantially assisted Jagos Kosti} in raping A.S.".[557] The Appeals Chamber concurs with the findings of the Trial Chamber in this respect, and therefore dismisses this part of the grounds of appeal.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kova~)

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[551] Trial Judgement, paras 567 and 569.
[552] *Ibid.*, para 586.
[553] *Ibid.*
[554] *Ibid.*, para 587.
[555] *Ibid.*
[556] *Ibid.*, para 762.
[557] *Ibid.*, para 761.

391. The Appellant submits that if credit were not to be given for his time in detention as from 2 August 1999, his rights would be infringed.[558]

(ii) The Respondent

392. The Respondent, while agreeing that no order was made in the last paragraph of the Trial Judgement with regard to credit for time served, submits that the Trial Chamber did state orally on 22 February 2001 that the time spent in custody be credited.[559]

(b) Discussion

393. The Appeals Chamber recalls its reasoning in paragraph 365, above, and dismisses this ground of appeal, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into the custody of the Tribunal.

6. Conclusion

394. For the foregoing reasons, the Appeals Chamber dismisses the Appellant Kova~'s appeal on sentencing in total.

C. The Appellant Zoran Vukovi}'s Appeal against Sentence

395. The Appellant Vukovi} has been sentenced to a single term of imprisonment of 12 years for convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal is based on the following grounds: 1) each conviction should receive a sentence and to impose a single sentence for all convictions is against the Rules; 2) the Tribunal is obligated to have recourse to the sentencing practice of the courts of the former Yugoslavia, under which rape as a war crime does not incur a heavier sentence than rape committed in peacetime; 3) the Trial Chamber has misapplied aggravating factors in relation to FWS-50; 4) the Appellant's help to Muslim families and his family situation should be considered as mitigating factors; and 5) the Trial Chamber has miscalculated the credit for time served.

[558] *Kova~* Appeal Brief, para 185 and Appeal Transcript, T 92-93.
[559] Trial Transcript, T 6568, 6572 and 6574.

1. Retroactive Application of the Rules that Resulted in a Single Sentence

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

396. The Appellant submits that the Trial Chamber erred in imposing a single sentence for multiple convictions.[560] He submits that both the 1977 Penal Code and the penal codes of the new countries in the territory of the former Yugoslavia allow for a single sentence for multiple convictions, subject to the condition that this sentence cannot exceed the severity of the heaviest sentence established by law. Nor can it represent the total of all sentences for the convictions.[561] Further, he argues that by not applying Rule 101(C) of the 18th edition of the Rules, the Trial Chamber acted in contravention of the principle against retroactive application of the Rules.[562] The Appellant adds that if it were possible for the Trial Chamber to impose a single sentence in accordance with "the earlier provisions of ICTY then there would not [be a] need to codify Rule 87(C) of the Rules."[563]

(ii) The Respondent

397. The Respondent submits that "the Appellant's reliance on Rule 101(C) is misplaced", because that Rule referred to the duty of a Trial Chamber to determine "how multiple sentences should be served."[564] She further asserts that the provision did not require the Chamber to impose multiple sentences.[565] The Respondent refers to the *Kambanda* Appeal Judgement, asserting that it expressly endorses the practice of imposing a single sentence for multiple convictions.[566] She also submits that the Appellant has failed to explain "why the Trial Chamber abused its discretion in imposing a single sentence", and "how the imposition of a global sentence prejudices his rights".[567]

(b) Discussion

398. The Appeals Chamber discerns two parts in this ground of appeal: 1) the allegedly retroactive application of the Rules allowing the imposition of a single sentence; and 2) whether the

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[560] *Vukovi}* Appeal Brief, para 177.
[561] *Ibid.*
[562] *Ibid.*, para 178.
[563] *Vukovi}* Reply Brief, para 4.2.
[564] Prosecution Respondent's Brief, para 4.6.
[565] *Ibid.*
[566] *Ibid.*, para 4.7.

imposition of a single sentence is subject to similar requirements to those of the 1977 Penal Code. Part 2) will be dealt with in the discussion on the sentencing practice of the former Yugoslavia.

399. As for part 1), the Appeals Chamber refers to the discussion in paragraphs 339-344, above, and repeats that Rule 87(C) of the 19th edition of the Rules simply confirmed the power of a Trial Chamber to impose a single sentence. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

400. The Appellant submits, in effect, that the Trial Chamber was obligated to comply with the requirement in Article 24(1) of the Statute to have recourse to the sentencing practice in the courts of the former Yugoslavia, and that this would mean that the heaviest penalty for criminal offences was 20 years' imprisonment.[568] He argues that the appropriate comparison is not between life imprisonment, allowed under the Statute, and the capital sentence, permitted in the penal codes of the republics of the former Yugoslavia, but between life imprisonment and the sentence of 20 years' imprisonment known at the relevant time.[569] He further argues that the Trial Chamber should have considered the sentencing practice with regard to rape convictions in the former Yugoslavia as presented by the defence expert witness. In relation to that testimony, the Appellant submits that it is not relevant that the witness focused on the peacetime practice, as sexual freedom is protected in peacetime and in armed conflict.[570] He suggests that a sentence of imprisonment of up to three years might be imposed.[571] The Appellant further points out that the practice in the former Yugoslavia, referred to in the Statute, was that of peacetime.[572] He tentatively argues that rape would be a more severe offence than torture, if both offences contained the same elements.[573] He also argues against retribution as a sentencing purpose.[574]

(ii) The Respondent

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[567] *Ibid.*, paras 4.10 and 4.11.
[568] *Vukovi}* Appeal Brief, paras 180 and 183.
[569] *Ibid.*
[570] *Ibid.*, para 181.
[571] *Ibid.*
[572] *Ibid.*, para 182.
[573] *Ibid.*, para 184.
[574] *Ibid.*, para 185.

401. The Respondent submits that "the Trial Chamber is not bound to apply the law of the former Yugoslavia in matters of sentencing but only to take it into account".[575]

(b) Discussion

402. This ground of appeal essentially repeats Kunarac's and Kovač's arguments. The Appeals Chamber refers to its reasoning in paragraphs 347 to 349 and 377. The Appeals Chamber adds that the Trial Chamber has taken into account the evidence given by the defence expert witness regarding the sentencing practice in the former Yugoslavia, with an emphasis on the crime of rape.[576] However, as the Trial Chamber noted, the expert witness's testimony is "of little relevance" because it centred upon rape during peacetime.[577] Rape as a crime against humanity or a violation of the laws or customs of war requires proof of elements that are not included in national penal codes, such as attack upon any civilian population (in the case of the former) or the existence of an armed conflict (in the case of both). The severity of rape as a crime falling under the jurisdiction of the Tribunal is decidedly greater than that of its national counterpart. This is shown by the difference between the maximum sentences imposed respectively by the Statute and, for instance, the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, upon the offence of rape. This ground of appeal therefore fails.

3. Aggravating Factor

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

403. The Appellant submits that the Trial Chamber erred in finding that FWS-50's age at the time of the offences in question was 15 and a half years, when in fact her age was 17 years. He further asserts that she would have been allowed to enter into marriage, and that her age should not be considered as an aggravating factor.[578] He also contends that it was not an aggravating circumstance that FWS-50 was especially vulnerable and helpless.[579]

(ii) The Respondent

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[575] Prosecution Respondent's Brief, para 4.14.
[576] Trial Judgement, para 835.
[577] *Ibid.*
[578] *Vukovi}* Appeal Brief, para 186.
[579] *Ibid.*

404. The Respondent contends that the Trial Chamber "did not err in concluding that the victim was youthful and that this was an aggravating factor", even though her age might not have been 15 and a half years.[580] Further, she argues that the vulnerability and defencelessness of the victim are not elements of the crimes,[581] and that there is no error on the part of the Trial Chamber in considering these factors in aggravation.[582]

(b) Discussion

405. As to the question of the age of the victim as an aggravating factor, the Appeals Chamber refers to its reasoning in paragraphs 354-355, above. The Appeals Chamber considers that the slight difference between the age of the victim as found in one part of the Trial Judgement, about 16 years,[583] and that referred to in another part, 15 and a half years,[584] does not negate the fact that the victim was at a young age when the offences in question were committed against her. The Appeals Chamber concurs with the findings of the Trial Chamber that this fact can aggravate the sentence against the Appellant. As to the argument relating to the factor of vulnerability and helplessness, the Appeals Chamber refers to its reasoning in paragraph 352, above. This ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

406. The Appellant argues that he helped "numerous of [*sic*] Muslim families", and that this should be considered as a mitigating factor, not, as the Trial Chamber found, as proof that he had knowledge about the attack upon the Muslim population.[585] In addition, the Appellant argues that the lack of serious consequences arising from his acts and the fact that no force or compulsion was

[580] Prosecution Respondent's Brief, para 4.16.
[581] *Ibid.*, para 4.19.
[582] Appeal Transcript, T 328-329.
[583] Trial Judgement, para 235.
[584] *Ibid.*, para 879.
[585] *Vukovi}* Appeal Brief, para 188.

used should be a mitigating factor.[586] Further, he submits that the fact that he is married and has two children should be considered in mitigation.[587]

(ii) The Respondent

407. The Respondent submits that the Trial Chamber did not err in not considering as a mitigating factor that the Appellant provided some help to Muslims, as it was concerned with "what sentence to impose for the rape of this victim, not his acts to persons who he was friendly with previously".[588] However, the Respondent agrees that the Trial Chamber erred in not considering the Appellant's family situation as a mitigating factor, although this factor would not affect the sentence.[589]

(b) Discussion

408. The Appeals Chamber holds that the Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked. However, the Appeals Chamber also agrees that the Appellant's family situation should have been considered as a mitigating factor. This particular part of the ground of appeal, therefore, succeeds. However, the Appeals Chamber concurs with the length of the imprisonment decided by the Trial Chamber.

409. As to the Appellant's argument that the lack of consequences arising from his acts should be considered as a mitigating factor, the Appeals Chamber recalls the finding in the Trial Judgement that the rape of FWS-50 "led to serious mental and physical pain for the victim".[590] The Appeals Chamber concurs with the Trial Chamber's findings that the Appellant's acts had serious consequences. In respect of the rape of the same witness, the Trial Judgement states that "[s]he was taken out of Partizan Sports Hall to an apartment and taken to a room by Vukovi} where he forced her to have sexual intercourse with full knowledge that she did not consent".[591] This finding shows that force or compulsion was used prior to rape. In this context, the Appeals Chamber further refers

[586] *Vukovi}* Reply Brief, para 4.3.
[587] *Vukovi}* Appeal Brief, para 188.
[588] Prosecution Respondent's Brief, para 4.20.
[589] *Ibid.*, para 4.21.
[590] Trial Judgement, para 815.
[591] *Ibid.*, para 817.

back to its finding that the coercive circumstances of this case made consent to the sexual acts by the Appellants impossible.[592] This argument is, therefore, without merit and is rejected.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

410. The Appellant submits that the Trial Judgement is not clear in this respect and that it would be erroneous not to take his period of detention since 23 December 1999 into account when imposing the sentence.[593]

(ii) The Respondent

411. The Respondent notes that, although the last paragraph of the Trial Judgement contains no order with regard to credit for time served, the Trial Chamber did state orally on 22 February 2001 that the time spent in custody by each of the three convicted persons be credited.[594]

(b) Discussion

412. The Appeals Chamber refers to its reasoning in paragraph 365, above. This ground of appeal is dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into custody of the Tribunal.

6. Conclusion

413. For the foregoing reasons, the Appeals Chamber dismisses the appeal of the Appellant Vukovi}, except the submission that his family concerns should be considered as a mitigating factor. However, in the circumstances of this case, which involves a serious offence, this factor does not change the scale of the sentence imposed in the Trial Judgement.

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[592] See *supra*, para 133.
[593] *Vukovi}* Appeal Brief, para 190.
[594] Trial Transcript, T 6568, 6572 and 6574.

D. Conclusion

414. For the foregoing reasons, the Appeals Chamber dismisses the appeals of the Appellants Kunarac, Kova~ and Vukovi}. For the reasons previously stated, the Appeals Chamber confirms the sentences imposed on the Appellants by the Trial Chamber with appropriate credit for time served.

XII. DISPOSITION

For the foregoing reasons:

A. The Appeals of Dragoljub Kunarac against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Dragoljub Kunarac on Counts 1-4, 9-12 and 18-20 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Dragoljub Kunarac is entitled to credit for the time he has spent in custody since his surrender on 4 March 1998;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 28 years' imprisonment as imposed by the Trial Chamber.

B. The Appeals of Radomir Kova~ against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Radomir Kova~ on Counts 22-25 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Radomir Kova~ is entitled to credit for the time he has spent in custody since his arrest on 2 August 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 20 years' imprisonment as imposed by the Trial Chamber.

C. The Appeals of Zoran Vukovi} against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Zoran Vukovi} on Counts 33-36 of Indictment IT-96-23/1.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Zoran Vukovi} is entitled to credit for the time he has spent in custody since his arrest on 23 December 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 12 years' imprisonment as imposed by the Trial Chamber.

D. Enforcement of Sentences

In accordance with Rules 103(C) and 107 of the Rules, the Appeals Chamber orders that Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfers to the State or States where their respective sentences will be served.

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

(signed)	*(signed)*	*(signed)*
Claude Jorda Presiding	Mohamed Shahabuddeen	Wolfgang Schomburg

(signed)	*(signed)*
Mehmet Güney	Theodor Meron

Dated this 12th day of June 2002
At The Hague
The Netherlands

FSeal of the Tribunalğ

ANNEX A: PROCEDURAL BACKGROUND

A. The Appeals

415. The Trial Judgement was delivered on 22 February 2001. Notices of appeal were filed by the Appellants Kova~[595] and Vukovi}[596] on 6 March 2001, and by the Appellant Kunarac[597] on 7 March 2001.

416. On 18 May 2001, the Appellants filed a joint application for an extension of the time limit for filing their Appellants' Briefs under Rule 111 of the Rules,[598] on the basis that they had not yet received the Trial Judgement in the B/C/S language. The Prosecutor responded to this application.[599] The Appeals Chamber ordered that the Appellants' Briefs be filed within thirty days of the filing of the B/C/S translation of the Trial Judgement.[600]

417. On 28 May 2001, counsel for the Appellant Vukovi} filed a notice of the impossibility of performing his duties as counsel, due to the expiry and non-extension of his Dutch visa.[601]

418. On 25 June 2001, the Appellants filed a joint application for authorisation to exceed page limits of their Appellants' Briefs.[602] The Prosecutor filed a response to this application on 5 July 2001.[603] The Appeals Chamber denied the request on 10 July 2001.[604]

419. The Appellant Vukovi} filed his confidential Appeal Brief on 12 July 2001.[605] The Appeal Briefs of the Appellants Kunarac[606] and Kova~[607] were filed on 16 July 2001.

420. On 10 August 2001, the Prosecutor filed a request: (i) for an extension of time to file its Respondent's Briefs under Rule 112 of the Rules; and (ii) to exceed the page limit for these

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[595] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[596] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[597] Notice of Appeal Against Judgment of 22 February 2001, 7 March 2001.
[598] Extension of Time Limit for Appelant's (*sic*) Brief, 18 May 2001.
[599] Prosecution Response to Request for Extension of Time Limit for Appellant's Brief, 22 May 2001.
[600] Décision relative à la requête aux fins de prorogation de délai, 25 May 2001.
[601] Impossibility of Performing the Duties as Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*), 28 May 2001.
[602] Joint Request for the Authorisation to Exced (*sic*) tha (*sic*) Page Limits for the Appellant's Brief, 25 June 2001.
[603] Prosecution Response to "Joint Request for the Authorisation to Exceed the Page Limits for the Appellant's Brief", 5 July 2001.
[604] Decision on Joint Request for Authorisation to Exceed Prescribed Page Limits, 10 July 2001.
[605] Appelant's (*sic*) Brief for the Acused (*sic*) Zoran Vukovic (*sic*) Against Judgment of 22. February 2001, 12 July 2001 (conf).
[606] Appelant's (*sic*) Brief for the Acused (*sic*) Dragoljub Kunarac Against Judgment of 22. February 2001, 16 July 2001.
[607] Appelant's (*sic*) Brief for the Acused (*sic*) Radomir Kova~ Against Judgment of 22. February 2001, 16 July 2001.

Briefs.[608] The Respondent's Briefs were filed within the time limit. The Prosecutor's Respondent's Brief to the Appellant Vukovi}'s Appeal Brief was filed on 13 August 2001,[609] and its Consolidated Respondent's Brief and book of authorities relating to the Appellants Kunarac and Kova~ were filed on 15 August 2001.[610] However, the Consolidated Respondent's Brief did exceed the page limit. The Appeals Chamber decided that it would deem and accept that Brief as having been validly filed with the authorisation of the Appeals Chamber.[611] On 26 September 2001, the Prosecutor filed a confidential request for clarification of that decision.[612] The Appeals Chamber ordered that: (i) the Prosecutor's Consolidated Respondent's Brief be deemed and accepted as having been validly filed on 15 August 2001 in respect of all three Appellants with the authorisation of the Appeals Chamber; and (ii) the Appellant Vukovi} be given leave to file his Brief in Reply within 15 days of the filing of the order.[613]

421. On 20 August 2001, the Appellants Kunarac and Kova~ filed a request for an extension of time to file their reply to the Prosecution Consolidated Respondent's Brief.[614] The Prosecutor responded to this request.[615] The Appeals Chamber granted the request and ordered that the Briefs in Reply be filed on or before 4 September 2001.

422. The Appellants' Briefs in Reply were filed on the following dates: 28 August 2001 by Vukovi};[616] 4 September 2001 by Kunarac and Kova~.[617] The Brief of the Appellants Kunarac and Kova~ exceeded the page limit, but was authorised retrospectively by the Pre-Appeal Judge.[618]

423. On 19 September 2001, the Appellant Kunarac filed a request for provisional release under Rule 65(I) of the Rules in order that he might undergo medical treatment in Belgrade.[619] The

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[608] Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, If Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 10 August 2001.
[609] Prosecution's Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vukovi} against Judgement of 22 February 2001", 13 August 2001 (conf).
[610] Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf) and Book of Authorities to Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf).
[611] Decision on Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, if Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 3 September 2001.
[612] Prosecution's Request for Clarification, 26 September 2001.
[613] Decision on Prosecution's Request for Clarification, 11 October 2001.
[614] The Defense's Request for the Extention (*sic*) of Time Limit, 20 August 2001.
[615] Prosecution's Response to the Joint Motion of the Appellants Radomir Kova~ and Dragoljub Kunarac Entitled "The Defense's Request for the Extension of Time Limit" Filed on 20 August 2001, 23 August 2001.
[616] Appellant's Brief in Reply on Prosecutor's Respondent's Brief, 28 August 2001.
[617] Appellants' Reply on Prosecution's Consolidated Respondent's Brief, 4 September 2001 (conf).
[618] Order on Page Limits, 7 September 2001.
[619] The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac, 19 September 2001.

Prosecutor filed a confidential response to the request on 25 September 2001.[620] The Appeals Chamber rejected the request on 16 October 2001.[621]

424. On 20 September 2001, counsel for the Appellant Vukovi} informed the Appeals Chamber that the Registry had denied him access to meet with his client.[622]

425. On 2 October 2001, the appointed Pre-Appeal Judge issued an order requiring the parties to file redacted public versions of the Appellant Vuković's Appeal Brief, the Prosecution Respondent's Brief, and the Prosecution Consolidated Respondent's Brief.[623] Public versions of the latter two documents were filed on 9 October 2001. On 11 October 2001, the Appellant Vukovi} informed the Appeals Chamber that his Appeal Brief filed on 12 July 2001 was never marked as confidential and should be considered to be the public version.[624] On 18 October 2001, the Registry lifted the confidentiality of that document.[625] The Appellants Kunarac and Kova~ filed a like document on 22 October 2001 informing the Appeals Chamber that their Appeal Briefs of 16 July 2001 ought also to be considered to be the public versions.[626]

426. On 29 October 2001, the Appeals Chamber made a scheduling order to the effect that presentation of Appeal Briefs would begin on 4 December 2001.[627]

427. On 6 November 2001, the Appellant Vukovi} filed a motion for presentation of additional evidence in accordance with Rule 115 of the Rules,[628] seeking the admission of an excerpt from the Registry of Births of Bosnia and Herzegovina by which to prove the age of his daughter, Marijana

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[620] Prosecution's Response to the Motion Entitled "The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac" Filed on 19 September 2001, 25 September 2001.
[621] Ordonnance de la Chambre d'Appel relative à la requette de Dragoljub Kunarac aux fins de mise en liberté provisoire, 16 October 2001.
[622] Information of (*sic*) Preventing Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*) to (*sic*) Visit His Client, 20 September 2001.
[623] Order for Filing Public Versions, 2 October 2001.
[624] Information Regarding the Order for Filing Public Versions of the Appealant's (*sic*) Brief of the Accused Zoran Vukovi} (*sic*), 11 October 2001.
[625] Document entitled "Internal Memorandum", 18 October 2001.
[626] Information Regarding the Order for Filing Public Versions of the Appelants' (*sic*) Briefs of the Accused Dragoljub Kunarac and Radomir Kova~ (*sic*), 20 October 2001.
[627] Ordonnance portant calendrier, 29 October 2001.
[628] Motion of the Defence of the Accused Zoran Vukovi} (*sic*) for Presentation of Additional Evidence, 6 November 2001.

Vukovi}. The Prosecutor filed a response to this request on 16 November 2001.[629] The Appeals Chamber rejected the motion on 30 November 2001.[630]

428. On 6 November 2001, the three Appellants filed a joint statement regarding the schedule of presentation of their Appeal Briefs.[631] The Prosecutor filed its response to that statement on 9 November 2001.[632] On 26 November 2001, the three Appellants filed a joint statement about the division of total time for the presentation of their submissions.[633]

429. On 19 December 2001, the Appellant Kova~ filed a statement informing the Appeals Chamber of the exact references to a case upon which he relied in oral explanations.[634]

B. Assignment of Judges

430. On 21 May 2001, by an order of the President of the International Tribunal, the following Judges were assigned to sit on the appeal: Judge Jorda, President, Judge Vohrah, Judge Shahabuddeen, Judge Nieto-Navia and Judge Liu.[635]

431. On 8 June 2001, Judge Shahabuddeen was appointed as Pre-Appeal Judge to deal with all motions of a procedural nature.[636] On the occasion of departures of Judges and the new composition of Chambers, the President of the International Tribunal reconstituted the Appeals Chamber for the instant appeal on 23 November 2001, assigning Judge Jorda, President, Judge Shahabuddeen, Judge Schomburg, Judge Güney and Judge Meron to sit on the appeal.[637]

C. Status Conferences

[629] Prosecution's Response to "Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence", 16 November 2001.
[630] Decision on the Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence, 30 November 2001.
[631] Joint Statement of the Defence Regarding the Schedule of Presentation of the Appellant's Briefs, 6 November 2001.
[632] Prosecution's Statement Regarding the Appellant's Schedule of Presentation, 9 November 2001.
[633] Joint Statement of the Defence about Division of Total Time for Presentation of Appellants' Submissions, 26 November 2001.
[634] Statement of the Defence of the Accused Radomir Kovac (*sic*), 18 December 2001.
[635] Ordonnance du Président portant affectation de Juges à la Chambre d'Appel, 21 May 2001.
[636] Ordonnance portant nomination d'un Juge de la mise en état en appel, 8 June 2001.
[637] Ordonnance du Président relative à la composition de la Chambre d'Appel pour une affaire, 23 November 2001.

432. Status conferences were held in accordance with Rule 65*bis* of the Rules on 25 June 2001[638] and 16 October 2001.[639]

D. Appeal Hearing

433. On 16 November 2001, the Pre-Appeal Judge issued a scheduling order for the Appeal Hearing,[640] which was held over three days, from 4 to 6 December 2001.

[638] Scheduling Order, 11 June 2001.
[639] Scheduling Order, 26 September 2001.
[640] Scheduling Order for the Hearing on Appeal, 16 November 2001.

ANNEX B: GLOSSARY

1926 Slavery Convention	Slavery Convention, adopted on 25 September 1926, in force as of 9 March 1927
1977 Penal Code	Code of the Socialist Federal Republic of Yugoslavia (SFRY), adopted by the SFRY Assembly at the session of the Federal Council held on 28 September 1976, amended in 1977 (unofficial translation on file with the Tribunal library)
ABiH	Muslim Army of Bosnia-Herzegovina
Akayesu Appeal Judgement	*Prosecutor* v *Jean-Paul Akayesu,* Case No. ICTR-96-4-A, Judgement, 1 June 2001
Akayesu Trial Judgement	*Prosecutor* v *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998
Aleksovski Appeal Judgement	*Prosecutor* v *Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000
Aleksovski Trial Judgement	*Prosecutor* v *Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999
Appeal Hearing	Appeal hearing of 4 to 6 December 2001 in *Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A
Appeal Transcript	Transcript of Appeal Hearing of 4 to 6 December 2001. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
Appellants	Collective term for Dragoljub Kunarac, Radomir Kovač and Zoran Vukovi}, or any combination thereof, depending upon the context of the discussion.
Blaški} Trial Judgement	*Prosecutor* v *Tihomir Blaški},* Case No. IT-95-14-T, Judgement, 3 March 2000 (currently under appeal)
Br|anin Amended Indictment Decision	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001
Br|anin Amended Indictment Decision II	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Form of Further Amended

	Indictment and Prosecution Application to Amend, 26 June 2001
Čelebići Appeal Judgement	*Prosecutor* v *Zejnil Delali} et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001
^elebi}i Trial Judgement	*Prosecutor* v *Zejnil Delali} et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998
Common article 3	Common article 3 of Geneva Conventions I through IV of 12 August 1949
Defence Final Trial Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Defence Final Trial Brief, 10 November 2000
Erdemovi} Sentencing Judgement	*Prosecutor* v *Drazen Erdemovi}*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998
Ex P	Prosecutor exhibit
Ex D	Defence exhibit
Furundžija Appeal Judgement	*Prosecutor* v *Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000
Furund`ija Trial Judgement	*Prosecutor* v *Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998
FWS	Prosecution witness pseudonyms (Foča Witness Statements)
Geneva Conventions	The four Geneva Conventions of 12 August 1949: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War
HVO	Croatian Defence Council
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 Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

Indictment IT-96-23	Indictment against Dragoljub Kunarac and Radomir Kovač
Indictment IT-96-23/1	Indictment against Zoran Vuković
Indictments	Indictments IT-96-23 and IT-96-23/1
International Tribunal or Tribunal or ICTY	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
Jelisić Appeal Judgement	*Prosecutor* v *Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001
Kambanda Appeal Judgement	*Jean Kambanda* v *Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000
Kayishema Appeal Judgement	*Le Procureur* c/ *Clément Kayishema et Obed Ruzindana*, Affaire No. ICTR-95-1-A, Motifs de l'ârret, 1er juin 2001 (English translation is not yet available)
Kova~	Radomir Kova~
Kova~ Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Radomir Kova~ Against Judgement of 22 February 2001, 16 July 2001 (public)
Krnojelac Amended Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000
Krnojelac Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999
Kunarac	Dragoljub Kunarac
Kunarac and *Kova~* Reply Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellants' Reply on Prosecutor's Consolidated Respondent's Brief, 4 September 2001 (confidential) (public version filed on 20 October 2001)
Kunarac Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Dragoljub Kunarac Against Judgement of 22 February 2001, 16 July 2001 (public)
Kunarac Evidence Decision	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000

Kupre{ki} Appeal Judgement	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001
Kupre{ki} Evidence Decision	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999
Kupre{ki} Trial	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000
Kvo~ka Indictment Decision	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999
Kvo~ka Trial Judgement	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (currently under appeal)
Mrk{i} Rule 61 Decision	*Prosecutor* v *Mile Mrk{i} et al.*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996
Nikoli} Rule 61 Decision	*Prosecutor* v *Dragan Nikoli}*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995
para	Paragraph
paras	Paragraphs
Prosecution Consolidated Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution's Consolidated Respondent's Brief, 15 August 2001 (confidential) (public version filed on 9 October 2001)
Prosecution Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vuković against Judgement of 22 February 2001", 13 August 2001 (confidential) (public version filed on 9 October 2001)
Respondent and Prosecutor	The Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the International Tribunal
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal

T	Transcript page. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Tadi} Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999
Tadi} Contempt Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000
Tadi} Indictment Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995
Tadi} Jurisdiction Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadi} Rule 115 Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998
Tadi} Sentencing Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Tadi} Sentencing Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997
Tadi} Trial Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Judgement, 7 May 1997.
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the United Nations General Assembly, in force as of 26 June 1987
Trial Judgement	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Trial Transcript	Transcript of trial in *Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1 T.
Vukovi}	Zoran Vukovi}
Vukovi} Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-23/1-A, Appellant's Brief for the Acused [sic]