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

IN THE TRIAL CHAMBER

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

Registrar: Mr Robin Vincent

Date filed: 24 November 2003

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL – 2003 – 11 – PT

PROSECUTION RESPONSE TO THE DEFENCE PRELIMINARY MOTION ON LACK OF JURISDICTION MATERIAE (NATURE OF THE ARMED CONFLICT)

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I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Defence Motion on the Lack of Jurisdiction Materiae: Nature of the Armed Conflict" (the "**Preliminary Motion**"), filed on behalf of Moinina Fofanah (the "**Accused**") on 14 November 2003.[1]

2. The Preliminary Motion argues essentially that the Special Court lacks jurisdiction to prosecute crimes under Articles 3 and 4 of the Statute as such crimes are limited to internal armed conflicts and that the armed conflict in Sierra Leone in the period covered by the indictment was a conflict of an international nature and not an internal armed conflict.

3. For the reasons given below, the Preliminary Motion should be dismissed in its entirety.

II. ARGUMENT

A. Nature of conflict irrelevant

4. The Defence argues that it is essential for the Court to determine the nature of the conflict as either internal or international. The Prosecution disagrees with the defence argument and will submit that the Statute of the Special Court which the Court is bound to apply does not include any requirement to prove that the conflict was

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[1] Registry Page ("RP") 625-635.

internal or international. The Defence states that the Article 4 of the Statute lacks any explicit reference to the nature of the underlying conflict[2] and that the Security Council made no explicit reference to the nature of the conflict,[3] the Prosecution submits that this was because it was immaterial to do so.

5. However, the Defence premise is erroneous. It is not the case that the Accused cannot be liable for violations of common Article 3 or of Additional Protocol II if it is established that the conflict was internal, rather than international, in character. The Prosecution argues that the Statute should be construed as drafted and that the additional element of proving whether the conflict was internal or international should not be imported into the Statute. Thus, the Accused could be found culpable without the necessity of proving whether the conflict was internal or international. The Prosecution submits that the element of internationality or otherwise forms no jurisdictional criterion of the offences created by Articles 3 and 4 of the Statute. This requirement does not appear in Articles 3 and 4. Nothing in the words of these articles requires the existence of an international or non-international armed conflict.

6. Further, the Prosecution submits that the crimes contained in Articles 3 and 4 of the Statute[4] have acquired the status of customary international law. In the *Prosecutor v. Akayesu* the court expressed the view that the norms of Common Article 3 have acquired the status of customary law[5] and although it stated that Protocol II as a whole had not acquired the status of customary law, it held that many of the provisions of Protocol II can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law.[6] The Court concluded that the core protections in Protocol II which mirror the Common Article 3 protections that is Articles 4(1) and 4(2) of Protocol II are likewise customary in nature. There is no argument that Article 4 of Protocol II which deals with the fundamental guarantees

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[2] Para 7.
[3] Para 11.
[4] Article 3 of the Statute deals with Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and Article 4 deals with serious violations of international humanitarian law.
[5] See also *Military and Paramilitary Activities (Nicaragua v United States)* 1986 I.C.J. 14 27 June 1896; *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence 4 September 1998 and *Prosecutor v. Jelisic*, IT-95-10, 14 December 1999 Judgment.
[6] ICTR-96-4-T Judgment 2 September 1998. See also *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence 4 September 1998.

and from which some of the crimes in Article 3 of the Statute are derived has acquired the status of customary international law. As the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") has said:

> "Common Article 3 of the Geneva Conventions may be considered as the "minimum yardstick" of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character."[7]

7. Similarly, in the Nicaragua Decision, the International Court of Justice decided that Common Article 3 applied to both conflicts, international and internal, commenting that Common Article 3 established a "minimum yardstick" of treatment for both types of armed conflict. The Court determined that under customary international law, Common Article 3 established the minimum treatment afforded to non-combatants regardless of whether the conflict was characterised as an international or internal armed conflict. The Court noted that common Article 3 evinces "general principles of humanitarian law...accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not." The Prosecution therefore argues that there is no ground for treating Articles 3 and 4 of the Statute as in effect importing into the Statute the whole of the terms of the Geneva Convention as they are now part of customary international law.

8. The Prosecution's argument is supported by the Secretary-General of the United Nations who noted that "Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law,

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[7] *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 140-152, esp. para. 147. The Appeals Chamber affirmed the judgement of the Trial Chamber on this point: see *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998, paras. 314, 317. *Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction)*, Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 14 (referring to *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995).

and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC),...they are recognized as war crimes."[8] The Prosecution further argues that the distinction between internal and international conflicts is irrelevant as regards war crimes. If these crimes are now regarded as war crimes the Prosecution submits that this is further evidence of the irrelevance of this distinction.

9. The Defence submits that Article 4 of the Statute of the Special Court is applicable in internal armed conflicts only. The Defence points out that the Article was taken from Article 8(2) (e) of the ICC Statute which defines these crimes as war crimes. With all due respect to the Defence, this provision could also have been taken from Article 8(2) (b) of the ICC Statute which deals with other serious violations of laws and custom applicable in an international armed conflict. The defence proposition that the ICC Statute is authority for their proposition that these crimes are only applicable in an internal armed conflict and not an international armed conflict therefore lacks merit.

10. The Indictment in this case does not allege that the armed conflict in Sierra Leone was internal in character. In view of the fact that the crimes with which the Accused is charged apply equally in both international and non-international armed conflicts, the nature of the armed conflict is simply irrelevant to the charges against the Accused, and the Trial Chamber would have to convict the Accused regardless of whether if it were ultimately to find, on the basis of the evidence presented at trial, that the conflict was international or non-international in character. Indeed, given that the nature of the armed conflict is irrelevant to the charges against the Accused, even if the Indictment *did* expressly allege that the armed conflict was non-international in character, the Trial Chamber would have to convict the Accused even if it were ultimately to find, on the basis of the evidence presented at trial, that the conflict was in fact international in character. This is because, in view of the fact that the relevant crimes with which the Accused is charged apply equally in both international and

[8] Report on the Establishment of the Special Court, S/2000/915, Para 14.

non-international armed conflicts, it is not the *essence* of the Prosecution's allegation that the crimes were committed in a non-international armed conflict.

11. The Prosecution argues that the fact that Common Article 3 and/or Protocol II apply to internal armed conflicts does not preclude it from applying in conflicts of an international character. It submits that the argument has always been about whether conflicts are international or not because the threshold imposed for armed conflicts of an international character is higher than that imposed by internal armed conflicts. The Defence is seeking to argue that the armed conflict in Sierra Leone meets a higher threshold, i.e. that it is international and not internal. It is submitted that all the crimes applicable under conflicts of an internal character are applicable to conflicts of an international character but not vice versa. Consequently, if the Defence argues that the conflict in Sierra Leone was international not internal then it follows that all the crimes applicable to internal armed conflicts, which is more restricted, will apply to international conflicts. The protections afforded by international humanitarian law have generally been considered to be higher in international armed conflicts than in internal armed conflicts. Thus, a rule which applies in international armed conflicts may not necessarily apply in internal armed conflicts. However, rules which apply in internal armed conflicts should be considered as minimum rules of protection of general application.[9]

12. The Prosecution submits that the raison d'etre of international humanitarian law is to protect the victims as well as potential victims of armed conflicts. Due to the overall protective and humanitarian purpose of international humanitarian law, the

[9] Eric David, Principes de droit des conflits armes, 3rd ed, Bruylant 2002 p 115 -117. Prof Eric David points out that "The content of these rules depends on the nature of the conflict, and more precisely, on the intensity and the scope of hostilities: the more important the non international conflict is the more numerous and complicated are the rules of armed conflict which apply to it. On the contrary, if the conflict is of limited importance, only a few minimum rules will apply to it. It is noted however that these minimum rules of humanitarian law continue to apply in armed conflicts of greater importance including in international armed conflicts as the ICJ has recognized in Nicaragua v. USA (1986) (ICJ, p. 114 par. 218), rejecting an argument which proposed to exclude the application of common art. 3 to international armed conflicts." Prof. David represents this system in concentric circles with the outside circle being the most elementary rules which apply to all the conflicts. In the middle circle are those rules which are in the outside circle and in addition other applicable rules which apply to non international armed conflict of a certain importance. In the centre circle which deals with conflicts of an international character are all the rules of armed conflicts.

Prosecution submits that its application must not be restricted or delimited by the nature of the conflict. This point was noted in Tadic. The Appeals Chamber stated:

> "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."[10]

B. Nature of conflict matter to be proved at the trial

13. If the Preliminary Motion is dismissed for the reasons given above, there is no need for the Trial Chamber to consider the matters below.

14. If, contrary to the Prosecution's submission, the criminal responsibility of the Defence were to depend on the non-international character of the armed conflict, it would be a matter to be determined by the Trial Chamber as part of its final judgement, based on all of the evidence led at trial, whether or not the armed conflict was non-international in character.[11] This is not an issue to be determined at a

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[10] Theodor Meron, currently President of the ICTY, endorsed the ICTY Appeals Chamber's call encouraging the blurring of the distinction between international and non international conflicts. In an article entitled "The Humanization of Humanitarian Law," 94 AJIL 239 he stated inter alia "A recent and welcome trend is blurring the different thresholds of applicability. The ICRC study on rules of customary humanitarian law, for example, makes only the basic distinction between international and non international armed conflicts. It does not adopt the three-tiered approach of the Geneva Conventions and Additional Protocols. Moreover, it seeks a broader recognition that many rules are applicable to both international and non international conflicts." The Prosecution urges the Court to follow this trend and continue to blur the now irrelevant distinction between internal and international armed conflict. The primary purpose for which the Geneva Conventions and its Protocols were adopted, to wit to protect the victims as well as potential victims of armed conflicts, must prevail.

[11] See *Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999, para. 16 (noting that the relevant legal standard to be applied to determine whether an armed conflict is international in character is a matter to be addressed at trial, and should not be discussed at the preliminary motions stage). See also *Prosecutor v Blaskic, Decision Rejecting a Motion of the Defence to dismiss counts 4, 7, 10, 14, 16 and 18 based on the failure to adequately plead the existence of an International Armed Conflict*, 4 April 1997 (in which the Tribunal held that it was not incumbent on the Prosecution at the pre-trial stage of the proceedings to provide proof of the existence of an international armed conflict since

preliminary stage, before any evidence has been presented. For this reason also, the Preliminary Motion should be rejected.

C. The international character of the armed conflict has not been established by the Defence

15. In any event, even if the matter can be considered at this preliminary stage, the Preliminary Motion should be rejected. If the Defence seeks to have the charges dismissed at a preliminary stage on the ground that the armed conflict is international in character, the burden of proof would be on the Defence at this stage, as the moving party, to prove that the armed conflict was international in character.

16. The Preliminary Motion argues first that the armed conflict was international in character, by virtue of Liberia's involvement in it. In seeking to discharge its burden of proof in relation to this allegation, the Preliminary Motion relies on only four items of evidence, namely a paragraph from an Amnesty International report,[12] a paragraph from a report of a UN Panel of Experts[13] a statement by the United Kingdom ambassador,[14] and a report of the International Crisis Group.[15] The Preliminary Motion also relies on certain allegations contained in the Indictment in Case No. SCSL-2003-01, *Prosecutor v. Taylor*. The Prosecution submits that this evidence does not establish that the armed conflict was international in character.

17. In relation to Liberia's involvement, the Preliminary Motion argues first that "There is ample evidence that the state of Liberia was during the entire period covered by the indictment a party to the conflict in Sierra Leone, thus rendering the conflict international".[16] The Prosecution submits that the four brief items of evidence relied upon by the Defence can hardly be considered "ample evidence". It is self-evident that a State does not become a party to an armed conflict, merely because it lends certain support to one of the parties to the armed conflict. For instance, during the Second World War, the United States provided certain assistance to the United

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such proof does not constitute a condition for the formal validity of the indictment); *Prosecutor v Hadzihasanovic and others, Decision on Form of Indictment*, 7 December 2001.

12 Preliminary Motion, para. 28.

13 Preliminary Motion, para. 29.

14 Preliminary Motion, para. 30.

15 Preliminary Motion, footnote 13.

16 Preliminary Motion, para. 27.

Kingdom before the United States became a party to the war. Furthermore, the Prosecution submits that the fact that Liberian soldiers may have been present and even active in Sierra Leone at certain times is not of itself sufficient to make Liberia a *party* as such to the armed conflict. In any event, it would certainly not be sufficient to make the whole of the conflict in the whole of Sierra Leone during the whole of the relevant period international in character.[17] The scant evidence relied upon by the Defence cannot establish that at the specific times and places material to the Indictment in this case, the armed conflict was international in character.

18. The Preliminary Motion then relies on the principle, established in the *Tadic Appeal Judgement*,[18] that an armed conflict may be held to be international in character if one of the armed groups that is a party to the conflict is subject to the "overall control" of another State. In that judgement, the Appeals Chamber of the ICTY said that:

> "In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY. ... Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. ... In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the

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[17] The Appeals Chamber of the ICTY has held that an armed conflict may have both internal and international aspects, and if so, it is a matter of evidence whether at a particular place and time during the course of the overall conflict, it was international or non-international in character. See *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 25.

[18] *Prosecutor v. Tadic, Judgement*, Case No. IT-94-1-A, App. Ch., 15 July 1999 (the "***Tadic Appeal Judgement***").

> head or to members of the group, instructions for the commission of specific acts contrary to international law. ... [19]

19. The Prosecution submits that the scant evidence relied upon by the Preliminary Motion falls far short of establishing that certain armed groups in Sierra Leone were not merely financially or even militarily assisted by Liberia, but were subject to the "overall control" of Liberia, in the sense that Liberia had a role in organising, coordinating or planning the military actions of the military group. In particular, in view of the fact that the Prosecution alleges in Case No. SCSL-2003-01 that Charles Taylor was acting in a personal capacity, the allegations in this indictment cannot be taken as support for the Defence arguments concerning the involvement of Liberia in the armed conflict.

20. In seeking to establish the involvement of Liberia in the armed conflict, the Preliminary Motion further relies on an additional test established by the Appeals Chamber of the ICTY in the *Tadic Appeal Judgement*, namely the test of "the assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)* [e.g., detainees in a prison camp who are "elevated by the camp administrators to positions of authority over the other internees"]".[20] The Prosecution submits that the scant evidence relied upon by the Defence can hardly be taken to establish that the RUF or any other armed group involved in the armed conflict was assimilated to an organ of the State of Liberia "on account of their actual behaviour within the structure" of that State.

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[19] The Court continued further that "This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts. ... Of course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions. ...." *Tadic Appeal Judgement*, para. 87 (footnote omitted), 130, 131, 137, 138-145.

[20] *Tadic Appeal Judgement*, para. 141: see Preliminary Motion, para. 33.

21. The Preliminary Motion then seeks to argue that the armed conflict was international in character because of the involvement of peacekeeping troops from Nigeria and other States. However, the Defence cites no authority for the proposition that an internal armed conflict becomes international in character if peacekeeping troops from another State are sent in. Peacekeepers are not combatants, and are therefore not *parties* to the conflict. The Defence has not established that this position is altered, even if peacekeepers use force on one or more occasions, as the Preliminary Motion alleges. In accordance with the principles set out above, the Defence would need to establish that Nigeria and/or other States not only provided assistance or support to one of the armed groups in the armed conflict, but were actually a party to the conflict, or exercised "overall control" over one of the armed groups in the armed conflict. The scant evidence relied upon by the Defence falls far short of establishing this.

22. From the way that the Statute of the Special Court was drafted, it is evident that the United Nations Secretary-General, the Security Council and the Government of Sierra Leone all considered the armed conflict in Sierra Leone to be non-international in character. The scant evidence relied upon by the Defence does not establish the contrary.

III. MISCELLANEOUS MATTERS

23. The Defence Preliminary Motion contains 13 pages. The Prosecution submits that it is the breach of Article 9.3(C) of the *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003, which limits the length of motions to ten (10) pages.

24. The Defence Motion is dated 14 November 2003 and was filed on the said date. However, the defence did not file the authorities in support of the said Motion until 18 November 2003. The Prosecution argues that time should not begin to run until the Motion and all the authorities are filed.

IV. CONCLUSION

25. The Court should therefore dismiss the Preliminary Motion in its entirety.

Freetown, 24 November 2003.

For the Prosecution,

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Deputy Prosecutor

Luc Côté
Chief of Prosecutions

Walter Marcus-Jones
Senior Appellate Counsel

Abdul Tejan-Cole
Appellate Counsel

PROSECUTION INDEX OF AUTHORITIES

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4. *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995);
5. *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence 4 September 1998.
6. *Prosecutor v. Jelisic*, IT-95-10, 14 December 1999 Judgment.
7. *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 140-152, esp. para. 147.
8. *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998, paras. 314, 317.
9. *Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction),* Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 14
10. P*rosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995
11. *Prosecutor v. Tadic, Judgement*, Case No. IT-94-1-A, App. Ch., 15 July 1999 (the "***Tadic Appeal Judgement***").
12. Report of the United Nations Secretary-General's on the Establishment of the Special Court S/2000/915 Para 14.
13. Eric David, Principes de droit des conflits armes, 3rd ed, Bruylant 2002 p 115 -117
14. Theodor Meron, "The Humanization of Humanitarian Law," 94 AJIL 239.
15. *Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999, para. 16
16. *Prosecutor v Blaskic, Decision Rejecting a Motion of the Defence to dismiss counts 4, 7, 10, 14, 16 and 18 based on the failure to adequately plead the*

existence of an International Armed Conflict, 4 April 1997 and *Judgment* dated 3 March 2000.

17. *Prosecutor v Hadzihasanovic and others, Decision on Form of Indictment,* 7 December 2001.

ANNEX 1

The *Prosecutor v. Akayesu* ICTR-96-4-T, Judgment 2 September 1998.

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CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

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6. THE LAW

6.1 Cumulative Charges

461. In the amended Indictment, the accused is charged cumulatively with more than one crime in relation to the same sets of facts, in all but count 4. For example the events described in paragraphs 12 to 23 of the Indictment are the subject of three counts of the Indictment - genocide (count 1), complicity in genocide (count 2) and crimes against humanity/extermination (count 3). Likewise, counts 5 and 6 of the Indictment charge murder as a crime against humanity and murder as a violation of common article 3 of the Geneva Conventions, respectively, in relation to the same set of facts; the same is true of counts 7 and 8, and of counts 9 and 10, of the Indictment. Equally, counts 11 (crime against humanity/torture) and 12 (violation of common article 3/cruel treatment) relate to the same events. So do counts 13 (crime against humanity/rape), 14 (crimes against humanity/other inhumane acts) and 15 (violation of common article 3 and additional protocol II/rape).

462. The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the Indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

463. The Chamber notes that this question has been posed, and answered, by the Trial Chamber of the ICTY in the first case before that Tribunal, *The Prosecutor v. Dusko Tadic*. Trial Chamber II, confronted with this issue, stated:

> "In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading". (Prosecutor v. Tadic , Decision on Defence Motion on Form of the Indictment at p.10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995)

464. In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing *concurrent* sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

465. The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime. 79

466. It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify the prosecutorial practice of accumulating criminal charges.

467. The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. Rwandan law allows multiple convictions in the following circumstances:

> Code pénal du Rwanda: Chapitre VI - Du concours d'infractions:
>
> > Article 92.- Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le mˆme auteur sans qu'une condamnation soit intervenue entre ces infractions.
> >
> > Article 93.- Il y concours idéal:
> > 1) lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications;
> > 2) lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.
> >
> > Seront seules prononcées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra ˆtre alors élevé de moitié.

468. On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

469. Having regard to its Statute, the Chamber believes that the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.

470. Conversely, the Chamber does not consider that any of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all

three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all cricumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible.

6.2. Individual criminal responsibility (Article 6 of the Statute)

471. The Accused is charged under Article 6(1) of the Statute of the Tribunal with individual criminal responsibility for the crimes alleged in the Indictment. With regard to Counts 13, 14 and 15 on sexual violence, the Accused is charged additionally, or alternatively, under Article 6(3) of the Statute. In the opinion of the Tribunal, Articles 6(1) and 6(3) address distinct principles of criminal liability and should, therefore, be considered separately. Article 6(1) sets forth the basic principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), as it derives from military law, namely the principle of the liability of a commander for the acts of his subordinates or "command responsibility".

472. Article 6(1) provides that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime".

Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide80. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

474. Article 6 (1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

475. The International Law Commission, in Article 2 (3) of the Draft Code of Crimes Against the Peace and Security of Mankind, reaffirmed the principle of individual responsibility for the five forms of participation deemed criminal referred to in Article 6 (1) and consistently included the phrase "which in fact occurs", with the exception of aiding and abetting, which is akin to complicity and therefore implies a principal offence.

476. The elements of the offences or, more specifically, the forms of participation in the commission of one of the crimes under Articles 2 to 4 of the Statute, as stipulated in Article 6 (1) of the said Statute, their elements are inherent in the forms of participation *per se* which render the perpetrators thereof

individually responsible for such crimes. The moral element is reflected in the desire of the Accused that the crime be in fact committed.

477. In this respect, the International Criminal Tribunal for the former Yugoslavia found in the Tadic case that:

> "a person may only be criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence" and that "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."81

478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered *infra* in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.

479. Therefore, as can be seen, the forms of participation referred to in Article 6 (1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6 (3) analyzed here below, which does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.

480. The first form of liability set forth in Article 6 (1) is **planning** of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.

481. The second form of liability is **'incitation'** (in the french version of the Statute) to commit a crime, reflected in the English version of Article 6 (1) by the word *instigated*. In English, it seems the words incitement and instigation are synonymous82. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments83. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different84. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6 (1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2 (3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion85. The Chamber also accepts this interpretation 86.

482. That said, the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator87.

483. By **ordering** the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior- subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda 88, ordering is a form of complicity through instructions given to the direct

perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.

484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". **Aiding** and **abetting**, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.

485. The Chamber finds that, in many legal systems, aiding and abetting constitute acts of complicity. However, though akin to the constituent elements of complicity, they themselves constitute one of the crimes referred to in Articles 2 to 4 of the Statute, particularly, genocide. The Chamber is consequently of the opinion that when dealing with a person Accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas, as stated *supra*, the same requirement is not needed for complicity in genocide89.

486. Article 6(3) of the Statute deals with the responsibility of the superior, or command responsibility. This principle, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions of 8 June 1977.

487. Article 6 (3) stipulates that:

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

488. There are varying views regarding the *Mens rea* required for command responsibility. According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement. Thus, the "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" stated, in reference to Article 86 of the Additional Protocol I, and the *mens rea* requirement for command responsibility that:

> "[...] the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place. This element in criminal law is far from being clarified, but it is essential, since it is precisely on the question of intent that the system of penal sanctions in the Conventions is based"90.

489. The Chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person Accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes

against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

490. As to whether the form of individual criminal responsibility referred to Article 6 (3) of the Statute applies to persons in positions of both military and civilian authority, it should be noted that during the Tokyo trials, certain civilian authorities were convicted of war crimes under this principle. Hirota, former Foreign Minister of Japan, was convicted of atrocities - including mass rape - committed in the "rape of Nanking", under a count which charged that he had " recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the law and customs of war".The Tokyo Tribunal held that:

> "Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence".

It should, however, be noted that Judge Röling strongly dissented from this finding, and held that Hirota should have been acquitted. Concerning the principle of command responsibility as applied to a civilian leader, Judge Röling stated that:

> "Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions'. Considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense".

491. The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

492. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

493. In accordance with the said provisions of the Statute, the Prosecutor has charged Akayesu with the crimes legally defined as genocide (count 1), complicity in genocide (count 2) and incitement to commit genocide (count 4).

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

494. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from

Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention")91. It states:

> " Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."

495. The Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations' Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia92.

496. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 197593. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

497. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2 (2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.

498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

499. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

Killing members of the group (paragraph (a)):

500. With regard to Article 2(2)(a) of the Statute, like in the Genocide Convention, the Chamber notes that the said paragraph states *"meurtre"* in the French version while the English version states "killing". The Trial Chamber is of the opinion that the term "killing" used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term *"meurtre"*, used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda which stipulates in its Article 311 that "Homicide committed with intent to cause death shall be treated

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as murder".

501. Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which *"meurtre"* (killing) is homicide committed with the intent to cause death. The Chamber notes in this regard that the *travaux préparatoires* of the Genocide Convention 94, show that the proposal by certain delegations that premeditation be made a necessary condition for there to be genocide, was rejected, because some delegates deemed it unnecessary for premeditation to be made a requirement; in their opinion, by its constitutive physical elements, the very crime of genocide, necessarily entails premeditation.

Causing serious bodily or mental harm to members of the group (paragraph b)

502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.

503. In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused

> " by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture"95.

504. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a

measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Forcibly transferring children of the group to another group (paragraph e)

509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

510. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.

511. On reading through the *travaux préparatoires* of the Genocide Convention96, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

512. Based on the *Nottebohm* decision97 rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

513. An ethnic group is generally defined as a group whose members share a common language or culture.

514. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.

515. The religious group is one whose members share the same religion, denomination or mode of worship.

516. Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was

patently to ensure the protection of any stable and permanent group.

517. As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in Article 2 (2) of the Statute, must have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

518. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator98.

519. As observed by the representative of Brazil during the *travaux préparatoires* of the Genocide Convention,

> "genocide [is] characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide."99

520. With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.

521. In concrete terms, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual100.

522. The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.

523. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

524. Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia also stated that

the specific intent of the crime of genocide

> " may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct"101.

Thus, in the matter brought before the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber, in its findings, found that

> "this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group".102

6.3.2. Complicity in Genocide

The Crime of Complicity in Genocide, punishable under Article 2(3)e) of the Statute

525. Under Article 2(3)e) of the Statute, the Chamber shall have the power to prosecute persons who have committed complicity in genocide. The Prosecutor has charged Akayesu with such a crime under count 2 of the Indictment.

526. Principle VII of the "Nuremberg Principles" 103 reads

> "complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

Thus, participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.

527. The Chamber notes that complicity is viewed as a form of criminal participation by all criminal law systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law). Since the accomplice to an offence may be defined as someone who associates himself in an offence committed by another 104, complicity necessarily implies the existence of a principal offence.105

528. According to one school of thought, complicity is borrowed criminality' (criminalité d'emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.

529. Therefore, the issue before the Chamber is whether genocide must actually be committed in order for any person to be found guilty of complicity in genocide. The Chamber notes that, as stated above,

complicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.

530. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.

531. The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not being tried. Under Article 89 of the Rwandan Penal Code, accomplices

> "may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification"[unofficial translation].

As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.

532. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act.

533. As regards the physical elements of complicity in genocide *(Actus Reus)*, three forms of accomplice participation are recognized in most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means106. It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at pubic gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal. Indeed, according to Article 91 of the Rwandan Penal Code:

> "An accomplice shall mean:
> 1. A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations or artifice, directly incite(s) to commit such action or order(s) that such action be committed.
> 2. A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
> 3. A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.
> 4. A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at pubic gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results.
> 5. A person or persons who harbour(s) or aid(s) perpetrators under the circumstances

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provided for under Article 257 of this Code."107 [unofficial translation]

534. The Chamber notes, first of all, that the said Article 91 of the Rwandan Penal Code draws a distinction between *"instigation"* (instigation), on the one hand, as provided for by paragraph 1 of said Article, and *"incitation"* (incitement), on the other, which is referred to in paragraph 4 of the same Article. The Chamber notes in this respect that, as pertains to the crime of genocide, the latter form of complicity, i.e. by incitement, is the offence which under the Statute is given the specific legal definition of "direct and public incitement to commit genocide," punishable under Article 2(3)c), as distinguished from "complicity in genocide." The findings of the Chamber with respect to the crime of direct and public incitement to commit genocide will be detailed below. That said, instigation, which according to Article 91 of the Rwandan Penal Code, assumes the form of incitement or instruction to commit a crime, only constitutes complicity if it is accompanied by, "gifts, promises, threats, abuse of authority or power, machinations or culpable artifice"108. In other words, under the Rwandan Penal Code, unless the instigation is accompanied by one of the aforesaid elements, the mere fact of prompting another to commit a crime is not punishable as complicity, even if such a person committed the crime as a result.

535. The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely "aid and abet, counsel and procure", mirror those conducts characterized under Civil Law as "l'aide et l'assistance, la fourniture des moyens".

536. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.

537. For the purposes of interpreting Article 2(3)e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus:

- complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
- complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide crime, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.

538. The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

539. Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of National Coal Board v. Gamble109, Justice Devlin stated

> "an indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent

> about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor."

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established110. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

540. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

541. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.

542. This finding by the Chamber comports with the decisions rendered by the District Court of Jerusalem on 12 December 1961 and the Supreme Court of Israel on 29 May 1962 in the case of Adolf Eichmann111. Since Eichmann raised the argument in his defence that he was a "small cog" in the Nazi machine, both the District Court and the Supreme Court dealt with accomplice liability and found that,

> "[...] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer".112

543. The District Court accepted that Eichmann did not personally devise the "Final Solution" himself, but nevertheless, as the head of those engaged in carrying out the "Final Solution" - "acting in accordance with the directives of his superiors, but [with] wide discretionary powers in planning operations on his own initiative," he incurred individual criminal liability for crimes against the Jewish people, as much as his superiors. Likewise, with respect to his subordinates who actually carried out the executions, "[...] the legal and moral responsibility of he who delivers up the victim to his death is, in our opinion, no smaller, and may be greater, than the responsibility of he who kills the victim with his own hands"113. The District Court found that participation in the extermination plan with knowledge of the plan rendered the person liable "as an accomplice to the extermination of all [...] victims from 1941 to 1945, irrespective of the extent of his participation"114.

544. The findings of the Israeli courts in this case support the principle that the *mens rea*, or special intent, required for complicity in genocide is *knowledge* of the genocidal plan, coupled with the *actus reus* of participation in the execution of such plan. Crucially, then, it does not appear that the specific intent to commit the crime of genocide, as reflected in the phrase "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," is required for complicity or accomplice liability.

545. In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while

knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

546. At this juncture, the Chamber will address another issue, namely that which, with respect to complicity in genocide covered under Article 2(3)(e) of the Statute, may arise from the forms of participation listed in Article 6 of the Statute entitled, "Individual Criminal Responsibility," and more specifically, those covered under paragraph 1 of the same Article. Indeed, under Article 6(1), "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Such forms of participation, which are summarized in the expression "[...] or otherwise aided or abetted [...]," are similar to the material elements of complicity, though they in and of themselves, characterize the crimes referred to in Articles 2 to 4 of the Statute, which include namely genocide.

547. Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.

548. Another difference between complicity in genocide and the principle of abetting in the planning, preparation or execution a genocide as per Article 6(1), is that, in theory, complicity requires a positive act, i.e. an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action. Thus, in the Jefferson and Coney cases, it was held that "The accused [...] only accidentally present [...] must know that his presence is actually encouraging the principal(s)"115. Similarly, the French Court of Cassation found that,

> "A person who, by his mere presence in a group of aggressors provided moral support to the assailants, and fully supported the criminal intent of the group, is liable as an accomplice"116[unofficial translation].

The International Criminal Tribunal for the Former Yugoslavia also concluded in the Tadic judgment that :

> "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."117

6.3.3. Direct and Public Incitement to commit Genocide

THE CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, PUNISHABLE UNDER ARTICLE 2(3)(c) OF THE STATUTE

549. Under count 4, the Prosecutor charges Akayesu with direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute.

550. Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*. The Nuremberg Tribunal found that: "Streicher's

incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity". 118

551. At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed".119

552. Under Common law systems, incitement tends to be viewed as a particular form of criminal participation, punishable as such. Similarly, under the legislation of some Civil law countries, including Argentina, Bolivia, Chili, Peru, Spain, Uruguay and Venezuela, provocation, which is similar to incitement, is a specific form of participation in an offence120; but in most Civil law systems, incitement is most often treated as a form of complicity.

553. The Rwandan Penal Code is one such legislation. Indeed, as stated above, in the discussion on complicity in genocide, it does provide that direct and public incitement or provocation is a form of complicity. In fact, Article 91 subparagraph 4 provides that an accomplice shall mean " A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results". 121

554. Under the Statute, direct and public incitement is expressly defined as a specific crime, punishable as such, by virtue of Article 2(3)(c). With respect to such a crime, the Chamber deems it appropriate to first define the three terms: incitement, direct and public.

555. Incitement is defined in Common law systems as encouraging or persuading another to commit an offence122. One line of authority in Common law would also view threats or other forms of pressure as a form of incitement123. As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication124. Such a provocation, as defined under Civil law, is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute, that is to say it is both direct and public.

556. The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition125. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television 126. It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement127.

557. The "direct" element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement128. Under Civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence129. However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience130. The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime. 131

558. The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

559. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

560. The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

561. Therefore, the issue before the Chamber is whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful. It appears from the *travaux préparatoires* of the Convention on Genocide that the drafters of the Convention considered stating explicitly that incitement to commit genocide could be punished, whether or not it was successful. In the end, a majority decided against such an approach. Nevertheless, the Chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.

562. There are under Common law so-called inchoate offences, which are punishable by virtue of the criminal act alone, irrespective of the result thereof, which may or may not have been achieved. The Civil law counterparts of inchoate offences are known as [*infractions formelles*] (acts constituting an offence *per se* irrespective of their results), as opposed to [*infractions matérielles*] (strict liability offences). Indeed, as is the case with inchoate offenses, in [*infractions formelles*], the method alone is punishable. Put another way, such offenses are "deemed to have been consummated regardless of the result achieved [*unofficial translation*]"132 contrary to [*infractions matérielles*]. Indeed, Rwandan lawmakers appear to characterize the acts defined under Article 91(4) of the Rwandan Penal Code as so-

called [*infractions formelles*], since provision is made for their punishment even where they proved unsuccessful. It should be noted, however, that such offences are the exception, the rule being that in theory, an offence can only be punished in relation to the result envisaged by the lawmakers. In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.

6.4. Crimes against Humanity (Article 3 of the Statute)

Crimes against Humanity - Historical development

563. Crimes against humanity were recognized in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Article 6(c) of the Charter of Nuremberg Tribunal defines crimes against humanity as

> "..murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Chamber, whether or not in violation of the domestic law of the country where perpetrated."

564. Article II of Law No. 10 of the Control Council Law defined crimes against humanity as:

> "Atrocities and Offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated."133

565. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character134. In fact, the concept of crimes against humanity had been recognised long before Nuremberg. On 28 May 1915, the Governments of France, Great Britain and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as "crimes against humanity and civilisation for which all the members of the Turkish government will be held responsible together with its agents implicated in the massacres".135 The 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties formulated by representatives from several States and presented to the Paris Peace Conference also referred to "offences against ... the laws of humanity".136

566. These World War I notions derived, in part, from the Martens clause of the Hague Convention (IV) of 1907, which referred to "the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience". In 1874, George Curtis called slavery a "crime against humanity". Other such phrases as "crimes against mankind" and "crimes against the human family" appear far earlier in human history (see 12 N.Y.L. Sch. J. Hum. Rts 545 (1995)).

567. The Chamber notes that, following the Nuremberg and Tokyo trials, the concept of crimes against humanity underwent a gradual evolution in the *Eichmann, Barbie, Touvier and Papon* cases.

568. In the *Eichmann* case, the accused, Otto Adolf Eichmann, was charged with offences under Nazi and Nazi Collaborators (punishment) Law, 5710/1950, for his participation in the implementation of the plan know as the Final Solution of the Jewish problem'. Pursuant to Section I (b) of the said law:

> "Crime against humanity means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population , and persecution on national, racial, religious or political grounds."137

The district court in the Eichmann stated that crimes against humanity differs from genocide in that for the commission of genocide special intent is required. This special intent is not required for crimes against humanity138. Eichmann was convicted by the District court and sentenced to death. Eichmann appealed against his conviction and his appeal was dismissed by the supreme court.

569. In the *Barbie* case, the accused, Klaus Barbie, who was the head of the Gestapo in Lyons from November 1942 to August 1944, during the wartime occupation of France, was convicted in 1987 of crimes against humanity for his role in the deportation and extermination of civilians. Barbie appealed in cassation, but the appeal was dismissed. For the purposes of the present Judgment, what is of interest is the definition of crimes against humanity employed by the Court. The French Court of Cassation, in a Judgment rendered on 20 December 1985, stated:

> Crimes against humanity, within the meaning of Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, which were not subject to statutory limitation of the right of prosecution, even if they were crimes which could also be classified as war crimes within the meaning of Article 6(b) of the Charter, *were inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.* (Words italicized by the Court)139

570. This was affirmed in a Judgment of the Court of Cassation of 3 June 1988, in which the Court held that:

> The fact that the accused, who had been found guilty of one of the crimes enumerated in Article 6(c) of the Charter of the Nuremberg Tribunal, in perpetrating that crime took part in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, constituted not a distinct offence or an aggravating circumstance but rather *an essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.*140(Emphasis added)

571. The definition of crimes against humanity developed in *Barbie* was further developed in the *Touvier* case. In that case, the accused, Paul Touvier, had been a high-ranking officer in the Militia (*Milice*) of Lyons, which operated in "Vichy" France during the German occupation. He was convicted of crimes against humanity for his role in the shooting of seven Jews at Rillieux on 29 June 1994 as a reprisal for the assassination by members of the Resistance, on the previous day, of the Minister for Propaganda of the "Vichy" Government.

572. The Court of Appeal applied the definition of crimes against humanity used in *Barbie*, stating that:

> The specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy.141

573. Applying this definition, the Court of Appeal held that Touvier could not be guilty of crimes against humanity since he committed the acts in question in the name of the "Vichy" State, which was not a State practising a policy of ideological supremacy, although it collaborated with Nazi Germany, which clearly did practice such a policy.

574. The Court of Cassation allowed appeal from the decision of the Court of Appeal, on the grounds that the crimes committed by the accused had been committed at the instigation of a Gestapo officer, and to that extent were linked to Nazi Germany, a State practising a policy of ideological supremacy against persons by virtue of their membership of a racial or religious community. Therefore the crimes could be categorised as crimes against humanity. Touvier was eventually convicted of crimes against humanity by the *Cour d'Assises des Yvelines* on 20 April 1994.142

575. The definition of crimes against humanity used in *Barbie* was later affirmed by the ICTY in its *Vukovar* Rule 61 Decision of 3 April 1996 (IT-95-13-R61), to support its finding that crimes against humanity applied equally where the victims of the acts were members of a resistance movement as to where the victims were civilians:

> "29. ... Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council resolution 780, noted, "it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. ... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose." (Doc S/1994/674, para. 78).

576. This conclusion is supported by case law. In the Barbie case, the French Cour de Cassation said that:

> "inhumane acts and persecution which, in the name of a State practising a policy of ideological hegemony, were committed systematically or collectively not only against individuals because of their membership in a racial or religious group but also against the adversaries of that policy whatever the form of the opposition" could be considered a crime against humanity. (Cass. Crim. 20 December 1985).

577. Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed as part of a widespread of systematic attack directed against any civilian population, with knowledge of the attack. These enumerated acts are murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this article or any other crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid;

other inhumane acts of a similar character intentionally causing great suffering , or serious injury to body or mental or physical health.143

Crimes against Humanity in Article 3 of the Statute of the Tribunal

578. The Chamber considers that Article 3 of the Statute confers on the Chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. This category of crimes may be broadly broken down into four essential elements, namely :

(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
(ii) the act must be committed as part of a wide spread or systematic attack;
(iii) the act must be committed against members of the civilian population;
(iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

The act must be committed as part of a wide spread or systematic attack.

579. The Chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both.144

580. The concept of widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy. 145

581. The concept of attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

The act must be directed against the civilian population

582. The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.146 Where there are certain individuals within the civilian population who do not come within the definition of civilians , this does not deprive the population of its civilian character.147

The act must be committed on discriminatory grounds

583. The Statute stipulates that inhumane acts committed against the civilian population must be committed on national, political, ethnic, racial or religious grounds.' Discrimination on the basis of a person's political ideology satisfies the requirement of political' grounds as envisaged in Article 3 of the Statute. For definitions on national, ethnic, racial or religious grounds see supra.

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584. Inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was to further his attacks on the group discriminated against on one of the grounds mentioned in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity. 148

The enumerated acts

585. Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the category of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.

586. The Chamber notes that the accused is indicted for murder, extermination, torture, rape and other acts that constitute inhumane acts. The Chamber in interpreting Article 3 of the Statute, shall focus its discussion on these acts only.

Murder

587. The Chamber considers that murder is a crime against humanity, pursuant to Article 3 (a) of the Statute. The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act.

588. The Chamber notes that article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "Assassinat". There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.

589. The Chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are :

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensures or not.

590. Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of this civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.

Extermination

591. The Chamber considers that extermination is a crime against humanity, pursuant to Article 3 (c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not

required for murder.

592. The Chamber defines the essential elements of extermination as the following :

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional.
3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population;
5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

Torture

593. The Chamber considers that torture is a crime against humanity pursuant to Article 3(f) of the Statute. Torture may be defined as :

> ..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.'149

594. The Chamber defines the essential elements of torture as :

(i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:

(a) to obtain information or a confession from the victim or a third person;
(b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
(c) for the purpose of intimidating or coercing the victim or the third person;
(d) for any reason based on discrimination of any kind.

(ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.

595. The Chamber finds that torture is a crime against humanity if the following further elements are satisfied :

(a) Torture must be perpetrated as part of a widespread or systematic attack;
(b) the attack must be against the civilian population;
(c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.

Rape

596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of

the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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.

598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed :

(a) as part of a wide spread or systematic attack;
(b) on a civilian population;
(c) on certained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute)

Article 4 of the Statute

599. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) collective punishments;

c) taking of hostages;

d) acts of terrorism;

e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) pillage;

g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are

recognised as indispensable by civilised peoples;

h) threats to commit any of the foregoing acts.

600. Prior to developing the elements for the above cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment upon the applicability of common Article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

Applicability of Common Article 3 and Additional Protocol II

601. The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.

602. The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to "armed conflicts not of an international character", whereas for a conflict to fall within the ambit of Additional Protocol II, it must "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application. 150

603. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria151.

604. The Security Council, when delimiting the subject-matter jurisdiction of the ICTR152, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

> " Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed

only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.
In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions."153

605. Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibilty of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTY 154, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are beyond any doubt part of customary law.

606. Notwithstanding the above, a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council. Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question', so long as the conflict were covered, at the very least, by the customary norms of Common Article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in Article 4 of the Statute.

607. However, the Chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts 6, 8, 10, 12 and 15. For the first four of these, there is mention only of Common Article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count 15 makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the Chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the Chamber finds it necessary and reasonable to establish the applicability of both Common Article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.

608. It is today clear that the norms of Common Article 3 have acquired the status of customary law in

that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the Tadic judgment 155 that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope156.

609. However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals Chamber concurred with this view inasmuch as "[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law[ ]", but not all.157

610. Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II 158. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3159 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

Individual Criminal Responsibility

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 and parts of Article 4 of Additional Protocol II - which comprise the subject-matter jurisdiction of Article 4 of the Statute - form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.

612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the Tadic case. In the ICTY Appeals Chamber, the problem was posed thus:

> " Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions 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.160"

613. Basing itself on rulings of the Nuremberg Tribunal, on "elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

> " 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 protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.161"

614. This was affirmed by the ICTY Trial Chamber when it rendered in the Tadic judgment162.

615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.

616. It should be noted, moreover, that Article 4 of the ICTR Statute states that, "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977" (emphasis added). The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned Appeals Chamber Decision in Tadic , paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims - and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises *serious* violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.

617. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.

The nature of the conflict

618. As aforesaid, it will not suffice to establish that as the criteria of Common Article 3 have been met, the whole of Article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character. Hence, the Chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of Article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

Common Article 3

619. The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an international character'. An inherent question follows such a description, namely, what constitutes an

armed conflict? The Appeals Chamber in the Tadic decision on Jurisdiction163 held "that an armed conflict exists whenever there is [...] 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 [...] in the case of internal conflicts, a peaceful settlement is reached". Similarly, the Chamber notes that the ICRC commentary on Common Article 3164 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

> That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
>
> That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
>
> (a) That the *de jure* Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or
>
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

620. The above reference' criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections165. The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent166. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

621. Evidence presented in relation to paragraphs 5-11 of the Indictment167, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.

Additional Protocol II

622. As stated above, Additional Protocol II applies to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

623. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

> (i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
>
> (ii) the dissident armed forces or other organized armed groups were under responsible command;
>
> (iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
>
> (iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

624. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.168

625. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

626. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.

627. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment169. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law170. The Chamber finds the said

conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

Ratione personae

628. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II - the class of victims and the class of perpetrators.

The class of victims

629. Paragraph 10 of the Indictment reads, "The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities". This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of "persons taking no active part in the hostilities" (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, "all persons who do not take a direct part or who have ceased to take part in hostilities". These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are *indeed* persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

The class of perpetrators

630. The four Geneva Conventions - as well as the two Additional Protocols - as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.

631. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols.

632. However, the Indictment does not specifically aver that the accused falls in the class of persons who may be held responsible for serious violations of Common Article 3 and Additional Protocol II. It has not been alleged that the accused was officially a member of the Rwandan armed forces' (in its broadest sense). It could, hence, be objected that, as a civilian, Article 4 of the Statute, which concerns the law of armed conflict, does not apply to him.

633. It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking171. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict172.The principle of holding civilians liable

for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.

634. Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense. Further, the Chamber notes, in light of the above dicta, that the accused was not, at the time of the events in question, a mere civilian but a bourgmestre. The Chamber therefore concludes that, if so established factually, the accused could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.

Ratione loci

635. There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied "to all persons affected by an armed conflict as defined in Article 1". The commentary thereon 173 specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on jurisdiction in Tadic , wherein it was held that "the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations"174.

636. Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front'. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

Conclusion

637. The applicability of Common Article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the Chamber to make its findings with regard the accused's culpability under Article 4 of the Statute. This will be dealt with in section 7 of the judgment.

ANNEX 2

ICC Statute Article 8

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Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death

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or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel

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using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

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(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

ANNEX 3

Military and Paramilitary Activities (Nicaragua v United States) 1986 I.C.J. 14 27 June 1896;

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CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(Nicaragua v. United States of America)

International Court of Justice
June 27, 1986

***14** MERITS

Failure of Respondent to appear - Statute of the Court, Article 53 - Equality of the parties.
Jurisdiction of the Court - Effect of application of multilateral treaty reservation to United States declaration of acceptance of jurisdiction under Statute, Article 36, paragraph 2 - Third State 'affected' by decision of the Court on dispute arising under a multilateral treaty - Character of objection to jurisdiction not exclusively preliminary - Rules of Court, Article 79.

Justiciability of the dispute - 'Legal dispute' (Statute, Article 36, paragraph 2).
Establishment of facts - Relevant period - Powers of the Court - Press information and matters of public knowledge - Statements by representatives of States - Evidence of witnesses - Implicit admissions - Material not presented in accordance with Rules of Court.
Acts imputable to respondent State - Mining of ports - Attacks on oil installations and other objectives - Overflights - Support of armed bands opposed to Government of applicant State - Encouragement of conduct contrary to principles of humanitarian law - Economic pressure - Circumstances precluding international responsibility - Possible justification of imputed acts - Conduct of Applicant during relevant period.
Applicable law - Customary international law - Opinio juris and State practice - Significance of concordant views of Parties - Relationship between customary international law and treaty law - United Nations Charter - Significance of Resolutions of United Nations General Assembly and Organization of American States General Assembly.
***15** Principle prohibiting recourse to the threat or use of force in international relations - Inherent right of self-defence - Conditions for exercise - Individual and collective self-defence - Response to armed attack - Declaration of having been the object of armed attack and request for measures in the exercise of collective self-defence.
Principle of non-intervention - Content of the principle - Opinion juris - State practice - Question of collective counter-measures in response to conduct not amounting to armed attack.
State sovereignty - Territory - Airspace - Internal and territorial waters - Right of access of foreign vessels.
Principles of humanitarian law - 1949 Geneva Conventions - Minimum rules applicable - Duty of States not to encourage disrespect for humanitarian law - Notification of existence and location of mines.
Respect for human rights - Right of States to choose political system, ideology and alliances.
1956 Treaty of Friendship, Commerce and Navigation - Jurisdiction of the Court - Obligation under customary international law not to commit acts calculated to defeat object and purpose of a treaty - Review of relevant treaty provisions.
Claim for reparation.
Peaceful settlement of disputes.
THE COURT,
composed as above,
delivers the following Judgment:
1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of the Statute.
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all

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other States entitled to appear before the Court were notified of the Application.
3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 10 May 1984, the Court rejected a request made by the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.
4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed 30 June 1984 as time-limit for the filing of a Memorial by the Republic of Nicaragua and 17 August 1984 as time-limit for the filing of a Counter- Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.
5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties ***17** in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.
6. Since the Court did not include upon the bench a judge of Nicaraguan nationality, Nicaragua, by a letter dated 3 August 1984, exercised its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge ad hoc to sit in the case. The person so designated was Professor Claude-Albert Colliard.
7. On 15 August 1984, two days before the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. Having been supplied with the written observations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the phase of the proceedings then current.
8. On 8-10 October and 15-18 October 1984 the Court held public hearings at which it heard the argument of the Parties on the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.
9. By a Judgment dated 26 November 1984, the Court found that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court; that it had jurisdiction to entertain the Application in so far as it relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956, on the basis of Article XXIV of that Treaty; that it had jurisdiction to entertain the case; and that the Application was admissible.
10. By a letter dated 18 January 1985 the Agent of the United States referred to the Court's Judgment of 26 November 1984 and informed the Court as follows:
'the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.'
11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.
***18** 12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as 'Supplemental Annexes' to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents

were treated as 'new documents' and copies were transmitted to the United States of America, which did not lodge any objection to their production.
13. On 12-13 and 16-20 September 1985 the Court held public hearings at which it was addressed by the following representatives of Nicaragua: H.E. Mr. Carlos Arguello Gomez, Hon. Abram Chayes, Mr. Paul S. Reichler, Mr. Ian Brownlie, and Mr. Alain Pellet. The United States was not represented at the hearing. The following witnesses were called by Nicaragua and gave evidence: Commander Luis Carrion, Vice-Minister of the Interior of Nicaragua (examined by Mr. Brownlie); Dr. David MacMichael, a former officer of the United States Central Intelligence Agency (CIA) (examined by Mr. Chayes); Professor Michael John Glennon (examined by Mr. Reichler); Father Jean Loison (examined by Mr. Pellet); Mr. William Huper, Minister of Finance of Nicaragua (examined by Mr. Arguello Gomez). Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua. The verbatim records of the hearings and the information and documents supplied in response to these requests were transmitted by the Registrar to the United States of America.
14. Pursuant to Article 53, paragraph 2, of the Rules of Court, the pleadings and annexed documents were made accessible to the public by the Court as from the date of opening of the oral proceedings.
15. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Nicaragua:
in the Application:
'Nicaragua, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare as follows:
(a) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under:
- Article 2 (4) of the United Nations Charter;
- Articles 18 and 20 of the Charter of the Organization of American States;
- Article 8 of the Convention on Rights and Duties of States;
- Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.
(b) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:
19 - armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.
(c) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.
(d) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.
(e) That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.
(f) That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.
(g) That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately: from all use of force - whether direct or indirect, overt or covert - against Nicaragua, and from all threats of force against Nicaragua;
from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua;
from all support of any kind - including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support - to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua;
from all efforts to restrict, block or endanger access to or from Nicaraguan ports;

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and from all killings, woundings and kidnappings of Nicaraguan citizens.
(h) That the United States has an obligation to pay Nicaragua, in its own right and as parens patriae for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court. Nicaragua reserves the right to introduce to the Court a precise evaluation of the damages caused by the United States';
in the Memorial on the merits:
'The Republic of Nicaragua respectfully requests the Court to grant the following relief:
First: the Court is requested to adjudge and declare that the United ***20*** States has violated the obligations of international law indicated in this Memorial, and that in particular respects the United States is in continuing violation of those obligations.
Second: the Court is requested to state in clear terms the obligation which the United States bears to bring to an end the aforesaid breaches of international law.
Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in this Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.
Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting from the violations of international law indicated in the substance of this Memorial.
With reference to the fourth request, the Republic of Nicaragua reserves the right to present evidence and argument, with the purpose of elaborating the minimum (and in that sense provisional) valuation of direct damages and, further, with the purpose of claiming compensation for the killing of nationals of Nicaragua and consequential loss in accordance with the principles of international law in respect of the violations of international law generally, in a subsequent phase of the present proceedings in case the Court accedes to the third request of the Republic of Nicaragua.
16. At the conclusion of the last statement made on behalf of Nicaragua at the hearing, the final submissions of Nicaragua were presented, which submissions were identical to those contained in the Memorial on the merits and set out above.
17. No pleadings on the merits having been filed by the United States of America, which was also not represented at the oral proceedings of September 1985, no submissions on the merits were presented on its behalf.

* * * * *

18. The dispute before the Court between Nicaragua and the United States concerns events in Nicaragua subsequent to the fall of the Government of President Anastasio Somoza Debayle in Nicaragua in July 1979, and activities of the Government of the United States in relation to Nicaragua since that time. Following the departure of President Somoza, a Junta of National Reconstruction and an 18-member government was installed by the body which had led the armed opposition to President Somoza, the Frente Sandinista de Liberacion Nacional (FSLN). That body had initially an extensive share in the new government, described as a 'democratic coalition', and as a result of later resignations and reshuffles, became ***21*** almost its sole component. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.
19. The attitude of the United States Government to the 'democratic coalition government' was at first favourable; and a programme of economic aid to Nicaragua was adopted. However by 1981 this attitude had changed. United States aid to Nicaragua was suspended in January 1981 and terminated in April 1981. According to the United States, the reason for this change of attitude was reports of involvement of the Government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador. There was however no interruption in diplomatic relations, which have continued to be maintained up to the present time. In September 1981, according to testimony called by Nicaragua, it was decided to plan and undertake activities directed against Nicaragua.
20. The armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups: the Fuerza Democratica

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Nicaraguense (FDN) and the Alianza Revolucionaria Democratica (ARDE). The first of these grew from 1981 onwards into a trained fighting force, operating along the borders with Honduras; the second, formed in 1982, operated along the borders with Costa Rica. The precise extent to which, and manner in which, the United States Government contributed to bringing about these developments will be studied more closely later in the present Judgment. However, after an initial period in which the 'covert' operations of United States personnel and persons in their pay were kept from becoming public knowledge, it was made clear, not only in the United States press, but also in Congress and in official statements by the President and high United States officials, that the United States Government had been giving support to the contras, a term employed to describe those fighting against the present Nicaraguan Government. In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting 'directly or indirectly, military or paramilitary operations in Nicaragua'. According to Nicaragua, the contras have caused it considerable material damage and widespread loss of life, and have also committed such acts as killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping. It is contended by Nicaragua that the United States Government is effectively in control of the contras, that it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua.

21. Nicaragua claims furthermore that certain military or paramilitary operations against it were carried out, not by the contras, who at the time claimed responsibility, but by persons in the pay of the United States ***22*** Government, and under the direct command of United States personnel, who also participated to some extent in the operations. These operations will also be more closely examined below in order to determine their legal significance and the responsibility for them; they include the mining of certain Nicaraguan ports in early 1984, and attacks on ports, oil installations, a naval base, etc. Nicaragua has also complained of overflights of its territory by United States aircraft, not only for purposes of intelligence-gathering and supply to the contras in the field, but also in order to intimidate the population.

22. In the economic field, Nicaragua claims that the United States has withdrawn its own aid to Nicaragua, drastically reduced the quota for imports of sugar from Nicaragua to the United States, and imposed a trade embargo; it has also used its influence in the Inter-American Development Bank and the International Bank for Reconstruction and Development to block the provision of loans to Nicaragua.

23. As a matter of law, Nicaragua claims, inter alia, that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary international law forbidding intervention; and that the United States has acted in violation of the sovereignty of Nicaragua, and in violation of a number of other obligations established in general customary international law and in the inter-American system. The actions of the United States are also claimed by Nicaragua to be such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

24. As already noted, the United States has not filed any pleading on the merits of the case, and was not represented at the hearings devoted thereto. It did however make clear in its Counter-Memorial on the questions of jurisdiction and admissibility that 'by providing, upon request, proportionate and appropriate assistance to third States not before the Court' it claims to be acting in reliance on the inherent right of self-defence 'guaranteed . . . by Article 51 of the Charter' of the United Nations, that is to say the right of collective self-defence.

25. Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua, in April 1984 (as the Court had occasion to note in its Order of 10 May 1984, and in its Judgment on jurisdiction and admissibility of 26 November 1984, I.C.J. Reports 1984, p. 432, para. 91), and on a number of other occasions. The subject-matter of the dispute also forms part of wider issues affecting Central America at present being dealt with on a regional basis in the ***23*** context of what is known as the 'Contadora Process' (I.C.J. Reports 1984, pp. 183-185, paras. 34-36; pp. 438-441, paras. 102-108).

* * *

26. The position taken up by the Government of the United States of America in the present proceedings, since the delivery of the Court's Judgment of 26 November 1984, as defined in the letter from the United States Agent dated 18 January 1985, brings into operation Article 53 of the Statute of the Court, which provides that 'Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim'. Nicaragua, has, in its Memorial and oral argument, invoked Article 53 and asked for a decision in favour of its claim. A special feature of the present case is that the United States only ceased to take part in the proceedings after a Judgment had been given adverse to its contentions on jurisdiction and admissibility. Furthermore, it stated when doing so 'that the judgment of the Court was clearly and manifestly erroneous as to both fact and law', that it 'remains firmly of the view . . . that the Court is without jurisdiction to entertain the dispute' and that the United States 'reserves its rights in respect of any decision by the Court regarding Nicaragua's claims'.

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice (cf. Fisheries Jurisdiction, I.C.J. Reports 1973, p. 7, para. 12; p. 54, para. 13; I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18; Nuclear Tests, I.C.J. Reports 1974, p. 257, para. 15; p. 461, para. 15; Aegean Sea Continental Shelf, I.C.J. Reports 1978, p. 7, para. 15; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 18, para. 33). In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to 'reserve its rights' ***24*** in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949, p. 248).

28. When Article 53 of the Statute applies, the Court is bound to 'satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim' of the party appearing is well founded in fact and law. In the present case, the Court has had the benefit of both Parties pleading before it at the earlier stages of the procedure, those concerning the request for the indication of provisional measures and to the questions of jurisdiction and admissibility. By its Judgment of 26 November 1984, the Court found, inter alia, that it had jurisdiction to entertain the case; it must however take steps to 'satisfy itself' that the claims of the Applicant are 'well founded in fact and law'. The question of the application of Article 53 has been dealt with by the Court in a number of previous cases, referred to above, and the Court does not therefore find it necessary to recapitulate the content of these decisions. The reasoning adopted to dispose of the basic problems arising was essentially the same, although the words used may have differed slightly from case to case. Certain points of principle may however be restated here. A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to 'satisfy itself' that that party's claim is well founded in fact and law.

29. The use of the term 'satisfy itself' in the English text of the Statute (and in the French text the term 's'assurer') implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle jura novit curia signifies that the Court is not

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solely dependent on the argument of the parties before it with respect to the applicable law (cf. 'Lotus', P.C.I.J., Series A, No. 10, p. 31), so that the absence of one party has less impact. As the Court observed in the Fisheries Jurisdiction cases:

'The Court . . ., as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be ***25*** relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.' (I.C.J. Reports 1974, p. 9, para. 17; p. 181, para. 18.)

Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly, as will be explained below (paragraphs 184 and 185), when those views are concordant. In the present case, the burden laid upon the Court is therefore somewhat lightened by the fact that the United States participated in the earlier phases of the case, when it submitted certain arguments on the law which have a bearing also on the merits.

30. As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties (cf. Brazilian Loans, P.C.I.J., Series A, No. 20/21, p. 124; Nuclear Tests, I.C.J. Reports 1974, pp. 263-264, paras. 31, 32). Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent. It is of course for the party appearing to prove the allegations it makes, yet as the Court has held:

'While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice.' (Corfu Channel, I.C.J. Reports 1949, p. 248.)

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing 'it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts' (Nuclear Tests, I.C.J. Reports 1974, p. 263, para. 31; p. 468, para. 32). On the other hand, the Court has to emphasize ***26*** that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

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32. Before proceeding further, the Court considers it appropriate to deal with a preliminary question, relating to what may be referred to as the justiciability of the dispute submitted to it by Nicaragua. In its Counter- Memorial on jurisdiction and admissibility the United States advanced a number of arguments why the claim should be treated as inadmissible: inter alia, again according to the United States, that a claim of unlawful use of armed force is a matter committed by the United Nations Charter and by practice to the exclusive competence of other organs, in particular the Security Council; and that an 'ongoing armed conflict' involving the use of armed force contrary to the

Charter is one with which a court cannot deal effectively without overstepping proper judicial bounds. These arguments were examined by the Court in its Judgment of 26 November 1984, and rejected. No further arguments of this nature have been submitted to the Court by the United States, which has not participated in the subsequent proceedings. However the examination of the merits which the Court has now carried out shows the existence of circumstances as a result of which, it might be argued, the dispute, or that part of it which relates to the questions of use of force and collective self-defence, would be nonjusticiable.

33. In the first place, it has been suggested that the present dispute should be declared non-justiciable, because it does not fall into the category of 'legal disputes' within the meaning of Article 36, paragraph 2, of the Statute. It is true that the jurisdiction of the Court under that provision is limited to 'legal disputes' concerning any of the matters enumerated in the text. The question whether a given dispute between two States is or is not a 'legal dispute' for the purposes of this provision may itself be a matter in dispute between those two States; and if so, that dispute is to be ***27*** settled by the decision of the Court in accordance with paragraph 6 of Article 36. In the present case, however, this particular point does not appear to be in dispute between the Parties. The United States, during the proceedings devoted to questions of jurisdiction and admissibility, advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible. It relied inter alia on proviso (c) to its own declaration of acceptance of jurisdiction under Article 36, paragraph 2, without ever advancing the more radical argument that the whole declaration was inapplicable because the dispute brought before the Court by Nicaragua was not a 'legal dispute' within the meaning of that paragraph. As a matter of admissibility, the United States objected to the application of Article 36, paragraph 2, not because the dispute was not a 'legal dispute', but because of the express allocation of such matters as the subject of Nicaragua's claims to the political organs under the United Nations Charter, an argument rejected by the Court in its Judgment of 26 November 1984 (I.C.J. Reports 1984, pp. 431 - 436). Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case - an argument which the Court was again unable to uphold (ibid., pp. 436-438) -, it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. In short, the Court can see no indication whatsoever that, even in the view of the United States, the present dispute falls outside the category of 'legal disputes' to which Article 36, paragraph 2, of the Statute applies. It must therefore proceed to examine the specific claims of Nicaragua in the light of the international law applicable.

34. There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter. Yet it is also suggested that, for another reason, the questions of this kind which arise in the present case are not justiciable, that they fall outside the limits of the kind of questions a court can deal with. It is suggested that the plea of collective self-defence which has been advanced by the United States as a justification for its actions with regard to Nicaragua requires the Court to determine whether the United States was legally justified in adjudging itself under a necessity, because its own security was in jeopardy, to use force in response to foreign intervention in El Salvador. Such a determination, it is said, involves a pronouncement on political and military matters, not a question of a kind that a court can usefully attempt to answer.

35. As will be further explained below, in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not ***28*** been raised. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. To resolve the first of these questions, the Court does not have to determine whether the United States, or the State which may have been under attack, was faced with a necessity of reacting. Nor does its examination, if it determines that an armed attack did occur, of issues relating to the collective character of the self-defence and the kind of reaction, necessarily involve it in any evaluation of military considerations. Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

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36. By its Judgment of 26 November 1984, the Court found that it had jurisdiction to entertain the present case, first on the basis of the United States declaration of acceptance of jurisdiction, under the optional clause of Article 36, paragraph 2, of the Statute, deposited on 26 August 1946 and secondly on the basis of Article XXIV of a Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956. The Court notes that since the institution of the present proceedings, both bases of jurisdiction have been terminated. On 1 May 1985 the United States gave written notice to the Government of Nicaragua to terminate the Treaty, in accordance with Article XXV, paragraph 3, thereof; that notice expired, and thus terminated the treaty relationship, on 1 May 1986. On 7 October 1985 the United States deposited with the Secretary-General of the United Nations a notice terminating the declaration under the optional clause, in accordance with the terms of that declaration, and that notice expired on 7 April 1986. These circumstances do not however affect the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, or its jurisdiction under Article XXIV, paragraph 2, of the Treaty to determine 'any dispute between the Parties as to the interpretation or application' of the Treaty. As the Court pointed out in the Nottebohm case:
'When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent ***29*** lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.' (I.C.J. Reports 1953, p. 123.)

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37. In the Judgment of 26 November 1984 the Court however also declared that one objection advanced by the United States, that concerning the exclusion from the United States acceptance of jurisdiction under the optional clause of 'disputes arising under a multilateral treaty', raised 'a question concerning matters of substance relating to the merits of the case', and concluded:
'That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that aragraph 7, of the present Rules of Court, and declare tht the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984.' (I.C.J. Reports 1984, pp. 425-426, para. 76.)
38. The present case is the first in which the Court has had occasion to exercise the power first provided for in the 1972 Rules of Court to declare that a preliminary objection 'does not possess, in the circumstances of the case, an exclusively preliminary character'. It may therefore be appropriate to take this opportunity to comment briefly on the rationale of this provision of the Rules, in the light of the problems to which the handling of preliminary objections has given rise. In exercising its rule-making power under Article 30 of the Statute, and generally in approaching the complex issues which may be raised by the determination of appropriate procedures for the settlement of disputes, the Court has kept in view an approach defined by the Permanent Court of International Justice. That Court found that it was at liberty to adopt
'the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law' (Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 16).
39. Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits 'whenever the interests of the good administration of justice require it' (Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75, ***30*** p. 56), and in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' (ibid.). If this power was exercised, there was always a risk, namely that the Court would

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ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, - and this did in fact occur (Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

40. Taking into account the wide range of issues which might be presented as preliminary objections, the question which the Court faced was whether to revise the Rules so as to exclude for the future the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible. The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. In the Panevezys-Saldutiskis Railway case, the Permanent Court defined a preliminary objection as one

'submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits' (P.C.I.J., Series A/B, No. 76, p. 22).

If this view is accepted then of course every preliminary objection should be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. To find out, for instance, whether there is a dispute between the parties or whether the Court has jurisdiction, does not normally require an analysis of the merits of the case. However that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution adopted in 1972, and maintained in the 1978 Rules, concerning preliminary objections is the following: the Court is to give its decision

'by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection, or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.' (Art. 79, para. 7.)

41. While the variety of issues raised by preliminary objections cannot possibly be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by the Court at an early stage without examination of the merits. Above all, it is clear that a question of jurisdiction is one which requires decision at the preliminary ***31*** stage of the proceedings. The new rule enumerates the objections contemplated as follows:

'Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits . . .' (Art. 79, para. 1.)

It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage.

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42. The Court must thus now rule upon the consequences of the United States multilateral treaty reservation for the decision which it has to give. It will be recalled that the United States acceptance of jurisdiction deposited on 26 August 1946 contains a proviso excluding from its application:

'disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction'.

The 1984 Judgment included pronouncements on certain aspects of that reservation, but the Court then took the view that it was neither necessary nor possible, at the jurisdictional stage of the proceedings, for it to take a position on all the problems posed by the reservation.

43. It regarded this as not necessary because, in its Application, Nicaragua had not confined its claims to breaches of multilateral treaties but had also invoked a number of principles of 'general and customary international law', as well as the bilateral Treaty of Friendship, Commerce and Navigation of 1956. These principles remained binding as such, although they were also enshrined in treaty law provisions. Consequently, since the case had not been referred to the Court solely on the basis of multilateral treaties, it was not necessary for the Court, in order to consider the merits of Nicaragua's claim, to decide the scope of the reservation in question: 'the claim . . . would not in any

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event be barred by the multilateral treaty reservation' (I.C.J. Reports 1984, p. 425, para. 73). Moreover, it was not found possible for the reservation to be definitively dealt with at the jurisdictional stage of the proceedings. To make a judgment on the scope of the reservation would have meant giving a definitive interpretation of the term 'affected' in that reservation. In its 1984 Judgment, the Court held ***32*** that the term 'affected' applied not to multilateral treaties, but to the parties to such treaties. The Court added that if those parties wished to protect their interests 'in so far as these are not already protected by Article 59 of the Statute', they 'would have the choice of either instituting proceedings or intervening' during the merits phase. But at all events, according to the Court, 'the determination of the States 'affected' could not be left to the parties but must be made by the Court' (I.C.J. Reports 1984, p. 425, para. 75). This process could however not be carried out at the stage of the proceedings in which the Court then found itself; 'it is only when the general lines of the judgment to be given become clear', the Court said, 'that the States 'affected' could be identified' (ibid.). The Court thus concluded that this was 'a question concerning matters of substance relating to the merits of the case' (ibid., para. 76). Since 'the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem', the Court found that it

'has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation . . . does not possess, in the circumstances of the case, an exclusively preliminary character' (ibid., para. 76).

44. Now that the Court has considered the substance of the dispute, it becomes both possible and necessary for it to rule upon the points related to the United States reservation which were not settled in 1984. It is necessary because the Court's jurisdiction, as it has frequently recalled, is based on the consent of States, expressed in a variety of ways including declarations made under Article 36, paragraph 2, of the Statute. It is the declaration made by the United States under that Article which defines the categories of dispute for which the United States consents to the Court's jurisdiction. If therefore that declaration, because of a reservation contained in it, excludes from the disputes for which it accepts the Court's jurisdiction certain disputes arising under multilateral treaties, the Court must take that fact into account. The final decision on this point, which it was not possible to take at the jurisdictional stage, can and must be taken by the Court now when coming to its decision on the merits. If this were not so, the Court would not have decided whether or not the objection was well-founded, either at the jurisdictional stage, because it did not possess an exclusively preliminary character, or at the merits stage, because it did to some degree have such a character. It is now possible to resolve the question of the application of the reservation because, in the light of the Court's full examination of the facts of the case and the law, the implications of the argument of collective self-defence raised by the United States have become clear.

45. The reservation in question is not necessarily a bar to the United States accepting the Court's jurisdiction whenever a third State which may ***33*** be affected by the decision is not a party to the proceedings. According to the actual text of the reservation, the United States can always disregard this fact if it 'specially agrees to jurisdiction'. Besides, apart from this possibility, as the Court recently observed: 'in principle a State may validly waive an objection to jurisdiction which it might otherwise have been entitled to raise' (I.C.J. Reports 1985, p. 216, para. 43). But it is clear that the fact that the United States, having refused to participate at the merits stage, did not have an opportunity to press again at that stage the argument which, in the jurisdictional phase, it founded on its multilateral treaty reservation cannot be tantamount to a waiver of the argument drawn from the reservation. Unless unequivocally waived, the reservation constitutes a limitation on the extent of the jurisdiction voluntarily accepted by the United States; and, as the Court observed in the Aegean Sea Continental Shelf case,

'It would not discharge its duty under Article 53 of the Statute if it were to leave out of its consideration a reservation, the invocation of which by the Respondent was properly brought to its notice earlier in the proceedings.' (I.C.J. Reports 1978, p. 20, para. 47.)

The United States has not in the present phase submitted to the Court any arguments whatever, either on the merits proper or on the question - not exclusively preliminary - of the multilateral treaty reservation. The Court cannot therefore consider that the United States has waived the reservation or no longer ascribes to it the scope which the United States attributed to it when last stating its position on this matter before the Court. This conclusion is the more decisive inasmuch as a respondent's non-participation requires the Court, as stated for example in the Fisheries Jurisdiction cases, to exercise 'particular circumspection and . . . special care' (I.C.J. Reports 1974, p. 10, para. 17, and p. 181, para. 18).

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46. It has also been suggested that the United States may have waived the multilateral treaty reservation by its conduct of its case at the jurisdictional stage, or more generally by asserting collective self defence in accordance with the United Nations Charter as justification for its activities vis-a-vis Nicaragua. There is no doubt that the United States, during its participation in the proceedings, insisted that the law applicable to the dispute was to be found in multilateral treaties, particularly the United Nations Charter and the Charter of the Organization of American States; indeed, it went so far as to contend that such treaties supervene and subsume customary law on the subject. It is however one thing for a State to advance a contention that the law applicable to a given dispute derives from a specified source; it is quite another for that State to consent to the Court's having jurisdiction to entertain that dispute, and thus to apply that law to the dispute. The whole purpose of the United States argument as to the applicability of the United Nations and Organization of American ***34*** States Charters was to convince the Court that the present dispute is one 'arising under' those treaties, and hence one which is excluded from jurisdiction by the multilateral treaty reservation in the United States declaration of acceptance of jurisdiction. It is impossible to interpret the attitude of the United States as consenting to the Court's applying multilateral treaty law to resolve the dispute, when what the United States was arguing was that, for the very reason that the dispute 'arises under' multilateral treaties, no consent to its determination by the Court has ever been given. The Court was fully aware, when it gave its 1984 Judgment, that the United States regarded the law of the two Charters as applicable to the dispute; it did not then regard that approach as a waiver, nor can it do so now. The Court is therefore bound to ascertain whether its jurisdiction is limited by virtue of the reservation in question.

47. In order to fulfil this obligation, the Court is now in a position to ascertain whether any third States, parties to multilateral treaties invoked by Nicaragua in support of its claims, would be 'affected' by the Judgment, and are not parties to the proceedings leading up to it. The multilateral treaties discussed in this connection at the stage of the proceedings devoted to jurisdiction were four in number: the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928 (cf. I.C.J. Reports 1984, p. 422, para. 68). However, Nicaragua has not placed any particular reliance on the latter two treaties in the present proceedings; and in reply to a question by a Member of the Court on the point, the Nicaraguan Agent stated that while Nicaragua had not abandoned its claims under these two conventions, it believed 'that the duties and obligations established by these conventions have been subsumed in the Organization of American States Charter'. The Court therefore considers that it will be sufficient to examine the position under the two Charters, leaving aside the possibility that the dispute might be regarded as 'arising' under either or both of the other two conventions.

48. The argument of the Parties at the jurisdictional stage was addressed primarily to the impact of the multilateral treaty reservation on Nicaragua's claim that the United States has used force against it in breach of the United Nations Charter and of the Charter of the Organization of American States, and the Court will first examine this aspect of the matter. According to the views presented by the United States during the jurisdictional phase, the States which would be 'affected' by the Court's judgment were El Salvador, Honduras and Costa Rica. Clearly, even if only one of these States is found to be 'affected', the United States reservation takes full effect. The Court will for convenience first take the case of El Salvador, as there are certain special features in the position of this State. It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States ***35*** claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua. Moreover, El Salvador, confirming this assertion by the United States, told the Court in the Declaration of Intervention which it submitted on 15 August 1984 that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise for its benefit the right of collective self-defence. Consequently, in order to rule upon Nicaragua's complaint against the United States, the Court would have to decide whether any justification for certain United States activities in and against Nicaragua can be found in the right of collective self-defence which may, it is alleged, be exercised in response to an armed attack by Nicaragua on El Salvador. Furthermore, reserving for the present the question of the content of the applicable customary international law, the right of self- defence is of course enshrined in the United Nations Charter, so that the dispute is, to this extent, a dispute 'arising under a multilateral treaty' to which the United States, Nicaragua and El Salvador are parties.

49. As regards the Charter of the Organization of American States, the Court notes that Nicaragua

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bases two distinct claims upon this multilateral treaty: it is contended, first, that the use of force by the United States against Nicaragua in violation of the United Nations Charter is equally a violation of Articles 20 and 21 of the Organization of American States Charter, and secondly that the actions it complains of constitute intervention in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. The Court will first refer to the claim of use of force alleged to be contrary to Articles 20 and 21. Article 21 of the Organization of American States Charter provides:

'The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.'

Nicaragua argues that the provisions of the Organization of American States Charter prohibiting the use of force are 'coterminous with the stipulations of the United Nations Charter', and that therefore the violations by the United States of its obligations under the United Nations Charter also, and without more, constitute violations of Articles 20 and 21 of the Organization of American States Charter.

50. Both Article 51 of the United Nations Charter and Article 21 of the Organization of American States Charter refer to self-defence as an exception to the principle of the prohibition of the use of force. Unlike the United Nations Charter, the Organization of American States Charter does not use the expression 'collective self-defence', but refers to the case of 'self-defence in accordance with existing treaties or in fulfillment thereof', one such treaty being the United Nations Charter. Furthermore it is evident that if actions of the United States complied with all requirements of the United Nations Charter so as to constitute the exercise ***36*** of the right of collective self-defence, it could not be argued that they could nevertheless constitute a violation of Article 21 of the Organization of American States Charter. It therefore follows that the situation of El Salvador with regard to the assertion by the United States of the right of collective self-defence is the same under the Organization of American States Charter as it is under the United Nations Charter.

51. In its Judgment of 26 November 1984, the Court recalled that Nicaragua's Application, according to that State, does not cast doubt on El Salvador's right to receive aid, military or otherwise, from the United States (I.C.J. Reports 1984, p. 430, para. 86). However, this refers to the direct aid provided to the Government of El Salvador on its territory in order to help it combat the insurrection with which it is faced, not to any indirect aid which might be contributed to this combat by certain United States activities in and against Nicaragua. The Court has to consider the consequences of a rejection of the United States justification of its actions as the exercise of the right of collective self-defence for the sake of El Salvador, in accordance with the United Nations Charter. A judgment to that effect would declare contrary to treaty-law the indirect aid which the United States Government considers itself entitled to give the Government of El Salvador in the form of activities in and against Nicaragua. The Court would of course refrain from any finding on whether El Salvador could lawfully exercise the right of individual self- defence; but El Salvador would still be affected by the Court's decision on the lawfulness of resort by the United States to collective self-defence. If the Court found that no armed attack had occurred, then not only would action by the United States in purported exercise of the right of collective self- defence prove to be unjustified, but so also would any action which El Salvador might take or might have taken on the asserted ground of individual self- defence.

52. It could be argued that the Court, if it found that the situation does not permit the exercise by El Salvador of its right of self-defence, would not be 'affecting' that right itself but the application of it by El Salvador in the circumstances of the present case. However, it should be recalled that the condition of the application of the multilateral treaty reservation is not that the 'right' of a State be affected, but that the State itself be 'affected' - a broader criterion. Furthermore whether the relations between Nicaragua and El Salvador can be qualified as relations between an attacker State and a victim State which is exercising its right of self-defence, would appear to be a question in dispute between those two States. But El Salvador has not submitted this dispute to the Court; it therefore has a right to have the Court refrain from ruling upon a dispute which it has not submitted to it. Thus, the decision of the Court in this case would affect this right of El Salvador and consequently this State itself.

53. Nor is it only in the case of a decision of the Court rejecting the United States claim to be acting in self-defence that El Salvador would be ***37*** ' affected' by the decision. The multilateral treaty reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be 'adversely' or 'prejudicially' affected by the decision, even though this is clearly the case primarily in view. In other situations in which the

position of a State not before the Court is under consideration (cf. Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954, p. 32; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984, p. 20, para. 31) it is clearly impossible to argue that that State may be differently treated if the Court's decision will not necessarily be adverse to the interests of the absent State, but could be favourable to those interests. The multilateral treaty reservation bars any decision that would 'affect' a third State party to the relevant treaty. Here also, it is not necessary to determine whether the decision will 'affect' that State unfavourably or otherwise; the condition of the reservation is met if the State will necessarily be 'affected', in one way or the other.

54. There may of course be circumstances in which the Court, having examined the merits of the case, concludes that no third State could be 'affected' by the decision: for example, as pointed out in the 1984 Judgment, if the relevant claim is rejected on the facts (I.C.J. Reports 1984, p. 425, para. 75). If the Court were to conclude in the present case, for example, that the evidence was not sufficient for a finding that the United States had used force against Nicaragua, the question of justification on the grounds of self-defence would not arise, and there would be no possibility of El Salvador being 'affected' by the decision. In 1984 the Court could not, on the material available to it, exclude the possibility of such a finding being reached after fuller study of the case, and could not therefore conclude at once that El Salvador would necessarily be 'affected' by the eventual decision. It was thus this possibility which prevented the objection based on the reservation from having an exclusively preliminary character.

55. As indicated in paragraph 49 above, there remains the claim of Nicaragua that the United States has intervened in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. That Article provides:

'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.'

The potential link, recognized by this text, between intervention and the use of armed force, is actual in the present case, where the same activities attributed to the United States are complained of under both counts, and ***38** the response of the United States is the same to each complaint - that it has acted in self-defence. The Court has to consider what would be the impact, for the States identified by the United States as likely to be 'affected', of a decision whereby the Court would decline to rule on the alleged violation of Article 21 of the Organization of American States Charter, concerning the use of force, but passed judgment on the alleged violation of Article 18. The Court will not here enter into the question whether self- defence may justify an intervention involving armed force, so that it has to be treated as not constituting a breach either of the principle of non-use of force or of that of non-intervention. At the same time, it concludes that in the particular circumstances of this case, it is impossible to say that a ruling on the alleged breach by the United States of Article 18 of the Organization of American States Charter would not 'affect' El Salvador.

56. The Court therefore finds that El Salvador, a party to the United Nations Charter and to the Charter of the Organization of American States, is a State which would be 'affected' by the decision which the Court would have to take on the claims by Nicaragua that the United States has violated Article 2, paragraph 4, of the United Nations Charter and Articles 18, 20 and 21 of the Organization of American States Charter. Accordingly, the Court, which under Article 53 of the Statute has to be 'satisfied' that it has jurisdiction to decide each of the claims it is asked to uphold, concludes that the jurisdiction conferred upon it by the United States declaration of acceptance of jurisdiction under Article 36, paragraph 2, of the Statute does not permit the Court to entertain these claims. It should however be recalled that, as will be explained further below, the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.

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57. One of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the

proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court's task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. Thirdly, there is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to ***39** establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

58. A further aspect of this case is that the conflict to which it relates has continued and is continuing. It has therefore been necessary for the Court to decide, for the purpose of its definition of the factual situation, what period of time, beginning from the genesis of the dispute, should be taken into consideration. The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case. While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports. As the Court recalled in the Nuclear Tests cases, where facts, apparently of such a nature as materially to affect its decision, came to its attention after the close of the hearings:

'It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings.' (I.C.J. Reports 1974, p. 264, para. 33; p. 468, para. 34.)

Neither Party has requested such action by the Court; and since the reports to which reference has been made do not suggest any profound modification of the situation of which the Court is seised, but rather its intensification in certain respects, the Court has seen no need to reopen the hearings.

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59. The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of ***40** evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence. The absence of one of the parties restricts this procedure to some extent. The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence; when the situation is complicated by the non-appearance of one of them, then a fortiori the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.

60. The Court should now indicate how these requirements have to be met in this case so that it can properly fulfil its task under that Article of its Statute. In so doing, it is not unaware that its role is not a passive one; and that, within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.

61. In this context, the Court has the power, under Article 50 of its Statute, to entrust 'any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion', and such a body could be a group of judges selected from among those sitting in the case. In the present case, however, the Court felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant

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State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.

62. At all events, in the present case the Court has before it documentary material of various kinds from various sources. A large number of documents have been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in the proceedings, the Court has been careful to treat them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.

63. However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge. In the case of United States Diplomatic ***41*** and Consular Staff in Tehran, the Court referred to facts which 'are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries' (I.C.J. Reports 1980, p. 9, para. 12). On the basis of information, including press and broadcast material, which was 'wholly consistent and concordant as to the main facts and circumstances of the case', the Court was able to declare that it was satisfied that the allegations of fact were well-founded (ibid., p. 10, para. 13). The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

64. The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission.

65. However, it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. I.C.J. Reports 1980, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact.

66. At the hearings in this case, the applicant State called five witnesses to give oral evidence, and the evidence of a further witness was offered in ***42*** the form of an affidavit 'subscribed and sworn' in the United States, District of Columbia, according to the formal requirements in force in that place. A similar affidavit, sworn by the United States Secretary of State, was annexed to the Counter-Memorial of the United States on the questions of jurisdiction and admissibility. One of the witnesses presented by the applicant State was a national of the respondent State, formerly in the employ of a government agency the activity of which is of a confidential kind, and his testimony was kept strictly within certain limits; the witness was evidently concerned not to contravene the legislation of his country of origin. In addition, annexed to the Nicaraguan Memorial on the merits were two declarations, entitled 'affidavits', in the English language, by which the authors 'certify and declare' certain facts, each with a notarial certificate in Spanish appended, whereby a Nicaraguan notary authenticates the signature to the document. Similar declarations had been filed by Nicaragua along

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with its earlier request for the indication of provisional measures.
67. As regards the evidence of witnesses, the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench. Secondly, the Respondent did not itself present any witnesses of its own. This latter disadvantage merely represents one aspect, and a relatively secondary one, of the more general disadvantage caused by the non-appearance of the Respondent.
68. The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight; as the Court observed in relation to a particular witness in the Corfu Channel case:
'The statements attributed by the witness . . . to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence.' (I.C.J. Reports 1949, pp. 16-17.)
69. The Court has had to attach considerable significance to the declarations made by the responsible authorities of the States concerned in view of the difficulties which it has had to face in determining the facts. ***43** Nevertheless, the Court was still bound to subject these declarations to the necessary critical scrutiny. A distinctive feature of the present case was that two of the witnesses called to give oral evidence on behalf of Nicaragua were members of the Nicaraguan Government, the Vice-Minister of the Interior (Commander Carrion), and the Minister of Finance (Mr. Huper). The Vice- Minister of the Interior was also the author of one of the two declarations annexed to the Nicaraguan Memorial on the merits, the author of the other being the Minister for Foreign Affairs. On the United States side, an affidavit was filed sworn by the Secretary of State. These declarations at ministerial level on each side were irreconcilable as to their statement of certain facts. In the view of the Court, this evidence is of such a nature as to be placed in a special category. In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness - one who is not a party to the proceedings and stands to gain or lose nothing from its outcome - and secondly so much of the evidence of a party as is against its own interest. Indeed the latter approach was invoked in this case by counsel for Nicaragua.
70. A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve. The Court believes this approach to be the more justified in view of the need to respect the equality of the parties in a case where one of them is no longer appearing; but this should not be taken to mean that the non-appearing party enjoys a priori a presumption in its favour.
71. However, before outlining the limits of the probative effect of declarations by the authorities of the States concerned, the Court would recall that such declarations may involve legal effects, some of which it has defined in previous decisions (Nuclear Tests, United States Diplomatic and Consular Staff in Tehran cases). Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts. The Court is here concerned with the significance of the official declarations as evidence of specific facts and of their imputability to the States in question.
***44** 72. The declarations to which the Court considers it may refer are not limited to those made in

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the pleadings and the oral argument addressed to it in the successive stages of the case, nor are they limited to statements made by the Parties. Clearly the Court is entitled to refer, not only to the Nicaraguan pleadings and oral argument, but to the pleadings and oral argument submitted to it by the United States before it withdrew from participation in the proceedings, and to the Declaration of Intervention of El Salvador in the proceedings. It is equally clear that the Court may take account of public declarations to which either Party has specifically drawn attention, and the text, or a report, of which has been filed as documentary evidence. But the Court considers that, in its quest for the truth, it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant, whether or not such material has been drawn to its attention by a Party.
73. In addition, the Court is aware of the existence and the contents of a publication of the United States State Department entitled 'Revolution Beyond Our Borders', Sandinista Intervention in Central America intended to justify the policy of the United States towards Nicaragua. This publication was issued in September 1985, and on 6 November 1985 was circulated as an official document of the United Nations General Assembly and the Security Council, at the request of the United States (A/40/858; S/17612); Nicaragua had circulated in reply a letter to the Secretary-General, annexing inter alia an extract from its Memorial on the Merits and an extract from the verbatim records of the hearings in the case (A/40/907; S/17639). The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject. The representatives of Nicaragua before the Court during the hearings were aware of the existence of this publication, since it was referred to in a question put to the Agent of Nicaragua by a Member of the Court. They did not attempt to refute before the Court what was said in that publication, pointing out that materials of this kind 'do not constitute evidence in this case', and going on to suggest that it 'cannot properly be considered by the Court'. The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication.

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74. In connection with the question of proof of facts, the Court notes that Nicaragua has relied on an alleged implied admission by the United States. It has drawn attention to the invocation of collective self-defence by the United States, and contended that 'the use of the justification of ***45*** collective self-defence constitutes a major admission of direct and substantial United States involvement in the military and paramilitary operations' directed against Nicaragua. The Court would observe that the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful. If advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct, and of the wrongfulness of that conduct in the absence of the justification of self-defence. This reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence. However, in the present case the United States has not listed the facts or described the measures which it claims to have taken in self- defence; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence. Since it has not done this, the United States cannot be taken to have admitted all the activities, or any of them; the recourse to the right of self-defence thus does not make possible a firm and complete definition of admitted facts. The Court thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States; but it is certainly a recognition as to the imputability of some of the activities complained of.

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75. Before examining the complaint of Nicaragua against the United States that the United States is responsible for the military capacity, if not the very existence, of the contra forces, the Court will first deal with events which, in the submission of Nicaragua, involve the responsibility of the United States in a more direct manner. These are the mining of Nicaraguan ports or waters in early 1984; and certain attacks on, in particular, Nicaraguan port and oil installations in late 1983 and early 1984. It is the contention of Nicaragua that these were not acts committed by members of the

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contras with the assistance and support of United States agencies. Those directly concerned in the acts were, it is claimed, not Nicaraguan nationals or other members of the FDN or ARDE, but either United States military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. (These persons were apparently referred to in the vocabulary of the CIA as 'UCLAs' - 'Unilaterally Controlled Latino Assets', and this acronym will be used, purely for convenience, in what follows.) Furthermore, Nicaragua contends that such United States personnel, while they may have refrained from themselves entering Nicaraguan territory or recognized territorial waters, directed the operations and gave very close logistic, intelligence and practical support. A further complaint by Nicaragua which does not ***46*** relate to contra activity is that of overflights of Nicaraguan territory and territorial waters by United States military aircraft. These complaints will now be examined.

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76. On 25 February 1984, two Nicaraguan fishing vessels struck mines in the Nicaraguan port of El Bluff, on the Atlantic coast. On 1 March 1984 the Dutch dredger Geoponte, and on 7 March 1984 the Panamanian vessel Los Caraibes were damaged by mines at Corinto. On 20 March 1984 the Soviet tanker Lugansk was damaged by a mine in Puerto Sandino. Further vessels were damaged or destroyed by mines in Corinto on 28, 29 and 30 March. The period for which the mines effectively closed or restricted access to the ports was some two months. Nicaragua claims that a total of 12 vessels or fishing boats were destroyed or damaged by mines, that 14 people were wounded and two people killed. The exact position of the mines - whether they were in Nicaraguan internal waters or in its territorial sea - has not been made clear to the Court: some reports indicate that those at Corinto were not in the docks but in the access channel, or in the bay where ships wait for a berth. Nor is there any direct evidence of the size and nature of the mines; the witness Commander Carrion explained that the Nicaraguan authorities were never able to capture an unexploded mine. According to press reports, the mines were laid on the sea-bed and triggered either by contact, acoustically, magnetically or by water pressure; they were said to be small, causing a noisy explosion, but unlikely to sink a ship. Other reports mention mines of varying size, some up to 300 pounds of explosives. Press reports quote United States administration officials as saying that mines were constructed by the CIA with the help of a United States Navy Laboratory.

77. According to a report in Lloyds List and Shipping Gazette, responsibility for mining was claimed on 2 March 1984 by the ARDE. On the other hand, according to an affidavit by Mr. Edgar Chamorro, a former political leader of the FDN, he was instructed by a CIA official to issue a press release over the clandestine radio on 5 January 1984, claiming that the FDN had mined several Nicaraguan harbours. He also stated that the FDN in fact played no role in the mining of the harbours, but did not state who was responsible. According to a press report, the contras announced on 8 January 1984, that they were mining all Nicaraguan ports, and warning all ships to stay away from them; but according to the same report, nobody paid much attention to this announcement. It does not appear that the United States Government itself issued any ***47*** warning or notification to other States of the existence and location of the mines.

78. It was announced in the United States Senate on 10 April 1984 that the Director of the CIA had informed the Senate Select Committee on Intelligence that President Reagan had approved a CIA plan for the mining of Nicaraguan ports; press reports state that the plan was approved in December 1983, but according to a member of that Committee, such approval was given in February 1984. On 10 April 1984, the United States Senate voted that

'it is the sense of the Congress that no funds . . . shall be obligated or expended for the purpose of planning, directing, executing or supporting the mining of the ports or territorial waters of Nicaragua'.

During a televised interview on 28 May 1984, of which the official transcript has been produced by Nicaragua, President Reagan, when questioned about the mining of ports, said 'Those were homemade mines . . . that couldn't sink a ship. They were planted in those harbors . . . by the Nicaraguan rebels.' According to press reports quoting sources in the United States administration, the laying of mines was effected from speed boats, not by members of the ARDE or FDN, but by the 'UCLAs'. The mother ships used for the operation were operated, it is said, by United States nationals; they are reported to have remained outside the 12-mile limit of Nicaraguan territorial waters recognized by the United States. Other less sophisticated mines may, it appears, have been laid in ports and in Lake Nicaragua by contras operating separately; a Nicaraguan military official

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was quoted in the press as stating that 'most' of the mining activity was directed by the United States.

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet, Liberian and Japanese registry, and one (Homin) of unidentified registry, were damaged by mines, though the damage to the Homin has also been attributed by Nicaragua rather to gunfire from minelaying vessels. Other sources mention damage to a British or a Cuban vessel. No direct evidence is available to the Court of any diplomatic protests by a State whose vessel had been damaged; according to press reports, the Soviet Government accused the United States of being responsible for the mining, and the British Government indicated to the United States that it deeply deplored the mining, as a matter of principle. Nicaragua has also submitted evidence to show that the mining of the ports caused a rise in marine insurance rates for cargo to and from Nicaragua, and that some shipping companies stopped sending vessels to Nicaraguan ports.

***48** 80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

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81. The operations which Nicaragua attributes to the direct action of United States personnel or 'UCLAs', in addition to the mining of ports, are apparently the following:

(i) 8 September 1983: an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down;

(ii) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;

(iii) 2 October 1983: an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel;

(iv) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;

(v) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;

(vi) 4/5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;

(vii) 24/25 February 1984: an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 76;

(viii) 7 March 1984: an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters;

(ix) 28/30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speed-boats;

(x) 9 April 1984: a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

***49** 82. At the time these incidents occurred, they were considered to be acts of the contras, with no greater degree of United States support than the many other military and paramilitary activities of the contras. The declaration of Commander Carrion lists the incidents numbered (i), (ii), (iv) and (vi) above in the catalogue of activities of 'mercenaries', without distinguishing these items from the rest; it does not mention items (iii), (v) and (vii) to (x). According to a report in the New York Times (13 October 1983), the Nicaraguan Government, after the attack on Corinto (item (iv) above) protested to the United States Ambassador in Managua at the aid given by the United States to the contras, and addressed a diplomatic note in the same sense to the United States Secretary of State. The Nicaraguan Memorial does not mention such a protest, and the Court has not been supplied with the text of any such note.

83. On 19 October 1983, thus nine days after the attack on Corinto, a question was put to President

Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows:
'Question: Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air raids? And do the American people have a right to be informed about any CIA role?
The President: I think covert actions have been a part of government and a part of government's responsibilities for as long as there has been a government. I'm not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.
But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can't let your people know without letting the wrong people know, those that are in opposition to what you're doing.'
Nicaragua presents this as one of a series of admissions 'that the United States was habitually and systematically giving aid to mercenaries carrying out military operations against the Government of Nicaragua'. In the view of the Court, the President's refusal to comment on the connection between covert activities and 'what has been going on, or with some of the specific operations down there' can, in its context, be treated as an admission that the United States had something to do with the Corinto attack, but not necessarily that United States personnel were directly involved.
84. The evidence available to the Court to show that the attacks listed above occurred, and that they were the work of United States personnel or 'UCLAs', other than press reports, is as follows. In his declaration, ***50** Commander Carrion lists items (i), (ii), (iv) and (vi), and in his oral evidence before the Court he mentioned items (ii) and (iv). Items (vi) to (x) were listed in what was said to be a classified CIA internal memorandum or report, excerpts from which were published in the Wall Street Journal on 6 March 1985; according to the newspaper, 'intelligence and congressional officials' had confirmed the authenticity of the document. So far as the Court is aware, no denial of the report was made by the United States administration. The affidavit of the former FDN leader Edgar Chamorro states that items (ii), (iv) and (vi) were the work of UCLAs despatched from a CIA 'mother ship', though the FDN was told by the CIA to claim responsibility. It is not however clear what the source of Mr. Chamorro's information was; since there is no suggestion that he participated in the operation (he states that the FDN 'had nothing whatsoever to do' with it), his evidence is probably strictly hearsay, and at the date of his affidavit, the same allegations had been published in the press. Although he did not leave the FDN until the end of 1984, he makes no mention of the attacks listed above of January to April 1984.
85. The Court considers that it should eliminate from further consideration under this heading the following items:
- the attack of 8 September 1983 on Managua airport (item (i)): this was claimed by the ARDE; a press report is to the effect that the ARDE purchased the aircraft from the CIA, but there is no evidence of CIA planning, or the involvement of any United States personnel or UCLAs;
- the attack on Benjamin Zeledon on 2 October 1983 (item (iii)): there is no evidence of the involvement of United States personnel or UCLAs;
- the incident of 24-25 February 1984 (item vii), already dealt with under the heading of the mining of ports.
86. On the other hand the Court finds the remaining incidents listed in paragraph 81 to be established. The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A 'mother ship' was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by 'UCLAs'. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather ***51** of the 'UCLAs', while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

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87. Nicaragua complains of infringement of its airspace by United States military aircraft. Apart from a minor incident on 11 January 1984 involving a helicopter, as to which, according to a press report, it was conceded by the United States that it was possible that the aircraft violated Nicaraguan airspace, this claim refers to overflights by aircraft at high altitude for intelligence reconnaissance purposes, or aircraft for supply purposes to the contras in the field, and aircraft producing 'sonic booms'. The Nicaraguan Memorial also mentions low-level reconnaissance flights by aircraft piloted by United States personnel in 1983, but the press report cited affords no evidence that these flights, along the Honduran border, involved any invasion of airspace. In addition Nicaragua has made a particular complaint of the activities of a United States SR-71 plane between 7 and 11 November 1984, which is said to have flown low over several Nicaraguan cities 'producing loud sonic booms and shattering glass windows, to exert psychological pressure on the Nicaraguan Government and population'.

88. The evidence available of these overflights is as follows. During the proceedings on jurisdiction and admissibility, the United States Government deposited with the Court a 'Background Paper' published in July 1984, incorporating eight aerial photographs of ports, camps, an airfield, etc., in Nicaragua, said to have been taken between November 1981 and June 1984. According to a press report, Nicaragua made a diplomatic protest to the United States in March 1982 regarding overflights, but the text of such protest has not been produced. In the course of a Security Council debate on 25 March 1982, the United States representative said that

'It is true that once we became aware of Nicaragua's intentions and actions, the United States Government undertook overflights to safeguard our own security and that of other States which are threatened by the Sandinista Government',

and continued

'These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, are no threat to regional peace and stability; quite the contrary.' (S/PV.2335, p. 48, emphasis added.)

***52** The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

89. The claim that sonic booms were caused by United States aircraft in November 1984 rests on assertions by Nicaraguan Defence Ministry officials, reported in the United States press; the Court is not however aware of any specific denial of these flights by the United States Government. On 9 November 1984 the representative of Nicaragua in the Security Council asserted that United States SR-71 aircraft violated Nicaraguan airspace on 7 and 9 November 1984; he did not specifically mention sonic booms in this respect (though he did refer to an earlier flight by a similar aircraft, on 31 October 1984, as having been 'accompanied by loud explosions' (S/PV. 2562, pp. 8-10)). The United States representative in the Security Council did not comment on the specific incidents complained of by Nicaragua but simply said that 'the allegation which is being advanced against the United States' was 'without foundation' (ibid., p. 28).

90. As to low-level reconnaissance flights by United States aircraft, or flights to supply the contras in the field, Nicaragua does not appear to have offered any more specific evidence of these; and it has supplied evidence that United States agencies made a number of planes available to the contras themselves for use for supply and low-level reconnaissance purposes. According to Commander Carrion, these planes were supplied after late 1982, and prior to the contras receiving the aircraft, they had to return at frequent intervals to their basecamps for supplies, from which it may be inferred that there were at that time no systematic overflights by United States planes for supply purposes.

91. The Court concludes that, as regards the high-altitude overflights for reconnaissance purposes, the statement admitting them made in the Security Council is limited to the period up to March 1982. However, not only is it entitled to take into account that the interest of the United States in 'verifying reports of Nicaraguan intervention' - the justification offered in the Security Council for these flights - has not ceased or diminished since 1982, but the photographs attached to the 1984 Background Paper are evidence of at least sporadic overflights subsequently. It sees no reason therefore to doubt the assertion of Nicaragua that such flights have continued. The Court finds that the incidents of overflights causing 'sonic booms' in November 1984 are to some extent a matter of public knowledge. As to overflights of aircraft for supply purposes, it appears from Nicaragua's

evidence that these were carried out generally, if not exclusively, by the contras themselves, though using aircraft supplied to them by the United States. Whatever other responsibility the United States ***53*** may have incurred in this latter respect, the only violations of Nicaraguan airspace which the Court finds imputable to the United States on the basis of the evidence before it are first of all, the high-altitude reconnaissance flights, and secondly the low-altitude flights of 7 to 11 November 1984, complained of as causing 'sonic booms'.

* *

92. One other aspect of activity directly carried out by the United States in relation to Nicaragua has to be mentioned here, since Nicaragua has attached a certain significance to it. Nicaragua claims that the United States has on a number of occasions carried out military manoeuvres jointly with Honduras on Honduran territory near the Honduras/Nicaragua frontier; it alleges that much of the military equipment flown in to Honduras for the joint manoeuvres was turned over to the contras when the manoeuvres ended, and that the manoeuvres themselves formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government. The manoeuvres in question are stated to have been carried out in autumn 1982; February 1983 ('Ahuas Tara I'); August 1983 ('Ahuas Tara II'), during which American warships were, it is said, sent to patrol the waters off both Nicaragus's coasts; November 1984, when there were troop movements in Honduras and deployment of warships off the Atlantic coast of Nicaragua; February 1985 ('Ahuas Tara III'); March 1985 ('Universal Trek ' 85'); June 1985, paratrooper exercises. As evidence of these manoeuvres having taken place, Nicaragua has offered newspaper reports; since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established.

* *

93. The Court must now examine in more detail the genesis, development and activities of the contra force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect. According to Nicaragua, the United States 'conceived, created and organized a mercenary army, the contra force'. However, there is evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States. Nicaragua dates the beginning of the activity of the United States to 'shortly after' 9 March 1981, when, it was said, the President of the United States made a formal presidential finding authorizing the CIA to undertake 'covert activities' directed against Nicaragua. According to the testimony of Commander ***54*** Carrion, who stated that the 'organized military and paramilitary activities' began in December 1981, there were Nicaraguan 'anti-government forces' prior to that date, consisting of

'just a few small bands very poorly armed, scattered along the northern border of Nicaragua and . . . composed mainly of exmembers of the Somoza's National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines.'

These bands had existed in one form or another since the fall of the Somoza government: the affidavit of Mr. Edgar Chamorro refers to 'the ex-National Guardsmen who had fled to Honduras when the Somoza government fell and had been conducting sporadic raids on Nicaraguan border positions ever since'. According to the Nicaraguan Memorial, the CIA initially conducted military and paramilitary activities against Nicaragua soon after the presidential finding of 9 March 1981, 'through the existing armed bands'; these activities consisted of 'raids on civilian settlements, local militia outposts and army patrols'. The weapons used were those of the former National Guard. In the absence of evidence, the Court is unable to assess the military effectiveness of these bands at that time; but their existence is in effect admitted by the Nicaraguan Government.

94. According to the affidavit of Mr. Chamorro, there was also a political opposition to the Nicaraguan Government, established outside Nicaragua, from the end of 1979 onward, and in August 1981 this grouping merged with an armed opposition force called the 15th of September Legion, which had itself incorporated the previously disparate armed opposition bands, through mergers arranged by the CIA. It was thus that the FDN is said to have come into being. The other major armed opposition group, the ARDE, was formed in 1982 by Alfonso Robelo Callejas, a former

member of the original 1979 Junta and Eden Pastora Gomez, a Sandinista military commander, leader of the FRS (Sandino Revolutionary Front) and later Vice-Minister in the Sandinista government. Nicaragua has not alleged that the United States was involved in the formation of this body. Even on the face of the evidence offered by the Applicant, therefore, the Court is unable to find that the United States created an armed opposition in Nicaragua. However, according to press articles citing official sources close to the United States Congress, the size of the contra force increased dramatically once United States financial and other assistance became available: from an initial body of 500 men (plus, according to some reports, 1,000 Miskito Indians) in December 1981, the force grew to 1,000 in February 1982, 1,500 in August 1982, 4,000 in December 1982, 5,500 in February 1983, 8,000 in June 1983 and 12,000 in November 1983. When (as explained below) United States aid other than 'humanitarian *55 assistance' was cut off in September 1984, the size of the force was reported to be over 10,000 men.

95. The financing by the United States of the aid to the contras was initially undisclosed, but subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States. Initial activities in 1981 seem to have been financed out of the funds available to the CIA for 'covert' action; according to subsequent press reports quoted by Nicaragua, $19.5 million was allocated to these activities. Subsequently, again according to press sources, a further $19 million was approved in late 1981 for the purpose of the CIA plan for military and paramilitary operations authorized by National Security Decision Directive 17. The budgetary arrangements for funding subsequent operations up to the end of 1983 have not been made clear, though a press report refers to the United States Congress as having approved 'about $20 million' for the fiscal year to 30 September 1983, and from a Report of the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter called the 'Intelligence Committee') it appears that the covert programme was funded by the Intelligence Authorization Act relating to that fiscal year, and by the Defense Appropriations Act, which had been amended by the House of Representatives so as to prohibit 'assistance for the purpose of overthrowing the Government of Nicaragua'. In May 1983, this Committee approved a proposal to amend the Act in question so as to prohibit United States support for military or paramilitary operations in Nicaragua. The proposal was designed to have substituted for these operations the provision of open security assistance to any friendly Central American country so as to prevent the transfer of military equipment from or through Cuba or Nicaragua. This proposal was adopted by the House of Representatives, but the Senate did not concur; the executive in the meantime presented a request for $45 million for the operations in Nicaragua for the fiscal year to 30 September 1984. Again conflicting decisions emerged from the Senate and House of Representatives, but ultimately a compromise was reached. In November 1983, legislation was adopted, coming into force on 8 December 1983, containing the following provision:

'During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or *56 which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.' (Intelligence Authorization Act 1984, Section 108.)

96. In March 1984, the United States Congress was asked for a supplemental appropriation of $21 million 'to continue certain activities of the Central Intelligence Agency which the President has determined are important to the national security of the United States', i.e., for further support for the contras. The Senate approved the supplemental appropriation, but the House of Representatives did not. In the Senate, two amendments which were proposed but not accepted were: to prohibit the funds appropriated from being provided to any individual or group known to have as one of its intentions the violent overthrow of any Central American government; and to prohibit the funds being used for acts of terrorism in or against Nicaragua. In June 1984, the Senate took up consideration of the executive's request for $28 million for the activities in Nicaragua for the fiscal year 1985. When the Senate and the House of Representatives again reached conflicting decisions, a compromise provision was included in the Continuing Appropriations Act 1985 (Section 8066). While in principle prohibiting the use of funds during the fiscal year to 30 September 1985

'for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual', the Act provided $14 million for that purpose if the President submitted a report to Congress after 28 February 1985 justifying such an appropriation, and both Chambers of Congress voted affirmatively

to approve it. Such a report was submitted on 10 April 1985; it defined United States objectives toward Nicaragua in the following terms:

'United States policy toward Nicaragua since the Sandinistas' ascent to power has consistently sought to achieve changes in Nicaraguan government policy and behavior. We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government.'

The changes sought were stated to be:

'- termination of all forms of Nicaraguan support for insurgencies or subversion in neighboring countries;

***57** - reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region;

- severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba and the return to those countries of their military and security advisers now in Nicaragua; and

- implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non- alignment, and a mixed economy.'

At the same time the President of the United States, in a press conference, referred to an offer of a cease-fire in Nicaragua made by the opponents of the Nicaraguan Government on 1 March 1984, and pledged that the $14 million appropriation, if approved, would not be used for arms or munitions, but for 'food, clothing and medicine and other support for survival' during the period 'while the cease-fire offer is on the table'. On 23 and 24 April 1985, the Senate voted for, and the House of Representatives against, the $14 million appropriation.

97. In June 1985, the United States Congress was asked to approve the appropriation of $38 million to fund military or paramilitary activities against Nicaragua during the fiscal years 1985 and 1986 (ending 30 September 1986). This appropriation was approved by the Senate on 7 June 1985. The House of Representatives, however, adopted a proposal for an appropriation of $27 million, but solely for humanitarian assistance to the contras, and administration of the funds was to be taken out of the hands of the CIA and the Department of Defense. The relevant legislation, as ultimately agreed by the Senate and House of Representatives after submission to a Conference Committee, provided

'$27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided in such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense . . .

As used in this subsection, the term 'humanitarian assistance' means the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.'

The Joint Explanatory Statement of the Conference Committee noted that while the legislation adopted

***58** 'does proscribe these two agencies [CIA and DOD] from administering the funds and from providing any military training or advice to the democratic resistance . . . none of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prevents the sharing of intelligence information with the democratic resistance'.

In the House of Representatives, it was stated that an assurance had been given by the National Security Council and the White House that

'neither the [CIA] reserve for contingencies nor any other funds available [would] be used for any material assistance other than that authorized . . . for humanitarian assistance for the Nicaraguan democratic resistance, unless authorized by a future act of Congress'.

Finance for supporting the military and paramilitary activities of the contras was thus available from the budget of the United States Government from some time in 1981 until 30 September 1984; and finance limited to 'humanitarian assistance' has been available since that date from the same source and remains authorized until 30 September 1986.

98. It further appears, particularly since the restriction just mentioned was imposed, that financial and other assistance has been supplied from private sources in the United States, with the knowledge of the Government. So far as this was earmarked for 'humanitarian assistance', it was actively encouraged by the United States President. According to press reports, the State Department made it known in September 1984 that the administration had decided 'not to discourage' private American citizens and foreign governments from supporting the contras. The Court notes that this statement was prompted by an incident which indicated that some private assistance of a military nature was being provided.

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99. The Court finds at all events that from 1981 until 30 September 1984 the United States Government was providing funds for military and paramilitary activities by the contras in Nicaragua, and thereafter for 'humanitarian assistance'. The most direct evidence of the specific purposes to which it was intended that these funds should be put was given by the oral testimony of a witness called by Nicaragua: Mr. David MacMichael, formerly in the employment of the CIA as a Senior Estimates Officer with the Analytic Group of the National Intelligence Council. He informed the Court that in 1981 he participated in that capacity in discussion of a plan relating to Nicaragua, excerpts from which were subsequently published in the Washington Post, and he confirmed that, with the exception of a detail (here omitted), these excerpts gave an accurate account of the plan, the purposes of which they described as follows:

***59** 'Covert operations under the CIA proposal, according to the NSC records, are intended to:

'Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.

Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

Work primarily through non-Americans'

to achieve these covert objectives . . .'

100. Evidence of how the funds appropriated were spent, during the period up to autumn 1984, has been provided in the affidavit of the former FDN leader, Mr. Chamorro; in that affidavit he gives considerable detail as to the assistance given to the FDN. The Court does not however possess any comparable direct evidence as to support for the ARDE, though press reports suggest that such support may have been given at some stages. Mr. Chamorro states that in 1981 former National Guardsmen in exile were offered regular salaries from the CIA, and that from then on arms (FAL and AK-47 assault rifles and mortars), ammunition, equipment and food were supplied by the CIA. When he worked full time for the FDN, he himself received a salary, as did the other FDN directors. There was also a budget from CIA funds for communications, assistance to Nicaraguan refugees or family members of FDN combatants, and a military and logistics budget; however, the latter was not large since all arms, munitions and military equipment, including uniforms, boots and radio equipment, were acquired and delivered by the CIA.

101. According to Mr. Chamorro, training was at the outset provided by Argentine military officers, paid by the CIA, gradually replaced by CIA personnel. The training given was in

'guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers, and explosives, such as Claymore mines . . . also . . . in field communications, and the CIA taught us how to use certain sophisticated codes that the Nicaraguan Government forces would not be able to decipher'.

The CIA also supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites. Mr. Chamorro also refers to aircraft being supplied by the CIA; from press reports it appears that those were comparatively small aircraft suitable for reconnaissance and a certain amount of supply-dropping, not for offensive ***60** operations. Helicopters with Nicaraguan crews are reported to have taken part in certain operations of the 'UCLAs' (see paragraph 86 above), but there is nothing to show whether these belonged to the contras or were lent by United States agencies.

102. It appears to be recognized by Nicaragua that, with the exception of some of the operations listed in paragraph 81 above, operations on Nicaraguan territory were carried out by the contras alone, all United States trainers or advisers remaining on the other side of the frontier, or in international waters. It is however claimed by Nicaragua that the United States Government has devised the strategy and directed the tactics of the contra force, and provided direct combat support for its military operations.

103. In support of the claim that the United States devised the strategy and directed the tactics of the contras, counsel for Nicaragua referred to the successive stages of the United States legislative authorization for funding the contras (outlined in paragraphs 95 to 97 above), and observed that every offensive by the contras was preceded by a new infusion of funds from the United States. From this, it is argued, the conclusion follows that the timing of each of those offensives was determined by the United States. In the sense that an offensive could not be launched until the funds were available, that may well be so; but, in the Court's view, it does not follow that each provision of funds by the United States was made in order to set in motion a particular offensive, and that that offensive was planned by the United States.

104. The evidence in support of the assertion that the United States devised the strategy and

directed the tactics of the contras appears to the Court to be as follows. There is considerable material in press reports of statements by FDN officials indicating participation of CIA advisers in planning and the discussion of strategy or tactics, confirmed by the affidavit of Mr. Chamorro. Mr. Chamorro attributes virtually a power of command to the CIA operatives: he refers to them as having 'ordered' or 'instructed' the FDN to take various action. The specific instances of influence of United States agents on strategy or tactics which he gives are as follows: the CIA, he says, was at the end of 1982 'urging' the FDN to launch an offensive designed to take and hold Nicaraguan territory. After the failure of that offensive, the CIA told the FDN to move its men back into Nicaragua and keep fighting. The CIA in 1983 gave a tactical directive not to destroy farms and crops, and in 1984 gave a directive to the opposite effect. In 1983, the CIA again indicated that they wanted the FDN to launch an offensive to seize and hold Nicaraguan territory. In this respect, attention should also be drawn to the statement of Mr. Ch morro (paragraph 101 above) that the CIA supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, and small aircraft suitable for reconnaissance and a certain amount of supply-dropping. Emphasis has been placed, by Mr. Chamorro, by Commander Carrion, and by counsel ***61** for Nicaragua, on the impact on contra tactics of the availability of intelligence assistance and, still more important, supply aircraft.

105. It has been contended by Nicaragua that in 1983 a 'new strategy' for contra operations in and against Nicaragua was adopted at the highest level of the United States Government. From the evidence offered in support of this, it appears to the Court however that there was, around this time, a change in contra strategy, and a new policy by the United States administration of more overt support for the contras, culminating in the express legislative authorization in the Department of Defense Appropriations Act, 1984, section 775, and the Intelligence Authorization Act for Fiscal Year 1984, section 108. The new contra strategy was said to be to attack 'economic targets like electrical plants and storage facilities' and fighting in the cities.

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court's view established that the support of the United States authorities for the activities of the contras took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the contras by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the contras in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State 'created' the contra force in Nicaragua. It seems certain ***62** that members of the former Somoza National Guard, together with civilian opponents to the Sandinista regime, withdrew from Nicaragua soon after that regime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-a-vis the regime of the Applicant. Nor does the evidence warrant a finding that the United States gave 'direct and critical combat support', at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

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

States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the contras 'constitute[d] an independent force' and that the 'only element of control that could be exercised by the United States' was 'cessation of aid'. Paradoxically this assessment serves to underline, a contrario, the potential for control inherent in the degree of the contras' dependence on aid. Yet despite the heavy subsides and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of 'humanitarian assistance' as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, contra activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the contra force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the contras depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is a fortiori unable to determine that the contra force may be equated for ***63** legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras.

111. In the view of the Court it is established that the contra force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of contra activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the contra force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the contra force had been selected, installed and paid by the United States; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro, who was directly concerned, when the FDN was formed 'the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA'; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the contra force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred inter alia from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

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113. The question of the degree of control of the contras by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes 'the spreading of terror and danger to non- combatants as an end in itself with no attempt to ***64*** observe humanitarian standards and no reference to the concept of military necessity'. In support of this, Nicaragua has catalogued numerous incidents, attributed to 'CIA-trained mercenaries' or 'mercenary forces', of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrion annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide 'direct proof of the tactics adopted by the contras under United States guidance and control', the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the New York Times on 21 October 1984, disclosing that the contras were carrying out assassinations; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the contras are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, 'stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.' If such a finding of the imputability of the acts of the contras to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the contras to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United ***65*** States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-a-vis Nicaragua, including conduct related to the acts of the contras. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the contras, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the contras. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the contras may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the contras were in fact committed by them. At the same time, the question whether

the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the contras is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the contras in 1983. The first of these, in Spanish, is entitled 'Operaciones sicologicas en guerra de guerrillas' (Psychological Operations in Guerrilla Warfare), by 'Tayacan'; the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as

'a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos'.

The second is entitled the Freedom Fighter's Manual, with the subtitle 'Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant'. The text is printed in English and Spanish, and illustrated with simple drawings: it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the New York Times, quoting a United States Congressman and ***66** Mr. Edgar Chamorro as attributing the book to the CIA. Since the evidence linking the Freedom Fighter's Manual to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.

118. The Court will therefore concentrate its attention on the other manual, that on 'Psychological Operations'. That this latter manual was prepared by the CIA appears to be clearly established: a report published in January 1985 by the Intelligence Committee contains a specific statement to that effect. It appears from this report that the manual was printed in several editions; only one has been produced and it is of that text that the Court will take account. The manual is devoted to techniques for winning the minds of the population, defined as including the guerrilla troops, the enemy troops and the civilian population. In general, such parts of the manual as are devoted to military rather than political and ideological matters are not in conflict with general humanitarian law; but there are marked exceptions. A section on 'Implicit and Explicit Terror', while emphasizing that 'the guerrillas should be careful not to become an explicit terror, because this would result in a loss of popular support', and stressing the need for good conduct toward the population, also includes directions to destroy military or police installations, cut lines of communication, kidnap officials of the Sandinista government, etc. Reference is made to the possibility that 'it should be necessary . . . to fire on a citizen who was trying to leave the town', to be justified by the risk of his informing the enemy. Furthermore, a section on 'Selective Use of Violence for Propagandistic Effects' begins with the words:

'It is possible to neutralize carefully selected and planned targets, such as court judges, mesta judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor.'

In a later section on 'Control of mass concentrations and meetings', the following guidance is given (inter alia):

'If possible, professional criminals will be hired to carry out specific selective 'jobs'.

.....

Specific tasks will be assigned to others, in order to create a 'martyr' for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the regime, in order to create greater conflicts.'

***67** 119. According to the affidavit of Mr. Chamorro, about 2,000 copies of the manual were distributed to members of the FDN, but in those copies Mr. Chamorro had arranged for the pages containing the last two passages quoted above to be torn out and replaced by expurgated pages. According to some press reports, another edition of 3,000 copies was printed (though according to one report Mr. Chamorro said that he knew of no other edition), of which however only some 100 are said to have reached Nicaragua, attached to balloons. He was quoted in a press report as saying that the manual was used to train 'dozens of guerrilla leaders' for some six months from December 1983 to May 1984. In another report he is quoted as saying that 'people did not read it' and that

most of the copies were used in a special course on psychological warfare for middle-level commanders. In his affidavit, Mr. Chamorro reports that the attitude of some unit commanders, in contrast to that recommended in the manual, was that 'the best way to win the loyalty of the civilian population was to intimidate it' - by murders, mutilations, etc. - 'and make it fearful of us'.

120. A question examined by the Intelligence Committee was whether the preparation of the manual was a contravention of United States legislation and executive orders; inter alia, it examined whether the advice on 'neutralizing' local officials contravened Executive Order 12333. This Executive Order, re- enacting earlier directives, was issued by President Reagan in December 1981; it provides that

'2.11. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in, assassination.

2.12. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.' (US Code, Congressional and Administrative News, 97th Congress, First Session, 1981, p. B. 114.)

The manual was written, according to press reports, by 'a low-level contract employee' of the CIA; the Report of the Intelligence Committee concluded:

'The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.

The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention ***68*** to the manual. Most CIA officials learned about it from news accounts.

The Committee was told that CIA officers should have reviewed the manual and did not. The Committee was told that all CIA officers should have known about the Executive Order's ban on assassination . . . but some did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action . . .

CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual's history.

The Committee concluded that there was no intentional violation of Executive Order 12333.'

When the existence of the manual became known at the level of the United States Congress, according to one press report, 'the CIA urged rebels to ignore all its recommendations and began trying to recall copies of the document'.

121. When the Intelligence Committee investigated the publication of the psychological operations manual, the question of the behaviour of the contras in Nicaragua became of considerable public interest in the United States, and the subject of numerous press reports. Attention was thus drawn to allegations of terrorist behaviour or atrocities said to have been committed against civilians, which were later the subject of reports by various investigating teams, copies of which have been supplied to the Court by Nicaragua. According to the press, CIA officials presented to the Intelligence Committee in 1984 evidence of such activity, and stated that this was the reason why the manual was prepared, it being intended to 'moderate the rebels' behaviour'. This report is confirmed by the finding of the Intelligence Committee that 'The original purpose of the manual was to provide training to moderate FDN behaviour in the field'. At the time the manual was prepared, those responsible were aware of, at the least, allegations of behaviour by the contras inconsistent with humanitarian law.

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town; and advised the 'neutralization' for propaganda purposes of local judges, officials or notables after the semblance ***69*** of trial in the presence of the population. The text supplied to the contras also advised the use of professional criminals to perform unspecified 'jobs', and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make 'martyrs'.

* *

123. Nicaragua has complained to the Court of certain measures of an economic nature taken

against it by the Government of the United States, beginning with the cessation of economic aid in April 1981, which it regards as an indirect form of intervention in its internal affairs. According to information published by the United States Government, it provided more than $100 million in economic aid to Nicaragua between July 1979 and January 1981; however, concern in the United States Congress about certain activities attributed to the Nicaraguan Government led to a requirement that, before disbursing assistance to Nicaragua, the President certify that Nicaragua was not 'aiding, abetting or supporting acts of violence or terrorism in other countries' (Special Central American Assistance Act, 1979, Sec. 536 (g)). Such a certification was given in September 1980 (45 Federal Register 62779), to the effect that
'on the basis of an evaluation of the available evidence, that the Government of Nicaragua 'has not co-operated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries".
An official White House press release of the same date stated that
'The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field . . . Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed.'
On 1 April 1981 however a determination was made to the effect that the United States could no longer certify that Nicaragua was not engaged in support for 'terrorism' abroad, and economic assistance, which had been suspended in January 1981, was thereby terminated. According to the Nicaraguan Minister of Finance, this also affected loans previously contracted, and its economic impact was more than $36 million per annum. Nicaragua also claims that, at the multilateral level, the United States has ***70** acted in the Bank for International Reconstruction and Development and the Inter-American Development Bank to oppose or block loans to Nicaragua.
124. On 23 September 1983, the President of the United States made a proclamation modifying the system of quotas for United States imports of sugar, the effect of which was to reduce the quota attributed to Nicaragua by 90 per cent. The Nicaraguan Finance Minister assessed the economic impact of the measure at between $15 and $18 million, due to the preferential system of prices that sugar has in the market of the United States.
125. On 1 May 1985, the President of the United States made an Executive Order, which contained a finding that 'the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States' and declared a 'national emergency'. According to the President's message to Congress, this emergency situation had been created by 'the Nicaraguan Government's aggressive activities in Central America'. The Executive Order declared a total trade embargo on Nicaragua, prohibiting all imports from and exports to that country, barring Nicaraguan vessels from United States ports and excluding Nicaraguan aircraft from air transportation to and from the United States.

* * *

126. The Court has before it, in the Counter-Memorial on jurisdiction and admissibility filed by the United States, the assertion that the United States, pursuant to the inherent right of individual and collective self-defence, and in accordance with the Inter-American Treaty of Reciprocal Assistance, has responded to requests from El Salvador, Honduras and Costa Rica, for assistance in their self-defence against aggression by Nicaragua. The Court has therefore to ascertain, so far as possible, the facts on which this claim is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of. Furthermore, it has been suggested that, as a result of certain assurances given by the Nicaraguan 'Junta of the Government of National Reconstruction' in 1979, the Government of Nicaragua is bound by international obligations as regards matters which would otherwise be matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States. The Court will therefore examine the facts underlying this suggestion also.
127. Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely 'pretexts' for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses ***71** Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed

opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.

128. In its Counter-Memorial on jurisdiction and admissibility, the United States claims that Nicaragua has 'promoted and supported guerrilla violence in neighboring countries', particularly in El Salvador; and has openly conducted cross-border military attacks on its neighbours, Honduras and Costa Rica. In support of this, it annexed to the Memorial an affidavit by Secretary of State George P. Shultz. In his affidavit, Mr. Shultz declares, inter alia, that:

'The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.

In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States.'

In connection with this declaration, the Court would recall the observations ***72** it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

129. In addition, the United States has quoted Presidents Magana and Duarte of El Salvador, press reports, and United States Government publications. With reference to the claim as to cross-border military attacks, the United States has quoted a statement of the Permanent Representative of Honduras to the Security Council, and diplomatic protests by the Governments of Honduras and Costa Rica to the Government of Nicaragua. In the subsequent United States Government publication 'Revolution Beyond Our Borders', referred to in paragraph 73 above, these claims are brought up to date with further descriptive detail. Quoting 'Honduran government records', this publication asserts that there were 35 border incursions by the Sandinista People's Army in 1981 and 68 in 1982.

130. In its pleading at the jurisdictional stage, the United States asserted the justification of collective self-defence in relation to alleged attacks on El Salvador, Honduras and Costa Rica. It is clear from the material laid before the Court by Nicaragua that, outside the context of the present judicial proceedings, the United States administration has laid the greatest stress on the question of arms supply and other forms of support to opponents of the Government in El Salvador. In 1983, on the proposal of the Intelligence Committee, the covert programme of assistance to the contras 'was to be directed only at the interdiction of arms to El Salvador'. Nicaragua's other neighbours have not been lost sight of, but the emphasis has continued to be on El Salvador: the United States Continuing Appropriations Act 1985, Section 8066 (b) (1) (A), provides for aid for the military or paramilitary activities in Nicaragua to be resumed if the President reports inter alia that 'the Government of Nicaragua is providing material or monetary support to anti-government forces engaged in military or paramilitary operations in El Salvador or other Central American countries'.

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador; it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities

of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua's conduct in relation to Honduras or Costa *73 Rica may justify the exercise of that right; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities 'on a smaller scale' in those countries than in El Salvador.

132. In its Declaration of Intervention dated 15 August 1984, the Government of El Salvador stated that: 'The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980.' (Para. IV.) The statements of fact in that Declaration are backed by a declaration by the Acting Minister for Foreign Affairs of El Salvador, similar in form to the declarations by Nicaraguan Ministers annexed to its pleadings. The Declaration of Intervention asserts that 'terrorists' seeking the overthrow of the Government of El Salvador were 'directed, armed, supplied and trained by Nicaragua' (para. III); that Nicaragua provided 'houses, hideouts and communication facilities' (para. VI), and training centres managed by Cuban and Nicaraguan military personnel (para. VII). On the question of arms supply, the Declaration states that 'Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country.' (Para. VIII.)

133. In its observations, dated 10 September 1984, on the Declaration of Intervention of El Salvador, Nicaragua stated as follows:

'The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto Brockmann, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members.'

134. Reference has also to be made to the testimony of one of the witnesses called by Nicaragua. Mr. David MacMichael (paragraph 99 above) said in evidence that he was in the full time employment of the CIA from March 1981 to April 1983, working for the most part on Inter-*74 American affairs. During his examination by counsel for Nicaragua, he stated as follows:

'[Question:] In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities?
[Answer:] In any significant manner over this long period of time I do not believe they could have done so.
Q.: And there was in fact no such detection during the period that you served in the Central Intelligence Agency?
A.: No.
Q.: In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador - with or without the Government's knowledge or consent - could these shipments have been accomplished without detection by United States intelligence capabilities?
A.: If you say in significant quantities over any reasonable period of time, no I do not believe so.
Q.: And there was in fact no such detection during your period of service with the Agency?
A.: No.
Q.: Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA - 6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadorian rebels from Nicaragua at any time?
A.: Yes, I did.
Q.: When was that?
A.: Late 1980 to very early 1981.'

Mr. MacMichael indicated the sources of the evidence he was referring to, and his examination continued:

'[Question:] Does the evidence establish that the Government of Nicaragua was involved during this period?
[Answer:] No, it does not establish it, but I could not rule it out.'

135. After counsel for Nicaragua had completed his examination of the witness, Mr. MacMichael was questioned from the bench, and in this context he stated (inter alia) as follows:

'[Question:] Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El *75 Salvador, you would not be in a position to know that; is that correct?
[Answer:] I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.
Q.: Would you rule it 'in'?
A.: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling ' in' than ruling 'out'.
.....
Q.: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadorian insurgency. Is that the conclusion I can draw from your remarks?
A.: I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion.'
In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.
136. Some confirmation of the situation in 1981 is afforded by an internal Nicaraguan Government report, made available by the Government of Nicaragua in response to a request by the Court, of a meeting held in Managua on 12 August 1981 between Commander Ortega, Co-ordinator of the Junta of the Government of Nicaragua and Mr. Enders, Assistant Secretary of State for Inter-American Affairs of the United States. According to this report, the question of the flow of 'arms, munitions and other forms of military aid' to El Salvador, was raised by Mr. Enders as one of the 'major problems' (problemas principales). At one point he is reported to have said:
'On your part, you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results.'
*76 Later in the course of the discussion, the following exchange is recorded:
'[Ortega:] As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.
[Enders:] You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports.'
137. As regards the question, raised in this discussion, of the picture given by United States intelligence sources, further evidence is afforded by the 1983 Report of the Intelligence Committee (paragraphs 95, 109 above). In that Report, dated 13 May 1983, it was stated that
'The Committee has regularly reviewed voluminous intelligence material on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua.'
The Committee continued:
'At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty:
A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.
The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.
The Sandinista leadership sanctions and directly facilitates all of the above functions.
Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.
In addition, Nicaragua and Cuba have provided - and appear to continue providing - training to the Salvadorian insurgents.'
The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent *77 period. It notes however that the Resolution

adopted by the United States Congress on 29 July 1985 recorded the expectation of Congress from the Government of Nicaragua of:
'the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador'.
138. In its Declaration of Intervention, El Salvador alleges that 'Nicaraguan officials have publicly admitted their direct involvement in waging war on us' (para. IX). It asserts that the Foreign Minister of Nicaragua admitted such support at a meeting of the Foreign Ministers of the Contadora Group in July 1983. Setting this against the declaration by the Nicaraguan Foreign Minister annexed to the Nicaraguan Memorial, denying any involvement of the Nicaraguan Government in the provision of arms or other supplies to the opposition in El Salvador, and in view of the fact that the Court has not been informed of the exact words of the alleged admission, or with any corroborative testimony from others present at the meeting, the Court cannot regard as conclusive the assertion in the Declaration of Intervention. Similarly, the public statement attributed by the Declaration of Intervention (para. XIII) to Commander Ortega, referring to 'the fact of continuing support to the Salvadorian guerrillas' cannot, even assuming it to be accurately quoted, be relied on as proof that that support (which, in the form of political support, is openly admitted by the Nicaraguan Government) takes any specific material form, such as the supply of arms.
139. The Court has taken note of four draft treaties prepared by Nicaragua in 1983, and submitted as an official proposal within the framework of the Contadora process, the text of which was supplied to the Court with the Nicaraguan Application. These treaties, intended to be 'subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador' (p. 58), contained the following provisions:

'Article One

The High Contracting Parties promise to not offer and, should such be the case, to suspend military assistance and training and the supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.

Article Two

The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment and military assistance to and training of the contending forces in the Republic of El Salvador.' (P. 60.)
***78** In the Introduction to its proposal the Nicaraguan Government stated that it was ready to enter into an agreement of this kind immediately, even if only with the United States, 'in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua' (p. 58).
140. When filing its Counter-Memorial on the questions of jurisdiction and admissibility, the United States deposited a number of documents in the Registry of the Court, two of which are relevant to the questions here under examination. The first is a publication of the United States Department of State dated 23 February 1981, entitled Communist Interference in El Salvador, reproducing a number of documents (in Spanish with English translation) stated to have been among documents in 'two particularly important document caches . . . recovered from the Communist Party of El Salvador (PCS) in November 1980 and the People's Revolutionary Army (ERP) in January 1981'. A summary of the documents is also to be found in an attachment to the 1983 Report of the Intelligence Committee, filed by Nicaragua. The second is a 'background Paper' published by the United States Department of State and Department of Defense in July 1984, entitled Nicaragua's Military Build-Up and Support for Central American Subversion.
141. The full significance of the documents reproduced in the first of these publications, which are 'written using cryptic language and abbreviations', is not readily apparent, without further assistance from United States experts, who might have been called as witnesses had the United States appeared in the proceedings. For example, there are frequent references to 'Lagos' which, according to the United States, is a code-name for Nicaragua; but without such assistance the Court cannot judge whether this interpretation is correct. There is also however some specific reference in an undated document to aid to the armed opposition 'which all would pass through Nicaragua' - no code-name being here employed - which the Court must take into account for what it is worth.

142. The second document, the Background Paper, is stated to be based on 'Sandinista documents, press reports, and interviews with captured guerrillas and defectors' as well as information from 'intelligence sources'; specific intelligence reports are not cited 'because of the potential consequences of revealing sources and methods'. The only material evidence included is a number of aerial photographs (already referred to in paragraph 88 above), and a map said to have been captured in a guerrilla camp in El Salvador, showing arms transport routes; this map does not appear of itself to indicate that arms enter El Salvador from Nicaraguan territory.

143. The Court's attention has also been drawn to various press reports of statements by diplomats, by leaders of the armed opposition in El Salvador, or defectors from it, supporting the view that Nicaragua was ***79*** involved in the arms supply. As the Court has already explained, it regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact (paragraph 62 above). The press reports here referred to will therefore be taken into account only to that extent.

144. In an interview published in English in the New York Times Magazine on 28 April 1985, and in Spanish in ABC, Madrid, on 12 May 1985 given by Daniel Ortega Saavedra, President of the Junta of Nicaragua, he is reported to have said:

'We've said that we're willing to send home the Cubans, the Russians, the rest of the advisers. We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador, and we're willing to accept international verification. In return, we're asking for one thing: that they don't attack us, that the United States stop arming and financing . . . the gangs that kill our people, burn our crops and force us to divert enormous human and economic resources into war when we desperately need them for development.' ('Hemos dicho que estamos dispuestos a sacar a los cubanos, sovieticos y demas asesores; a suspender todo transito por nuestro territorio de ayuda militar u otra a los salvadorenos, bajo verificacion internacional. Hemos dicho que lo unico que pedimos es que no nos agredan y que Estados Unidos no arme y financie . . . a las bandas que entran a matarnos, a quemar las cosechas, y que nos obligan a distraer enormes recursos humanos y economicos que nos hacen una falta angustiosa para el desarrollo.')

The Court has to consider whether this press report can be treated as evidence of an admission by the Nicaraguan Head of State that the Nicaraguan Government is in a position to stop the movement of military or other aid through Nicaraguan territory to El Salvador; and whether it can be deduced from this (in conjunction with other material) that the Nicaraguan Government is responsible for the supply or transit of such aid.

145. Clearly the remarks attributed to President Ortega raise questions as to his meaning, namely as to what exactly the Nicaraguan Government was offering to stop. According to Nicaragua's own evidence, President Ortega had offered during the meeting of 12 August 1981 to stop the arms flow if the United States would supply the necessary information to enable the Nicaraguan Government to track it down; it may in fact be the interview of 12 August 1981 that President Ortega was referring to when he spoke of what had been said to the United States Government. At all events, against the background of the firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that that Government ***80*** was in fact doing what it had already officially denied and continued subsequently to deny publicly.

146. Reference was made during the hearings to the testimony of defectors from Nicaragua or from the armed opposition in El Salvador; the Court has no such direct testimony before it. The only material available in this respect is press reports, some of which were annexed to the United States Counter-Memorial on the questions of jurisdiction and admissibility. With appropriate reservations, the Court has to consider what the weight is of such material, which includes allegations of arms supply and of the training of Salvadoreans at a base near Managua. While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself. Still less can statements attributed in the press to unidentified diplomats stationed in Managua be regarded as evidence that the Nicaraguan Government was continuing to supply aid to the opposition in El Salvador.

147. The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative. Annexed to the Memorial was a declaration dated 21 April 1984 of Miguel d'Escoto Brockmann, the Foreign Minister of Nicaragua. In this respect the Court has, as in the case of the affidavit of the United States Secretary of State, to recall the observations it has already made (paragraphs 69 and 70) as to the evidential value of such declarations. In the declaration, the Foreign Minister states that the allegations made by the United States, that the Nicaraguan

Government 'is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false'. He continues: 'In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador . . . Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them.'

The Foreign Minister explains the geographical difficulty of patrolling Nicaragua's frontiers:

***81** 'Nicaragua's frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. To the south, Nicaragua's border with Costa Rica extends for 220 kilometers. This area is also characterized by dense and remote jungles and is also virtually inaccessible by land transport. As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic.'

He then points out the complication of the presence of the contras along the northern and southern borders, and describes efforts by Nicaragua to obtain verifiable international agreements for halting all arms traffic in the region.

148. Before turning to the evidence offered by Nicaragua at the hearings, the Court would note that the action of the United States Government itself, on the basis of its own intelligence reports, does not suggest that arms supply to El Salvador from the territory of Nicaragua was continuous from July 1979, when the new regime took power in Managua, and the early months of 1981. The presidential Determination of 12 September 1980, for the purposes of the Special Central American Assistance Act 1979, quoted in paragraph 123 above, officially certified that the Government of Nicaragua was not aiding, abetting or supporting acts of violence or terrorism in other countries, and the press release of the same date emphasized the 'careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field' for the purposes of the Determination. The 1983 Report of the Intelligence Committee, on the other hand, referring to its regular review of intelligence since 'the 1979 Sandinista victory in Nicaragua', found that the intelligence available to it in May 1983 supported 'with certainty' the judgment that arms and material supplied to 'the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas' (see paragraph 137 above).

149. During the oral proceedings Nicaragua offered the testimony of Mr. MacMichael, already reviewed above (paragraphs 134 and 135) from a different aspect. The witness, who was well placed to judge the situation from United States intelligence, stated that there was no detection by United States intelligence capabilities of arms traffic from Nicaraguan territory to El Salvador during the period of his service (March 1981 to April 1983). He was questioned also as to his opinion, in the light of official ***82** statements and press reports, on the situation after he left the CIA and ceased to have access to intelligence material, but the Court considers it can attach little weight to statements of opinion of this kind (cf. paragraph 68 above).

150. In weighing up the evidence summarized above, the Court has to determine also the significance of the context of, or background to, certain statements or indications. That background includes, first, the ideological similarity between two movements, the Sandinista movement in Nicaragua and the armed opposition to the present government in El Salvador; secondly the consequent political interest of Nicaragua in the weakening or overthrow of the government in power in El Salvador; and finally, the sympathy displayed in Nicaragua, including among members of the army, towards the armed opposition in El Salvador. At the meeting of 12 August 1981 (paragraph 136 above), for example, Commander Ortega told the United States representative, Mr. Enders, that 'we are interested in seeing the guerrillas in El Salvador and Guatemala triumph . . .', and that 'there is a great desire here to collaborate with the Salvadorian people . . .'. Against this background, various indications which, taken alone, cannot constitute either evidence or even a strong presumption of aid being given by Nicaragua to the armed opposition in El Salvador, do at least require to be examined meticulously on the basis that it is probable that they are significant.

151. It is in this light, for example, that one indirect piece of evidence acquires particular importance. From the record of the meeting of 12 August 1981 in Managua, mentioned in the preceding paragraph, it emerges that the Nicaraguan authorities may have immediately taken steps,

at the request of the United States, to bring to a halt or prevent various forms of support to the armed opposition in El Salvador. The United States representative is there reported to have referred to steps taken by the Government of Nicaragua in March 1981 to halt the flow of arms to El Salvador, and his statement to that effect was not contradicted. According to a New York Times report (17 September 1985) Commander Ortega stated that around this time measures were taken to prevent an airstrip in Nicaragua from continuing to be used for this type of activities. This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport. The promptness with which the Nicaraguan authorities closed off this channel is a strong indication that it was in fact being used, or had been used for such a purpose.

152. The Court finds, in short, that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. While the Court does not possess full proof that there was aid, or as to its exact nature, its scale and its continuance until the early months of ***83** 1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory. The Court has already explained (paragraphs 64, 69 and 70) the precise degree to which it intended to take account, as regards factual evidence, of statements by members of the governments of the States concerned, including those of Nicaragua. It will not return to this point.

153. After the early months of 1981, evidence of military aid from or through Nicaragua remains very weak. This is so despite the deployment by the United States in the region of extensive technical resources for tracking, monitoring and intercepting air, sea and land traffic, described in evidence by Mr. MacMichael and its use of a range of intelligence and information sources in a political context where, moreover, the Government had declared and recognized surveillance of Nicaragua as a 'high priority'. The Court cannot of course conclude from this that no transborder traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind, had it been persistent and on a significant scale, must inevitably have been discovered, in view of the magnitude of the resources used for that purpose. The Court merely takes note that the allegations of arms-trafficking are not solidly established; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

154. In this connection, it was claimed in the Declaration of Intervention by El Salvador that there was a 'continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country' (para. VIII), and El Salvador also affirmed the existence of 'land infiltration routes between Nicaragua and El Salvador'. Had evidence of this become available, it is not apparent why El Salvador, given full knowledge of an arms-flow and the routes used, could not have put an end to the traffic, either by itself or with the assistance of the United States, which has deployed such powerful resources. There is no doubt that the United States and El Salvador are making considerable effort to prevent any infiltration of weapons and any form of support to the armed opposition in El Salvador from the direction of Nicaragua. So far as the Court has been informed, however, they have not succeeded in tracing and intercepting this infiltration and these various forms of support. Consequently, it can only interpret the lack of evidence of the transborder arms-flow in one of the following two ways: either this flow exists, but is neither as frequent nor as considerable as alleged by the respondent State; or it is being carried on without the knowledge, and against the will, of a government which would rather put a stop to it. If this latter conclusion is at all valid with regard to El Salvador and the United States it must therefore be at least equally valid with regard to Nicaragua.

155. Secondly, even supposing it well established that military aid is ***84** reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949:

'it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.' (Corfu Channel, I.C.J. Reports 1949, p. 18.)

Here it is relevant to bear in mind that there is reportedly a strong will for collaboration and mutual

support between important elements of the populations of both El Salvador and Nicaragua, not least among certain members of the armed forces in Nicaragua. The Court sees no reason to dismiss these considerations, especially since El Salvador itself recognizes the existence in Nicaraguan coastal areas of 'traditional smugglers' (Declaration, para. VIII, H), because Nicaragua is accused not so much of delivering weapons itself as of allowing them to transit through its territory; and finally because evidence has been provided, in the report of the meeting of 12 August 1981 referred to in paragraph 136 above, of a degree of co-operation between the United States and Nicaragua for the purpose of putting a stop to these arms deliveries. The continuation of this co-operation does not seem to have depended solely on the Government of Nicaragua, for the Government of the United States, which in 1981 again raised with it the question of this traffic, this time refused to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it. Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged evidence which the United States claimed to possess.

156. In passing, the Court would remark that, if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed; it could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua. It is difficult to accept that it should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of collective self-defence. If, on the other hand, this evidence does not exist, that, as the Court has pointed out, implies that the arms traffic is so insignificant and ***85** casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, a fortiori, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.

157. This second hypothesis would provide the Court with a further reason for taking Nicaragua's affirmation into consideration, in that, if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic: its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega ***86** did not in any sense promise to cease sending arms, but,

on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza regime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

* *

161. The Court therefore turns to the claim that Nicaragua has been responsible for cross-border military attacks on Honduras and Costa Rica. The United States annexed to its Counter-Memorial on jurisdiction, inter alia, a document entitled 'Resume of Sandinista Aggression in Honduran Territory in 1982' issued by the Press and Information Officer of the Honduran Ministry of Foreign Relations on 23 August 1982. That document listed 35 incidents said to involve violations of Honduran territory, territorial waters or airspace, attacks on and harassment of the Honduran population or Honduran patrols, between 30 January 1982 and 2 1 August 1982. Also attached to the Counter- Memorial were copies of diplomatic Notes from Honduras to Nicaragua protesting at other incidents stated to have occurred in June/July 1983 and July 1984. The Court has no information as to whether Nicaragua replied to these communications, and if so in what terms.

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as ***87*** to the contemporary reaction of Nicaragua to these allegations; from press reports it appears that the matter was later amicably settled.

163. As the Court has already observed (paragraphs 130 to 131 above), both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984 on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the 'supposed armed attacks of Nicaragua against its neighbours', and proceeded to 'reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings'. However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. The Court is also aware of the fact that the FDN operates along the Nicaraguan border with Honduras, and the ARDE operates along the border with Costa Rica.

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165. In view of the assertion by the United States that it has acted in exercise of the right of collective self-defence for the protection of El Salvador, Honduras and Costa Rica, the Court has also

to consider the evidence available on the question whether those States, or any of them, made a request for such protection. In its Counter-Memorial on jurisdiction and admissibility, the United States informed the Court that

'El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression. Pursuant to the inherent right of individual and collective self-defense, and in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance, the United States has responded to these requests.'

No indication has however been given of the dates on which such requests for assistance were made. The affidavit of Mr. Shultz, Secretary of State, ***88** dated 14 August 1984 and annexed to the United States Counter-Memorial on jurisdiction and admissibility, while asserting that the United States is acting in accord with the provisions of the United Nations Charter, and pursuant to the inherent right of self defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression,

'we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world.' (Para. XII.)

Again, no dates are given, but the Declaration continues 'This was also done by the Revolutionary Junta of Government and the Government of President Magana', i.e., between October 1979 and December 1980, and between April 1982 and June 1984.

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take

'if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty [of Reciprocal Assistance]'.

This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance.

* * *

167. Certain events which occurred at the time of the fall of the regime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its immediate***89** predecessor, the Government of National Reconstruction, in 1979. From the documents made available to the Court, at its request, by Nicaragua, it appears that what occurred was as follows. On 23 June 1979, the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States adopted by majority, over the negative vote of, inter alios, the representative of the Somoza government of Nicaragua, a resolution on the subject of Nicaragua. By that resolution after declaring that 'the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua', the Meeting of Consultation declared

'That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following:

1. Immediate and definitive replacement of the Somoza regime.
2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza regime and which reflects the free will of the people of Nicaragua.
3. Guarantee of the respect for human rights of all Nicaraguans without exception.
4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice.'

On 12 July 1979, the five members of the Nicaraguan 'Junta of the Government of National Reconstruction' sent from Costa Rica a telegram to the Secretary- General of the Organization of American States, communicating the 'Plan of the Government of National Reconstruction to Secure Peace'. The telegram explained that the plan had been developed on the basis of the Resolution of the Seventeenth Meeting of Consultation; in connection with that plan, the Junta members stated that they wished to 'ratify' (ratificar) some of the 'goals that have inspired their government'. These included, first

'our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man [sic], and the Charter on Human Rights of the Organization of American States';

The Inter-American Commission on Human Rights was invited 'to visit our country as soon as we are installed in our national territory'. A further goal was

'the plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities'.

***90** The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan; they were enacted into law on 20 July 1979 and 21 August 1979.

168. In this connection, the Court notes that, since thus announcing its objectives in 1979, the Nicaraguan Government has in fact ratified a number of international instruments on human rights. At the invitation of the Government of Nicaragua, the Inter-American Commission on Human Rights visited Nicaragua and compiled two reports (OEA/Ser.L/V/11.53 and 62). A state of emergency was declared by the Nicaraguan Government (and notified to the United Nations Secretary-General) in July 1979, and was re-declared or extended on a number of subsequent occasions. On 4 November 1984, presidential and legislative elections were held, in the presence of foreign observers; seven political parties took part in the election, while three parties abstained from taking part on the ground that the conditions were unsatisfactory.

169. The view of the United States as to the legal effect of these events is reflected in, for example, a Report submitted to Congress by President Reagan on 10 April 1985 in connection with finance for the contras. It was there stated that one of the changes which the United States was seeking from the Nicaraguan Government was:

'implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy'.

A fuller statement of those views is contained in a formal finding by Congress on 29 July 1985, to the following effect:

'(A) the Government of National Reconstruction of Nicaragua formally accepted the June 23, 1979, resolution as a basis for resolving the Nicaraguan conflict in its 'Plan to Achieve Peace' which was submitted to the Organization of American States on July 12, 1979;

(B) the June 23, 1979, resolution and its acceptance by the Government of National Reconstruction of Nicaragua was the formal basis for the removal of the Somoza regime and the installation of the Government of National Reconstruction;

(C) the Government of National Reconstruction, now known as the Government of Nicaragua and controlled by the Frente Sandinista (the FSLN), has flagrantly violated the provisions of the June 23, 1979, resolution, the rights of the Nicaraguan people, and the security of the nations in the region, in that it -

***91** (i) no longer includes the democratic members of the Government of National Reconstruction in the political process;

(ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador;

(iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power;

(iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States;

(v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization;

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(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter- American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention; and
(vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern.'

170. The resolution goes on to note the belief expressed by Costa Rica, El Salvador and Honduras that

'their peace and freedom is not safe so long as the Government of Nicaragua excludes from power most of Nicaragua's political leadership and is controlled by a small sectarian party, without regard to the will of the majority of Nicaraguans'

and adds that

'the United States, given its role in the installation of the current Government of Nicaragua, has a special responsibility regarding the implementation of the commitments made by that Government in 1979, especially to those who fought against Somoza to bring democracy to Nicaragua with United States support'.

Among the findings as to the 'Resolution of the Conflict' is the statement that the Congress ***92** 'supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua's solemn commitments to the Nicaraguan people, the United States, and the Organization of American States'. From the transcripts of speeches and press conferences supplied to the Court by Nicaragua, it is clear that the resolution of Congress expresses a view shared by the President of the United States, who is constitutionally responsible for the foreign policy of the United States.

171. The question whether the alleged violations by the Nicaraguan Government of the 1979 Resolution of the Organization of American States Meeting of Consultation, listed in paragraph 169, are relied on by the United States Government as legal justifications of its conduct towards Nicaragua, or merely as political arguments, will be examined later in the present Judgment. It may however be observed that the resolution clearly links United States support for the contras to the breaches of what the United States regards as the 'solemn commitments' of the Government of Nicaragua.

* * * * *

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide- ranging. The United States has argued that:

'Just as Nicaragua's claims allegedly based on 'customary and general international law' cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties.'

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter: in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the 'principal source of the ***93** relevant international law', namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense 'the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law'. The United States concludes that 'since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims'. Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question; it further prevents it from applying in its decision any rule of customary

international law the content of which is also the subject of a provision in those multilateral treaties.
174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it
'cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.' (I.C.J. Reports 1984, p. 424, para. 73.)
Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been 'subsumed' and 'supervened' by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.
175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in ***94*** the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.
176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.
177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this ***95*** would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its

applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to 'crystallize', or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question 'were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law' (I.C.J. Reports 1969, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a 'provision essential to the accomplishment of the object or purpose of the treaty' (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, vis-a-vis the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are ***96*** customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of pacta sunt servanda. Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not 'susceptible of any compliance or execution whatever' (Northern Cameroons, I.C.J. Reports 1963, p. 37). The Court does not consider that this is

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the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174 above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, ***97*** to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes 'arising under' the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and opinio juris of States; as the Court recently observed,

'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.' (Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985, pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non- intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia, ***98*** international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this 'subjective element' - the expression used by the Court in its 1969 Judgment in the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 44) - that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency,

from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and ***99*** admissibility the United States asserts that 'Article 2(4) of the Charter is customary and general international law'. It quotes with approval an observation by the International Law Commission to the effect that

'the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force' (ILC Yearbook, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that 'indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law'. And the United States concludes:

'In sum, the provisions of Article 2(4) with respect to the lawfulness of the use of force are 'modern customary law' (International Law Commission, loc. cit.) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, loc. cit.). There is no other 'customary and general international law' on which Nicaragua can rest its claims.'

'It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law - Article 2(4) of the United Nations Charter.'

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that 'in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule'.

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an opinio juris as to the binding character of such abstention. This opinio juris may, though with all due caution, be deduced ***100*** from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It

would therefore seem apparent that the attitude referred to expresses an opinio juris respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of opinio juris can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also signifcant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to 'refrain in their mutual relations, as well as in their international relations in general,' (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an opinio juris of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens' (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966-II, p. 247). Nicaragua in its ***101** Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations 'has come to be recognized as jus cogens'. The United States, in its Counter- Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of jus cogens'.

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their opinio juris as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution:

'Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

.....

States have a duty to refrain from acts of reprisal involving the use of force.

.....

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'

***102** 192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

'Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or

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armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.'
In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)); it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

'The General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigation, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles.'

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or 'droit naturel') which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the ***103** Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that:
'nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful'.
This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description, contained in Article 3, paragraph (g), of the

Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the ***104** Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point: and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 (f), the principle that:

'an act of aggression against one American State is an act of aggression against all the other American States'

and a provision in Article 27 that:

'Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.'

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High- Contracting Parties

'agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations';

and under paragraph 2 of that Article,

'On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate ***105** measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity.'

(The 1947 Rio Treaty was modified by the 1975 Protocol of San Jose, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided 'on the request of the State or States directly attacked'. It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in 'the special treaties on the subject'.

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be 'immediately reported' to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so

unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

***106** 201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non- participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (I.C.J. Reports 1949, p. 35), and international law requires political integrity also to be respected. Expressions of an opinio juris regarding the existence of the principle of non- intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the Corfu Channel case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (I.C.J. Reports 1949, p. 34), the Court observed that:

***107** 'the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.' (I.C.J. Reports 1949, p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be 'only a statement of political intention and not a formulation of law' (Official Records of the General Assembly, Twentieth Session, First Committee, A/C.1/SR.1423, p. 436). However, the

essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be 'basic principles' of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to 'interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations'; or the ratification by the United States of the Additional Protocol relative to Non- Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions: first, ***108** what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem - that of the content of the principle of non-intervention - the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State 'involve a threat or use of force'. These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied ***109** by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis.' (I.C.J. Reports 1969, p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of

States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the 'classic' rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they ***110*** directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

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210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question: if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today - whether customary international law or that of the United Nations system - States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack'. Furthermore, the Court has to recall that the

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United States itself is relying on the 'inherent right of self-defence' (paragraph 126 above), but apparently does not claim that any such right exists ***111*** as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist; but in doing so it may take note of the absence of any such claim by the United States as an indication of opinio juris.

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212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for ***112*** maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

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215. The Court has noted above (paragraph 77 in fine) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (the Hague Convention No. VIII) provides that 'every possible precaution must be taken for the security of peaceful shipping' and belligerents are bound 'to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel' (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of

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Convention No. VIII of 1907. Those principles were expressed by the Court in the Corfu Channel case as follows:
'certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war' (I.C.J. Reports 1949, p. 22).

* *

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. Nicaragua has in the present proceedings not expressly invoked the provisions of international humanitarian law as such, even though, as noted above (paragraph 113), it has complained of acts committed on its territory which ***113** would appear to be breaches of the provisions of such law. In the submissions in its Application it has expressly charged
'That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.' (Application, 26 (f).)
The Court has already indicated (paragraph 115) that the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua; accordingly, this submission has to be rejected. The question however remains of the law applicable to the acts of the United States in relation to the activities of the contras, in particular the production and dissemination of the manual on psychological operations described in paragraphs 117 to 122 above; as already explained (paragraph 116), this is a different question from that of the violations of humanitarian law of which the contras may or may not have been guilty.
217. The Court observes that Nicaragua, which has invoked a number of multilateral treaties, has refrained from making reference to the four Geneva Conventions of 12 August 1949, to which both Nicaragua and the United States are parties. Thus at the time when the Court was seised of the dispute, that dispute could be considered not to 'arise', to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute 'arising' under them; on that basis, it would have to consider whether any State party to those Conventions would be 'affected' by the decision, for the purposes of the United States multilateral treaty reservation.
218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them
'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the ***114** public conscience' (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).
Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non- international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.
219. The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to in

ernational conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.

220. The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any ***115** adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) the wounded and sick shall be collected and cared for . . .
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention . . .'

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221. In its Judgment of 26 November 1984, the Court concluded that, in so far as the claims presented in Nicaragua's Application revealed the existence of a dispute as to the interpretation or application of the Articles of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties mentioned in paragraph 82 of that Judgment (that is, Arts. XIX, XIV, XVII, XX, I), it had jurisdiction to deal with them under Article XXIV, paragraph 2, of that treaty. Having thus established its jurisdiction to entertain the dispute between the Parties in respect of the interpretation and application of the Treaty in question, the Court must determine the meaning of the various provisions which are relevant for its judgment. In this connection, the Court has in particular to ascertain the scope of Article XXI, paragraphs 1 (c) and 1 (d), of the Treaty. According to that clause
'the present Treaty shall not preclude the application of measures:
.....
(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
116 (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'.
In the Spanish text of the Treaty (equally authentic with the English text) the last phrase is rendered as 'sus intereses esenciales y seguridad'.
222. This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the treaty, it is covered by the provision in Article XXIV that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such.
223. The Court will therefore determine the substantial nature of the two categories of measures contemplated by this Article and which are not barred by the Treaty. No comment is required at this stage on subparagraph 1 (c) of Article XXI. As to subparagraph 1 (d), clearly 'measures ... necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security' must signify measures which the State in question must take in performance of an international commitment of which any evasion constitutes a breach. A commitment of this kind is accepted by Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25), or, for members of the Organization of American States, in respect of decisions taken by the Organ of Consultation of the Inter-American system, under Articles 3 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947). The Court does not ***117*** believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence.
224. On the other hand, action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as 'necessary to protect' the 'essential security interests' of a party. In its Counter-Memorial on jurisdiction and admissibility, the United States contended that: 'Any possible doubts as to the applicability of the FCN Treaty to Nicaragua's

claims is dispelled by Article XXI of the Treaty ...' After quoting paragraph 1 (d) (set out in paragraph 221 above), the Counter-Memorial continues:
'Article XXI has been described by the Senate Foreign Relations Committee as containing 'the usual exceptions relating ... to traffic in arms, ammunition and implements of war and to measures for collective or individual self- defense'.'
It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but necessary'.
225. Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty. The appraisal of the conduct of the United States in the light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law.

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226. The Court, having outlined both the facts of the case as proved by the evidence before it, and the general rules of international law which appear to it to be in issue as a result of these facts, and the applicable treaty-law, has now to appraise the facts in relation to the legal rules applicable. In so far as acts of the Respondent may appear to constitute violations of the relevant rules of law, the Court will then have to determine ***118*** whether there are present any circumstances excluding unlawfulness, or whether such acts may be justified upon any other ground.

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227. The Court will first appraise the facts in the light of the principle of the non-use of force, examined in paragraphs 187 to 200 above. What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any State. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect:
- the laying of mines in Nicaraguan internal or territorial waters in early 1984 (paragraph 80 above);
- certain attacks on Nicaraguan ports, oil installations and a naval base (paragraphs 81 and 86 above).
These activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness, a question now to be examined. The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a 'threat of force', which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.
228. Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in
'recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua' (Application, para. 26 (a) and (c)).
So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that

principle by its ***119*** assistance to the contras in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State', and 'participating in acts of civil strife ... in another State', in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to 'involve a threat or use of force'. In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain transborder***120*** incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an 'armed attack' by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13-23); the representative of Honduras however stated that

'my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population' (ibid., p. 37).

There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence.

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self- defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim

of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the 'open foreign intervention practised by Nicaragua in our internal affairs' (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed ***121*** attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua 'since at least 1980'. In that Declaration, El Salvador affirmed that initially it had 'not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply', since it sought 'a solution of understanding and mutual respect' (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective selfdefence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council 'is a Central American problem, without exception, and it must be solved regionally' (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self- defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government add essed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security ***122*** Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The states concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

237. Since the Court has found that the condition sine qua non required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality,

they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year - paragraph 93 above) cannot be said to correspond to a 'necessity' justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the contras might meet the criterion of proportionality, the Court cannot regard the United States activities summarized in paragraphs 80, 81 and 86, i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also ***123*** observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above).

* *

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the 'military and paramilitary activities aimed at the government and people of Nicaragua' have two purposes:

'(a) The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States; and

(b) The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands.'

Nicaragua also contends that the various acts of an economic nature, summarized in paragraphs 123 to 125 above, constitute a form of 'indirect' intervention in Nicaragua's internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to the Government of the United States in giving aid and support to the contras. It contends that the purpose of the policy of the United States and its actions against Nicaragua in pursuance of this policy was, from the beginning, to overthrow the Government of Nicaragua. In order to demonstrate this, it has drawn attention to numerous statements by high officials of the United States Government, in particular by President Reagan, expressing solidarity and support for the contras, described on occasion as 'freedom fighters', and indicating that support for the contras would continue until the Nicaraguan Government took certain action, desired by the United States Government, amounting in effect to a surrender to the demands of the latter Government. The official Report of the ***124*** President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that: 'We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government.' But it indicates also quite openly that 'United States policy toward Nicaragua' - which includes the support for the military and paramilitary activities of the contras which it was the purpose of the Report to continue - 'has consistently sought to achieve changes in Nicaraguan government policy and behavior'.

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the contras, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of

State sovereignty, to decide freely (see paragraph 205 above); and secondly that the intention of the contras themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the contras' 'openly acknowledged goal of overthrowing the Sandinistas'. Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the contras was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the 'Nicaraguan Democratic Force', intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua. The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally farreaching. It is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the contras in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle ofnon-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the contras to 'humanitarian assistance' (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first ***125*** and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

'The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours - in its international and national capacity - to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co- operation and lasting peace amongst all peoples'

and that

'It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.'

243. The United States legislation which limited aid to the contras to humanitarian assistance however also defined what was meant by such assistance, namely:

'the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death' (paragraph 97 above).

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be 'shared' with the contras. Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the contras, it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.

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244. As already noted, Nicaragua has also asserted that the United States is responsible for an 'indirect' form of intervention in its internal ***126*** affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981; and the trade embargo adopted on 1

May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.

245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua; any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seised the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

* *

246. Having concluded that the activities of the United States in relation to the activities of the contras in Nicaragua constitute prima facie acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non- intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State - supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

247. The Court has already indicated (paragraph 238) its conclusion that the conduct of the United States towards Nicaragua cannot be justified by the right of collective self-defence in response to an alleged armed attack on one or other of Nicaragua's neighbours. So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed ***127*** attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack. The Court must therefore enquire now whether the activities of the United States towards Nicaragua might be justified as a response to an intervention by that State in the internal affairs of another State in Central America.

248. The United States admits that it is giving its support to the contras in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed transborder attacks on those two States. The United States raises this justification as one of self-defence; having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.

249. On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

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250. In the Application, Nicaragua further claims:
'That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by:
- armed attacks against Nicaragua by air, land and sea;
- incursions into Nicaraguan territorial waters;
- aerial trespass into Nicaraguan airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.' (Para. 26 (b).)
***128** The Nicaraguan Memorial, however, enumerates under the heading of violations of sovereignty only attacks on Nicaraguan territory, incursions into its territorial sea, and overflights. The claim as to United States 'efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua' was presented in the Memorial under the heading of the threat or use of force, which has already been dealt with above (paragraph 227). Accordingly, that aspect of Nicaragua's claim will not be pursued further.
251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the contras, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sover-eignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sover-eignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).
252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take counter-measures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law.

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253. At this point it will be convenient to refer to another aspect of the legal implications of the mining of Nicaragua's ports. As the Court has indicated in paragraph 214 above, where the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by ***129** the laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce. This is clearly the case here. It is not for the Court to pass upon the rights of States which are not parties to the case before it; but it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

* *

254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 abo ve) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the 'UCLAs', as distinct from the contras. The Applicant has claimed

that acts perpetrated by the contras constitute breaches of the 'fundamental norms protecting human rights'; it has not raised the question of the law applicable in the event of conflict such as that between the contras and the established Government. In effect, Nicaragua is accusing the contras of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld; but it has also found the United States responsible for the publication and dissemination of the manual on 'Psychological Operations in Guerrilla Warfare' referred to in paragraphs 118 to 122 above.

255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to 'neutralize' certain 'carefully selected and planned targets', including judges, police officers, State Security officials, etc., after the local population have been gathered ***130*** in order to 'take part in the act and formulate accusations against the oppressor'. In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'

and probably also of the prohibition of 'violence to life and person, in particular murder to all kinds, ...'.

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the contras in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to 'moderate' such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.

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257. The Court has noted above (paragraphs 169 and 170) the attitude of the United States, as expressed in the finding of the Congress of 29 July 1985, linking United States support to the contras with alleged breaches by the Government of Nicaragua of its 'solemn commitments to the Nicaraguan people, the United States, and the Organization of American States'. Those breaches were stated to involve questions such as the composition of the government, its political ideology and alignment, totalitarianism, human rights, militarization and aggression. So far as the question of 'aggression in the form of armed subversion against its neighbours' is concerned, the Court has already dealt with the claimed justification of collective self-defence in response to armed attack, and will not return to that matter. It has also disposed of the suggestion of a right to collective counter-measures in face of an armed intervention. What is now in question is whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States.

258. The questions as to which the Nicaraguan Government is said to ***131*** have entered into a commitment are questions of domestic policy. The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind, even assuming that it was in a position to do so. A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be no need to make any enquiries, in a matter outside the

Court's jurisdiction, to ascertain in what sense and along what lines Nicaragua has actually exercised its right.

259. However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sover-eignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization. Both Nicaragua and the United States are members of the Organization of American States. The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3 (d) that

'The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy';

on the other hand, it provides for the right of every State 'to organize itself as it sees fit' (Art. 12), and to 'develop its cultural, political and economic life freely and naturally' (Art. 16).

260. The Court has set out above the facts as to the events of 1979, including the resolution of the XVIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a 'Plan to secure peace'. The letter contained inter alia a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new regime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua 'as soon as we are installed'. In this way, before its installation in Managua, the new regime soothed apprehensions as desired and expressed its intention of governing the country democratically.

***132** 261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the 'Plan to secure peace', from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter 'exclusively' for the Nicaraguan people, while stating that that solution was to be based (in Spanish, deberia inspirarse) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members 'agree to dedicate every effort', including:

'The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system.' (Art. 43 (f).)

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not

directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the 'special responsibility regarding the implementation of the ***133*** commitments made' by the Nicaraguan Government which the United States considers itself to have assumed in view of 'its role in the installation of the current Government of Nicaragua' (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship'. However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on 'Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.

134 266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of 'ideological intervention', which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of 'the 1965 General Assembly Declaration on Intervention' (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle 'of ideological intervention', the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law: it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a 'legal commitment' by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of

which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San Jose, Costa Rica). The mechanisms provided for therein have functioned. The Inter- American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports. 268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ***135*** ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence. 269. The Court now turns to another factor which bears both upon domestic policy and foreign policy. This is the militarization of Nicaragua, which the United States deems excessive and such as to prove its aggressive intent, and in which it finds another argument to justify its activities with regard to Nicaragua. It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

* * *

270. Having thus concluded its examination of the claims of Nicaragua based on customary international law, the Court must now consider its claims based on the Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956; Article XXIV, paragraph 2, of that Treaty provides for the jurisdiction of the Court for any dispute between the Parties as to its interpretation or application. The first claim which Nicaragua makes in relation to the Treaty is however one not based directly on a specific provision thereof. Nicaragua has argued that the United States, by its conduct in relation to Nicaragua, has deprived the Treaty of its object and purpose, and emptied it of real content. For this purpose, Nicaragua has relied on the existence of a legal obligation of States to refrain from acts which would impede the due performance of any treaties entered into by them. However, if there is a duty of a State not to impede the due performance of a treaty to which it is a party, that is not a duty imposed by the treaty itself. Nicaragua itself apparently contends that this is a duty arising under customary international law independently of the treaty, that it is implicit in the rule pacta sunt servanda. This claim therefore does not in fact fall under the heading of possible breach by the United States of the provisions of the 1956 Treaty, though it may involve the interpretation or application thereof.
271. In view of the Court's finding in its 1984 Judgment that the Court has jurisdiction both under the 1956 FCN Treaty and on the basis of the United States acceptance of jurisdiction under the Optional Clause of Article 36, paragraph 2, this poses no problem of jurisdiction in the present ***136*** case. It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head. However, as indicated in paragraph 221 above, the Court has first to determine whether the actions of the United States complained of as breaches of the 1956 FCN Treaty have to be regarded as 'measures ... necessary to protect its essential security interests [sus intereses esenciales y seguridad]', since Article XXI of the Treaty provides that 'the present Treaty shall not preclude the application of' such measures. The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be 'measures ... necessary to protect' essential security interests.
272. In the view of the Court, an act cannot be said to be one calculated to deprive a treaty of its

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object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty 'shall not preclude' the act, so that it will not constitute a breach of the express terms of the treaty. Accordingly, the Court cannot entertain either the claim of Nicaragua alleging conduct depriving the treaty of its object and purpose, or its claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not 'measures ... necessary to protect' the essential security interests of the United States. The Court will first proceed to examine whether the claims of Nicaragua in relation to the Treaty appear to be well founded, and then determine whether they are nevertheless justifiable by reference to Article XXI.

273. The argument that the United States has deprived the Treaty of its object and purpose has a scope which is not very clearly defined, but it appears that in Nicaragua's contention the Court could on this ground make a blanket condemnation of the United States for all the activities of which Nicaragua complains on more specific grounds. For Nicaragua, the Treaty is 'without doubt a treaty of friendship which imposes on the Parties the obligation to conduct amicable relations with each other', and 'Whatever the exact dimensions of the legal norm of 'friendship' there can be no doubt of a United States violation in this case'. In other words, the Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act ***137** toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

274. The Court has in this respect to note that the Treaty itself provides in Article XXIV, paragraph 1, as follows:

'Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.'

Nicaragua claims that the conduct of the United States is such as drastically to 'affect the operation' of the Treaty; but so far as the Court is informed, no representations on the specific question have been made. The Court has therefore first to be satisfied that a claim based on the 1956 FCN Treaty is admissible even though no attempt has been made to use the machinery of Article XXIV, paragraph 1, to resolve the dispute. In general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim. However, in the present case, the operation of Article XXIV, paragraph 1, if it had been invoked, would have been wholly artificial. While Nicaragua does allege that certain activities of the United States were in breach of the 1956 FCN Treaty, it has also claimed, and the Court has found, that they were violations of customary international law. In the Court's view, it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court. In its 1984 Judgment the Court has already dealt with the argument that Article XXIV, paragraph 2, of the Treaty required that the dispute be 'one not satisfactorily adjusted by diplomacy', and that this was not the case in view of the absence of negotiations between the Parties. The Court held that:

'it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty' (I.C.J. Reports 1984, p. 428).

***138** The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compromissory clause in the Treaty. The Court nevertheless considers that neither paragraph of Article XXIV constitutes a bar to examination of Nicaragua's claims.

275. In respect of the claim that the United States activities have been such as to deprive the 1956 FCN Treaty of its object and purpose, the Court has to make a distinction. It is unable to regard all the acts complained of in that light; but it does consider that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to

sponsoring friendship between the two States parties to it. These are: the direct attacks on ports, oil installations, etc., referred to in paragraphs 81 to 86 above; and the mining of Nicaraguan ports, mentioned in paragraph 80 above. Any action less calculated to serve the purpose of 'strengthening the bonds of peace and friendship traditionally existing between' the Parties, stated in the Preamble of the Treaty, could hardly be imagined.

276. While the acts of economic pressure summarized in paragraphs 123 to 125 above are less flagrantly in contradiction with the purpose of the Treaty, the Court reaches a similar conclusion in respect of some of them. A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty. The 90 per cent cut in the sugar import quota of 23 September 1983 does not on the other hand seem to the Court to go so far as to constitute an act calculated to defeat the object and purpose of the Treaty. The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances. The Court has also to note that, by the very terms of the legislation authorizing such aid (the Special Central American Assistance Act, 1979), of which the Government of Nicaragua must have been aware, the continuance of aid was made subject to the appreciation of Nicaragua's conduct by the President of the United States. As to the opposition to the grant of loans from international institutions, the Court cannot regard this as sufficiently linked with the 1956 FCN Treaty to constitute an act directed to defeating its object and purpose.

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277. Nicaragua claims that the United States is in breach of Article I of the 1956 FCN Treaty, which provides that each Party is to accord 'equitable***139*** treatment' to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression 'equitable treatment' 'it necessarily precludes the Government of the United States from ... killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property'.

It is Nicaragua's claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the contras were 'controlled' by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the contras on the United States authorities cannot be established; and it has not been able to conclude that the contras are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for 'equitable treatment' in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua - as to which the Court expresses no opinion - those acts of the contras performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States.

278. Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty; there remains the question whether such action can be justified under Article XXI (see paragraphs 280 to 282 below). In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce. Nicaragua however also contended that all the activities of the United States in and against Nicaragua are 'violative of the 1956 Treaty':

'Since the word 'commerce' in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms.'

It is clear that considerable economic loss and damage has been inflicted ***140*** on Nicaragua by the actions of the contras: apart from the economic impact of acts directly attributable to the United States, such as the loss of fishing boats blown up by mines, the Nicaraguan Minister of Finance

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estimated loss of production in 1981-1984 due to inability to collect crops, etc., at some US$ 300 million. However, as already noted (paragraph 277 above) the Court has not found the relationship between the contras and the United States Government to have been proved to be such that the United States is responsible for all acts of the contras.

279. The trade embargo declared by the United States Government on 1 May 1985 has already been referred to in the context of Nicaragua's contentions as to acts tending to defeat the object and purpose of the 1956 FCN Treaty. The question also arises of its compatibility with the letter and the spirit of Article XIX of the Treaty. That Article provides that 'Between the territories of the two Parties there shall be freedom of commerce and navigation' (para. 1) and continues

'3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation ...'

By the Executive Order dated 1 May 1985 the President of the United States declared 'I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto'. The Court notes that on the same day the United States gave notice to Nicaragua to terminate the Treaty under Article XXV, paragraph 3, thereof; but that Article requires 'one year's written notice' for the termination to take effect. The freedom of Nicaraguan vessels, under Article XIX, paragraph 3, 'to come with their cargoes to all ports, places and waters' of the United States could not therefore be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo. The Court accordingly finds that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty.

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 (c) and 1 (d), concerning respectively 'traffic in arms' and 'measures ... necessary to fulfill' obligations 'for the maintenance or restoration of international peace and security' or necessary to protect the 'essential security interests' of a party, may be invoked to justify the acts complained of. In its Counter- Memorial on jurisdiction and admissibility, ***141** the United States relied on paragraph 1 (c) as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the contras, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 (c) does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 (d), to the direct attacks on ports, oil installations, etc.; the mining of Nicaraguan ports; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

281. In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that 'the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States', even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date.

282. Secondly, the Court emphasizes the importance of the word 'necessary' in Article XXI: the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of selfdefence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as 'necessary' to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party; the text does not refer to what the party 'considers necessary' for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four

years previously, the Court is unable to find that the embargo was 'necessary' to protect those interests. Accordingly, Article XXI affords ***142** no defence for the United States in respect of any of the actions here under consideration.

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283. The third submission of Nicaragua in its Memorial on the merits, set out in paragraph 15 above, requests the Court to adjudge and declare that compensation is due to Nicaragua and 'to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua'. The fourth submission requests the Court to award to Nicaragua the sum of 370,200,000 United States dollars, 'which sum constitutes the minimum valuation of the direct damages' claimed by Nicaragua. In order to decide on these submissions, the Court must satisfy itself that it possesses jurisdiction to do so. In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation. More specifically, the Court notes that in its declaration of acceptance of jurisdiction under the Optional Clause of 26 August 1946, the United States expressly accepted the Court's jurisdiction in respect of disputes concerning 'the nature or extent of the reparation to be made for the breach of an international obligation'. The corresponding declaration by which Nicaragua accepted the Court's jurisdiction contains no restriction of the powers of the Court under Article 36, paragraph 2 (d), of its Statute; Nicaragua has thus accepted the 'same obligation'. Under the 1956 FCN Treaty, the Court has jurisdiction to determine 'any dispute between the Parties as to the interpretation or application of the present Treaty' (Art. XXIV, para. 2); and as the Permanent Court of International Justice stated in the case concerning the Factory at Chorzow, 'Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.' (Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.)

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more farreaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove ***143** exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become res judicata.

285. There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the 'minimum (and in that sense provisional) valuation of direct damages'. There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement ...' (Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

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286. By its Order of 10 May 1984, the Court indicated, pursuant to Article 41 of the Statute of the Court, the provisional measures which in its view 'ought to be taken to preserve the respective rights of either party', pending the final decision in the present case. In connection with the first such measure, namely that
'The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines', ***144** the Court notes that no complaint has been made that any further action of this kind has been taken.
287. On 25 June 1984, the Government of Nicaragua addressed a communication to the Court referring to the Order indicating provisional measures, informing the Court of what Nicaragua regarded as 'the failure of the United States to comply with that Order', and requesting the indication of further measures. The action by the United States complained of consisted in the fact that the United States was continuing 'to sponsor and carry out military and paramilitary activities in and against Nicaragua'. By a letter of 16 July 1984, the President of the Court informed the Agent of Nicaragua that the Court considered that that request should await the outcome of the proceedings on jurisdiction which were then pending before the Court. The Government of Nicaragua has not reverted to the question.
288. The Court considers that it should re-emphasize, in the light of its present findings, what was indicated in the Order of 10 May 1984:
'The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.'
289. Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties 'should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court' and
'should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case'.
When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can effect the results of conduct which the Court may rule to have been contrary to international law.

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***145** 290. In the present Judgment, the Court has found that the Respondent has, by its activities in relation to the Applicant, violated a number of principles of customary international law. The Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law. In the present case, the Court has already taken note, in its Order indicating provisional measures and in its Judgment on jurisdiction and admissibility (I.C.J. Reports 1984, pp. 183-184, paras. 34 ff., pp. 438-441, paras. 102 ff.) of the diplomatic negotiation known as the Contadora Process, which appears to the Court to correspond closely to the spirit of the principle which the Court has here recalled.
291. In its Order indicating provisional measures, the Court took note of the Contadora Process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly (I.C.J. Reports 1984, pp. 183- 184, para. 34). During that phase of the proceedings as during the

phase devoted to jurisdiction and admissibility, both Nicaragua and the United States have expressed full support for the Contadora Process, and praised the results achieved so far. Therefore, the Court could not but take cognizance of this effort, which merits full respect and consideration as a unique contribution to the solution of the difficult situation in the region. The Court is aware that considerable progress has been achieved on the main objective of the process, namely agreement on texts relating to arms control and reduction, exclusion of foreign military bases or military interference and withdrawal of foreign advisers, prevention of arms traffic, stopping the support of groups aiming at the destabilization of any of the Governments concerned, guarantee of human rights and enforcement of democratic processes, as well as on co-operation for the creation of a mechanism for the verification of the agreements concerned. The work of the Contadora Group may facilitate the delicate and difficult negotiations, in accord with the letter and spirit of the United Nations Charter, that are now required. The Court recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes.

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***146** 292. For these reasons,
THE COURT
(1) By eleven votes to four,
Decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the 'multilateral treaty reservation' contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Ruda, Elias, Sette-Camara and Ni.
(2) By twelve votes to three,
Rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(3) By twelve votes to three,
Decides that the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(4) By twelve votes to three,
Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against ***147** the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(5) By twelve votes to three,
Decides that the United States of America, by directing or authorizing overflights of Nicaraguan

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territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(6) By twelve votes to three,
Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(7) By fourteen votes to one,
Decides that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Schwebel.
(8) By fourteen votes to one,
Decides that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph ***148** (6) hereof, has acted in breach of its obligations under customary international law in this respect;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Oda.
(9) By fourteen votes to one,
Finds that the United States of America, by producing in 1983 a manual entitled Operaciones sicologicas en guerra de guerrillas, and disseminating it to contra forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Oda.
(10) By twelve votes to three,
Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(11) By twelve votes to three,
Decides that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.

***149** (12) By twelve votes to three,
Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(13) By twelve votes to three,
Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judges Oda, Schwebel and Sir Robert Jennings.
(14) By fourteen votes to one,
Decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Schwebel.
(15) By fourteen votes to one,
Decides that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case;
IN FAVOUR: President Nagendra Singh; Vice-President de Lacharriere; Judges Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen; Judge ad hoc Colliard;
AGAINST: Judge Schwebel.
(16) Unanimously,
Recalls to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.
***150** Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Republic of Nicaragua and to the Government of the United States of America, respectively.

(Signed) NAGENDRA SINGH, President.

(Signed) Santiago TORRES BERNARDEZ, Registrar.
President NAGENDRA SINGH, Judges LACHS, RUDA, ELIAS, AGO, SETTECAMARA and NI append separate opinions to the Judgment of the Court.
Judges ODA, SCHWEBEL and Sir Robert JENNINGS append dissenting opinions to the Judgment of the Court.
(Initialled) N.S.
(Initialled) S.T.B.

ANNEX 4

Kadic v Karadzic, 70 F.3d 232 (2d Cir. 1995);

nying his motions for summary judgment, the district court relied almost exclusively on the consulting agreement between Dan–Mar Enterprises and UEL. 867 F.Supp. at 258–59. However, the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993); see also *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir.1984) (under agency principles, "employee does not become an independent contractor simply because a contract describes him as such"). Moreover, the corporate form under which Sharkey did business is not dispositive under the common-law agency test. Cf. *Frankel v. Bally Inc.*, 987 F.2d 86, 91 (2d Cir.1993). Employment status depends on all of the factual incidents of the relationship. *Darden*, 503 U.S. at 324, 112 S.Ct. at 1348.

Furthermore, as already indicated, Sharkey contends that the part-time arrangement provided for in the consulting agreement changed almost immediately into full-time employment in which he held the same position and performed the same duties as he had as an employee prior to his retirement. Appellees dispute exactly when this change occurred. Appellees also dispute Sharkey's assertion that he worked exclusively for UEL in 1988–91. The factual issues thus raised could not properly be determined on a motion for summary judgment—either by Sharkey or by appellees. We therefore conclude that the district court did not err in denying Sharkey's motions for summary judgment.

III. Conclusion

To summarize, we hold that the district court erred in granting appellees' motions for summary judgment and did not err in denying Sharkey's motions. We therefore reverse and remand for further proceedings.

S. KADIC, on her own behalf and on behalf of her infant sons Benjamin and Ognjen, Internationalna Iniciativa Zena Bosne I Hercegovine "Biser," and Zene Bosne I Hercegovine, Plaintiffs–Appellants,

v.

Radovan KARADŽIĆ, Defendant–Appellee.

Jane DOE I, on behalf of herself and all others similarly situated; and Jane Doe II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated, Plaintiffs–Appellants,

v.

Radovan KARADŽIĆ, Defendant–Appellee.

Nos. 1541, 1544, Dockets 94–9035, 94–9069.

United States Court of Appeals, Second Circuit.

Argued June 20, 1995.

Decided Oct. 13, 1995.

Rehearing Denied Jan. 6, 1996.

Two groups of victims from Bosnia-Herzegovina brought actions against self-proclaimed president of unrecognized Bosnian-Serb entity under, inter alia, Alien Tort Claims Act for violations of international law. The United States District Court for the Southern District of New York, Peter K. Leisure, J., 866 F.Supp. 734, dismissed actions for lack of subject matter jurisdiction, and plaintiffs appealed. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) plaintiffs sufficiently alleged violations of customary international law and law of war for purposes of Alien Tort Claims Act; (2) plaintiffs sufficiently alleged that unrecognized Bosnian-Serb entity of "Srpska" was a "state," and that defendant acted under color of law for purposes of international law violations requiring official action; (3) defendant was not immune from personal service of process while invitee of United Nations; (4) actions were not precluded by political ques-

tion doctrine; and (5) defense under act of state doctrine was waived.

Reversed and remanded.

1. Federal Courts ⇐192.10, 243

Alien Tort Claims Act confers federal subject-matter jurisdiction when alien sues for tort committed in violation of law of nations, i.e., international law; there is no federal subject-matter jurisdiction under Alien Tort Claims Act unless complaint adequately pleads violation of law of nations or treaty of United States. 28 U.S.C.A. § 1350.

2. International Law ⇐1

Federal courts ascertaining content of the law of nations, for purposes of action brought under Alien Tort Claims Act, must interpret international law not as it was when Act was enacted, but as it has evolved and exists among nations of world today. 28 U.S.C.A. § 1350.

3. International Law ⇐2

In action brought under Alien Tort Claims Act, federal courts find norms of contemporary international law by consulting works of jurists writing professedly on public law, by general usage and practice of nations, or by judicial decisions recognizing and enforcing that law. 28 U.S.C.A. § 1350.

4. Criminal Law ⇐45.50
International Law ⇐1, 10.11
Slaves ⇐2
War and National Emergency ⇐11

Law of nations, as understood in modern era for purposes of action brought under Alien Tort Claims Act, does not confine its reach to state action, in that certain forms of conduct violate law of nations whether undertaken by those acting under auspices of state or only as private individuals, such as piracy, slave trade, and war crimes. 28 U.S.C.A. § 1350; Restatement (Third) of the Foreign Relations § 404; note preceding § 201.

5. International Law ⇐1, 10.11

Acts of genocide violate law of nations, or customary international law, regardless of whether offenders acted as individuals or as members of organizations. 18 U.S.C.A. § 1091.

6. International Law ⇐10.11

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly stated violation of international law norm proscribing genocide, regardless of whether person acted under color of law, for purposes of action brought under Alien Tort Claims Act. 18 U.S.C.A. § 1091; 28 U.S.C.A. § 1350.

7. War and National Emergency ⇐11

Acts of murder, rape, torture, and arbitrary detention of civilians, committed in course of hostilities, are "war crimes" in violation of international law of war.

See publication Words and Phrases for other judicial constructions and definitions.

8. War and National Emergency ⇐11

International law of war imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for prevention of war crimes.

9. Treaties ⇐8
War and National Emergency ⇐11

Under law of war as codified in Geneva Conventions, all "parties" to conflict, including insurgent military groups, are obliged to adhere to most fundamental requirements of law of war.

10. War and National Emergency ⇐11

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture against noncombatants in Bosnian civil war clearly stated "war crimes" in violation of most fundamental norms of international law of war, for purposes of action brought under Alien Tort Claims Act. 28 U.S.C.A. § 1350.

See publication Words and Phrases for other judicial constructions and definitions.

11. International Law ⇐1

War and National Emergency ⇐11

Torture Victim Act codifies universally accepted norm of international law prohibiting official torture and extends it to cover summary execution; however, torture and summary execution, when not perpetrated in course of genocide or war crimes, are proscribed only when committed by state officials or under color of law. Torture Victim Protection Act of 1991, §§ 2(a), 3(a), 28 U.S.C.A. § 1350 note.

12. International Law ⇐3, 4

Under international law, a "state" is entity that has defined territory and permanent population, that is under control of its own government, and that engages in, or has capacity to engage in, formal relations with other such entities; recognition by other states is not required. Restatement (Third) of Foreign Relations §§ 201, 202 comment.

See publication Words and Phrases for other judicial constructions and definitions.

13. International Law ⇐8

Any government, however violent and wrongful in its origin, must be considered "de facto government" if it is in full and actual exercise of sovereignty over territory and people large enough for nation. Restatement (Third) of Foreign Relations § 201.

See publication Words and Phrases for other judicial constructions and definitions.

14. International Law ⇐1, 4

Customary international law of human rights, such as proscription of official torture, applies without distinction between recognized and unrecognized states. Restatement (Third) of Foreign Relations §§ 207, 702.

15. International Law ⇐3

Plaintiff classes of Bosnian victims, who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that entity called "Srpska" satisfied criteria to be considered a "state" for purposes of establishing international law violations requiring state action; Srpska was alleged to control defined territory, to control populations within its power, to have entered into agreements with other governments, and to have had president, legislature, and its own currency. 28 U.S.C.A. § 1350; Restatement (Third) of Foreign Relations §§ 201, 207, 702.

16. International Law ⇐10.11

Plaintiff classes of Bosnian victims who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that defendant acted under color of law, for purposes of establishing international law violations which required official action, by alleging that defendant acted in concert with officials of former Yugoslavian state of Serbia. 28 U.S.C.A. § 1350.

17. Federal Courts ⇐192.10

"Color of law" jurisprudence of § 1983 is relevant guide to whether defendant has engaged in international law violations requiring "official action" for purposes of jurisdiction under Alien Tort Claims Act. 28 U.S.C.A. § 1350; 42 U.S.C.A. § 1983.

18. Civil Rights ⇐198(4)

Private individual acts under "color of law," within meaning of § 1983, when he acts together with state officials or with significant state aid. 42 U.S.C.A. § 1983.

19. International Law ⇐10.11

In construing terms "actual or apparent authority" and "color of law" under Torture Victim Protection Act, courts are to look to principles of agency law and to jurisprudence under 42 U.S.C.A. § 1983, respectively. Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note; 42 U.S.C.A. § 1983.

20. Federal Courts ⇐192.10

Though Torture Victim Protection Act creates cause of action for official torture, that statute, unlike Alien Tort Act, is not itself jurisdictional statute. 28 U.S.C.A. § 1331; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

21. Federal Courts ⇐192.10

Torture Victim Protection Act permitted plaintiff classes of Bosnian victims to pursue their claims of official torture against self-proclaimed leader of unrecognized Bosnian-Serb entity under jurisdiction conferred by Alien Tort Claims Act and also under general federal question jurisdiction statute. 28 U.S.C.A. §§ 1331, 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

22. Federal Civil Procedure ⇐415.1
Treaties ⇐8

Neither United Nations Headquarters Agreement nor federal common law provided defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," immunity from service of process while in judicial district as "invitee" of United Nations. 22 U.S.C.A. § 287 note; Restatement (Third) of Foreign Relations § 469 note.

23. Constitutional Law ⇐69

Mere possibility that defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," might at some future date be recognized by United States as head of state of friendly nation and might thereby acquire head-of state immunity did not transform claims of plaintiff Bosnian victims under Alien Tort Claims Act and Torture Victim Protection Act into nonjusticiable request for advisory opinion. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

24. Constitutional Law ⇐68(1)

Not every case "touching foreign relations" is nonjusticiable as political question, and judges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in context of human rights; preferable approach is to weigh carefully relevant considerations on case-by-case basis.

25. Constitutional Law ⇐68(1)

A "nonjusticiable political question" would ordinarily involve one or more of following factors: textually demonstrable constitutional commitment of issue to coordinate political department; lack of judicially discoverable and manageable standards for resolving it; or impossibility of deciding without initial policy determination of kind clearly for nonjudicial discretion; impossibility of court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; unusual need for unquestioning adherence to political decision already made; or potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See publication Words and Phrases for other judicial constructions and definitions.

26. Constitutional Law ⇐68(1)

Actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act were not nonjusticiable political questions; officials of United States expressly disclaimed any concern that political question doctrine should be invoked to prevent litigation of subject lawsuits. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

27. Federal Courts ⇐616

Act of state doctrine was not asserted in district court, and was therefore not before court on appeal, in actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

Beth Stephens, New York City (Matthew J. Chachère, Jennifer Green, Peter Weiss, Michael Ratner, Jules Lobel, Center for Constitutional Rights, New York City; Rhonda Copelon, Celina Romany, International Women's Human Rights Clinic, Flushing, NY; Judith Levin, International League of Human Rights, New York City; Harold Hongju Koh, Ronald C. Slye, Swati Agrawal, Bruce Brown, Charlotte Burrows, Carl Goldfarb, Linda Keller, Jon Levitsky, Daniyal

Mueenuddin, Steve Parker, Maxwell S. Peltz, Amy Valley, Wendy Weiser, Allard K. Lowenstein International Human Rights Clinic, New Haven, CT, on the brief), for plaintiffs-appellants, Jane Doe I and Jane Doe II.

Catharine A. MacKinnon, Ann Arbor, MI (Martha F. Davis, Deborah A. Ellis, Yolanda S. Wu, NOW Legal Defense and Education Fund, New York City, on the brief), for plaintiffs-appellants Kadic, Internationalna Iniciativa Zena Bosne I Hercegovine, and Zena Bosne I Hercegovine.

Ramsey Clark, New York City (Lawrence W. Schilling, New York City, on the brief), for defendant-appellee.

Drew S. Days, III, Solicitor General, and Conrad K. Harper, Legal Adviser, Department of State, Washington, DC, submitted a Statement of Interest of the U.S.; Frank W. Hunger, Asst. Atty. Gen., and Douglas Letter, Appellate Litigation Counsel, on the brief.

Karen Honeycut, Vladeck, Waldman, Elias & Engelhard, New York, NY, submitted a brief for amici curiae Law Professors Frederick M. Abbott, et al.

Nancy Kelly, Women Refugee Project, Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, Cambridge, Mass., submitted a brief for amici curiae Alliances—an African Women's Network, et al.

Juan E. Mendez, Joanne Mariner, Washington, DC; Professor Ralph G. Steinhardt, George Washington University School of Law, Washington, DC; Paul L. Hoffman, Santa Monica, CA; Professor Joan Fitzpatrick, University of Washington School of Law, Seattle, WA, submitted a brief for amicus curiae Human Rights Watch.

Stephen M. Schneebaum, Washington, DC, submitted a brief for amici curiae The International Human Rights Law Group, et al.

Before: NEWMAN, Chief Judge, FEINBERG and WALKER, Circuit Judges.

JON O. NEWMAN, Chief Judge:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian–Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña–Irala*, 630 F.2d 876 (2d Cir.1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune from service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadžić, President of the self-proclaimed Bosnian–Serb republic of "Srpska." *Doe v. Karadžić*, 866 F.Supp. 734 (S.D.N.Y. 1994) ("*Doe*"). For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background

The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia–Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape,

forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian–Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadžić, formerly a citizen of Yugoslavia and now a citizen of Bosnia–Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian–Serb republic within Bosnia–Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia–Herzegovina. In his capacity as President, Karadžić possesses ultimate command authority over the Bosnian–Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command. The complaints allege that Karadžić acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

The two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney's fees, and, in one of the cases, injunctive relief. Plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991 ("Torture Victim Act"), Pub.L. No. 102–256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (Supp. V 1993), the general federal-question jurisdictional statute, 28 U.S.C. § 1331 (1988), and principles of supplemental jurisdiction, 28 U.S.C. § 1367 (Supp. V 1993).

In early 1993, Karadžić was admitted to the United States on three separate occasions as an invitee of the United Nations. According to affidavits submitted by the plaintiffs, Karadžić was personally served with the summons and complaint in each action during two of these visits while he was physically present in Manhattan. Karadžić admits that he received the summons and complaint in the *Kadic* action, but disputes whether the attempt to serve him personally in the *Doe* action was effective.

In the District Court, Karadžić moved for dismissal of both actions on the grounds of insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, and nonjusticiability of plaintiffs' claims. However, Karadžić submitted a memorandum of law and supporting papers only on the issues of service of process and personal jurisdiction, while reserving the issues of subject-matter jurisdiction and nonjusticiability for further briefing, if necessary. The plaintiffs submitted papers responding only to the issues raised by the defendant.

Without notice or a hearing, the District Court by-passed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. In an Opinion and Order, reported at 866 F.Supp. 734, the District Judge preliminarily noted that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadžić as the head of state of a friendly nation, *see Lafontant v. Aristide*, 844 F.Supp. 128 (E.D.N.Y.1994) (head-of-state immunity), and that this possibility could render the plaintiffs' pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dispositive but believed that it "militates against this Court exercising jurisdiction." *Doe*, 866 F.Supp. at 738.

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations," *id.* at 739. Finding that "[t]he current Bosnian–Serb warring military faction does not constitute a recognized state," *id.* at 741, and that "the members of Karadžić's faction do not act under the color of any recognized state law," *id.*, the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *id.* at 740–41. The Court did not consider the plaintiffs' alternative claim that Karadžić acted under color of law by acting in concert with the Serbian Repub-

lic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claims under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claims that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadžić urges us to affirm on any one of these three grounds. We consider each in turn.

I. Subject-Matter Jurisdiction

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court—the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants' Claims

[1] The Alien Tort Act provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 (1988). Our decision in *Filártiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).[1] 630 F.2d at 887; *see also Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir.1987), *rev'd on other grounds*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filártiga*, 630 F.2d at 887–88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

[2, 3] *Filártiga* established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881; *see also Amerada Hess*, 830 F.2d at 425. We find the norms of contemporary international law by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filártiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57

1. *Filártiga* did not consider the alternative prong of the Alien Tort Act: suits by aliens for a tort committed in violation of "a treaty of the United States." *See* 630 F.2d at 880. As in *Filártiga*, plaintiffs in the instant cases "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law," *id.* at 880 n. 7.

(1820)). If this inquiry discloses that the defendant's alleged conduct violates "well-established, universally recognized norms of international law," *id.* at 888, as opposed to "idiosyncratic legal rules," *id.* at 881, then federal jurisdiction exists under the Alien Tort Act.

Karadžić contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals. In making this contention, Karadžić advances the contradictory positions that he is not a state actor, *see* Brief for Appellee at 19, even as he asserts that he is the President of the self-proclaimed Republic of Srpska, *see* statement of Radovan Karadžić, May 3, 1993, submitted with Defendant's Motion to Dismiss. For their part, the Kadic appellants also take somewhat inconsistent positions in pleading defendant's role as President of Srpska, Kadic Complaint ¶ 13, and also contending that "Karadžić is not an official of any government," Kadic Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n. 25.

Judge Leisure accepted Karadžić's contention that "acts committed by non-state actors do not violate the law of nations," *Doe*, 866 F.Supp. at 739, and considered him to be a non-state actor.[2] The Judge appears to have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture, *see, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir.1988), without consideration of the substantial body of law, discussed below, that renders private individuals liable for some international law violations.

[4] We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196–97, 5 L.Ed. 64 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without ... any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765–1769, Univ. of Chi. ed., 1979). Later examples are prohibitions against the slave trade and certain war crimes. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992); Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum.Rts.J. 51 (1992).

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). The Executive Branch has emphatically restated

2. Two passages of the District Court's opinion arguably indicate that Judge Leisure found the pleading of a violation of the law of nations inadequate because Srpska, even if a state, is not a state "recognized" by other nations. "The current Bosnian-Serb warring military faction does not constitute a recognized state...." *Doe*, 866 F.Supp. at 741; "[t]he Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984)]," *id.* However, the opinion, read as a whole, makes clear that the Judge believed that Srpska is not a state and was not relying on lack of recognition by other states. *See, e.g., id.* at 741 n. 12 ("The Second Circuit has limited the definition of 'state' to 'entities that have a defined [territory] and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other entities.' *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir.1991) (quotation, brackets and citation omitted). The current Bosnian-Serb entity fails to meet this definition."). We quote Judge Leisure's quotation from *Klinghoffer* with the word "territory," which was inadvertently omitted.

in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5–13.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) ("*Restatement (Third)*") proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." *Restatement (Third)* pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, *Restatement (Third)* § 702,[3] and a more limited category of violations of "universal concern," *id.* § 404,[4] partially overlapping with those listed in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, *cf. id.* § 402(1)(a), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of "universal concern" include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act. Indeed, the two cases invoking the Alien Tort Act prior to *Filártiga* both applied the civil remedy to private action. *See Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961); *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1,607).

Karadžić disputes the application of the law of nations to any violations committed by private individuals, relying on *Filártiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985).[5] *Filártiga* involved an allegation of torture committed by a state official. Relying on the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture, G.A.Res. 3452, U.N. GAOR, U.N. Doc. A/1034 (1975) (hereinafter "Declaration on Torture"), as a definitive statement of norms of customary international law prohibiting states from permitting torture, we ruled that "*official* torture is now prohibited by the law of nations." *Filártiga*, 630 F.2d at 884 (emphasis added). We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filártiga* purports to preclude such a result.

Nor did Judge Edwards in his scholarly opinion in *Tel-Oren* reject the application of international law to any private action. On the contrary, citing piracy and slave-trading as early examples, he observed that there exists a "handful of crimes to which the law of nations attributes individual responsibility," 726 F.2d at 795. Reviewing authorities similar to those consulted in *Filártiga*, he merely concluded that torture—the specific violation alleged in *Tel-Oren*—was not within the limited category of violations that do not require state action.

3. Section 702 provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

4. Section 404 provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

5. Judge Edwards was the only member of the *Tel-Oren* panel to confront the issue whether the law of nations applies to non-state actors. Then-Judge Bork, relying on separation of powers principles, concluded, in disagreement with *Filártiga*, that the Alien Tort Act did not apply to most violations of the law of nations. *Tel-Oren*, 726 F.2d at 798. Judge Robb concluded that the controversy was nonjusticiable. *Id.* at 823.

Karadžić also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. *See* H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (explaining that codification of *Filártiga* was necessary in light of skepticism expressed by Judge Bork's concurring opinion in *Tel-Oren*). At the same time, Congress indicated that the Alien Tort Act "has other important uses and should not be replaced," because

> Claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

Id. The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

[5] (a) *Genocide.* In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations. In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are "private individuals, public officials or statesmen." G.A.Res. 96(I), 1 U.N.GAOR, U.N. Doc. A/64/Add.1, at 188–89 (1946). The General Assembly also affirmed the principles of Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal for punishing " 'persecutions on political, racial, or religious grounds,' " regardless of whether the offenders acted " 'as individuals or as members of organizations,' " *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 n. 11 (N.D.Ohio 1985) (quoting Article 6). *See* G.A.Res. 95(I), 1 U.N.GAOR, U.N.Doc. A/64/Add.1, at 188 (1946).

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989 (hereinafter "Convention on Genocide"), provides a more specific articulation of the prohibition of genocide in international law. The Convention, which has been ratified by more than 120 nations, including the United States, *see* U.S. Dept. of State, *Treaties in Force* 345 (1994), defines "genocide" to mean

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births with the group;
>
> (e) Forcibly transferring children of the group to another group.

Convention on Genocide art. II. Especially pertinent to the pending appeal, the Convention makes clear that "[p]ersons committing genocide . . . shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals.*" *Id.* art. IV (emphasis added). These authorities un-

ambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, *see id.* § 1091(a) ("[w]hoever" commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, *id.* § 1091(d). Though Congress provided that the Genocide Convention Implementation Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding," *id.* § 1092, the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act. Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide,[6] and the two statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the Alien Tort Act by implication. *See Rodriguez v. United States*, 480 U.S. 522, 524, 107 S.Ct. 1391, 1392, 94 L.Ed.2d 533 (1987) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest.") (citations and internal quotation marks omitted); *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir.) ("mutual exclusivity" of statutes is required to demonstrate Congress's "clear, affirmative intent to repeal"), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

[6] Appellants' allegations that Karadžić personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadžić acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

[7, 8] (b) *War crimes.* Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. *See In re Yamashita*, 327 U.S. 1, 14, 66 S.Ct. 340, 347, 90 L.Ed. 499 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities. *Id.* at 15–16, 66 S.Ct. at 347–48.

[9] After the Second World War, the law of war was codified in the four Geneva Conventions,[7] which have been ratified by more than 180 nations, including the United States, *see Treaties in Force, supra*, at 398–99. Common article 3, which is substantially identical in each of the four Conventions,

6. The Senate Report merely repeats the language of section 1092 and does not provide any explanation of its purpose. *See* S. Rep. 333, 100th Cong., 2d Sess., at 5 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4156, 4160. The House Report explains that section 1092 "clarifies that the bill creates no *new* federal cause of action in civil proceedings." H.R. Rep. 566, 100th Cong., 2d Sess., at 8 (1988) (emphasis added). This explanation confirms our view that the Genocide Convention Implementation Act was not intended to abrogate civil causes of action that might be available under *existing* laws, such as the Alien Tort Act.

7. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (hereinafter "Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

applies to "armed conflict[s] not of an international character" and binds "each Party to the conflict ... to apply, as a minimum, the following provisions":

> Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court....

Geneva Convention I art. 3(1). Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war.[8]

[10] The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law,* 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, *see* Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts, in* 4 The Vietnam War and International Law 447 (R.Falk ed., 1976). The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

[11] (c) *Torture and summary execution.* In *Filártiga,* we held that *official* torture is prohibited by universally accepted norms of international law, *see* 630 F.2d at 885, and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law. *See* Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment pt. I, art. 1, 23 I.L.M. 1027 (1984), *as modified,*

8. Appellants also maintain that the forces under Karadžić's command are bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II"), which has been signed but not ratified by the United States, *see* International Committee of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II,* 30 I.L.M. 397 (1991). Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* art. 1. In addition, plaintiffs argue that the forces under Karadžić's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, *see* Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs.

24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by United States* Oct. 21, 1994, 34 I.L.M. 590, 591 (1995) (defining torture as "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"); Torture Victim Act § 2(a) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadžić's command and with the specific intent of destroying appellants' ethnic-religious groups. Thus, many of the alleged atrocities are already encompassed within the appellants' claims of genocide and war crimes. Of course, at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes. It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadžić to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadžić does not meet the definition of a state. *Doe*, 866 F.Supp. at 741 n. 12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadžić acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

[12, 13] (a) *Definition of a state in international law.* The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) § 201; *accord Klinghoffer*, 937 F.2d at 47; *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir.1988); *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720, 19 L.Ed. 227 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620, 24 L.Ed. 1018 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with other states, it does not require recognition by other states. *See Restatement (Third)* § 202 cmt. b ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states."). Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318–20, 98 S.Ct. 584, 590–91, 54 L.Ed.2d 563 (1978) (diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408–12, 84 S.Ct. 923, 929–32, 11 L.Ed.2d 804 (1964) (access to U.S. courts); *Lafontant*, 844 F.Supp. at 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101–03, 22 L.Ed. 816 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9–12, 19 L.Ed. 361 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 91 S.Ct.

2205, 29 L.Ed.2d 680 (1971) (post-World War II East Germany).

[14] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. *See Restatement (Third)* §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

[15] Appellants' allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

[16–18] (b) *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadžić acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. *See Forti v. Suarez-Mason,* 672 F.Supp. 1531, 1546 (N.D.Cal.1987), *reconsideration granted in part on other grounds,* 694 F.Supp. 707 (N.D.Cal.1988). A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 2753–54, 73 L.Ed.2d 482 (1982). The appellants are entitled to prove their allegations that Karadžić acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

B. The Torture Victim Protection Act

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Act § 2(a). The statute also requires that a plaintiff exhaust adequate and available local remedies, *id.* § 2(b), imposes a ten-year statute of limitations, *id.* § 2(c), and defines the terms "extrajudicial killing" and "torture," *id.* § 3.

[19] By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that this language was intended to "make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively. *Id.*

[20, 21] Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331, *see Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D.Mass.1995), to which we now turn.

C. Section 1331

The appellants contend that section 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law. Relying on the settled proposition that federal common law incorporates international law, *see The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993); *Filártiga*, 630 F.2d at 886, they reason that causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under section 1331. Whether that is so is an issue of some uncertainty that need not be decided in this case.

In *Tel-Oren*, Judge Edwards expressed the view that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *Tel-Oren*, 726 F.2d at 779–80 n. 4. The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations. *Id.* at 778 (Edwards, J., concurring). Some district courts, however, have upheld section 1331 jurisdiction for international law violations. *See Abebe-Jiri v. Negewo*, No. 90-2010 (N.D.Ga. Aug. 20, 1993), *appeal argued*, No. 93-9133 (11th Cir. Jan. 10, 1995); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4–5 (N.D.Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1544 (N.D.Cal. 1987).

We recognized the possibility of section 1331 jurisdiction in *Filártiga*, 630 F.2d at 887 n. 22, but rested jurisdiction solely on the applicable Alien Tort Act. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.

II. Service of Process and Personal Jurisdiction

Appellants aver that Karadžić was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action, the affidavits detail that on February 11, 1993, process servers approached Karadžić in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose, and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadžić submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the *Kadic* action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendant's State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit states that he received the complaint and handed it to Karadžić outside the Russian Embassy in Manhattan. Karadžić's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadžić stayed at

hotels outside the "headquarters district" of the United Nations and engaged in non-United Nations-related activities such as fund-raising.

Fed.R.Civ.P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

Nevertheless, Karadžić maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. Headquarters Agreement

[22] The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal process ... may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General." *Id.* § 9(a). This provision is of no benefit to Karadžić, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* § 15. This provision is also of no benefit to Karadžić, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of ... persons invited to the headquarters district by the United Nations ... on official business." *Id.* § 11. Karadžić maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden—exposure to suit—on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir.1991). We therefore reject Karadžić's proposed construction of section 11, because it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.[9]

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadžić, a responsible State Department official wrote: "Mr. Karadžić's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune from legal process while in the United States at locations outside of the Headquarters District. *See In re Galvao*, [1963] U.N.Jur.Y.B. 164 (opinion of U.N. legal coun-

9. Conceivably, a narrow immunity from service of process might exist under section 11 for invitees who are in *direct* transit between an airport (or other point of entry into the United States) and the Headquarters District. Even if such a narrow immunity did exist—which we do not decide—Karadžić would not benefit from it since he was not served while traveling to or from the Headquarters District.

sel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. Federal common law immunity

Karadžić nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadžić analogizes his proposed rule to the "government contacts exception" to the District of Columbia's long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C.1978); *see also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785–87 (D.C.Cir.1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engage in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1076 (2d ed. 1987).

Karadžić also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, *Klinghoffer* declined to extend the immunities of the Headquarters Agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y.Civ.Prac.L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations that guided *Klinghoffer* in its narrowing construction of the general terminology of New York's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

[23] Finally, we note that the mere possibility that Karadžić might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, *see Lafontant*, 844 F.Supp. at 133, would create head-of-state immunity, *but see In re Doe*, 860 F.2d 40, 45 (2d Cir.1988) (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future. *See Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 532, 89 L.Ed. 729 (1945) ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy ..., not to enlarge an immunity to an extent which the government ... has not seen fit to recognize.").

In sum, if appellants personally served Karadžić with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

III. Justiciability

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that

suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 92 S.Ct. 1808, 1813, 32 L.Ed.2d 466 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

[24] Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the "'constitutional' underpinnings" of these doctrines that influenced the concurring opinions of Judge Robb and Judge Bork in *Tel-Oren*. Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is nonjusticiable, *see Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 707, 7 L.Ed.2d 663 (1962); *Lamont v. Woods*, 948 F.2d 825, 831–32 (2d Cir.1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Karadžić maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases."'" *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. at 710).

[25] A nonjusticiable political question would ordinarily involve one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir.1994). With respect to the first three factors, we have noted in a similar context involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 506 U.S. 224, 227–29, 113 S.Ct. 732, 735, 122 L.Ed.2d 1 (1993).

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests. Disputes implicating foreign policy concerns have the potential to

raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229–30, 106 S.Ct. 2860, 2865–66, 92 L.Ed.2d 166 (1986) (quoting *Baker*, 369 U.S. at 211, 82 S.Ct. at 706–07).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804; *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), might be implicated in some cases arising under section 1350. However, as in *Filártiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.

[26] In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadžić, attorneys for the plaintiffs in *Doe* wrote to the Secretary of State to oppose reported attempts by Karadžić to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions, the Department responded with a letter indicating that Karadžić was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*.[10] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reinforces our view that adjudication may properly proceed.

[27] As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of ... unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, 84 S.Ct. at 940, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, *see id.* at 428–30, 84 S.Ct. at 940–41.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome

10. The Habib Letter on behalf of the State Department added:

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.

the plaintiffs' preference for a United States forum.

Conclusion

The judgment of the District Court dismissing appellants' complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

LANDSCAPE FORMS, INC., Plaintiff–Appellee,

v.

COLUMBIA CASCADE COMPANY, Defendant–Appellant.

No. 2080, Docket 95–7343.

United States Court of Appeals, Second Circuit.

Argued June 8, 1995.

Decided Nov. 13, 1995.

Outdoor furniture manufacturer brought action against competitor, alleging trade dress infringement in violation of Lanham Act and state law. The United States District Court for the Southern District of New York, John E. Sprizzo, J., granted preliminary injunction in favor of manufacturer, and competitor appealed. The Court of Appeals, Oakes, Senior Circuit Judge, held that district court should have considered competitor's functionality defense.

Vacated and remanded.

1. Trade Regulation ⇐43

While "trade dress" initially referred to product's packaging, concept now includes design and appearance of product as well as that of container and essentially denotes product's total image and overall appearance.

See publication Words and Phrases for other judicial constructions and definitions.

2. Trade Regulation ⇐43, 478

To maintain action for trade dress infringement under Lanham Act, plaintiff must show either that its trade dress is inherently distinctive or, if trade dress is not inherently distinctive, that it has acquired secondary meaning. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

3. Trade Regulation ⇐43

Even if plaintiff in trade dress infringement action can show that its trade dress is either inherently distinctive or has acquired secondary meaning, defendant may avoid liability by demonstrating that allegedly similar trade dress feature is functional.

4. Trade Regulation ⇐43, 525

Functionality doctrine limits scope of trademark protection by forbidding use of product's feature as trademark where doing so will put competitor at significant disadvantage because feature is essential to use or purpose of article or affects its cost or quality; doctrine prevents trademark law, which seeks to promote competition by protecting firm's reputation, from instead inhibiting legitimate competition by allowing producer to control useful product feature.

5. Trade Regulation ⇐43, 525

To find product design "functional," and thus not entitled to trade dress protection, court must first find that certain features of design are essential to effective competition in particular market.

See publication Words and Phrases for other judicial constructions and definitions.

6. Trade Regulation ⇐727

District court's failure to consider functionality defense before granting preliminary injunction in outdoor furniture manufacturer's trade dress infringement action against competitor warranted remand for consideration of that issue, in light of evidence that injunction would hinder competitor's ability to compete in market.

ANNEX 5

Prosecutor v Kambanda ICTR-97-23-S Judgment and Sentence 4 September 1998.

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Before:
Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Decision of: 4 September 1998

Registry: Mr. Agwu Okali

THE PROSECUTOR

VERSUS

JEAN KAMBANDA

Case no.: ICTR 97-23-S

JUDGEMENT and SENTENCE

Office of the Prosecutor:
Mr. Bernard Muna
Mr. Mohamed Othman
Mr. James Stewart
Mr. Udo Gehring

Counsel for the Defence:
Mr. Oliver Michael Inglis

I. The Proceedings

A. Background

1. Jean Kambanda was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor on 9 July 1997, in accordance with the provisions of Rule 40 of the Rules of Procedure and Evidence (the "Rules"). On 16 July 1997, Judge Laïty Kama, ruling on the Prosecutor=s motion of 9 July 1997, ordered the transfer and provisional detention of the suspect Jean Kambanda at the Detention Facility of the Tribunal for a period of thirty days, pursuant to Rule 40 *bis* of the Rules. The provisional detention of Jean Kambanda was extended twice for thirty days, the first time under the provisions of Rule 40 *bis* (F) and the second time under the provisions of Rule 40 *bis* (G).

2. On 16 October 1997, an indictment against the suspect Jean Kambanda, prepared by the Office of the Prosecutor, was submitted to Judge Yakov Ostrovsky, who confirmed it, issued a warrant of arrest against the accused and ordered his continued detention.

3. On 1 May 1998, during his initial appearance before this Trial Chamber, the accused pleaded guilty to the six counts contained in the indictment, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder), punishable under Article 3 (a) of the Statute and crimes against humanity (extermination), punishable under Article 3 (b) of the Statute.

4. After verifying the validity of his guilty plea, particularly in light of an agreement concluded between the Prosecutor, on the one hand, and the accused and his lawyer, on the other, an agreement which was signed by all the parties, the Chamber entered a plea of guilty against the accused on all the counts in the indictment. During a status conference held immediately after the initial appearance, the date for the pre-sentencing hearing, provided for under Rule 100 of the Rules, was set for 31 August 1998. Later, at the request of the Prosecutor, this date was postponed to 3 September 1998. During that same status conference, the parties agreed to submit their respective briefs in advance of the above-mentioned pre-sentencing hearing. The submission date was later set for 15 August 1998. The Defence and the Prosecutor, in fact, filed their briefs before this date. The pre-sentencing hearing was held on 3 September 1998.

B. The guilty plea

5. As indicated *supra,* Jean Kambanda pleaded guilty, pursuant to Rule 62 of the Rules, to all the six counts set forth in the indictment against him. As stated earlier, the accused confirmed that he had concluded an agreement with the Prosecutor, an agreement signed by his counsel and himself and placed under seal, in which he admitted having committed all the acts charged by the Prosecution.

6. The Chamber, nevertheless, sought to verify the validity of the guilty plea. To this end, the Chamber asked the accused:

> (i) if his guilty plea was entered voluntarily, in other words, if he did so freely and knowingly, without pressure, threats, or promises;
>
> (ii) if he clearly understood the charges against him as well as the consequences of his guilty plea; and
>
> (iii) if his guilty plea was unequivocal, in other words, if he was aware that the said plea could not be refuted by any line of defence.

7. The accused replied in the affirmative to all these questions. On the strength of these answers, the Chamber delivered its decision from the bench as follows:

> "Mr. Jean Kambanda, having deliberated and after verifying that your plea of guilty is voluntary, unequivocal and that you clearly understand its terms and consequences,
>
> Considering the factual and legal issues contained in the agreement concluded between you and the Office of the Prosecutor and that you have acknowledged that both you and your counsel have signed, the Tribunal finds you guilty on the six counts brought against you,

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Orders your continued detention; and Rules that a status conference will be held immediately after this hearing, with the Registrar, to set a date for the pre-sentencing hearing [...]".

II. Law and applicable principles

8. The Chamber will now summarize the legal texts relating to sentences and penalties and their enforcement, before going on to specify the applicable scale of sentences, on the one hand, and the general principles on the determination of penalties, on the other.

A. Applicable texts

9. The Chamber recalls below the statutory and regulatory provisions on sentencing, applicable to the accused.

Article 22 of the Statute: Judgment

" The Trial Chamber shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."

Rule 100 of the Rules: Pre-sentencing procedure

"If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence."

Article 23 of the Statute: Penalties

" 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of Rwanda."

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

Rule 101 of the Rules: Penalties

"(A) A person convicted by the Tribunal may be sentenced to imprisonment for a term up to and including the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction;

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(iii) the general practice regarding prison sentences in the courts of Rwanda;

(v) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Rule 102 (B).

(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal."

Article 26 of the Statute: Enforcement of sentences

"Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted person. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Tribunal."

Rule 102 of the Rules: Status of the convicted person

"(A) The sentence shall begin to run from the day it is pronounced under Rule 101(D). However, as soon as notice of appeal is given, the enforcement of the judgment shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided for in Rule 64.

(B) If, by a previous decision of the Trial Chamber, the convicted person has been provisionally released, or is for any reason at liberty, and he is not present when the judgment is pronounced, the Trial Chamber shall issue a warrant for his arrest. On arrest, he shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed."

Rule 103 of the Rules: Place of imprisonment

"(A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.

(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed."

Article 27 of the Statute: Pardon or commutation of sentences

"If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in

consultation with the judges, so decides on the basis of the interests of justice and the general principles of law."

Rule 104 of the Rules: Supervision of imprisonment

"All sentences of imprisonment shall be served under the supervision of the Tribunal or a body designated by it."

B. Scale of sentences applicable to the accused found guilty of one of the crimes listed in Articles 2, 3 or 4 of the Statute of the Tribunal.

10. As noted from a reading of all the above provisions on penalties, the only penalties the Tribunal can impose on an accused who pleads guilty or is convicted as such are prison terms up to and including life imprisonment, pursuant in particular to Rule 101 (A) of the Rules, whose provisions apply to all crimes which fall within the jurisdiction of the Tribunal, namely genocide, (Article 2 of the Statue), crimes against humanity (Article 3) and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto (Article 4). The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine.

11. Neither Article 23 of the Statute nor Rule 101 of the Rules determine any specific penalty for each of the crimes falling under the jurisdiction of the Tribunal. The determination of sentences is left to the discretion of the Chamber, which should take into account, apart from the general practice regarding prison sentences in the courts of Rwanda, a number of other factors including the gravity of the crime, the personal circumstances of the convicted person, the existence of any aggravating or mitigating circumstances, including the substantial co-operation by the convicted person before or after conviction.

12. Whereas in most national systems the scale of penalties is determined in accordance with the gravity of the offence, the Chamber notes that, as indicated *supra*, the Statute does not rank the various crimes falling under the jurisdiction of the Tribunal and, thereby, the sentence to be handed down. In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.

13. It should be noted, however, that in imposing the sentence, the Trial Chamber should take into account, in accordance with Article 23 (2) of the Statute, such factors as the gravity of the offence.

14. The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity. On the other hand, it seems more difficult for the Chamber to rank genocide and crimes against humanity in terms of their respective gravity. The Chamber holds that crimes against humanity, already punished by the Nuremberg and Tokyo Tribunals, and genocide, a concept defined later, are crimes which particularly shock the collective conscience. The Chamber notes in this regard that the crimes prosecuted by the Nuremberg Tribunal, namely the holocaust of the Jews or the "Final Solution", were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later.

15. The indictment setting forth the charges against the accused in the Nuremberg trial, stated, in regard to crimes against humanity that Athese methods and crimes constituted violations of international law, domestic law as deriving from the criminal law of all civilised nations. According to the International Criminal Tribunal for the former Yugoslavia ("ICTY"):

"Crimes against humanity are serious acts of violence which harm human beings by

> striking what is most essential to them: their lives, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity"

16. Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent >to destroy in whole or in part, a national, ethnic, racial or religious group as such=, as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.

17. There is no argument that, precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately. Article 27 of the Charter of the Nuremberg Tribunal empowered that Tribunal, pursuant to Article 6 (c) of the said Charter, to sentence any accused found guilty of crimes against humanity to death or such other punishment as shall be determined by it to be just.

18. Rwanda, like all the States which have incorporated crimes against humanity or genocide in their domestic legislation, has envisaged the most severe penalties in the criminal legislation for these crimes. To this end, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since 1 October 1990, adopted in 1996, groups accused persons into four categories as follows:

"Category 1

> a) persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity;
>
> b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes;
>
> c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed;
>
> d) Persons who committed acts of sexual violence.

Category 2

> Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.

Category 3

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Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.

Category 4

Persons who committed offences against property."

19. According to the list drawn up by the Attorney General of the Supreme Court of Rwanda, pursuant to the afore-mentioned Organic Law, and attached to the Prosecutor=s brief, Jean Kambanda figures in Category 1. Article 14 of the Organic Law stipulates that :

" penalties imposed for the offences referred to in Article 1 shall be those provided for in the Penal Code, except that :

a) persons in Category 1 are liable mandatorily to the death penalty;

b) for persons in Category 2, the death penalty is replaced by life imprisonment (....)"

20. For persons in Category 3, the term of imprisonment shall be of shorter duration.

21. As indicated *supra*, in determining the sentence, the Chamber must, among other things, have recourse to the general practice regarding prison sentences in the courts of Rwanda (Article 23 of the Statute and Rule 101 of the Rules).

22. The Chamber notes that it is logical that in the determination of the sentence, it has recourse only to prison sentences applicable in Rwanda, to the exclusion of other sentences applicable in Rwanda, including the death sentence, since the Statute and the Rules provide that the Tribunal cannot impose this one type of sentence.

23. That said , the Chamber raises the question as to whether the scale of sentences applicable in Rwanda is mandatory or whether it is to be used only as a reference. The Chamber is of the opinion that such reference is but one of the factors that it has to take into account in determining the sentences. It also finds, as did Trial Chamber I of the ICTY in the Erdemovic case, that "the reference to this practice can be used for guidance, but is not binding". According to that Chamber, this opinion is supported by the interpretation of the United Nations Secretary-General, who in his report on the establishment of the ICTY stated that: "in determining the term of imprisonment, the Trial Chamber should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia."

24. Regarding the penalties, the Chamber notes that since the trials related to the events in 1994 began in this country, the death penalty and prison terms of up to life imprisonment have been passed on several occasions. However, the Chamber does not have information on the contents of these decisions, particularly their underlying reasons.

25. Also, while referring as much as practicable to the general practice regarding prison sentences in the courts of Rwanda, the Chamber will prefer, here too, to lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling within its jurisdiction, taking into account the circumstances of the case and the standing of the accused persons.

C. General principles regarding the determination of sentences

26. In determining the sentence, the Chamber has to always have in mind that this Tribunal was established by the Security Council pursuant to Chapter VII of the Charter of the United Nations within the context of measures the Council was empowered to take under Article 39 of the said Charter to ensure that violations of international humanitarian law in Rwanda in 1994 were halted and effectively redressed. As required by the Charter in previous cases, the Council noted that the situation in Rwanda constituted a threat to international peace and security. And resolution 955 of 8 November 1994, which was passed by the Council in this connection, clearly indicates that the aim for the establishment of the Tribunal was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace.

27. It will be noted that the preamble of the Rwandan Organic Law, referred to above, states that :

> "Considering that it is vital, in order to achieve national reconciliation, to forever eradicate the culture of impunity;
>
> Considering that the exceptional situation facing the country requires the adoption of adequate measures to meet the need of the Rwandan people for justice."

28. That said, it is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.

29. The Chamber recalls, however, that in the determination of sentences, it is required by Article 23 (2) of the Statute and Rule 101 (B) of the Rules to take into account a number of factors including the gravity of the offence, the individual circumstances of the accused, the existence of any aggravating or mitigating circumstances, including the substantial co-operation by the accused with the Prosecutor before or after his conviction. It is a matter, as it were, of individualising the penalty, for it is true that "among the joint perpetrators of an offence or among the persons guilty of the same type of offence, there is only one common element: the target offence which they committed with its inherent gravity. Apart from this common trait, there are, of necessity, fundamental differences in their respective personalities and responsibilities : their age, their background, their education, their intelligence, their mental structure....It is not true that they are *a priori* subject to the same intensity of punishment "[unofficial translation]

30. Clearly, however, as far as the individualisation of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules. Here again, their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent.

31. Similarly, the factors at issue in the Statute and in the Rules cannot be interpreted as having to be mandatorily cumulative in the determination of the sentence.

32. Recalling these factors, the Chamber would like to emphasise three of them, in particular. These are the aggravating circumstances, individual circumstances of Jean Kambanda (Article 23 (2) of the Statute) and the mitigating circumstances.

33. Regarding the aggravating circumstances, it will be noted that the gravity of crimes such as genocide and crimes against humanity which are particularly revolting to the collective conscience alone, is

enough to merit lengthy elaboration. The Chamber will, however, come back to it when weighing the aggravating factors against the mitigating factor or factors in favour of the accused for the determination of the sentence.

34. As far as the "individual circumstances of Jean Kambanda" are concerned, the individualisation of the sentence, as the expression itself seems to suggest, is not possible unless facts about his "personality" are known, including his background, his behaviour before, during and after the offence, his motives for the offence and demonstration of remorse thereafter.

35. With regard to the mitigating circumstances, Article 6 (4) of the Statute states that the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. The problem should not arise in the instant case, since the accused was the Prime Minister. For its part, Rule 101 (B) (ii) of the Rules, as mentioned earlier stipulates as mitigating circumstances "the substantial co-operation by the convicted person with Prosecutor before or after the conviction." In this regard, when determining the sentence for Jean Kambanda, the Chamber will have to assess the extent of the co-operation by the accused referred to by the Prosecutor in the documents under seal entitled "Agreement on a guilty plea.", signed by herself, the accused and his counsel.

36. However, the wording of the above-mentioned Rule 101 (...any mitigating circumstances including the substantial .....) shows, in the opinion of the Chamber , that substantial co-operation by the accused with the Prosecutor could only be one mitigating circumstance, among others, when the accused pleads guilty plea or shows sincere repentance.

37. Having said that, the Chamber should, nevertheless, stress that the principle must always remain that the reduction of the penalty stemming from the application of mitigating circumstances must not in any way diminish the gravity of the offence. The aforementioned Rwandan Organic Law No. 8/96 of 30/8/96 goes further because under the Law, persons falling under Category 1 cannot benefit from a reduction of sentences even after a guilty plea.

III. Case on Merits

38. Having reviewed the principles set out above, the Trial Chamber proceeds to consider all relevant information submitted by both parties in order to determine an appropriate sentence in terms of Rule 100 of the Rules.

A. Facts of the Case

39. Together with his >guilty= plea, Jean Kambanda submitted to the Chamber a document entitled "Plea Agreement between Jean Kambanda and the OTP", signed by Jean Kambanda and his defence counsel, Oliver Michael Inglis, on 28 April 1998, in which Jean Kambanda makes full admissions of all the relevant facts alleged in the indictment. In particular:-

> (i) Jean Kambanda admits that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them. Mass killings of hundreds of thousands of Tutsi occurred in Rwanda, including women and children, old and young who were pursued and killed at places where they had sought refuge i.e. prefectures, commune offices, schools, churches and stadiums.
>
> (ii) Jean Kambanda acknowledges that as Prime Minister of the Interim Government of

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Rwanda from 8 April 1994 to 17 July 1994, he was head of the 20 member Council of Ministers and exercised *de jure* authority and control over the members of his government. The government determined and controlled national policy and had the administration and armed forces at its disposal. As Prime Minister, he also exercised de jure and *de facto* authority over senior civil servants and senior officers in the military.

(iii) Jean Kambanda acknowledges that he participated in meetings of the Council of Ministers, cabinet meetings and meetings of *prefets* where the course of massacres were actively followed, but no action was taken to stop them. He was involved in the decision of the government for visits by designated ministers to prefectures as part of the government=s security efforts and in order to call on the civilian population to be vigilant in detecting the enemy and its accomplices. Jean Kambanda also acknowledges participation in the dismissal of the *prefet* of Butare because the latter had opposed the massacres and the appointment of a new *prefet* to ensure the spread of massacre of Tutsi in Butare.

(iv) Jean Kambanda acknowledges his participation in a high level security meeting at Gitarama in April 1994 between the President, T. Sindikubwabo, himself and the Chief of Staff of the Rwandan Armed Forces (FAR) and others, which discussed FAR=s support in the fight against the Rwandan Patriotic Front (RPF) and its "accomplices", understood to be the Tutsi and Moderate Hutu.

(v) Jean Kambanda acknowledges that he issued the Directive on Civil Defence addressed to the *prefets* on 25 May 1994 (Directive No. 024-0273, disseminated on 8 June 1994). Jean Kambanda further admits that this directive encouraged and reinforced the *Interahamwe* who were committing mass killings of the Tutsi civilian population in the prefectures. Jean Kambanda further acknowledges that by this directive the Government assumed the responsibility for the actions of the Interahamwe.

(vi) Jean Kambanda acknowledges that before 6 April 1994, political parties in concert with the Rwanda Armed Forces organized and began the military training of the youth wings of the MRND and CDR political parties (Interahamwe and Impuzamugambi respectively) with the intent to use them in the massacres that ensued. Furthermore, Jean Kambanda acknowledges that the Government headed by him distributed arms and ammunition to these groups. Additionally, Jean Kambanda confirms that roadblocks manned by mixed patrols of the Rwandan Armed Forces and the Interahamwe were set up in Kigali and elsewhere as soon as the death of President J.B. Habyarimana was announced on the Radio. Furthermore Jean Kambanda acknowledges the use of the media as part of the plan to mobilize and incite the population to commit massacres of the civilian Tutsi population. That apart, Jean Kambanda acknowledges the existence of groups within military, militia, and political structures which had planned the elimination of the Tutsi and Hutu political opponents.

(vii) Jean Kambanda acknowledges that, on or about 21 June 1994, in his capacity as Prime Minister, he gave clear support to Radio Television Libre des Mille Collines (RTLM), with the knowledge that it was a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of Tutsi and moderate Hutu. On this occasion, speaking on this radio station, Jean Kambanda, as Prime Minister, encouraged the RTLM to continue to incite the massacres of the Tutsi civilian population, specifically stating that this radio station was "an indispensable weapon in the fight against the enemy".

(viii) Jean Kambanda acknowledges that following numerous meetings of the Council of

Ministers between 8 April 1994 and 17 July 1994, he as Prime Minister, instigated, aided and abetted the *Prefets, Bourgmestres*, and members of the population to commit massacres and killings of civilians, in particular Tutsi and moderate Hutu. Furthermore, between 24 April 1994 and 17 July 1994, Jean Kambanda and Ministers of his Government visited several prefectures, such as Butare, Gitarama (Nyabikenke), Gikongoro, Gisenyi and Kibuye to incite and encourage the population to commit these massacres including by congratulating the people who had committed these killings.

(ix) Jean Kambanda acknowledges that on 3 May 1994, he was personally asked totake steps to protect children who had survived the massacre at a hospital and he did not respond. On the same day, after the meeting, the children were killed. He acknowledges that he failed in his duty to ensure the safety of the children and the population of Rwanda.

(x) Jean Kambanda admits that in his particular role of making public engagements in the name of the government, he addressed public meetings, and the media, at various places in Rwanda directly and publicly inciting the population to commit acts of violence against Tutsi and moderate Hutu. He acknowledges uttering the incendiary phrase which was subsequently repeatedly broadcast, "you refuse to give your blood to your country and the dogs drink it for nothing." (Wima igihugu amaraso imbwa zikayanywera ubusa)

(xi) Jean Kambanda acknowledges that he ordered the setting up of roadblocks with the knowledge that these roadblocks were used to identify Tutsi for elimination, and that as Prime Minister he participated in the distribution of arms and ammunition to members of political parties, militias and the population knowing that these weapons would be used in the perpetration of massacres of civilian Tutsi.

(xii) Jean Kambanda acknowledges that he knew or should have known that persons for whom he was responsible were committing crimes of massacre upon Tutsi and that he failed to prevent them or punish the perpetrators. Jean Kambanda admits that he was an eye witness to the massacres of Tutsi and also had knowledge of them from regular reports of prefets, and cabinet discussions.

Judgement

40. In light of the admissions made by Jean Kambanda in amplification of his plea of guilty, the Trial Chamber, on 1st May 1998, accepted his plea and found him guilty on the following counts:

(1) By his acts or omissions described in paragraphs 3.12 to 3.15, and 3.17 to 3.19 of the indictment, Jean Kambanda is responsible for the killing of and the causing of serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, an ethnic or racial group, as such, and has thereby committed **GENOCIDE**, stipulated in Article 2(3)(a) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

(2) By his acts or omissions described in paragraphs 3.8, 3.9, 3.13 to 3.15 and 3.19 of the indictment, Jean Kambanda did conspire with others, including Ministers of his Government, such as Pauline Nyiramasuhuko, Andre Ntagerura, Eliezer Niyitegeka and Edouard Karemera, to kill and to cause serious bodily or mental harm to members of the Tutsi population, with intent to destroy in whole or in part, an ethnic or racial group as such,

and has thereby committed **CONSPIRACY TO COMMIT GENOCIDE**, stipulated in Articles 2(3)(b) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

(3) By his acts or omissions described in paragraphs 3.12 to 3.14 and 3.19 of the indictment, Jean Kambanda did directly and publicly incite to kill and to cause serious bodily or mental harm to members of the Tutsi population, with intent to destroy, in whole or in part, an ethnic group as such, and has thereby committed **DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE**, stipulated in Article 2(3)(c) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3),which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

(4) By his acts or omissions described in paragraphs 3.10, 3.12 to 3.15 and 3.17 to3.19 of the indictment, which do not constitute the same acts relied on for counts 1,2 and 3 Jean Kambanda was complicit in the killing and the causing of serious bodily or mental harm to members of the Tutsi population, and thereby committed **COMPLICITY IN GENOCIDE** stipulated in Article 2(3)(e) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

(5) By his acts or omissions described in paragraphs 3.12 to 3.15 and 3.17 to 3.19 of the indictment, Jean Kambanda is responsible for the murder of civilians, as part of a widespread or systematic attack against a civilian population on ethnic or racial grounds, and has thereby committed a **CRIME AGAINST HUMANITY**, stipulated in Article 3(a) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

(6) By his acts or omissions described in paragraphs 3.12 to 3.15, and 3.17 to 3.19 of the indictment, Jean Kambanda is responsible for the extermination of civilians, as part of a widespread or systematic attack against a civilian population on ethnic or racial grounds, and has thereby committed a **CRIME AGAINST HUMANITY**, stipulated in Article 3(b) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

B. Factors relating to Sentence

41. Article 23(1) of the Statute stipulates that penalties imposed by the Trial Chamber shall be limited to imprisonment and that in the determination of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the Court s of Rwanda. The Trial Chamber notes that the Death sentence which is proscribed by the Statute of the ICTR is mandatory for crimes of this nature in Rwanda. Reference to the Rwandan sentencing practice is intended as a guide to determining an appropriate sentence and does not fetter the discretion of the judges of the Trial Chamber to determine the sentence. In determining the sentence, the Court shall, in accordance with the Rules of Procedure, take into account such factors as the gravity of the crime and the individual circumstances of Jean Kambanda.

(i) Gravity of the Crime

42. In the brief dated 10 August 1998 and in her closing argument at the hearing, the Prosecutor stressed the gravity of the crimes of genocide, and crimes against humanity. The heinous nature of the crime of

genocide and its absolute prohibition makes its commission inherently aggravating. The magnitude of the crimes involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days constitutes an aggravating fact.

43. Crimes against Humanity are as aforementioned conceived as offences of the gravest kind against the life and liberty of the human being.

44. The crimes were committed during the time when Jean Kambanda was Prime Minister and he and his government were responsible for maintenance of peace and security. Jean Kambanda abused his authority and the trust of the civilian population. He personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed. He failed to take necessary and reasonable measures to prevent his subordinates from committing crimes against the population. Abuse of positions of authority or trust is generally considered an aggravating factor.

(ii) Individual circumstances of Jean Kambanda

Personal particulars

45. Jean Kambanda was born on 10 October 1955 at Mubumbano in the Prefecture of Butare. He has a wife and two children. He holds a Diploma d=Ingenieur Commercial and from May 1989 to April 1994, he worked in the Union des Banques Populaires du Rwanda rising to the position of Director of the network of those banks. He was Vice President of the Butare Section of the MDR and member of its Political Bureau. On 9 April 1994, he became Prime Minister of the Interim Government. The Prosecutor has not proved previous criminal convictions, if any, of Jean Kambanda.

(iii) Mitigating Factors

46. Defence Counsel has proffered three factors in mitigation:- Plea of guilty; remorse; which he claims is evident from the act of pleading guilty; and co-operation with the Prosecutor=s office.

47. The Prosecutor confirms that Jean Kambanda has extended substantial co-operation and invaluable information to the Prosecutor. The Prosecutor requests the Trial Chamber to regard as a significant mitigating factor, not only the substantial co-operation so far extended, but also the future co-operation when Jean Kambanda testifies for the prosecution in the trials of other accused.

48. The Plea Agreement signed by the parties expressly records that no agreements, understandings or promises have been made between the parties with respect to sentence which, it is acknowledged, is at the discretion of the Trial Chamber.

49. The Prosecutor however disclosed that Jean Kambanda=s co-operation has been recognised by significant protection measures that have been put in place to alleviate any concerns that he may have, about the security of his family.

50. According to the Prosecutor, Jean Kambanda had expressed his intention to plead guilty immediately upon his arrest and transfer to the Tribunal, on 18 July 1997. Jean Kambanda declared in the Plea Agreement that he had resolved to plead guilty even before his arrest in Kenya and that his prime motivation for pleading guilty was the profound desire to tell the truth, as the truth was the only way to restoring national unity and reconciliation in Rwanda. Jean Kambanda condemned the massacres that occurred in Rwanda and considers his confession as a contribution towards the restoration of peace

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in Rwanda.

51. The Chamber notes however that Jean Kambanda has offered no explanation for his voluntary participation in the genocide; nor has he expressed contrition, regret or sympathy for the victims in Rwanda, even when given the opportunity to do so by the Chamber, during the hearing of 3 September 1998.

52. Both Counsel for Prosecution and Defence have urged the Chamber to interpret Jean Kambanda=s guilty pleas as a signal of his remorse, repentance and acceptance of responsibility for his actions. The Chamber is mindful that remorse is not the only reasonable inference that can be drawn from a guilty plea; nevertheless it accepts that most national jurisdictions consider admissions of guilt as matters properly to be considered in mitigation of punishment.

> "A prompt guilty plea is considered a major mitigating factor."

53. In civil criminal law systems, a guilt plea may be favourably considered as a mitigating factor, subject to the discretionary faculty of a judge.

> "An admission of guilt demonstrates honesty and it is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators."

54. The Chamber has furthermore been requested to take into account in favour of Jean Kambanda that his guilty plea has also occasioned judicial economy, saved victims the trauma and emotions of trial and enhanced the administration of justice.

55. The Trial Chamber finds that the gravity of the crime has been established and the mitigatory impact on penalty has been characterised.

56. The Trial Chamber holds the view that a finding of mitigating circumstances relates to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates punishment, not the crime. In this respect the Trial Chamber adopts the reasoning of "Erdemovic" and the "Hostage" case cited therein.

> "It must be observed however that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime."

57. The degree of magnitude of the crime is still an essential criterion for evaluation of sentence.

58. A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender. Just sentences contribute to respect for the law and the maintenance of a just, peaceful and safe society.

59. The Chamber recalls as aforementioned that the Tribunal was established at the request of the government of Rwanda; and the Tribunal was intended to enforce individual criminal accountability on behalf of the international community, contribute in ensuring the effective redress of violence and the culture of impunity, and foster national reconciliation and peace in Rwanda. (Preamble, Security Council resolution 955(1994)).

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60. In her submissions, although the Prosecutor sought a term of life imprisonment for Jean Kambanda, she requested that the Tribunal, in the determination of the sentence, take into consideration the guilty plea and the cooperation of Jean Kambanda with her office. The Defence Counsel in his submissions emphasised that Jean Kambanda was only a puppet controlled by certain military authorities and that his power was consequently limited. He thus submitted that the Tribunal, taking into account the guilty plea, Jean Kambanda=s cooperation and willingness to continue cooperating with the Prosecutor, and the role Jean Kambanda could play in the process of national reconciliation in Rwanda, sentence him for a term of imprisonment not exceeding two years.

61. The Chamber has examined all the submissions presented by the Parties pertaining to the determination of sentence, from which it can be inferred:

(A) (i) Jean Kambanda has cooperated and is still willingly cooperating with the Office of the Prosecutor;

(ii) the guilty plea of Jean Kambanda is likely to encourage other individuals to recognize their responsibilities during the tragic events which occurred in Rwanda in 1994;

(iii) a guilty plea is generally considered, in most national jurisdictions, including Rwanda, as a mitigating circumstance;

(B) but that, however:

(v) the crimes for which Jean Kambanda is responsible carry an intrinsic gravity, and their widespread, atrocious and systematic character is particularly shocking to the human conscience;

(vi) Jean Kambanda committed the crimes knowingly and with premeditation;

(vii) and, moreover, Jean Kambanda, as Prime Minister of Rwanda was entrusted with the duty and authority to protect the population and he abused this trust.

62. On the basis of all of the above, the Chamber is of the opinion that the aggravating circumstances surrounding the crimes committed by Jean Kambanda negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post, at the time he committed the said crimes.

IV. VERDICT

TRIAL CHAMBER I,

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, inter partes and in the first instance;

PURSUANT to Articles 23, 26 and 27 of the Statute and Rules 100, 101, 102, 103 and 104 of the Rules of Procedure and Evidence;

NOTING the general practice of sentencing by the Courts of Rwanda;

NOTING the indictment as confirmed on 16 October 1997;

NOTING the Plea of guilty of Jean Kambanda on 1 May 1998 on the Counts of:

COUNT 1: Genocide (stipulated in Article 2(3)(a) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the Statute of theTribunal);

COUNT 2: Conspiracy to commit genocide (stipulated in Articles 2(3)(b) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal);

COUNT 3: Direct and public incitement to commit genocide (stipulated in Article 2(3)(c) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal);

COUNT 4: Complicity in genocide (stipulated in Article 2(3)(e) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal);

COUNT 5: Crime against humanity (murder) (stipulated in Article 3(a) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal);

COUNT 6: Crime against humanity (extermination) (stipulated in Article 3(b) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal);

HAVING FOUND Jean Kambanda guilty on all six counts on 1 May 1998;

NOTING the briefs submitted by the parties;

HAVING HEARD the Closing Statements of the Prosecutor and the Defence Counsel;

IN PUNISHMENT OF THE ABOVEMENTIONED CRIMES,

SENTENCES Jean Kambanda

born on 19 October 1955 in Gishamvu Commune, Butare Prefecture, Rwanda

TO LIFE IMPRISONMENT

RULES that imprisonment shall be served in a State designated by the President of the Tribunal, in consultation with the Trial Chamber and the said designation shall be conveyed to the government of Rwanda and the designated State by the Registry;

RULES that this judgement shall be enforced immediately, and that until his transfer to the said place of imprisonment, Jean Kambanda shall be kept in detention under the present conditions.

Arusha, 4 September 1998,

Laïty Kama (Presiding Judge)

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Lennart Aspegren- (Judge)

Navanethem Pillay- (Judge)

(Seal of the Tribunal)

ANNEX 6

Prosecutor v. Jelisic, IT-95-10, 14 December 1999 Judgment.

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IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Almiro Rodrigues

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 14 December 1999

THE PROSECUTOR

v.

GORAN JELISIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Geoffrey Nice
Mr. Vladimir Tochilovsky

Defence Counsel:

Mr. Veselin Londrovic
Mr. Michael Greaves

I. INTRODUCTION

1. The trial of Goran Jelisic before Trial Chamber I (hereinafter "the Trial 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 (hereinafter "the Tribunal") opened on 30 November 1998 and ended on 25 November 1999.

2. Further to several amendments to the indictment, Goran Jelisic had to answer to thirty-two (32) distinct counts[1] of genocide, violations of the laws or customs of war and crimes against humanity.

A. The Indictment

3. The indictment[2] charges Goran Jelisic with genocide:

> In May 1992, Goran Jelisic, intending to destroy a substantial or significant part of the Bosnian Muslim people as a national, ethnical or religious group, systematically killed

III. THE CRIMES ADMITTED TO BY THE ACCUSED IN THE GUILTY PLEA

24. Goran Jelisic pleaded guilty to violations of the laws or customs of war (sixteen counts)[24] and crimes against humanity (fifteen counts)[25].

25. A guilty plea is not in itself a sufficient basis for the conviction of an accused. Although the Trial Chamber notes that the parties managed to agree on the crime charged, it is still necessary for the Judges to find something in the elements of the case upon which to base their conviction both in law and in fact that the accused is indeed guilty of the crime.

26. Pursuant to Rule 62 *bis* of the Rules, the Judges must verify that:

(i) the guilty plea has been made voluntarily;

(ii) the guilty plea is informed;

(iii) the guilty plea is not equivocal; and

(iv) there is sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or of lack of any material disagreement between the parties about the facts of the case.

27. In this respect, the Trial Chamber recalls that on 11 March 1998 it ordered an expert evaluation whose results[26] indicated that Goran Jelisic was fit to understand the nature of the charges brought against him and to follow the proceedings fully informed. Moreover, the accused pleaded guilty only after long discussions between the parties either directly or during hearings. The ensuing Memorandum of Understanding quite clearly presents the result of these discussions as regards the nature and scope of the crimes committed by the accused.

28. The Trial Chamber must also verify whether the elements presented in the guilty plea are sufficient to establish the crimes acknowledged.

29. First, it is appropriate to note that the existence of an armed conflict is a condition for both Article 3 and Article 5 of the Statute to apply[27]. The Trial Chamber here takes up the definition of armed conflict used by the Appeals Chamber in the *Tadic* Case which states 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[28]

30. The Defence concurred that the municipality of Brcko was the theatre for an armed conflict at the moment the crimes were committed[29] and there can be no doubt that the crimes were linked to this conflict. The Trial Chamber also observes that the facts accepted in support of the guilty plea[30] as recounted in the historical background do not leave any doubt about the existence of an armed conflict in the region at that time.

31. The legal ingredients of war crimes and crimes against humanity invoked as part of the armed conflict are as follows.

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A. Violations of the laws or customs of war

32. The counts based on Article 3 of the Statute charge the accused with murder, cruel treatment and plunder.

33. Article 3 of the Statute is a general, residual clause which applies to all violations of humanitarian law not covered under Articles 2, 4 and 5 of the Statute provided that the rules concerned are customary[31].

34. The charges for murder and cruel treatment are based on Article 3 common to the Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda[3233]. As a rule of customary international law, Article 3 common to the Geneva Conventions is covered by Article 3 of the Statute as indicated in the *Tadic Appeal Decision*[34]. Common Article 3 protects "[p]ersons taking no active part in the hostilities" including persons "placed *hors de combat* by sickness, wounds, detention, or any other cause". Victims of murder, bodily harm and theft, all placed *hors de combat* by their detention, are clearly protected persons within the meaning of common Article 3.

1. Murder

35. Murder is defined as homicide committed with the intention to cause death. The legal ingredients of the offence as generally recognised in national law may be characterised as follows:

- the victim is dead,
- as a result of an act of the accused,
- committed with the intention to cause death.[35]

36. The elements submitted in the Annex to the factual basis clearly confirmed that the accused was guilty of the murder of the thirteen persons listed in support of the counts.

37. Five of the thirteen murders to which the accused pleaded guilty were perpetrated at the Brcko police station on about 7 May 1992[36] in an always identical manner which was described by the accused himself[37]. Having undergone an interrogation at the Brcko police station, the victims were placed in the hands of the accused who took them out to an alley near the police station. The accused executed them, generally with two bullets to the back of the neck fired from a "Skorpion" pistol fitted with a silencer. A lorry then came to gather up the bodies. According to the accused, these murders were committed over a period of two days. Goran Jelisic admitted killing in this manner:

- an unidentified male (count 4),
- Hasan Jasarevic (count 6),
- a young man from Sinteraj (count 8),
- Ahmet Hodzic or Hadzic, *alias* Papa (count 10), the head of the Muslim SDA political party,
- a person by the first name of Suad (count 12).

38. Eight of the thirteen murders to which the accused pleaded guilty were perpetrated at Luka camp. Here again, the murders were always committed in an identical way. First, the victims underwent an interrogation inside the administrative buildings in which for the most part the accused participated and during which they were severely beaten, in particular with truncheons and clubs. Armed with a "Skorpion" pistol fitted with a silencer, the accused made them go to the corner of the offices where he

then executed them with one or two bullets fired point-blank into the back of the neck or into the back. Some victims were killed even before they reached the corner of the administrative buildings such that other detainees actually witnessed the murders. Other detainees were killed with one or two bullets to the back of the head whilst kneeling over a grate near the office where the interrogations were held. He then made some detainees carry the body of the victim behind the administrative offices where the bodies were piled up. The accused admitted to having killed in this manner:

- Jasminko Cumurovic, *alias* Jasce (count 14),
- Huso and Smajil Zahirovic (count 16),
- Naza Bukvic (count 18),
- Muharem Ahmetovic, father of Naza Bukvic, killed the day after his daughter died (count 20),
- Stipo Glavocevic, *alias* Stipo, (count 22),
- Novalija (count 32),
- Adnan Kucalovic (count 38).

39. Naza Bukvic[38] was very severely beaten before being executed[39]. It appears that her executioners wanted to find out where her brother and father, members of the police forces before the war, were hiding. She was handcuffed to a signpost and then beaten with long truncheons by several policemen for a whole day[40]. The victim's clothes were torn and covered with blood. That evening, she was brought back to the hangar covered in bruises and moaning with pain. The accused returned for her the next morning and executed her in the same fashion as he had his other victims[41].

40. One Croatian person, named Stipo Glavocevic, also suffered serious bodily harm before being killed. He arrived at Luka camp on about 9 May 1992 on a truck. His right ear was cut off and then Goran Jelisic, accompanied by a guard carrying a sabre, stood the victim before the detainees under guard in the hangar. Stipo Glavocevic begged someone to put him out of his misery. Goran Jelisic offered his weapon to the detainees for one of them to volunteer to do so. No one moved. The guard accompanying the accused hit Stipo Glavocevic with the edge of the sabre. Stipo Glavocevic was led outside the hangar and then the accused went out and killed him in the manner previously described.

2. Cruel Treatment

41. This Trial Chamber shares the opinion of the Trial Chamber in the *Celebici* case which defined cruel treatment as "an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity"[42].

42. The bodily harm suffered by the brothers Zejcir and Resad Osmic is the focus of count 30. The two brothers were first taken to the Brcko police station where Goran Jelisic came looking for them. The accused called them "balijas"[43], handcuffed them and punched them. He then made them get into the boot of a red "Zastava 101" car. The victims were thus transported to Luka camp. Goran Jelisic forced them to go into the administrative office in which were his girlfriend Monika, who was sitting at a desk in front of a typewriter, and her brother, Kole. The two brothers were made to stand with their backs to the wall and Goran Jelisic began to hit them with a club, mostly to the head, the neck and the chest. According to one of the brothers, they were allegedly beaten like this for approximately thirty minutes. Zejcir Osmic was then taken to the hangar. Goran Jelisic continued to beat Resad Osmic who was no longer able to open his eyes as his eyelids were too swollen. He ended up collapsing from the blows. Goran Jelisic kicked him in the chest while he was trying to get back up. The accused then left. The victim was not beaten while Goran Jelisic was away. Goran Jelisic returned after approximately ten minutes. His shirt was stained with blood. He explained "I just killed a man from fifty centimetres away.

I cut off his ear. He didn't want to talk, like you". The accused then slashed the victim's two forearms with a knife before again beating him with a club. Goran Jelisic next made the victim take out his papers and his money. None of his identity papers gave any indication that he was Muslim. The accused then became angry and asked why the two brothers had been brought to Luka. He ordered their immediate release[44].

43. Count 37 relates to the bodily harm suffered by Muhamed Bukvic. The factual basis offered in support of the guilty plea shows that this man was very severely beaten by Goran Jelisic during an interrogation which he underwent in the administrative offices in Luka camp. The victim, already covered in bruises from the beating he received the previous day from another guard at the camp named Kosta, was beaten all over his body by Goran Jelisic with a truncheon[45]. The accused, using his fingers to squeeze the victims cheeks up towards his eyes, hit him with his truncheon at eye level.

44. The bodily harm inflicted on Amir Didic is covered in count 40. He was beaten several times during the interrogations to which he was subjected in the Luka camp offices. Amir Didic indicated that he had been beaten by several guards even though the accused was by far the most active. Goran Jelisic hit him on one occasion with a fire hose thereby making him lose consciousness. Amir Didic was allegedly beaten to the point of being unrecognisable. He stated that another official at the camp named Kole and the girlfriend of the accused, Monika, were always present during these beatings[46].

45. The Trial Chamber is of the opinion that the assault described in the indictment, admitted by the accused and moreover confirmed by the elements presented during the trial, constitute inhumane acts.

3.Plunder

46. Count 44 charges the accused with stealing money from persons detained at Luka camp, in particular from Hasib Begic, Zejcir Osmic, Enes Zukic and Armin Drapic, between approximately 7 May and 28 May 1992.

47. Pursuant to Article 3(e), the Tribunal has jurisdiction over violations of the laws or customs of war which:

> shall include, but not be limited to:
>
> [...]
>
> e. plunder of public or private property.

48. Plunder is defined as the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto. The Trial Chamber hearing the *Celebici* case recalled that the "prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory"[47]. It thus found that the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators.

49. The factual basis attached to the guilty plea[48] indicates that the accused stole money, watches, jewellery and other valuables from the detainees upon their arrival at Luka camp by threatening those

who did not hand over all their possessions with death. The accused was sometimes accompanied by guards or Monika[49] but he mostly acted alone. The Trial Chamber holds that these elements are sufficient to confirm the guilt of the accused on the charge of plunder.

B. Crimes against humanity

50. Within the terms of Article 5 of the Statute, murder and other inhumane acts specified in paragraphs (a) and (i) respectively must be characterised as crimes against humanity when "committed in armed conflict, whether international or internal in character, and directed against any civilian population".

1. Underlying offences: murder and other inhumane acts

(a) murder[50]

51. The Trial Chamber notes firstly that the English text of the Statute uses the term "murder". The Trial Chamber observes that in line with the *Akayesu* case[51] of the Tribunal for Rwanda it is appropriate to adopt this as the accepted term in international custom[52]. The Trial Chamber will therefore adopt the definition of murder set out above[53]. The murders listed in support of the counts of crimes against humanity are the same as those enounced in support of the violations of the laws or customs of war and which, as previously seen, have been established.

(b) other inhumane acts

52. The sub-characterisation "other inhumane acts" specified under Article 5(i) of the Statute is an generic charge which encompasses a series of crimes. It is appropriate to recall the position of the Trial Chamber in the *Celebici* case which stated that the notion of cruel treatment set out in Article 3 of the Statute " carries an equivalent meaning [...] as inhuman treatment does in relation to grave breaches of the Geneva Conventions"[54]. Likewise, the Trial Chamber considers that the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning. The facts submitted in support of these counts are moreover the same as those invoked for cruel treatment under Article 3 which, as the Trial Chamber has already noted, have been established.

2. An attack against a civilian population as a general condition of the charge

(a) A widespread or systematic attack

53. Article 5 defines crimes against humanity as crimes "directed against any population". Customary international law has interpreted this characteristic, particular to crimes against humanity, as assuming the existence of a widespread or systematic attack against a civilian population[55]. The conditions of scale and "systematicity" are not cumulative as is evidenced by the case-law of this Tribunal[56] and the Tribunal for Rwanda[57], the Statute of the International Criminal Court[58] and the works of the International Law Commission (hereinafter "the ILC")[59]. Nevertheless, the criteria which allow one or other of the aspects to be established partially overlap. The existence of an acknowledged policy targeting a particular community[60], the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may

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demonstrate the widespread or systematic nature of an attack.

(b) against a civilian population

54. It follows from the letter and the spirit of Article 5 that the term "civilian population" must be interpreted broadly. The text states that the acts are directed against "any" civilian population. In addition, reference to a civilian population would seek to place the emphasis more on the collective aspect of the crime than on the status of the victims[61]. The Commission of Experts formed pursuant to Security Council resolution 780 (hereinafter "the Commission of Experts")[62] considered furthermore that the civilian population within the meaning of Article 5 of the Statute must include all those persons bearing or having borne arms who had not, strictly speaking, been involved in military activities. The Trial Chamber therefore adjudges that the notion of civilian population as used in Article 5 of the Statute includes, in addition to civilians in the strict sense, all persons placed *hors de combat* when the crime is perpetrated. Moreover, in accordance with the case-law of this Tribunal and the Tribunal for Rwanda[63], the Trial Chamber deems that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character"[64].

55. The elements presented in support of the guilty plea as summarised in the historical background[65] do not leave any doubt as to the widespread and systematic nature of the attack against the Muslim and Croatian civilian population in the municipality of Brcko.

3. An attack in which an accused participates in full knowledge of the significance of his acts

56. The accused must also be aware that the underlying crime which he is committing forms part of the widespread and systematic attack.

57. The accused has not denied that his acts formed part of the attack by the Serbian forces against the non-Serbian population of Brcko[66]. The Trial Chamber moreover notes that, despite remaining uncertainties regarding his exact rank and position, the accused was part of the Serbian forces that took part in the operation conducted against the non-Serbian civilian population in Brcko. It was indeed in anticipation and in the service of the attack that the accused, who comes from Bijeljina, was given police duties in the municipality of Brcko. As one of the active participants in this attack, Goran Jelisic must have known of the widespread and systematic nature of the attack against the non-Serbian population of Brcko.

C. Conclusion

58. In conclusion, the Trial Chamber declares Goran Jelisic guilty on thirty-one counts of violations of the laws or customs of war and crimes against humanity.

ANNEX 7

Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 140-152, esp. para. 147.

IN THE APPEALS CHAMBER

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

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

Zejnil DELALIC,
Zdravko MUCIC (aka "PAVO"),
Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

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

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

1. What is the Applicable Law?

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

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character . There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215).[179]

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

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

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

142. Referring to the *Tadic* Jurisdiction Decision, which the Trial Chamber followed, Delalic argues that the Appeals Chamber failed to properly consider the status of common Article 3, and in particular failed to analyse state practice and *opinio juris*, in support of its conclusion that it was, as a matter of customary international law, applicable to international armed conflicts. Further, in his opinion, the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international conflicts are *dicta*.[184] The Prosecution is of the view that, as stated by the ICJ in *Nicaragua*, it is because common Article 3 gives expression to elementary considerations of humanity , which are applicable irrespective of the nature of the conflict, that common Article 3 is applicable to international conflicts.[185]

143. It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as

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

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

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

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

146. This is entirely consistent with the logic and spirit of the Geneva Conventions ; it is a "logical application of its fundamental principle".[190] Specifically, in relation to the substantive rules set out in subparagraphs (1) (a)-(d) of common Article 3, the ICRC Commentary continues:

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

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

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

149. Both human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground in the following terms: "This irreducible core of human rights , also known as 'non-derogable rights' corresponds to the lowest level of protection which can be claimed by anyone at anytime [...]".[194] The universal and regional human rights instruments[195] and the Geneva Conventions share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

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

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

151. The Trial Chamber found:

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

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

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadic* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at Nuremberg [199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

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

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

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

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

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

157. The appellants contend that the evidence presented in the *Tadic* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall within the scheme providing for individual criminal responsibility .[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

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

159. The Prosecution argues that the *Tadic* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international

humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law .[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate .[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadic* found that as a matter of customary law, breaches of international humanitarian law committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

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

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

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

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

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

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

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

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

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

168. As referred to by the Appeals Chamber in the *Tadic* Jurisdiction Decision , States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

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

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

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

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

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

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

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

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

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

176. It then concluded:

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

> this must also be permitted to prosecute and punish such violations of the Conventions.[228]

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

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

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

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

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

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

ANNEX 8

Prosecutor v. Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-T, T. Ch. IIqtr, 16 November 1998, paras. 314, 317.

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IN THE TRIAL CHAMBER

Before:
Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:
Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:
Ms. Edina Residovic, Mr. Eugene O'Sullivan, for Zejnil Delalic
Ms. Nihada Buturovic, Mr. Howard Morrison, for Zdravko Mucic
Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landzo

I.Introduction

The trial of Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (hereafter "accused"), before this Trial 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 (hereafter "International Tribunal" or "Tribunal"), commenced on 10 March 1997 and came to a close on 15 October 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor (hereafter "Prosecution") and the Defence for each of the accused (hereafter, collectively, "Defence"), the Trial Chamber,

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E. Article 3 of the Statute

1. Introduction

278. In addition to the charges of grave breaches of the Geneva Conventions, the Indictment also contains 26 counts of violations of the laws or customs of war, punishable under Article 3 of the Statute[298]. In the *Tadic Jurisdiction Decision*, the Appeals Chamber opined that Article 3 refers to a broad category of offences, namely all "violations of the laws or customs of war", and that the enumeration of some of these in the Article itself is merely illustrative, not exhaustive[299]. In particular, Article 3 is not limited to offences under "Hague law", being the law regulating the conduct of hostilities and most notably finding expression in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, (hereafter "Hague Convention IV") and annexed Regulations, but includes some violations of the Geneva Conventions.[300]

279. The Appeals Chamber, in its discussion of Article 3, proceeded further to enunciate four requirements that must be satisfied in order for an offence to be considered as within the scope of this Article. These requirements are the following:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (...);
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. (...);
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[301]

280. This Trial Chamber finds no reason to depart from the position taken by the Appeals Chamber on this matter and considers that the first and third of these requirements have been dealt with by our discussion of the general requirements for the application of both Articles 2 and 3 of the Statute above.[302]

281. With the exception of count 49 (plunder), the Indictment specifies that the offences charged as violations of the laws or customs of war are "recognised by" article 3 common to the four Geneva Conventions, which reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are, and shall remain, prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> > (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

282. Thus, the Trial Chamber, in its discussion of the applicability of Article 3 of the Statute to the present case, must perforce consider common article 3 of the Geneva Conventions. The Defence has challenged the nature of this provision and its place within the bounds of Article 3 of the Statute, on the basis that it does not form part of customary international law and that any violation thereof does not entail individual criminal responsibility.

283. In relation to the charge of plunder in count 49 of the Indictment, the Trial Chamber notes that Article 3(e) of the Statute specifically enumerates this offence as a violation of the laws or customs of war within the jurisdiction of the International Tribunal. Nonetheless, it must be established that the prohibition of plunder is a norm of customary international law which attracts individual criminal responsibility.

284. In order to proceed with its determination on the applicability of Article 3, the Trial Chamber deems it necessary, for the sake of clarity, to briefly set out the arguments of the parties in relation to these issues.

2. Arguments of the Parties

285. In the *Tadic Jurisdiction Decision*, the Appeals Chamber found that the International Tribunal may have jurisdiction over offences under Article 3 of the Statute whether the offences alleged were committed in an international or internal armed conflict[303]. In reaching this conclusion, it examined the customary nature of common article 3 of the Geneva Conventions, as well as other norms governing internal armed conflicts, and determined that their violation does entail individual criminal responsibility. The Prosecution contends that the findings of the Appeals Chamber on this matter should be applied in the present case. On this basis, the Prosecution takes the view that it is only required to prove that an armed conflict existed and that the alleged violations were related to this conflict in order for the Trial Chamber to apply Article 3 of the Statute in the present case.

286. In relation to violations of the substantive prohibitions contained in common article 3 of the Geneva Conventions, the Prosecution submits that these are clearly part of customary international law and that it must simply demonstrate that the victims of the alleged offences satisfy the requirements of sub-paragraph (1) (that is, that they be taking no active part in the hostilities). In sum, it is the view of the Prosecution that common article 3 of the Geneva Conventions can be applied by the International

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Tribunal when four conditions are met, namely, that:

1) the unlawful acts were committed in the context of an armed conflict;
2) the perpetrator was connected to one side involved in the armed conflict;
3) the victims were persons taking no active part in the hostilities, which includes civilians, members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause; and
4) one of the enumerated acts listed in common article 3 of the Geneva Conventions was committed.[304]

287. In addition, the Prosecution contends that violations of article 75 of Additional Protocol I, which reflects customary international law, are covered by Article 3 of the Statute. It asserts that the offences charged under Article 3 in the Indictment, clearly also constitute violations of this provision.[305]

288. The Prosecution finally argues that the prohibition of plunder is a well-established principle in international law, recognised in the 1907 Hague Convention (IV) and annexed Regulations, as well as Geneva Convention IV.

289. The Defence concedes that its position on Article 3, which is that it cannot incorporate common article 3 of the Geneva Conventions, is contrary to that taken by the Appeals Chamber in the *Tadic Jurisdiction Decision*[306]. Nonetheless, it contends that the Appeals Chamber wrongly decided the issue of whether common article 3 of the Geneva Conventions is included in Article 3 of the Statute.

290. The first argument raised by the Defence in support of its position is that the Security Council, in establishing the International Tribunal, never intended it to have jurisdiction over violations of common article 3. By examining the provisions of the statute of the International Criminal Tribunal for Rwanda (hereafter "ICTR"), the Defence deduces that, without explicit reference to common article 3 in the Statute as is contained in the statute of the ICTR, the Security Council could not have intended to include it within the ambit of the jurisdiction of the International Tribunal.

291. The Defence further contends that the listed offences in Article 3 of the Statute are illustrative of offences under "Hague law" – that is the laws enunciated in the 1907 Hague Convention (IV) and annexed Regulations – which relates to the conduct of hostilities, not the protection of victims taking no active part in the fighting. In its view, had the Security Council intended to include certain provisions of "Geneva law" – such as common article 3 - within Article 3 of the Statute, it would have done so explicitly.

292. Responding to the Prosecution on this matter, the Defence examines the statements made by certain State representatives to the Security Council at the time of adoption of the Statute of the Tribunal. The Defence challenges the Prosecution's interpretation of these statements and maintains that they cannot be regarded as an endorsement of the inclusion of common article 3 of the Geneva Conventions into Article 3 of the Statute.

293. Fundamentally, the Defence argues that the provisions of common article 3 of the Geneva Conventions do not constitute settled customary international law on the basis of State practice and *opinio juris*. The Report of the Secretary-General, adopted by the Security Council and containing the Statute, clearly states that the Tribunal is to apply "rules of international humanitarian law which are beyond doubt part of customary law"[307] and it is the view of the Defence that common article 3 does not conform to this requirement.

294. The second leg of the Defence argument is that, even should the substantive prohibitions in

common article 3 be regarded as customary international law, individual criminal responsibility does not necessarily flow from their violation. In support of this view, it discusses the historical development of international law and concludes that it is only recently that the concept of individual criminal responsibility has been introduced to this field. It notes that, in 1949, the States adopting the four Geneva Conventions did not include common article 3 in the system of "grave breaches" established to enforce the Conventions' proscriptions. It then argues that there has been no development of customary international law since that time such as to attach individual criminal responsibility to violations of common article 3.

3. Discussion

295. Bearing in mind the findings made in sub-section C above concerning the relevant nexus between the alleged acts of the accused and the armed conflict, along with the position of the alleged victims as detainees in the Celebici prison-camp and of the accused in relation to that prison-camp, the Trial Chamber turns to the question of the customary nature of the prohibitions contained in common article 3 of the Geneva Conventions and their incorporation into Article 3 of the Statute.

296. The Trial Chamber is instructed in its consideration of Article 3 by the views expressed by the Appeals Chamber in the *Tadic Jurisdiction Decision*. In that Decision, the Appeals Chamber engages in a lengthy discussion of the nature of Article 3 and the incorporation of common article 3 of the Geneva Conventions therein, a discussion which this Trial Chamber finds unnecessary to revisit in whole.

297. Fundamentally, the Appeals Chamber describes the division of labour between Articles 2 and 3 of the Statute thus:

> Article 3 may be taken to cover all violations of international humanitarian law other than "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).[308]

Furthermore,

> 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.[309]

298. The Trial Chamber observes that the finding of the Appeals Chamber on the extent of application of Article 2 of the Statute, excluding internal armed conflicts from the ambit of the Tribunal's jurisdiction over "grave breaches" of the Geneva Conventions, is such that its approach to Article 3 has to be rather broader, in order to achieve this goal of making our jurisdiction "watertight". Hence, violations of common article 3 of the Geneva Conventions find their place within Article 3 of the Statute.

299. In similar spirit, this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal. Thus, if violations of common article 3 of the Geneva Conventions are not to be considered as having been incorporated into the "grave breaches" regime, and hence falling under Article 2 of the Statute, such violations must be considered as forming part of the more general provisions of Article 3.

300. It is noteworthy that the Appeals Chamber qualifies its discussion of the existence of customary

rules of international humanitarian law relating to internal armed conflicts with the *caveat* that not all of the rules applicable in international armed conflicts have been extended to internal conflicts and that it is the essence of these rules that is important and not their detailed provisions[310]. However, the prohibitions contained in the first paragraph of common article 3 of the Geneva Conventions express "the fundamental principle underlying the four Geneva Conventions" – that of humane treatment[311]. The perpetrators of violations of this article during internal conflicts cannot, on any level of reasoning, be treated more leniently than those who commit the same acts in international conflicts. It would, therefore, appear that the prohibitions contained in common article 3 are of precisely the nature which may be expected to apply in internal, as well as international, armed conflicts.

301. While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised[312]. This development is illustrative of the evolving nature of customary international law, which is its strength. Since at least the middle of this century, the prevalence of armed conflicts within the confines of one State or ensuing from the breakdown of previous State boundaries is apparent and absent the necessary conditions for the creation of a comprehensive new law by means of a multilateral treaty, the more fluid and adaptable concept of customary international law takes the fore.

302. The evidence of the existence of such customary law - State practice and *opinio juris* – may, in some situations, be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States. The evidence of State practice *outside* of the treaty, providing evidence of separate customary norms or the passage of the conventional norms into the realms of custom, is rendered increasingly elusive, for it would appear that only the practice of non-parties to the treaty can be considered as relevant.[313] Such is the position of the four Geneva Conventions, which have been ratified or acceded to by most States.

303. Despite these difficulties, international tribunals do, on occasion, find that custom exists alongside conventional law, both having the same substantive content. This occurred, in relation to the prohibition on the use of force contained in the United Nations Charter, in the *Nicaragua Case*[314]. Additionally, in that case, the ICJ's discussion of the Geneva Conventions, particularly common articles 1 and 3 thereof, indicates that it considered these also to be part of customary international law[315]. Furthermore, the ICJ found that common article 3 was not merely to be applied in internal armed conflicts, but that,

> [t]here is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22).[316]

304. Additionally, in a recent Judgement, the ICTR also discussed the customary status of common article 3 in the context of its application of the provisions of its statute[317]. The Trial Chamber adjudicating that case stated that,

> [i]t is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute violations of Common

Article 3.[318]

305. It should be noted that the Secretary-General, in charging the International Tribunal to apply the customary rules of international humanitarian law, specified particular conventions as being incorporated in custom. Included in these are the four Geneva Conventions of 1949, with no mention of the exclusion of certain of their provisions, such as common article 3[319]. That common article 3 was considered included in the law to be applied by the Tribunal is borne out by the statement of the representative of the United States upon the adoption of Security Council resolution 827, which was not contradicted by any other State representative, that

> 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.[320]

306. On the basis of these considerations, the Trial Chamber is in no doubt that the prohibitions contained within common article 3 of the Geneva Conventions are prohibitions of customary international law which may be considered to be within the scope of the jurisdiction of the International Tribunal under Article 3 of the Statute.

307. The Trial Chamber is thus led to the second argument of the Defence that, even if it should constitute custom in its prohibitions, there is no customary law to suggest that common article 3 attracts individual criminal responsibility in its violation. Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadic Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings[321]. In its Decision, the Appeals Chamber examines various national laws, as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts[322]. From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.

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

309. This conclusion finds support in the ILC Draft Code of Crimes Against the Peace and Security of Mankind (hereafter "ILC Draft Code")[323]. Article 20 of the ILC Draft Code, entitled "War Crimes", includes violations of international humanitarian law applicable in non-international armed conflicts, as well as those violations which constitute grave breaches of the Geneva Conventions. The crimes listed in this section mirror the provisions of common article 3 of the Geneva Conventions, along with article 4 of Additional Protocol II (hereafter "Additional Protocol II")[324]. Moreover, the final Statute of the International Criminal Court, adopted in Rome on 17 July 1998, specifically lists serious violations of common article 3 of the Geneva Conventions as war crimes, under its article 8[325]. Another recent instrument, the statute of the ICTR, also enumerates violations of common article 3 as offences within the jurisdiction of that tribunal. While recognising that these instruments were all drawn up after the acts

alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common article 3 are not incompatible with the attribution of individual criminal responsibility.

310. The statute of the ICTR and the Report of the Secretary-General relating to that statute cannot be interpreted so as to restrict the application of our Statute. While article 4 of the ICTR statute contains explicit reference to common article 3 of the Geneva Conventions and Additional Protocol II, the absence of such express reference in the Statute of the International Tribunal does not, by itself, preclude the application of these provisions. The Defence cites the Report of the Secretary-General relating to the ICTR, which states that article 4 of that statute "for the first time criminalizes common article 3 of the four Geneva Conventions"[326] in support of its position. The Trial Chamber notes, however, that the United Nations cannot "criminalize" any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the statute of the ICTR.

311. The Defence is extremely concerned to draw attention to the principle of *nullum crimen sine lege* and, from its application, concludes that none of the accused can be convicted of crimes under common article 3 of the Geneva Conventions. It maintains that for the Tribunal to attach individual criminal responsibility to violations of common article 3 would amount to the creation of *ex post facto* law. Such a practice is contrary to basic human rights, as enunciated, *inter alia*, in the International Covenant on Civil and Political Rights 1966 (hereafter "ICCPR"). Article 15 of the ICCPR states, in relevant part:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...]
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

312. In addition to what has been stated above concerning the customary nature of the prohibitions contained in common article 3 of the Geneva Conventions and the individual criminal responsibility which their violation entails, this Trial Chamber places particular emphasis on the provisions of the Criminal Code of the SFRY, which were adopted by Bosnia and Herzegovina in April 1992[327]. This legislation establishes the jurisdiction of the Bosnian courts over war crimes committed "at the time of war, armed conflict or occupation", drawing no distinction between internal and international armed conflicts. Thus, each of the accused in the present case could have been held individually criminally responsible under their own national law for the crimes alleged in the Indictment. Consequently, on this ground also there is no substance to the argument that applying the provisions of common article 3 of the Geneva Conventions under Article 3 of the Statute violates the principle of *nullum crimen sine lege*.

313. Moreover, the second paragraph of article 15 of the ICCPR is of further note, given the nature of the offences charged in the Indictment. It appears that this provision was inserted during the drafting of the Covenant in order to avoid the situation which had been faced by the International Military Tribunals at Nürnberg and Tokyo after the Second World War. These tribunals had applied the norms of the 1929 Geneva Conventions and 1907 Hague Conventions, among others, despite the fact that these instruments contained no reference to the possibility of their criminal sanction. It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen*

sine lege in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.

314. While common article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflict. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflict. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3. Nor is it necessary for the Trial Chamber to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts. These provisions are clearly based upon the prohibitions contained in common article 3 and may also constitute customary international law. However, the Trial Chamber finds sufficient basis in the substance of common article 3 to apply Article 3 of the Statute to the acts alleged in the present case.

315. Finally, the Trial Chamber is in no doubt that the prohibition on plunder is also firmly rooted in customary international law. The Regulations attached to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (hereafter "Hague Regulations") provide expression to the prohibition and it is reiterated in the Geneva Conventions[329]. The Hague Regulations have long been considered to be customary in nature, as was confirmed by the Nürnberg and Tokyo Tribunals. Moreover, the Report of the Secretary-General makes explicit mention of the Hague Regulations in its Commentary on Article 3 of the Statute, in the following terms:

> The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
>
> The Nürnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognized that war crimes defined in article 6(b) of the Nürnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.[330]

There is, on this basis, no need to expand further upon the applicability of Article 3 of the Statute in relation to the charge of plunder.

4. Findings

316. In conclusion, the Trial Chamber finds that both the substantive prohibitions in common article 3 of the Geneva Conventions, and the provisions of the Hague Regulations, constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility for the offences alleged in the Indictment. As a consequence of the division of labour between Articles 2 and 3 of the Statute thus far articulated by the Appeals Chamber, such violations have been considered as falling within the scope of Article 3.

317. Recognising that this would entail an extension of the concept of "grave breaches of the Geneva Conventions" in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within Article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed. The Trial Chamber has determined that an international armed conflict existed in Bosnia and Herzegovina during the time-period relevant to the Indictment and that the victims of the alleged offences were "protected persons", rendering Article 2 applicable. In addition, Article 3 is applicable to each of the crimes charged on the basis that they also constitute violations of the laws or customs of war, substantively prohibited by common article 3 of the Geneva Conventions (with the exception of the charges of plunder and unlawful confinement of civilians).

318. Having thus found that the requirements for the applicability of Articles 2 and 3 of the Statute are satisfied in the present case, the Trial Chamber must turn its attention to the nature of individual criminal responsibility as recognised under Article 7 of the Statute.

ANNEX 9

Prosecutor v. Furundzija, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), Case No. IT-95-17/1-PT, Trial Chamber, 29 May 1998, para. 14

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IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding

Judge Antonio Cassese

Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Order of: 29 May 1998

PROSECUTOR

v.

ANTO FURUNDZIJA

DECISION ON THE DEFENDANT'S MOTION TO DISMISS COUNTS 13 AND 14 OF THE INDICTMENT (LACK OF SUBJECT MATTER JURISDICTION)

The Office of the Prosecutor:

Mrs. Patricia Viseur-Sellers

Mr. Michael Blaxill

Mr. Rodney Dixon

Counsel for the Accused:

Mr. Luka Misetic

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998 ("Defence Motion") (Official Record at Registry Page ("RP") D770 - D777) and the Prosecution's Response to the Defence Motion filed on 27 May 1998 ("Prosecution's Response") (RP D813 - D819);

2. The accused, Anto Furundzija, was charged in the Indictment dated 2 November 1995 (RP D36 - D41, D50) ("Indictment") with violations of Article 2 of the Statute of the International Tribunal ("Statute") for allegedly committing acts amounting to grave breaches of the Geneva Conventions of 1949 and under Article 3 of the Statute with alleged violations of the laws or customs of war. On 13 March 1998, this Trial Chamber gave the Prosecution leave to withdraw the charges alleging violation of Article 2 of the Statute, namely those contained in Count 12 of the Indictment.

3. The trial of Anto Furundzija is scheduled to commence on 8 June 1998, on counts 13 and 14 only, both alleging violations of Article 3 of the Statute. His actions are said to amount to involvement in torture and outrages upon personal dignity including rape, triggering individual criminal responsibility under Article 7(1) of the Statute.

4. The Trial Chamber finds that the matters raised in the Defence Motion and the Prosecution's Response are suitable for determination in the absence of oral argument in accordance with the Order for Filing of Motions issued by the Trial Chamber on 19 December 1997 (RP D21-D22).

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS OF THE DEFENCE

5. In challenging the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape, the Defence Motion follows several lines of argument.

(a) It is initially argued that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute". These acts are covered instead by Article 2 of the Statute. At a later stage in the Defence Motion, this position is modified to "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict".

This reasoning is based on the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction issued by the Appeals Chamber of the International Tribunal in the case of *Prosecutor v. Dusko Tadic* on 2 October 1995 (RP D6413 - D6491) ("Appeals Chamber Decision") and the finding that Common Article 3 of the Geneva Conventions 1949 ("Common Article 3") had been incorporated into Article 3 of the Statute. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of "armed conflict not of an international character", that is, internal armed conflicts only. Therefore, Defence Counsel argues, the Prosecution, who continues to insist the conflict was international, cannot rely on Common Article 3 and therefore Article 3 of the Statute.

(b) The Defence argues (without committing itself) that the alleged acts fall within Article 2, the grave breaches regime. With respect to torture, the Defence acknowledges that the position is quite clear: torture is one of the specifically prohibited acts under Article 2(b). The Defence does not take a stand on whether rape is a grave breach.

It is argued that rape and torture in an international armed conflict can only be prosecuted under Article

2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict. Applying the Appeals Chamber Decision, torture can only be prosecuted under Article 2 as a grave breach. If rape is a grave breach of the Geneva Conventions (it is not specifically mentioned), then under this decision it cannot be prosecuted under Article 3 because grave breaches can be prosecuted only under Article 2.

(c) According to the Defence, proper application of the Appeals Chamber Decision must mean that crimes listed in Article 2 of the Statute cannot be brought under Article 3. Several extracts of the Appeals Chamber Decision dealing with Article 3 are quoted in support of this interpretation.

III. SUBMISSIONS OF THE PROSECUTION

6. In the Prosecution Response, the arguments of the Defence are countered as follows:

(a) The offences charged in Counts 13 and 14 of the Indictment constitute violations of the laws or customs of war, as recognised by Article 3 of the Statute. Torture and outrages upon personal dignity, including rape, are prohibited under international humanitarian law as distinct offences for all armed conflicts, whether internal or international. These offences are properly charged under Article 3 of the Statute.

(b) The Appeals Chamber in the *Tadic* case held that the prohibitions contained in Common Article 3, which include torture and outrages against personal dignity, including rape, are applicable to all conflicts whether international or internal. Violations of Common Article 3 may properly be prosecuted under Article 3 of the Statute. The test for determining the applicability of Article 3 of the Statute is that set out in the Appeals Chamber Decision:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

In that case, the Prosecution argues, it was confirmed that violations of Common Article 3 satisfied the conditions for prosecution under Article 3 of the Statute.

(c) Rape is prohibited in international armed conflicts, as demonstrated by Article 27 of Geneva Convention IV and Article 76 of Additional Protocol II. Article 4 of Additional Protocol II, which elaborates upon the offences contained in Common Article 3, prohibits rape in internal armed conflict. These prohibitions were recognised in the Appeals Chamber Decision as being part of customary

international law and are applicable in international and internal armed conflicts. They are therefore validly charged under Article 3.

(d) By describing Article 3 as a "residual" clause, the Appeals Chamber in *Tadic* did not preclude charging violations of torture and outrages upon personal dignity, including rape, thereunder. In the present case, these actions have been charged under Article 3 of the Statute as violations of Common Article 3 and other rules of humanitarian law, and are separate substantive offences with separate elements to the grave breaches offences and crimes against humanity. The ruling of this Trial Chamber in the case of *Prosecutor v. Kupreskic et al* in its Decision on Defence Challenges to Form of Indictment issued on 15 May 1998 (RP D1074 - D1076) is cited in support of this proposition.

(e) The effect of the Appeals Chamber's ruling (that Article 3 of the Statute is a general clause covering all serious violations of international humanitarian law not falling under Article 2 or covered by Article 4 or 5) is that Article 3 cannot be relied upon to prosecute grave breaches, crimes against humanity or genocide. It does however, permit the charging of torture and outrages upon personal dignity, including rape.

IV. DISCUSSION

7. Both parties have relied on Articles 2 and 3 of the Statute, which provide as follows:

Article 2

Grave breaches of the Geneva Conventions of 1949

> 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.

Article 3

Violations of the laws or customs of war

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.

8. Common Article 3 is also highly relevant to the issue at hand:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria .

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliation and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by

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civilized people.

(2) The wounded and sick shall be collected and cared for.

. . . .

9. Much reliance has also been placed upon the Appeals Chamber Decision, relevant extracts of which are quoted below:

> Paragraph 87: "....***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)."
>
> [Extracts quoted by the Defence are in bold].
>
> Paragraph 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....".
>
> Paragraph 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.***".
>
> [Extracts quoted by the Defence are in bold].

10. The Appeals Chamber Decision

The Appeals Chamber's interpretation of the International Tribunal's subject matter jurisdiction is based on a study of the norms prohibiting certain conduct in armed conflict and where they fall in the Statute. The norms prohibiting conduct such as rape and torture of protected persons which are incorporated into Article 2 of the Statute, are of a specialised nature and only apply upon satisfaction of the criteria set out in the Geneva Conventions 1949. The norms prohibiting such conduct in armed conflict, irrelevant of whether international or internal, are encompassed in Article 3. Article 3 contains the prohibitions of those serious violations of international humanitarian law which do not fall within the specialised

provisions contained in Articles 2, 4 or 5.

The Trial Chamber emphasises that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute, and that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved and that all such acts are indeed prosecuted.

11. The Appeals Chamber viewed the International Tribunal's subject matter jurisdiction as encompassing all serious violations of international humanitarian law committed in the former Yugoslavia since 1991. These norms fall into different categories: (i) acts committed in circumstances amounting to grave breaches under Article 2, (ii) acts amounting to genocide under Article 4 and (iii) acts meeting the criteria for crimes against humanity under Article 5. There are also acts amounting to serious violations of international humanitarian law which do not fall into the specialised categories: these are the violations of the laws or customs of war under Article 3. The relationship between Article 2 and 3 can be described as one of concentric circles: grave breaches are a species of violation of the laws or customs of war. The Appeals Chamber held that when an act meets the criteria of a grave breach under Article 2 and therefore also Article 3, it falls within the subject matter jurisdiction of the more specific clause, namely Article 2. This finding is vital to the Defence challenge to the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape under Article 3.

12. The application of the Appeals Chamber's finding by the Defence is flawed. All grave breaches are violations of the laws and customs of war. Theoretically, they can be charged as both if the criteria are satisfied. However, there is a general principle of international law (the doctrine of speciality/*lex specialis derogat generali*) which provides that in a choice between two provisions where one has a broader scope and completely encompasses the other, the more specific charge should be chosen. Nevertheless, the situation at hand is not one where the Trial Chamber is faced with different charges under separate articles of the Statute. The Prosecution has already made a choice and has withdrawn the specific charge alleging grave breaches of the Geneva Conventions. It is the finding of the Trial Chamber that the Prosecution is justified in relying on the residual clause to ensure that no serious violation of international humanitarian law escapes the jurisdiction of the International Tribunal. This is fully in line with the reasoning of the Appeals Chamber Decision.

13. The submission of the Defence that torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute

The argument that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute" is a misinterpretation of the Statute. Such acts are prohibited under customary international law at all times. As the Prosecution points out, in times of armed conflict, they also amount to violations of the laws or customs of war, which include the prohibitions in the Hague Conventions of 1907 and Common Article 3.

14. The Defence's later qualification of this incorrect statement is also mistaken: "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict". The Appeals Chamber Decision held that the nature of the armed conflict is irrelevant when acts are committed in violation of the minimum rules in Common Article 3. It was also held that Article 3 of the Statute implicitly refers, *inter alia,* to the customary rules arising from Common Article 3. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment.

Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of "armed conflict not of an international character", that is, internal armed conflicts. However, the Appeals Chamber found that in customary international law, the norms reflected in Common Article 3 applied in all situations of armed conflict. It cited the dicta in the *Case of Paramilitary Activities In and Around Nicaragua*, whereby the International Court of Justice opined that the rules contained in Common Article 3 reflected "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of internal or international character. The Prosecution, which continues to insist the conflict was international, can rely on the rules of customary international law emerging from Common Article 3 and is therefore entitled to charge Anto Furundzija with violating Article 3 of the Statute.

15. The Defence submission that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute

The Defence assertion that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict, is wrong. Rape and torture committed in circumstances which do not amount to grave breaches under Article 2 may fall under Article 3. This demonstrates the meaning of the Appeals Chamber when it described Article 3 as a residual clause intended to confer jurisdiction over all serious violations of international humanitarian law which would otherwise evade the International Tribunal's jurisdiction.

16. Equally inappropriate is the Defence argument that using the Appeals Chamber's reasoning, torture (specifically identified in Article 2(b)) can only be prosecuted under Article 2 as a grave breach. If rape is a grave breach of the Geneva Conventions, then, the Defence argues, under the Appeals Chamber Decision, it cannot be prosecuted under Article 3 of the Statute because grave breaches can be prosecuted only under Article 2.

In the case at hand, grave breaches are no longer charged. The Prosecution, having dropped Count 12 of the Indictment, is proceeding to go to trial on the basis of Article 3 charges, on which a *prima facie* case has already been demonstrated in the course of the Confirmation proceedings. The Appeals Chamber was speaking of norms and not of actual charges. Whilst it is theoretically possible that the offences in this case may have been committed in circumstances such as to amount to grave breaches, the Prosecution has chosen to go to trial on the Article 3 charges. That choice between two provisions having been made, it is not the role of the Trial Chamber to intrude upon the Prosecution's discretion. This is reinforced by the findings in paragraphs 12 and 14 above that, in law, the Prosecutor is indeed entitled to bring charges under Article 3 in respect of the conduct alleged.

17. Test for the applicability of Article 3

The Trial Chamber endorses the submission of the Prosecution that the test to apply in determining the applicability of Article 3 of the Statute is that set out by the Appeals Chamber in the *Tadic* Decision. It also approves the submission of the Prosecution that the acts prohibited by Common Article 3 satisfy the test of the Appeals Chamber Decision.

18. Finding

In sum, the Trial Chamber finds that the Defence is suggesting that allegations of serious violations of international humanitarian law should escape the jurisdiction of the International Tribunal. The arguments raised in support of this do not stand up to close scrutiny and the conclusion that is reached runs contrary to the reasoning of the Appeals Chamber Decision and its very purpose. In consideration

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of all the foregoing conclusions, the Trial Chamber holds that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction to try Anto Furundzija for alleged violations of Article 3 of the Statute.

V. DISPOSITION

For the foregoing reasons

PURSUANT TO RULE 72

THE TRIAL CHAMBER DENIES the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998.

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

Florence
Ndepele
Mwachande
Mumba

Presiding
Judge

Dated this twenty-ninth day of May 1998

At The Hague,

The Netherlands.

[Seal
of
the
Tribunal]

ANNEX 10

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

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Criminal Law Forum
1996

International Tribunal for the Former Yugoslavia

*51 DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION [FNa]

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

PROSECUTOR V. DUSKO TADIC A/K/A "DULE" CASE NO. IT-94-1-AR72 (2 OCTOBER 1995) [FNaa]

IN THE APPEALS CHAMBER, Before Judge Cassese, Presiding; Judge Abi-Saab; Judge Deschênes; Judge Li; Judge Sidhwa

[*1]I. INTRODUCTION

A. The Judgment under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International *52 Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by the Defence against a judgment rendered by Trial Chamber II on 10 August 1995. By that judgment, 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 judgment 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 Aug. 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 judgment, 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.

[*2] From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

*53 (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 (originally published as an annex to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (1993), and adopted pursuant to S.C. Res. 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 Dec. 1966, art. 14, ¶ 5, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 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." (Statute of the International Tribunal art. 15) The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence. (Rules of Procedure and Evidence, Rules 107-118, adopted 11 Feb. 1994 pursuant to Statute of the International Tribunal art. 15, as amended by U.N. Doc. IT/32/Rev.5 (1995) (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 ***54*** of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72(B))

[*3]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 favor 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 Honors 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 Sept. 1995, at 4 (hereinafter "Appeal Transcript")) ***55***

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"))

[*4]

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 favor of the accused, after the latter

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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 honored 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 ***56** 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.

[*5]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 ¶ 4)

There is a petitio principii underlying this affirmation and it fails to explain the criteria by which the Trial Chamber disqualified the plea of invalidity ***57** 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 U.S. case, Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633))

[*6]

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 labor 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). 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 ***58*** 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 "nonjusticiable." (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," regardless of whether or not it falls within its jurisdiction.

[*7]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 ***59*** 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 ¶ 8)
Both the first and the last sentence 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.
[*8] [. . .]
The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, ***60*** 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, 60-61 (Advisory Op. 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." (Effect of Awards at 51-52 (quoting Statute of the United Nations Administrative Tribunal, art. 2, ¶ 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, ¶ 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 Mar.))

***61** 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." (Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against UNESCO, 1956 I.C.J. Reports 77, 163 (Advisory Op. of 23 Oct.) (Cordova, J., dissenting))

[*9]

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 ¶ 5; see also id. ¶¶ 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 ***62** 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 ¶¶ 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, ¶ 89 (Advisory Op. of 21 June) (hereinafter Namibia Advisory Opinion))

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[*10] 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 [sic] 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. ¶ 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 ***63*** 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 ¶ 24)

[*11]

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty," "national honor," 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 considers 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 exercise 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 ***64*** 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, 155 (Advisory Op. 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 Sept.

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.

[*12]

27. The Trial Chamber summarized the claims of 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 tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not ***65*** 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 ¶ 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?

66 [*13]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 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?

***67** 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 [*14] 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, 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.

***68** 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 [sic] such threats [. . .] by appropriate measures." ([Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 Aug. 1995 (Case No. IT-94-1-AR72), ¶ 5.1 (hereinafter "Defence Appeal Brief")) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

[*15]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 (¶ 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 ***69** 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 (id., art. 2, ¶ 5; arts. 25, 48) and with one another (id. art. 49), in the implementation of the action or measures decided by the Security Council.

[*16]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 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 (25 May 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 ***70** 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.
[*17] 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), ¶ 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.

***71** 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.

[*18] 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 ***72** 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.

[*19]

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:

***73** "[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.

[*20]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 ***74*** a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, ¶ 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 Nov. 1950, art. 6, ¶ 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 Nov. 1969, art. 8, ¶ 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 recognised 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 emphasizes 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 [*21] Chamber is, however, satisfied that the principle that a tribunal must be established ***75*** 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 entail 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 has not been "established by law." (Defence Appeal Brief ¶ 5.4)

The case law applying the words "established by law" in the European Convention on Human Rights has favored 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, 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) 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, 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 ***76** 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.

[*22] 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 (¶¶ 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 ***77** expressed its satisfaction with, and encouragement of, the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88, U.N. GAOR, 48th Sess., Supp. No. 49 (vol. I), at 40, U.N. Doc. A/48/49 (1993); G.A. Res. 48/143, U.N. GAOR, 48th Sess., Supp. No. 49 (vol. I), at 263, U.N. Doc. A/48/49 (1993); G.A. Res. 49/10, U.N. GAOR, 49th Sess., Supp. No. 49 (vol. I), at 9, U.N. Doc. A/49/49 (1994); G.A. Res. 49/205, U.N. GAOR, 49th Sess., Supp. No. 49 (vol. I), at 226, U.N. Doc. A/49/49 (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 [*23] 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 ¶ 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 were 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 U.N. ESCOR, Comm'n on Human Rights, 5th Sess., 8 June 1949, U.N. Doc. E/CN.4/SR.109 (1949))

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg ***78*** and Tokyo gave the accused a fair trial in a procedural sense. (Decision at Trial ¶ 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 that it observe 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 the 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., 43d Sess., Supp. No. 40, ¶ 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 (1984)) 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 Mar. 1973, at 1; Inter-Am. C.H.R., Annual Report 1973, OEA/ser.P/AG/doc. 409/174, 5 Mar. 1974, [*24] at 2-4) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinize 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.

79 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.

[*25]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:

2695

"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 honor by surrendering Appellant to the International Tribunal. (United Nations Charter arts. 25, 48, 49; Statute of the International Tribunal art. 29.2(e); Rules of Procedure, Rule 10)

***80** 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), ¶ 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.

[*26]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 analyzed 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 ¶ 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. ¶ 7.4 (emphasis added)) In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (Id. ¶ 7.5 (emphasis added))

These statements are not in agreement with the findings of Trial Chamber I in its decision on deferral of 8 November 1994:

***81** "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Dusko Tadic, that the said Dusko Tadic 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 Dusko Tadic, 8 Nov. 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.

[*27] But there is more to it. Appellant insists repeatedly (see Defence Appeal Brief ¶¶ 7.2, 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognizes 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, ¶ 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):
"[W]hat 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.
***82** 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 ¶ 5)
[*28]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. Karadzic et al." (Id. ¶ 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 realize. 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 ***83** interest "justified by a treaty or customary international law or an opinio juris on the issue." (Defence Trial Brief ¶ 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 ¶ 41)
The Trial Chamber relied on the judgment of the District Court of Jerusalem in Israel 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), aff'd, 36 International Law Reports 277 (Isr. S. Ct. 1962))
[*29] 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, recently this concept 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.

***84** 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 recognized the right to plead State sovereignty does not mean, of course, that his plea must be favorably 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, ¶ 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:

[*30]

(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 Apr. 1995) (translation);

(c) Letter from Vasvija Vidovic, Liaison Officer of the Republic ***85** 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 ¶ 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.

[. . .]

[*31] 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 ***86** 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 (arts. 537 and 604 of the penal code)." (It Sup. Mil. Trib. 13 Mar. 1950, in Rivista Penale 753, 757 (1950) (unofficial translation))
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 interest; 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: [*32] the Security Council. This organ is empowered and mandated, by definition, to ***87*** deal with transboundary matters or matters which, though domestic in nature, may affect "international peace and security." (United Nations Charter arts. 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:
"[B]y 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 (Fr. Cass. crim. 1983))
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 characterized as "ordinary crimes" (Statute of the International Tribunal, art. 10, ¶ 2(a)), or proceedings being "designed to shield the accused," or cases not being diligently prosecuted (id., art. 10, ¶ 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 ***88*** 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 [*33] 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 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 ¶ 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. (Constitution of the Netherlands art. 17; Constitution of Germany (unified) art. 101; Constitution of Belgium art. 13; Constitution of Italy art. 25; Constitution of Spain art. 24; Constitution of Surinam art. 10; Constitution of Venezuela art. 30) 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." (A.P. Blaustein & G.H. Flanz, Constitutions of the Countries of the World (1991))
The other constitutional provisions cited are either similar in substance, ***89** 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.
[*34] 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 ¶ 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.
***90** 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.

[*35]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

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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 ***91** 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.
[*36]
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 Aug. 1949, art. 5, 75 U.N.T.S. 970 (hereinafter "Geneva Convention I"); Convention Relative to the Treatment of Prisoners of War, 12 Aug. 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 Aug. 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:
***92** "[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, ¶ 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 Dec. 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter "Additional 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.
[*37]
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 theater of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in ¶¶ 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 Dec. 1977, art. 4, ¶ 1, 1125 U.N.T.S. 609 (hereinafter "Additional 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., art. 2, ¶ 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 ***93*** reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty." (Id., art. 2, ¶ 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 [*38] 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 ***94*** 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 Sept. 1995, at 36-37) 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 [*39] 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 ***95*** 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 Yugoslav 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 Nov. 1991) [*40] 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 ***96*** 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 Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (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, ¶¶ 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 (arts. 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

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[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 ***97** conflicts governed by the agreement in question as internal.

[*41] Taken together, the agreements reached between the various parties to the conflicts 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 Aug. 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 ***98** 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 [*42] 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 judgment as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 62, U.N. Doc. S/25704 (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, U.N. SCOR, 48th Year, 3217th mtg., at 11, 15, 19, U.N. Doc. S/PV.3217 (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

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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.)

***99** 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 [*43] 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-á-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.

***100** 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** (¶¶ 140-141 below), 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 suggests 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. [*44] 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

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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 a 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.

***101** 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 [*45] 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 ***102** 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 Tadic, 17 July 1995 (Case No. IT-94-1-T), at 35-36 (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 requires 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 ¶¶ 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: ***103** there is on the one hand an enumeration of offences that are regarded as 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

[*46] 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 International 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 ***104** 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 ¶ 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 [*47] rights--which, as pointed out below (¶¶ 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 (¶ 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 ***105** 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 (¶ 73 above), 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 judgment by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High

Court delivered a judgment 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 op. (Den. H. Ct. 25 Nov. 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 (Saric Transcript at 1), 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 judgment 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.
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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 (¶ 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:
106 "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.

[*49](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) ***107*** 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 ¶ 41) However, as the Report indicates, the Hague Convention, considered qua customary law, constitutes an important area of humanitarian

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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 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), 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. ¶ 43) These comments suggest that Article 3 is intended to cover both Geneva and Hague 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. ¶¶ 43-44) 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 [*50] 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 ***108*** 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." (U.N. SCOR, 48th Year, 3217th mtg., at 11, U.N. Doc. S/PV.3217 (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 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 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 ***109*** and the entire duration of the conflict throughout the territory of the former Yugoslavia." (Id. at 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.

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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 ¶ 143 below).

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 emphasizes 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 Articles 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International ***110** 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 [*52] 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, ¶ 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 cooperation with the United Nations and in conformity with the United Nations Charter." (Additional Protocol I art. 89 (emphasis added))

Article 3 is intended to realize 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 ***111** 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 (¶ 143 below);

(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;

[*53] (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)

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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 ***112*** 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 [*54] 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 1936-1939, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, in 1967-1970, the civil strife in Nicaragua, in 1981-1990 or El Salvador, in 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 ***113*** account of their legal regimes 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 crystallized, which are by no means conflicting or inconsistent, but instead mutually support and

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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 ¶ 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 (¶ 117), to the core of Additional Protocol II of 1977.

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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 ***114*** to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behavior of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behavior. This examination is rendered extremely difficult by the fact that not only is access to the theater 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 (1936-1939), 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 ***115*** 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 Mar. 1938))

[*56] 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

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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]ecognise[d] the following principles as a necessary basis for any subsequent regulations:
116 (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 theater 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 "people's 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 [*57] 147, 151 (1961)) 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. at 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 ¶ 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** 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** ***117*** 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 [*58] against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), reprinted in 59 American Journal of International Law 614, 616 (1965) (emphasis in original))
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 ***118*** 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

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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 theater of military operations. (See A.H.M. Kirk-Greene, 1 Crisis and Conflict in Nigeria: A Documentary Sourcebook, 1966-1969, at 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 Sept. 1968, at 1; Daily Times--Nigeria, 4 Sept. 1968, at 1)
This attitude of the Nigerian authorities thus confirms the trend initiated with the Spanish Civil War and referred to above (¶¶ 101-102).
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 [*59] apply the Additional Protocol II it had previously ratified. The FMLN undertook to respect both common Article 3 and Protocol II:
119 "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." (El Salvador, FMLN, Secretaria de promoción y protección de los derechos humanos, La legitimidad de nuestros métados de lucha 89 (10 Oct. 1988) (unofficial translation))
108. In addition to the behavior 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 endeavored 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** [*60] **conflict**." The first ***120*** one, resolution 2444, was unanimously 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 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 50, 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, 3d Comm., 23d 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 Defense 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 122, 124 (1973))

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously 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, 3d Comm., 25th Sess., 1785th mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); see also U.N. GAOR, 25th Sess., 1922d mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of G.A. Res. 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, ***121** [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:

[*61]

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, at 76, 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 ***122** 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 295 (1990))
[*62]
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 Nov. 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 Jan. 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 Dec. 1992)) and resolution 814 (S.C. Res. 814 (26 Mar. 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:
123 "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 Jan. 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 Jan. 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 [*63] 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 crystallized 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, U.N. GAOR, 41st Sess., Supp. No. 53, at 205, U.N. Doc. A/41/53 (1986)), the ***124*** Salvadoran 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 application were met). (See, e.g., 43 Annuaire Suisse de Droit International 185-87 (1987)) Nevertheless, the Salvadoran 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." (See Informe de la Fuerza Armada de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el período de Septiembre de 1986 a Agosto de 1987, at 3 (31 Aug. 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission 2 Oct. 1987) (unofficial translation)) Similarly, in 1987, Mr. M.J.

Matheson, speaking in his capacity as Deputy Legal Advisor of the United States State Department, stated:
"[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 419, 430-31 (1987))
[*64]
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 ¶ 211 in fine (Aug. 1992) (DSK AV207320065) (unofficial translation))
119. So far we have pointed to the formation of general rules or principles designed to protect civilians or civilian objects from the hostilities ***125*** 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 (¶ 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 materiel 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, U.N. ESCOR, Comm'n 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 ¶ 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, U.N. ESCOR, Comm'n 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.
[*65]
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 ***126*** 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 position, 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 92 (1988))
This statement was reiterated by the Greek representative, on behalf of the Twelve, on many occasions. (See U.N. GAOR, 1st Comm., 43d Sess., 4th mtg., at 47, U.N. Doc. A/C.1/43/PV.4 (1988) (statement of 18 Oct. 1988 in the First Committee of the General Assembly); U.N. GAOR, 1st

Comm., 43d Sess., 31st mtg., at 23, U.N. Doc. A/C.1/43/PV.31 (statement of 9 Nov. 1988 in the 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., 43d Sess., 49th mtg., at 16, U.N. Doc. A/C.3/43/SR.49 (summary of statement of 22 Nov. 1988 in the Third Committee of the General Assembly); see also Report on European Union [EPC Aspects], 4 European Political Cooperation Documentation Bulletin 325, 330 (1988); Question No. 362/88 by Mr. Arbeloa Muru (S-E) Concerning the Poisoning of Opposition Members in Iraq, 4 European Political Cooperation Documentation Bulletin 187 (1988) (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 579 (1988); 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 ***127** not expressly prohibited [*66] by the Geneva Protocol of 1925." (50 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 382-83 (1990) (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., 43d Sess., 31st mtg., 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 1980 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 Sept. 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 Schultz, 100th Cong., 2d Sess. (13 Sept. 1988) (statement of Secretary of State Schultz)) 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 United States, Department of State Bulletin 41, 43-44 (Dec. 1988))

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 Sept. 1988, at A11) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

***128** "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." (United States, Department of State Bulletin 44 (Dec. 1988))

[*67] This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr. Redman. (See United States, Department of State Daily Briefing, 20 Sept. 1988, at 8 (Transcript ID 390807)) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrein, 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 Sept. 1988, at A13; Washington Post, 20 Sept. 1988, at A21)

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 theater 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, 496-97 (Nig. S. Ct. 1972))

***129** 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 137, 145-49 (1982))

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 [*68] 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 Trial of Major War Criminals:

***130** 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:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (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 (¶¶ 106, 125 above).

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[*69]
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 ¶ 1209 (Aug. 1992) (DSK AV207320065) (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," ***131*** as well as "the fact of impeding a fair and regular trial." (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkkerrecht--Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht ¶ 12 (Mar. 1961) (ZDv 15/10); Kriegsvölkkerrecht--Allgemeine Bestimmungen des Humanitätsrechts ¶¶ 15-16, 30-32 (Aug. 1959) (ZDv 15/5)) 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, Interim Law of Armed Conflict Manual ¶¶ 1807-1808 (1992)) The relevant provisions of the manual of the United States 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. (United States, Department of the Army, The Law of Land Warfare: Department of the Army Field Manual ¶¶ 11,499 (1956) (FM 27-10)) A similar interpretation might be placed on the British manual of 1958. (United Kingdom, War Office, The Law of War on Land, Being Part III of the Manual of Military Law ¶ 626 (1958))
132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which goes so far as to make it possible for national courts to try persons 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 [*70] of Yugoslavia, Federal Criminal Code arts. 142-143 (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 Apr. 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 Dec. 1978)) As a result, by virtue of Article 210 of ***132*** 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 (art. 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 Aug. 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 Dec. 1992); S.C. Res. 814 (26 Mar. 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 (¶ 132), such violations were punishable under the Criminal Code of the Socialist Federal Republic ***133*** of Yugoslavia and the law [*71] 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, ¶ 2 (emphasis added))
Furthermore, the Agreement of 1 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 Oct. 1992, art. 3, ¶ 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.

134 (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.
[*72](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 ¶ 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.

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(G.A. Res. 95 (I), U.N. Doc. A/64/Add.1, at 188 (1946))

***135** 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 Appellant has foregone this argument (see Appeal Transcript, 8 Sept. 1995, at [*73] 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 Jan. 1946, at 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 Dec. 1948, art. 1, 78 U.N.T.S. 277 (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 Nov. 1973, arts. 1-2, 1015 U.N.T.S. 243)

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 ***136** 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 IVA (¶¶ 66- 70), we conclude that in this case there was an armed conflict. Therefore, Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

[*74]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 emphasized 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 ¶ 34) It follows that the International Tribunal is authorized 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 derogated 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 (¶¶ 75, 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. (U.N. SCOR, 48th Year, 3217th mtg., at 11, 15, 19, U.N. Doc. S/PV.3217 (1993))

***137** 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.

[*75]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 FAVOR: 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.
***138** IN FAVOR: President Cassese, Judges Li, Deschênes and Abi-Saab
AGAINST: Judge Sidhwa
[*76]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.
[Signed]
Antonio Cassese, President
2 October 1995
At the Hague
[Seal of the Tribunal]

[FNa]. Editors'note: This opinion is reproduced in full except for the table of contents and the footnotes (which set out either voting histories in the United Nations or original-language versions of English translations in the text). Judges Abi-Saab, Li, and Sidhwa filed separate opinions that are not reproduced here. Judge Deschênes filed a declaration that is also not reproduced. Original pagination is indicated as [*1], [*2], and so forth. Typographical errors and stylistic inconsistencies have been corrected but are not flagged. Both [sic] and ellipsis points [. . .] are the Appeals Chamber's usage. American spelling has been followed except for "offence" and "defence."

[FNaa]. Office of the Prosecutor: Richard Goldstone, Prosecutor; Grant Niemann; Brenda Hollis; Alan Tieger; William Fenrick; and Michael Keegan. Counsil for the Accused: Michail Wladimiroff; Alphons Orie; Milan Vujin; and Krstan Simic.
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ANNEX 11

Prosecutor v. Tadic, Judgement, Case No. IT-94-1-A, App. Ch., 15 July 1999 (the "***Tadic Appeal Judgement***").

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IN THE APPEALS CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DUSKO TADIC

JUDGEMENT

The Office of the Prosecutor:

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

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II[1] on 7 May 1997 in the case of *The Prosecutor v. Dusko Tadic,* Cass No.: IT-94-1-T ("Judgement")[2] and the subsequent Sentencing

B. Discussion

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

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

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

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

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

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

2. The Nature of the Conflict

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

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

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

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.[104] However, the Trial Chamber did not explicitly state what the nature of the conflict was *after* 19 May 1992. As the Prosecution points out, "[t] he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb Army (VRS) and the BH after the VRS was established in May 1992".[105] Nevertheless, it may be held that the Trial Chamber at least implicitly considered that after 19 May 1992 the conflict became internal in nature.[106]

87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character.[107] The question whether after 19 May 1992

it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces - in whose hands the Bosnian victims in this case found themselves - could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY.

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

(a) International Humanitarian Law

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

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

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

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

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

Geneva Conventions may be classified as "grave breaches".

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

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

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

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

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

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

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

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is,

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

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

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

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

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

(i) Two Preliminary Issues

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

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

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of *the conditions on which under international law an individual may be held*

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

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

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

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

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

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

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

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

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

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

113. In contrast with what the Prosecution, in following Judge McDonald's dissent, has termed the "agency" test, the Court's agency test amounts instead to a determination of the status of an individual as

an organ or official (or member of a public entity exercising certain elements of governmental authority) within the domestic legal order of a particular State. In this regard, it would seem that the Separate Opinion of Judge Ago relied upon by Judge McDonald[134] and the Prosecution[135] does not actually support their interpretation.[136]

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

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

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

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

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

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

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a

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

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

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

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

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

acts of organised groups over which a State exercises overall control.[141]

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem),* or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

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

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

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

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

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Claims Tribunal considered instead that the acts were attributable to Iran because the "Guards" or "Komitehs" had acted as *de facto* State organs of Iran. On this point the Claims Tribunal noted that:

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

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

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

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

accused or other Bosnian Serbs had been ordered by the authorities of the FRY.[156]

130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States.[157] *Nicaragua* also supports this proposition, since the United States, although it aided the *contras* financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other assistance to the *contras,* the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as "its obligation [...] not to use force against another State."[158] This was clearly a case of responsibility for the acts of its own organs).

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

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

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

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

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

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

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

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

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

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

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

only briefly.[168]

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

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

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

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

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

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

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

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

148. The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge

McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement,[176] but only on the legal interpretation to be given to those facts.

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

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

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

> (i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.[181]
>
> (ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS.[182] As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.
>
> (iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina.[183] Much *de facto*

continuity, in terms of the ongoing hostilities,[184] was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.[185]

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

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

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade.[188] It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade.[189] In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that "without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out 'on behalf of' the Federal Republic of Yugoslavia (Serbia and Montenegro)."[190]

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

154. Furthermore, the Trial Chamber, noting that the pay of all 1st Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well "be equated with control".[192] The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being "as much matters of convenience as military necessity" and noted that such evidence "establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced."[193] In the Appeals Chamber's view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply

demonstrated by the Prosecution.[194] In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

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

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

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

emphasise the high degree of overall control exercised over the *Republika Srpska* by the FRY, for, soon after this cessation of support from the FRY, the *Republika Srpska* realised that it had little choice but to succumb to the authority of the FRY.[199] Thus, the Dayton-Paris Accord may *indirectly* shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

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

159. By an agreement concluded on 29 August 1995 between the FRY and the *Republika Srpska* and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the *Republika Srpska.* The Delegation was to be chaired by President Milosevic, who would have a casting vote in case of divided votes.[200] Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the *Republika Srpska.* The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milosevic. This signature had the effect of guaranteeing respect for these commitments by the *Republika Srpska.* Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the *Republika Srpska* fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord).[201] In addition, the letter by which the *Republika Srpska* undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinovic, for the *Republika Srpska.*[202]

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

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

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

5. The Status of the Victims

ANNEX 12

Report of the United Nations Secretary-General's on the Establishment of the Special Court S/2000/915 Para 14.

United Nations S/2000/915

Security Council

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Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

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security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations

For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. 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.

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

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

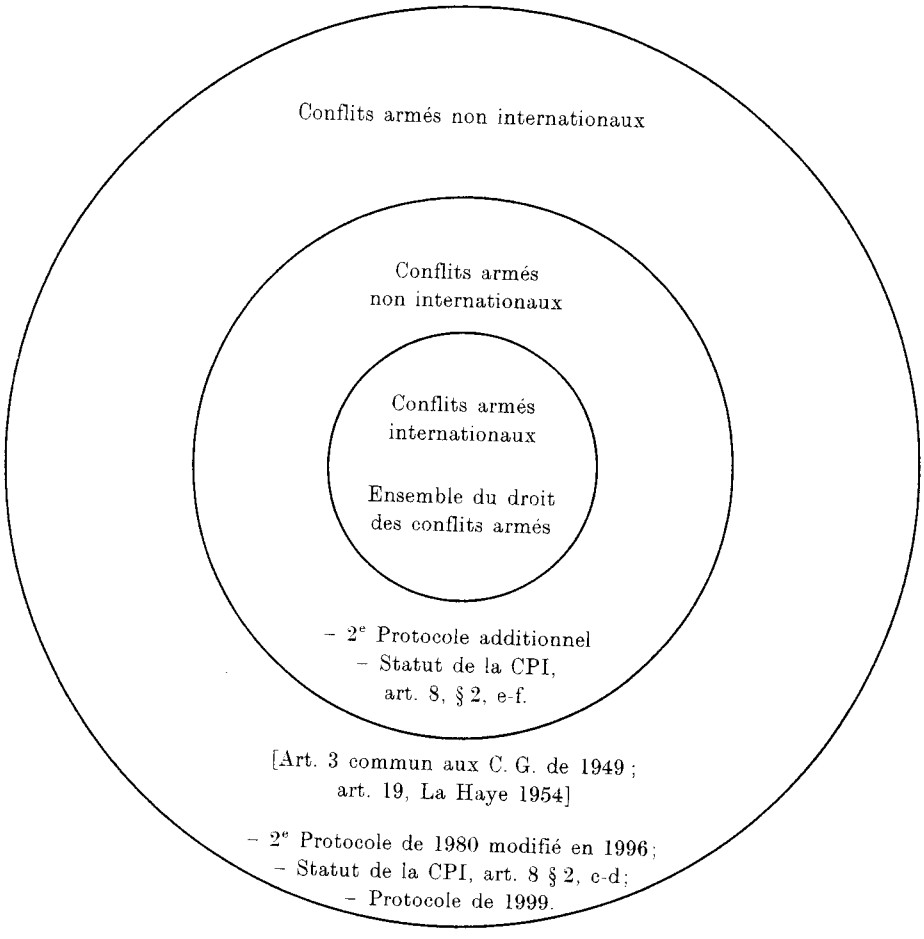
The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 13

Eric David, Principes de droit des conflits armes, 3rd ed, Bruylant 2002 p 115 -117



a) Les conflits armés non internationaux visés par le 2e PA et par le Statut de la CPI

1.59 Les conflits visés par le 2e PA et ceux visés par le Statut de la CPI ne sont pas identiques. Les conflits visés par le 2e PA sont définis en son art. 1er. Il s'agit de conflits opposant les forces armées d'une Partie contractante d'un côté, à des forces armées dissidentes ou des groupes armés organisés, de l'autre côté ; les seconds doivent être sous commandement responsable et contrôler une partie du territoire de telle manière qu'ils puissent mener des opérations militaires continues et appliquer le Protocole. Cela signifie, par exemple, que la Partie insurgée doit occuper

"Le contenu de ces règles varie selon la nature du conflit, et plus précisément, selon l'intensité et l'ampleur des hostilités : plus le conflit armé non international est important, plus nombreuses et complexes sont les règles du droit des conflits armés qui s'appliquent. A contrario, si un conflit armé reste d'importance limitée, seules quelques règles minimales s'y appliquent. On notera toutefois que ces règles, en tant que minimum humanitaire, continuent à s'appliquer dans des conflits armés plus importants, y compris les conflits armés internationaux, ainsi que la CIJ l'a reconnue dans l'aff. Nicaragua c. E-U. (1986) (CIJ, Rec. 1986, p. 114 par. 218), rejetant ainsi une thèse qui semblait exclure l'application de l'art. 3 commun aux conflits armés internationaux. Pour une chambre d'appel du TPIY qui se fonde sur la décision de la CIJ, « en ce qui concerne les règles minima de l'art. 3 commun, le caractère du conflit importe peu » (TPIY, App., aff. IT-94-1-AR72, 2 oct. 1995, Tadic, par. 102 ; aussi, ICTY., Chbre. II, aff. IT-95-17/1-PT, 29 mai 1998, Furundzia, par. 14 ; ICTY., App., aff. IT-96-21-T, Celibici, 20 févr. 2001, par. 1; ICTY. Aff. IT-95-14/2-T, Kordic et al., 26 février 2001, par. 260). Dans une autre affaire, utilisant un argument a maiori ad minus ou a fortiori, la Chambre d'appel du TPIY affirme : « (...) something which is prohibited in internal conflict is necessarily outlawed in an international conflict where the scope of rules is broader » (TPIY, App., aff. IT-96-21-T, Celebici, 20 février 2001, par. 150)"

" The content of these rules depends on the nature of the conflict, and more precisely, on the intensity and the scope of hostilities: the more important the non international conflict is, the more numerous and complicated are the rules of armed conflict which apply to it. On the contrary, if the conflict is of limited importance, only a few minimum rules will apply to it. It is noted however that these minimum rules of humanitarian law continue to apply in armed conflicts of greater importance including in international armed conflicts as the ICJ has recognized in Nicaragua v. USA (1986) (ICJ, p. 114 par. 218), rejecting an argument which proposed to exclude the application of common art. 3 to international armed conflicts (Report of the Secretary General Doc. ONU A/8052, 18 September 1970, p. 36, par. 95) . For the Appeal Chamber of the ICTY which based its decision upon the ICJ decision : " concerning the minimum rules of common art. 3, the character of the conflict is of little consequence" (ICTY, Appeal Chamber., case IT-94-1-AR72, 2 October 1995, Tadic, par. 102 ; ICTY., Trial Chamber. II, aff. IT-95-17/1-PT, 29 Mai 1998, Furundzia, par. 14 ; ICTY., Appeal Chamber., case IT-96-21-T, Celibici, 20 February. 2001, par. 1; ICTY. case IT-95-14/2-T, Kordic et al., 26 February 2001, par. 260). In another case, using another argument a fortiori, the Appeal Chamber of the ICTY affirmed: " (...) something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of rules is broader" (ICTY, Appeal Chamber., case IT-96-21-T, Celebici, 20 February 2001, par. 150)".

Eric David: Principes de droit des conflits armés, troisième edition, Bruylant, 2002, p. 115.

"On peut présenter le système de règles par des cercles concentrique (TPIY., App., aff. IT-96-21-T, Celebici, 20 févr. 2001, par. 150) :

- dans la couronne extérieure, les règles les plus élémentaires (l'art. 3 commun aux CG) applicables à tous les conflicts (Plattner D. « La Convention de 1980 sur les armes classiques et l'applicabilité de règles relatives aux moyens de combat dans un conflit armé non international », RICR, 1990, p. 606) ;
- dans le cercle intermédiaire, ces mêmes règles auxquelles s'ajoutent d'autres règles applicables aux conflits armés non internationaux d'une certaine ampleur ;
- au centre, l'ensemble des règles du droit des conflits armés.

Chaque cercle correspond à un type de conflit et à un type de règle, mais si les règles applicables aux conflits situés dans un cercle périphérique s'appliquent aussi aux conflits situés dans un cercle central, l'inverse n'est pas vrai ».

It is possible to present this system of law by concentric circles (ICTY, Appeal Chamber, case IT-96-21-T, Celebici, 20 February 2001, par. 150):

- in the outside circle, the most elementary rules (art. 3 common Geneva Conventions) which apply to all the conflicts (Plattner D. « La Convention de 1980 sur les armes classiques et l'applicabilité de règles relatives aux moyens de combat dans un conflit armé non international », RICR, 1990, p. 606)
- in the medium circle, those rules which are in the outside circle and in addition other applicable rules which apply to non international armed conflict of a certain importance
- in the centre, all the rules of armed conflicts.

Every circle corresponds to a particular kind of conflict and a has its own set of rules but if the rules which apply to a conflict which belongs to the outside circle apply as well to the conflicts which belongs to the circle in the centre, the contrary is not true.

Eric David, Principes de droit des conflits armés, troisième édition, Bruylant, 2002, p. 116.

ANNEX 14

Theodor Meron, "The Humanization of Humanitarian Law," 94 AJIL 239.

*94 A.J.I.L. 239, **

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ARTICLE: The Humanization of Humanitarian Law

By Theodor Meron *

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VII. THRESHOLDS OF APPLICABILITY

The thresholds of applicability and the qualification of conflicts pose some of the most difficult and controversial questions regarding international humanitarian law. The Geneva Conventions distinguish between international conflicts, as defined in common Article 2, and conflicts not of an international character under common Article 3. Conflicts involving lower-intensity violence that do not reach the threshold of an armed conflict are implicitly distinguished from noninternational armed conflicts to which the provisions of that article are applicable. Article 8(2)(d) of the Rome Statute of the International Criminal Court, drawing on the language of Article 1(2) of Additional Protocol II, makes this distinction explicit for the purposes of this statute by providing that paragraph 2(c), which tracks the language of common Article 3, applies to armed conflicts and not to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature. The Additional Protocols distinguish between international armed conflicts as defined in Article 1 of Protocol I, noninternational armed conflicts [114] as defined in Article 1 of Protocol II, and "situations of internal disturbances and tensions," which fall below the threshold of applicability of Protocol II. Article 8(2)(f) of the ICC statute has further complicated the question. It declares that the provisions in paragraph 2(e), which go beyond common Article 3 and include some additional Geneva and Hague law, apply to "armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups." [115] This language draws on the 1995 ICTY appellate decision in the *Tadic* case. Article 8(2)(f) should not be considered as creating yet another threshold of applicability, but it may well exacerbate the previous lack of clarity. [116]

The characterization of the conflict, or the thresholds, determines which rules of international humanitarian law, if any, will be applicable. The first threshold, common Article 3, determines the applicability of international humanitarian law pertaining to noninternational armed conflicts. Since common Article 3 does not define "conflicts not of **[*261]** an international character," governments can easily contest its applicability. [117] Even a better definition would not prevent a government from contending that the article is not applicable to its territory. Distinguishing between international and noninternational conflicts is particularly difficult in contemporary conflict situations, which often present aspects of both. The contradictory decisions rendered by the different ICTY chambers on the nature of the conflicts in the former Yugoslavia illustrate the difficulty of characterizing "mixed" or "internationalized" conflicts. There is no agreed-upon mechanism for definitively characterizing

situations of violence.

A very high threshold triggers the application of Additional Protocol II. The Protocol applies to "situations at or near the level of a full-scale civil war" [118] or belligerency. But the states involved are rarely willing to recognize such situations. In practice, therefore, Protocol II has seldom been formally applied. Even the applicability of the Fourth Geneva Convention has been contested with respect to some international armed conflicts. [119]

The applicability of the Geneva Conventions as a whole or of common Article 3 has been denied in many situations. The principal obstacle to the application of international humanitarian law, as Aldrich observed, has been states' refusal "to apply the conventions in situations where they should be applied. Attempts to justify such refusals are often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted." [120] Richard Baxter concluded that "the first line of defense against international humanitarian law is to deny that it applies at all." [121]

A recent and welcome trend is blurring the different thresholds of applicability. The ICRC study on rules of customary humanitarian law, for example, makes only the basic distinction between international and noninternational armed conflicts. It does not adopt the three-tiered approach of the Geneva Conventions and Additional Protocols. Moreover, it seeks a broader recognition that many rules are applicable to both international and non-international conflicts. Most military manuals do not explicitly distinguish between rules applicable in noninternational conflicts and in international conflicts (although they often indicate the relevant provisions of the Geneva Conventions and Additional Protocols). Some armed forces now recognize that the same rules of international humanitarian law should be applicable in all situations involving armed conflict. Thus, an instruction issued by the chairman of the U.S. Joint Chiefs of Staff states that the "Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized." [122] This approach, which brings about the comprehensive and uniform application of international humanitarian law, should be emulated by other countries.

The recent regulations promulgated by the Secretary-General of the United Nations on the observance by United Nations forces of international humanitarian law [123] restate a broad set **[*262]** of protective norms distilled from humanitarian law treaties without making any distinction between the international and noninternational conflicts in which UN forces are involved. [124]

Limitations or prohibitions in the regulations regarding weapons and methods of war are increasingly being applied to internal armed conflicts governed by common Article 3, such as the rules in the revised Protocol II to the 1980 Convention on Certain Conventional Weapons dealing with mines, booby traps, and other devices. [125] Some instruments impose these limitations or prohibitions in all circumstances, including the Ottawa Convention on antipersonnel land mines, [126] the Convention on bacteriological (biological) and toxin weapons (a 1972 arms control treaty), [127] and the Convention on chemical weapons (which concerns both arms control and use). [128] The recent Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict applies to armed conflicts not of an international character. [129]

The ICTY appeals chamber has encouraged the blurring of the distinction between international and noninternational conflicts. According to the chamber, one of the

factors prompting this softening has been "the impetuous development and propagation in the international community of human rights doctrines," especially in the years after the Universal Declaration of Human Rights was adopted. [130] As noted above, the traditional focus on state sovereignty has shifted toward a human rights approach to international problems, an approach whose origin the chamber traced to the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings). In light of this evolution, the chamber found that the distinction between international and noninternational conflicts was "losing its value" in relation to human beings:

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. [131]

In recent years, remarkable progress has been made in the identification of customary rules and the willingness of states to recognize the extension of rules to noninternational armed conflicts. This progress is attributable to the establishment of the two ad hoc tribunals and the direction of their jurisprudence, the drafting and adoption of the statute of the international criminal court, and even the as-yet-unpublished ICRC study on customary rules of international humanitarian law. [132] The UN Secretary-General alluded to prospects for further advances and noted that "it might well be that the identification of **[*263]** customary rules obviates some of the problems which exist in the scope of the existing treaty law, and will assist in the identification of fundamental standards of humanity." [133] Finally, the codification in the ICC statute of the principles that crimes against humanity can be committed in all situations, without regard to the thresholds of armed conflicts, and that they can be committed not only in furtherance of state policy, but also in furtherance of the policy of non-state entities, is a signal achievement.

n114 Article 1 of Protocol II, *supra* note 99, defines such conflicts as those "which take place in the territory of a [state] between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

n115 Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 *, *reprinted in* 37 ILM 999 (1998) [hereinafter ICC statute].

n116 *See* MERON, *supra* note 16, at 309.

n117 *See* Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted pursuant to Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87, para. 74 (1998).

n118 *Id.*, para. 79.

n119 Applicability was contested, for example, in the contexts of the West Bank by Israel, of Kuwait by Iraq, and of East Timor by Indonesia.

n120 George Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL PROC. 141, 142 (1973).

n121 Richard R. Baxter, *Some Existing Problems of Humanitarian Law, in* THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 1, 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974).

n122 Chairman, Joint Chiefs of Staff, Instruction 5810.01, *Implementation of the DOD Law of War Program* (1996), *quoted in* Corn, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17.

n123 UN Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, *reprinted in* 38 ILM 1656 (1999).

n124 *See id.* at 1.1. The regulations have been criticized by the United States for having been issued by the Secretary-General without adequate consultation with states. *See* U.S. Dep't of State, Press Release USUN No. 81 (Oct. 20, 1999) (statement of Revius O. Ortique, Jr., in General Assembly's Fourth Committee).

n125 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *opened for signature* Apr. 10, 1981, 19 ILM 1523 (1980), Protocol [II] on Mines, Booby-Traps and Other Devices, May 3, 1996, 35 ILM 1206 (1996).

n126 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997).

n127 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, 1015 UNTS 163.

n128 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong. (1993), 32 ILM 800 (1993).

n129 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, Art. 22, 38 ILM 769 (1999).

n130 *Tadic, supra* note 100, para. 97. Tadic 1995

n131 *Id.*

n132 *See* Minimum Humanitarian Standards, *supra* note 117, paras. 86-87.

n133 *Id.*; *see also* Fundamental Standards of Humanity: Report of the Secretary-General Submitted pursuant to Commission resolution 1998/29, UN Doc. E/CN.4/1999/92, paras. 23-34.

ANNEX 15

Prosecutor v. Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999, para. 16

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 March 1999

PROSECUTOR

v.

DARIO KORDIC
MARIO CERKEZ

DECISION ON THE JOINT DEFENCE MOTION TO DISMISS THE AMENDED INDICTMENT FOR LACK OF JURISDICTION BASED ON THE LIMITED JURISDICTIONAL REACH OF ARTICLES 2 AND 3

The Office of the Prosecutor

Mr. Geoffrey Nice
Mr. Rodney Dixon

Counsel for the Accused

Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr., and Ms. Ksenija Turkovic, for Dario Kordic
Mr. Bozidar Kovacic , for Mario Cerkez

I. INTRODUCTION

Pending before this Trial 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 ("the International Tribunal"), is the "Jurisdictional Motion #2 – Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3" filed by counsel for the two accused, Dario Kordic and Mario Cerkez, (together "the Defence") on 22 January 1999 ("the Defence Motion"). The Office of the Prosecutor ("Prosecution") responded to the Defence Motion on 5 February 1999 ("the Prosecutor's Response"). On 15 February 1999 the Defence filed an application for leave to file a reply to the Prosecutor's Response, with a "Joint Defence Reply in Support of Jurisdictional Motion #2" ("the Defence Reply") attached. The Defence

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application was granted orally on 16 February 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 16 February 1999,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS

A. Arguments of the Defence

1. The Defence challenges the jurisdiction of the International Tribunal on the grounds that:

- first, the scope of Article 3 of the Statute of the International Tribunal ("Statute") is limited to matters covered by the "Hague law"[1], which is concerned with the conduct of hostilities, and therefore does not cover common article 3 of the 1949 Geneva Conventions[2] and their Additional Protocols[3],
- second, Articles 2 and 3 of the Statute are only applicable to international armed conflicts.

2. As to its first argument, the Defence requests that the Trial Chamber dismiss the counts of the indictment based on Article 3[4], or in the alternative, strike all references to the Geneva Conventions of 12 August 1949 and Additional Protocols I and II. As to its second argument, the Defence requests the Trial Chamber to dismiss the charges brought under Articles 2 and 3 on the ground that there was no international armed conflict, at the time and place relevant to the indictment. In its brief, the Defence recognises that this second issue involves mixed questions of fact and law that may more properly be resolved at trial.

3. The Defence puts emphasis on the principle of *nullum crimen sine lege*[5], which underlies all of its arguments. Accordingly, it submits that the International Tribunal is only empowered to prosecute serious violations of international humanitarian law which are covered by the language of its Statute, and which beyond any doubt codify customary international law.

4. Starting with its second argument, and only addressing it briefly, the Defence submits that Article 2 of the Statute refers to the "grave breaches" provisions of the Geneva Conventions, and thus is only applicable to international conflicts. Likewise, it contends that Article 3 is based on the Hague Conventions, which are only applicable to international conflicts. In the opinion of the Defence, "at trial, the facts will show that there was no international armed conflict connected with the allegations in the Amended Indictment, that there was no armed conflict at all during a large part of the time period covered by such allegations..."[6].

6. As to its first contention, concerning the scope of Article 3 of the Statute, the Defence contends that Article 3 can be construed as referring to "Hague law" only (arguments relying on interpretation of the Security Council's intent), which is only applicable to international armed conflicts. The Defence further state that violations of common article 3 of the 1949 Geneva Conventions cannot be included within the ambit of Article 3 of the Statute, as common article 3 is not part of customary international law and does not entail individual criminal responsibility. The Defence relies on a wide range of arguments and expands the argument to discuss the scope of Article 2 of the Statute as regards the requirement of the

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existence of an international conflict. It also discusses serious violations of the Geneva Conventions and the Additional Protocols.

7. The Defence *inter alia* relies on the following arguments, mainly discussing the Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ("*Appeals Chamber Decision on Jurisdiction*") in the *Tadic* case[7], which the Defence claims "is in serious fundamental and widely acknowledged error"[8]:

- Article 3 is based on "Hague law" and does not mention the type of conflict it is applicable to: if the intention of the drafters of the Statute was to render it applicable also to internal conflicts, it would have been specifically mentioned, since "Hague law" is traditionally only applicable to international conflicts;
- The conclusion of the Appeals Chamber as to the residual character of Article 3, and its broad interpretation of the scope of Article 3, based on its interpretation of the term "international humanitarian law", is in violation of the principle of legality;
- The Security Council did not intend to criminalize through Article 3 of the Statute all violations of international humanitarian law not covered by the other subject-matter Articles of the Statute;
- The Security Council intended a distinction between "Hague law" and "Geneva law": referring to the approach taken by the Statute of the International Criminal Court ("ICC Statute"), the Defence asserts that it is "a completely novel approach, which has no basis in customary law."
- The statements of certain Security Council's members after the Security Council approved the Statute, to which the Appeals Chamber referred to support its conclusion, "do not reflect the Security Council intent" and only constitute "carefully manufactured *ex post facto* legislative history";
- The Appeals Chamber's conclusion is not supported by commentators;
- The Appeals Chamber's conclusions (as to all infringements of provisions of Geneva Conventions other than grave breaches being part of customary law; serious breaches of the Geneva Conventions and certain Hague rules being applicable to non-international conflicts; common article 3 and Additional Protocol II not being part of customary law; common article 3 being applicable to international as well as to internal conflicts) are not justified under customary law and "represent progressive development of law"; the Defence further contends that the Appeals Chamber instead of relying on State practice "relied principally on perceived changes in *opinio juris*",
- Provisions of common article 3, Additional Protocol II, serious breaches of the Geneva Conventions, and violations of certain Hague rules, do not entail individual criminal responsibility, and thus cannot fall within the scope of the jurisdiction of the International Tribunal;
- The standard established by the International Court of Justice ("ICJ") in its Decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* ("*Nicaragua Decision*")[9], as relied on by the Trial Chamber in its Judgement in the *Tadic* case[10], should be applied by this Chamber to assess the existence of an international armed conflict.

5. In the Defence Reply, the Defence discusses the Prosecution argument that the Trial Chamber is bound by the *Appeals Chamber Decision on Jurisdiction*, and responds to the submissions as to the proper interpretation of Article 3 of the Statute and the applicability of the *Nicaragua Decision* to the present case.

B. Arguments of the Prosecution

8. The Prosecution submits two arguments in support of its contention that the Defence Motion should be denied.

(a) A decision as to the scope of Article 3 of the Statute, discussing and rejecting the same arguments as those raised by the Defence, has already been rendered by the Appeals Chamber in the *Tadic* case. The Trial Chamber is bound by this decision and should uphold it. The Prosecution refers to paragraphs 87-89, 90-94, 103, 127, 134, and 143 of the *Appeals Chamber Decision on Jurisdiction*.

(b) The Defence "offers no compelling arguments for limiting the scope of Article 3 to the offences listed in the Statute." In support of its arguments, the Prosecution *inter alia* states the following:
- "all of the rules incorporated in Article 3 must either have been part of customary law or conventional law, binding on the parties, at the time the offences were committed". Thus common article 3 and Additional Protocols I and II "fall within the scope of Article 3 on the basis that they are clearly part of customary law, and in any event are binding on the parties as a matter of treaty law."
- The Defence arguments that the Security Council did not intend Article 3 to cover more than the Hague law are erroneous. Statements of members of the Security Council "demonstrate that the Council intended Article 3 to incorporate a broad range of offences", and the fact that no other members disagreed "adds extra weight to the interpretative value of the statements."
- "An expansive interpretation of Article 3 is justified by taking account of the context of the Statute as a whole". "Laws and customs of war" cover in fact "violations of international humanitarian law", which refer to "all violations of the rules of international and internal armed conflict."
- The Security Council intended to put an end to all serious violations of international humanitarian law, not just grave breaches and the Hague law.
- Even though common article 3 provides that it applies to non-international armed conflicts, the rules contained "within" common article 3 are applicable to all conflicts as a matter of customary law.
- The fact that a treaty provision or rule itself does not mention criminal liability will not preclude punishment for breaches thereof (referring to the Nürnberg Judgment[11]).
- The issue of the correct standard for assessing whether an international conflict exists, argued by the Defence which relied on the *Nicaragua Decision*, "is a legal dispute to be litigated at trial in relation to the facts of the case." The Prosecution submits that the "precise elements and proof of this requirement can only be determined at trial." The Prosecution further disputes the Defence contention that the *Nicaragua Decision* establishes the correct standard for assessing the existence of an international armed conflict.

III. DISCUSSION

A. Applicable law

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9. Both parties rely on Articles 2 and 3 of the Statute, which provide as follows:

Article 2
Grave breaches of the Geneva Conventions of 1949

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.

Article 3
Violations of the laws or customs of war

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.

10. Common article 3 of the 1949 Geneva Conventions, as well as Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II are also relevant to the issue at hand:

Article 3 common to the Geneva Conventions

In the case of an armed conflict not of an international character occuring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other

similar criteria.
To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
(2) The wounded and the sick shall be collected and cared for.
...

Additional Protocol I
Article 51
Protection of the civilian population

1. ...

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. ...

Additional Protocol I
Article 52
General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. ...

Additional Protocol II
Article 13
Protection of the civilian population

1. ...

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. ...

11. Both parties also rely on paragraphs 89, 91, 94, 103, 127, 134 and 143 of the *Appeals Chamber Decision on Jurisdiction*.

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B. Analysis

12. This Trial Chamber is of the view that it may not disregard a previous ruling of the Appeals Chamber that has already discussed in depth most of the arguments presently put forward by the Defence, and in this regard it notes the *Appeals Chamber Decision on Jurisdiction*. The Trial Chamber has nonetheless carefully reviewed the arguments presented by the Defence in support of its Motion, as well as the arguments submitted by the Prosecution in response.

13. The Trial Chamber will first address the second argument of the Defence as to the applicability of Articles 2 and 3 of the Statute to international armed conflicts, before turning to its first argument concerning the scope of Article 3 of the Statute.

14. As to the argument concerning Article 2 of the Statute raised in the Defence Motion, this is not, as argued by the Defence during the hearing, an issue of scope only, which can be addressed at the pre-trial stage, as the arguments of the Defence also pertain to the applicability of Article 2 insofar as they relate to the existence of an international armed conflict. The Defence contends that "at trial, the facts will show that there was no international armed conflict connected with the allegations in the amended indictment"[12]. The Defence itself acknowledges that the Trial Chamber "may choose to defer factual determinations at trial". The Trial Chamber is of the view that this is an issue that will be more properly addressed at trial as it depends on the assessment of a factual situation which can only be properly made after hearing the evidence submitted by both parties.

15. According to the jurisprudence of the International Tribunal, Article 2 of the Statute is applicable to international armed conflicts. This is not put into question here, although the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction* and Trial Chamber II in *Prosecutor v. Delalic et al.*[13] did not exclude the possibility that customary law may be evolving to apply the system of grave breaches to internal conflicts as well. However, the question of the applicability of Article 2 of the Statute in the present case is an issue that will be addressed at trial, as this Trial Chamber is not in a position, at this stage of the proceedings, to decide whether to dismiss or not charges brought under Articles 2 and 3 of the Statute on the ground that there was no international armed conflict in Central Bosnia at the time and place relevant to the indictment[14].

16. The Trial Chamber is also of the opinion that the applicable standard to assess the existence of an international armed conflict, and in particular whether, as argued by the Defence, the standard set out in the *Nicaragua Decision* should be applied, should not be discussed at this stage but would be more properly addressed at trial, as suggested by the Prosecution.

17. As to the scope of Article 3 of the Statute, the Trial Chamber is of the view that it is not necessary to respond to all the arguments raised by the Defence, as it finds that the relevant main issue as to the scope of Article 3 of the Statute at this stage, is, as stated in the *Appeals Chamber Decision on Jurisdiction*, whether the relevant norms are customary in nature, and whether they entail individual criminal responsibility[15].

18. In the *Appeals Chamber Decision on Jurisdiction,* the Appeals Chamber held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5"[16], and that it "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."[17] The Appeals Chamber then went on to spell out four requirements that must be met in order for a violation of international

humanitarian law to be subject to Article 3 of the Statute[18].

19. To support its argument that the Appeals Chamber Decision is in error, the Defence relies on the Report of the Secretary-General and, in particular on paragraph 34: "...the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law...".

20. The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed. Thus the arguments of the parties were examined in the light of this principle.

21. As stated by the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction*, Article 3 of the Statute has a "residual character"[19]. It means, practically, that Article 3 covers the list of offences enumerated in the provision as well as other serious violations of international humanitarian law provided they are customary in nature and entail individual criminal responsibility. Thus, Article 3 is not only based on conventional rules, such as the Hague Conventions, which are now part of customary law, but also "refers" to customary international law.

22. Indeed, this interpretation of the scope of Article 3 concerned with the "Violations of the laws or customs of war" is consistent with contemporary customary law as it stood at the time the alleged offences were committed. This is evidenced by the codification process that has taken place in the last decades since the adoption of the Hague Conventions in 1907. Violations of the laws or customs of war encompass what is called "war crimes" in contemporary customary law. It follows that the term "Violations of the laws or customs of war" cannot be limited to "Hague Law". It is encompassed in the larger "generic" term of "war crimes", as is evidenced by the codification of the notion of war crimes. The term "war crimes" is now considered as covering violations of customary norms of humanitarian law entailing individual criminal responsibility. It encompasses both grave breaches of the Geneva Conventions and violations of the laws and customs of war.

23. That this was the approach taken by the drafters of the Statute of the International Tribunal has subsequently been confirmed by the work of the United Nations International Law Commission ("ILC") on the draft Statute of an International Criminal Court ("draft ICC Statute") adopted in 1994. The draft ICC Statute listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts". In its commentary under Article 20 entitled "Crimes within the jurisdiction of the Court", the Commission stated that subparagraph (c) concerning "serious violations of the laws and customs of war applicable in armed conflicts" reflects the provisions contained in Article 2 and 3 of the International Tribunal, adding the "Commission shares the widespread view that there exists the category of war crimes in customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977."[20] It is also worth mentioning Article 85(5) of Additional Protocol I which states that grave breaches are to be regarded as war crimes. This can be considered as reflecting a consensus among the States participating in the 1977 Diplomatic Conference that adopted the Additional Protocols to the Geneva Conventions, that it is accepted that "war crimes" is a broad category, and that it covers crimes based on Geneva rules as well as crimes based on Hague rules.

24. The Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996 contains Article 20 concerned with "War crimes". The Commission stated in its report that although it

retained the expression "war crimes" as the title of the provision, the "expressions 'violations of laws and customs of war' and 'violations of the rules of humanitarian law applicable in armed conflicts' are ... also used in the body of the report"[21]. According to the ILC, war crimes in the context of Article 20 refer, among others, to violations covered by the 1907 Hague Convention and annexed Regulations, the grave breaches provisions of the 1949 Geneva Conventions and of Additional Protocol I, violations of common article 3 of the four 1949 Geneva Conventions, and to Additional Protocol II.

25. This is finally illustrated by Article 8 of the ICC Statute adopted in Rome on 17 July 1998. It is entitled "War Crimes", and covers both "grave breaches" of the Geneva Convention and violations of the laws and customs of war. The ICC Statute subjects to individual criminal responsibility violations of common article 3. It can be considered as reaffirming without any doubt a customary norm. Further, it is accepted that fundamental norms of international humanitarian law that are customary in nature are applicable to all types of armed conflicts, excluding situations of internal disturbances and tensions.

26. As also pointed out by the Prosecution, the customary status of common article 3 of the Geneva Conventions, which requires that parties abide by certain minimum fundamental humanitarian standards, was confirmed by the International Court of Justice in the *Nicaragua* case in 1986. The Court held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22).[22]

27. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons[23], the International Court of Justice also confirmed the customary nature of the Hague and Geneva law. The Court stated:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" (...), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

28. The scope of Article 3 of the Statute, and the customary status of certain provisions of humanitarian law are also addressed in the jurisprudence of the International Tribunal. As noted in the *Celebici Judgement*, the Report of the Secretary-General made reference to specified particular norms of humanitarian law as being incorporated in custom: "Included in these are the four Geneva Conventions of 1949, with no mention of the exclusion of certain of their provisions, such as common article 3."[24] In a recent judgement, in *Prosecutor v. Furundzija*, the Trial Chamber also discussed the scope of Article 3 of the Statute in relation to, among others, Geneva law. It found that "torture", which is, *inter alia*, mentioned in common article 3, is covered by Article 3 of the Statute, even though it is not specifically prohibited under the Article[25].

29. The Defence refers to statements made by certain members of the Security Council after the vote on the establishment of the International Tribunal, stating that it is not possible to rely on them to assess the

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scope of Article 3 of the Statute, as they can only be considered as "carefully manufactured *ex post facto* legislative history". In the Trial Chamber's view, this argument cannot stand, since these statements can be considered as an important part of the legislative history of the Statute and due account may be taken of them in assessing the scope of Article 3.

30. Besides common article 3 of the Geneva Conventions, the Defence also disputes that Additional Protocols I and II to the Geneva Conventions are part of customary law, and therefore argues that the International Tribunal is not competent to prosecute persons charged under these provisions. While both Protocols have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law.

31. It is not appropriate at this stage to embark on a general assessment of the customary status of the Additional Protocols as a whole, as suggested by the Defence arguments. It is sufficient here only to address the provisions of Additional Protocols I and II specifically referred to in the indictment. Counts 3, 4, 5 and 6 of the indictment against Dario Kordic and Mario Cerkez refer specifically to Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations[26]. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts.

32. The Trial Chamber will now address the requirement that a customary rule should entail individual criminal responsibility in order to be included in the scope of Article 3 of the Statute. That serious violations of both the Geneva Conventions, outside of the grave breaches provisions, and Hague law entail individual criminal responsibility has, for instance, been recognised by most States when enacting domestic legislation, including the Socialist Federal Republic of Yugoslavia. The ILC also stated in 1994, as to the Draft ICC Statute, that it is "not its function to define new crimes", thereby acknowledging the prior existence of the offences listed in Article 20 as crimes under customary law. While acknowledging that not every violation of the rules of international humanitarian law is a war crime, it is generally accepted that serious violations of both Geneva and Hague law entail individual criminal responsibility.

33. There can be no doubt that common article 3, and the relevant provisions of Additional Protocols I and II, constitute an appropriate basis to prosecute individuals. As already discussed in the jurisprudence of the International Tribunal, from which this Trial Chamber sees no reason to depart, common article 3 is considered as entailing individual criminal responsibility. Also, as was mentioned before, the relevant provisions of the Protocols are based on Hague law. The Charter of the International Military Tribunal at Nürnberg accepted individual criminal responsibility for violations of Hague rules although the Hague Conventions did not contain specific provisions on individual criminal responsibility. This was subsequently reaffirmed in the Principles of International Law Recognized in the Charter of the Nürenberg Tribunal and in the Judgement of the Tribunal ("Nürenberg Principles") adopted by the ILC in 1950[27].

34. To conclude, this Trial Chamber is in no doubt that common article 3 and the relevant above-mentioned provisions of Additional Protocols I and II, to which counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34 and 36[28] refer, are covered by Article 3 of the Statute. The principle of legality relied on by

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the Defence and referred to by the Secretary-General in his Report is respected, and the above-mentioned counts are legally founded. The Trial Chamber has jurisdiction to try the accused Dario Kordic and Mario Cerkez for alleged violations under Article 3 of the Statute.

IV. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DISMISSES the Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3.

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

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Richard May
Presiding

Dated this second day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and annexed Regulations.
2. 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Conventions").
3. 1977 Geneva Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocols").
4. Counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34, 36.
5. As referred to in paragraph 34 of the Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), and Annex thereto, U.N. Doc. S/25704 ("*Report of the Secretary-General*").
6. Joint Defence Motion to dismiss the amended indictment for lack of jurisdiction based on the limited jurisdictional reach of Articles 2 and 3 ("*Defence Motion*").
7. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic,* Case IT-94-1-AR72, A. Ch., 2 Oct. 1995 ("*Appeals Chamber Decision on Jurisdiction*").
8. Unofficial transcript of the hearing on 16 February 1999, pp. 472-73.
9. (Nicar. v U.S.) (Merits) 1986 I.C.J. Reports, 14.
10. Opinion and Judgment, *Prosecutor v. Dusko Tadic,* Case No. IT-94-1, T.Ch. II, 7 May 1997.
11. Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany (1947).
12. Defence Motion, *supra n. 6,* at p. 3.
13. Judgement, *Prosecutor v. Delalic et al.,* Case No. IT-96-21, T.Ch. II, 16 Nov. 1998 *("^elebi}i Judgement*") at para. 202.
14. Defence Motion, *supra n. 6,* at p. 3.
15. It is not appropriate to discuss the other criteria set out by the Appeals Chamber in paragraph 94 of the *Appeals Chamber*

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Decision on Jurisdiction at this pre-trial stage, as they involve questions of facts.
16. *Appeals Chamber Decision on Jurisdiction, supra n.* 7, at para. 89.
17. *Ibid.,* at para. 91.
18. *See Appeals Chamber Decision on Jurisdiction, supra n.* 7, at para. 94.
19. "caractère supplétif" in French.
20. Commentary under Article 20 of the Draft Statute for an International Criminal Court at page 74, in *Report of the I.L.C. on the work of its Forty-ninth Session*, (1994) G.A.O.R., 49th sess., Supp. No. 10, U.N. Doc. A/49/10.
21. Commentary under Article 20 of the Draft Code of Crimes against the Peace and Security of Mankind, in *Report of the I.L.C. on the work of its Forty-ninth session* (1996), G.A.O.R., A/51/10.
22. *Nicaragua Decision, supra n. 9.* para. 218.
23. 8 July 1996, at paragraph 79.
24. *Celebici Judgement, supra n. 13,* at para. 305.
25. Judgement, *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1, T.Ch. II, 10 Dec. 1998, at para. 158.
26. *See Appeals Chamber Jurisdiction Decision, supra n.* 7, at paras 117-120.
27. Nürenberg Principles, Ybk I.L.C., 1950, Vols I and II.
28. Other counts under Article 3 do not refer to provisions not specifically mentioned in the Statute.

ANNEX 16

Prosecutor v Blaskic, Decision Rejecting a Motion of the Defence to dismiss counts 4, 7, 10, 14, 16 and 18 based on the failure to adequately plead the existence of an International Armed Conflict, 4 April 1997 and *Judgment* dated 3 March 2000.

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IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Haopei Li
Judge Fouad Riad

Registrar:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
4 April 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION REJECTING A MOTION OF THE DEFENCE TO DISMISS COUNTS 4, 7, 10, 14, 16 AND 18 BASED ON THE FAILURE TO ADEQUATELY PLEAD THE EXISTENCE OF AN INTERNATIONAL ARMED CONFLICT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe
Mr. William Fenrick

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 16 December 1996, Defence Counsel for General Blaskic (hereinafter "the Defence") submitted to Trial Chamber I a motion "to dismiss counts 4, 7, 10, 14, 16 and 18 based on the failure to adequately plead the existence of an international armed conflict (hereinafter "the motion"). The Prosecutor, in her response of 20 January 1997 (hereinafter "the response") responded to the motion. The Defence replied to the Response in a brief filed on 3 February 1997 (hereinafter "the reply"). The Trial Chamber heard both parties during a hearing on 12 and 13 March 1997.

The Trial Chamber will first analyse the claims of the parties and then consider all the contested points

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of fact and law.

I. ANALYSIS OF THE CLAIMS AND ARGUMENTS OF THE PARTIES

2. In its motion, the Defence claims that the Prosecutor has not provided sufficient proof of the existence of a condition which is essential to argue the charges based on Article 2 of the Statute of the Tribunal (hereinafter "the Statute"), that is, the existence of an armed international conflict in Bosnia and Herzegovina at the time the events occurred. It therefore considers that, pursuant to Sub-rule 73(A)(i) of the Rules of Procedure and Evidence (hereinafter "the Rules"), the Trial Chamber does not have jurisdiction to hear the following six of the 19 counts in the indictment:

Count no. 4: wilful killing (Article 2 (a) of the Statute);

Count no. 7: wilfully causing great suffering or serious injury to body or health (Article 2 (c) of the Statute);

Count no. 10: extensive destruction of property (Article 2 (d) of the Statute);

Count no. 14: inhuman treatment (Article 2 (b) of the Statute);

Count no. 16: taking civilians as hostages (Article 2 (h) of the Statute);

Count no. 18: inhuman treatment (Article 2 (b) of the Statute).

3. The Prosecutor objects to this motion on the grounds that the existence of an international conflict at the time the acts were allegedly committed was adequately pleaded in the indictment. Basing herself on the *Tadic, Djukic* and *Delalic et al*[1] case-law, she asserts that she has fully satisfied her obligation pursuant to Article 21(4)(a) of the Statute to inform the accused "promptly and in detail in a language which he understands of the nature and cause of the charge against him". To this effect, she recalls paragraph 5.1 of the indictment: "at all times relevant to this indictment, a state of international armed conflict and partial occupation existed on the territory of the Republic of Bosnia and Herzegovina". Furthermore, she asserts that neither the Statute nor the Rules require that "legal arguments and evidence"[2] appear in the indictment. In addition, the Prosecutor maintains that both a brief on the jurisdiction of the Tribunal produced by her office and material attached to the indictment at the time confirmation was sought provided sufficient evidence to support the allegation of an international armed conflict at the time of the events.

The Prosecutor also affirms that the difficulties related to the legal definition of an international armed conflict, as well as the determination of what evidence is required to establish its existence, raise factual and legal issues which can be settled only during the hearing on the merits.

4. In its reply, the Defence, basing itself on Article 21(4) of the Statute, Article 14 of the International Covenant on Civil and Political Rights, Article 262 of the Criminal Code of the Socialist Federative Republic of Yugoslavia (1976) and United Sates case-law in the case *the United States v. Lopez*[3], considers that the Prosecutor must plead legally and factually sufficient allegations supporting the existence of an international armed conflict[4]. It also claims that the choice of criterion permitting a differentiation between an internal and an international conflict is a question of law which must be settled before the commencement of the trial on the merits. The Defence asserts further that the case-law of the Tribunal and of the International Court of Justice permits the conclusion that the conflict in the

case at hand was internal and that the provisions of Article 2 of the Statute, "Grave breaches of the Geneva Conventions of 1949"[5] therefore cannot be applied.

II. DISCUSSION

5. The Trial Chamber would recall that the Defence motion initially requested that the Judges declare that they have no jurisdiction over counts based merely on Article 2 of the Statute, "Grave Breaches of the Geneva Conventions". In this respect, the accused invoked Sub-rule 73(A)(i) of the Rules "objections based on lack of jurisdiction"[6]. It thus developed a substantive argument, in respect of both fact and law, seeking to demonstrate that the conflict in question could not be characterised as international. In its detailed analysis, the Defence referred moreover to the case-law of the International Court of Justice, more specifically to the case *Nicaragua v. The United States of America*[7] and to that of the Tribunal in the cases *The Prosecutor v. Tadic*[8] and *The Prosecutor v. Rajic*[9].

The Trial Chamber notes that the Defence supplemented its argument in its reply by pleading Article 21 (4)(a) of the Statute which gives the accused the right to be informed promptly and in detail the nature and the cause of the charge against him[10]. In this respect, it considered that the Prosecution had failed to satisfy this obligation because, in the indictment, it did not specify precisely what would justify characterising the conflict as international[11].

6. The Judges, accordingly, note that the dispute referred to them for consideration involves two points:

a) - jurisdiction: did an international conflict exist at the time the accused committed the crimes ascribed to him in the indictment or was the conflict merely internal?

b) - defects in the form of the indictment: at this stage of the proceedings, must the Prosecutor prove in fact and in law that an armed conflict existed in order to indict an individual pursuant to Article 2 of the Statute or is it sufficient for her to allege the existence of such a conflict at the time of the events?

The Trial Chamber will now deal with each of the questions separately

7. As regards the discussion on the characterisation of the conflict as internal or international, the Judges note that the Appeals Chamber, in the case *The Prosecutor v. Tadic*, was asked to consider a request analogous to that of General Blaskic seeking that the Tribunal find that it lacked subject matter jurisdiction, *inter alia* because the alleged crimes had not been committed within the scope of an international armed conflict. Although that Chamber ruled - in a split decision however which produced several separate opinions - 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"[12], it did not settle the issue of whether in that case, given the circumstances of time and place covered by the indictment, the said conflict was international. It thus considered that the Trial Chamber should settle this issue involving factual and legal questions only on the merits.

For the same reason, the Trial Chamber is of the opinion that it is premature to rule on this point since it can be considered properly only on its merits.

8. As regards the second point, identified above as a question of defects in form, the Trial Chamber would stress, as it asserted in its decision rejecting the motion alleging defects in the form of the indictment, that the indictment is, by its very nature, necessarily concise and succinct but must, however, permit the accused to prepare his defence.

In the case in point, the Prosecutor has satisfied her obligation pursuant to Article 18(4) of the Statute and Sub-rule 47(B) of the Rules and thus permitted the accused to prepare his defence by affirming that the Republic of Bosnia and Herzegovina was the theatre of an international armed conflict throughout the period covered by the indictment, a condition which was held by the Appeals Chamber in the case *The Prosecutor. v. Tadic* as necessary for recourse to Article 2 of the Statute on grave breaches of the Geneva Conventions.

The Trial Chamber therefore considers that it is not incumbent on the Prosecutor at this stage of the proceedings to provide the proof of the existence of an international armed conflict since such proof does not constitute a condition for the formal validity of the indictment.

III. DISPOSITION

9. **FOR THE FOREGOING REASONS,**

Trial Chamber I,

Ruling *inter partes* and unanimously,

REJECTS the motion of the accused dated 16 December 1996 that counts 4, 7, 10, 14,16 and 18 of the indictment be stricken because of a failure to adequately plead the existence of an international armed conflict.

Done in French and English, the French version being authoritative.

Done this fourth day of April 1997
At The Hague
The Netherlands

_____
Claude Jorda
Presiding Judge, Trial Chamber I

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1. Response of the Prosecutor, p. 2.
2. Response of the Prosecutor, p. 3.
3. Case *the United States v. Lopez,* cited on p. 2 of the Reply of the Defence
4. Defence Reply, p.1.
5. *Ibid.,* pp. 4 to 6.
6. Defence Motion, p.1
7. *Ibid.* pp. 5,7, 10, 11.
8. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *The Prosecutor v. Dusko Tadic*, Case no. IT-94-1AR72; Defence Motion, pp. 5,6,7,8.
9. Review of the indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 13 September 1996, *The Prosecutor v. Ivaca Rajic,* IT-95-12-R61; Defence Motion pp. 11-14.
10. Reply of the Defence, pp. 1 and 2.
11. *Ibid.* p. 5.

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12. Paragraph 84 Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *The Prosecutor v. Dusko Tadic*, Case no. IT-94-1AR72.

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IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLASKIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

ANNEX

Abbreviations

ABiH
Muslim Army of Bosnia-Herzegovina

BH
Republic of Bosnia-Herzegovina

BRITBAT
UNPROFOR British Battalion

ICRC
International Committee of the Red Cross

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B. Article 2 of the Statute: Grave breaches of the Geneva Conventions

73. Article 2 of the Statute "grave breaches of the Geneva Conventions" stipulates that :

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Convention 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 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.

74. Within the terms of the *Tadic* Appeal Decision and *Tadic* Appeal Judgement , Article 2 applies only when the conflict is international. Moreover, the grave breaches must be perpetrated against persons or property covered by the "protection " of any of the Geneva Conventions of 1949. Neither party challenged these two conditions . The Defence, however, refuted that these two conditions were met in the instance . The Trial Chamber will now address the issue of the nature of the armed conflict and that of the status of the victims as protected persons by relying on the *Tadic* Appeal Judgement and on other applicable sources of law.

a) International nature of the armed conflict

75. The legal criteria which allow the international nature of an armed conflict to be demonstrated were set out in great detail by the Appeals Chamber in its Judgement of 15 July 1999 in the *Tadic* case. The Trial Chamber, which agrees with the conclusions in that Judgement, does not intend to reproduce the lengthy analysis set forth therein. It prefers to limit itself to drawing on those essential elements necessary for ruling on the present case.

76. An armed conflict which erupts in the territory of a single State and which is thus at first sight internal may be deemed international where the troops of another State intervene in the conflict or even where some participants in the internal armed conflict act on behalf of this other State[140]. The intervention of a foreign State may be proved factually. Analysing this second hypothesis is more complex. In this instance, the legal criteria allowing armed forces to be linked to a foreign power must be determined. This link confers an international nature upon an armed conflict which initially appears internal.

77. The Prosecution put forward that the direct military intervention of Croatia and the involvement of

its armed forces (hereinafter the "HV") alongside those of the Croatian Defence Council (hereinafter the "HVO") in the armed conflict against the Bosnian Muslims conferred on it an international nature by January 1993 at the latest . The Prosecution pointed out however that the engagement of the HV had extended to central Bosnia even before the date marking the start of the period covered by the indictment charging the accused with having committed grave breaches[141].

78. The Defence maintained that the conflict pitting the HVO against the Muslim element of the Bosnia-Herzegovina army (hereinafter the "ABiH")[142] in central Bosnia was internal.

79. The Defence stated first that the HVO had been organised to fight the Serbian aggression in Bosnia. After a conflict pitting Croats against Serbs in Ravno, President Izetbegovi c allegedly stated: "this was not our war"[143]. This was a reaction to the statement that the Bosnian Croats were allegedly attempting to organise their own defence against the Serbian threat. Fighting the Muslims was allegedly never the HVO's objective.

80. The Defence therefore referred to the agreement signed in May 1992 under the auspices of the ICRC between the Croatian Democratic Community (hereinafter the "HDZ"), the Serbian Democratic Party (hereinafter the "SDS") and the Party of Democratic Action (hereinafter the "SDA" – Muslim), according to which, it claimed, the latter were committed to honouring the provisions regarding internal armed conflicts as covered in Article 3 common to the Geneva Conventions and to observing certain rules applicable to international armed conflicts. The Defence considered that the agreement demonstrated the conviction of the ICRC that the conflict was internal[144].

81. On this point, the Trial Chamber does not consider that the cited agreement clearly showed a conviction on the part of the ICRC that the conflict was internal. The preamble of the agreement[145] stipulates that:

> The parties agree that, *without any prejudice* to the legal status of the parties to the conflict or *to the international law of armed conflict in force* , they will apply the following rules... [146]

82. Whatever the case, the parties to the conflict may not agree between themselves to change the nature of the conflict, which is established by the facts whose interpretation , where applicable, falls to the Judge. In May 1992, the ICRC was certainly responsible for fulfilling its mandate to provide the best possible protection to civilians and persons placed *hors de combat* whilst the war unfolded around them. Nonetheless , it is this Trial Chamber which is responsible for evaluating the facts before it and determining the true nature of the conflict.

i) Direct intervention

83. The first issue to be resolved is whether Croatian HV troops intervened in the conflict in question. The Prosecutor's assertion that the HV was allegedly present in the territory of the Central Bosnia Operative Zone (hereinafter the "CBOZ") which the accused commanded, in particular in the Lasva Valley, was contested by the Defence . The Defence relied *inter alia* on testimony stating that some units of the Croatian army were present and engaged in an armed conflict not in the Lasva Valley but in other parts of Bosnian territory (in Herzegovina and in the border regions between Bosnia and Herzegovina)[147].

84. The presence of HV soldiers or units in Bosnia-Herzegovina (hereinafter "BH") has been amply

demonstrated and, indeed, the Defence acknowledged that the Prosecutor established the presence of HV soldiers or units in BH but not in the CBOZ[148]. The Trial Chamber heard the testimony of several witnesses on the subject of which it took especial note of the following.

85. One witness stated that he heard from a high-ranking Croatian government official that HV soldiers had been sent to BH in 1993 to combat the Muslim forces[149]. Another witness spoke of HV soldiers who had been dismissed from their positions because they did not want to got to Bosnia and of other soldiers who had to exchange their HV insignia for HVO insignia while they were in Bosnia[150]. One Defence witness, Admiral Domazet, confirmed that, along with other Croatian army personnel, he was in Bosnia-Herzegovina in April 1993 when he was "head of personnel" of the HV intelligence service [151]. He also testified that General Bobetko could never have defended and liberated the southern portion of the territory of Croatia without entering the territory of Bosnia -Herzegovina[152]. The presence of the HV in BH was even confirmed by one witness who discussed the nature of the intervention of the HV[153] and another who was of the view that the Croatian troops in Bosnia between 1992 and 1994 were not there lawfully given that such a decision had never been taken in the Sabor (parliament of the Republic of Croatia)[154]. Other evidence also demonstrated a general HV presence in Bosnia[155].

86. Those places where the presence of HV soldiers was noted have been specified. The Croatian army penetrated into BH territory at least as far as Livno[156] and Tomislavgrad[157]. In October 1992 , when he was Deputy Minister of Defence of the Republic of Croatia, General Praljak was seen in Mostar[158]. Other witnesses spoke of the presence of the HV in the Mostar region[159] and in the Prozor and Gornji Vakuf regions from mid-January to February 1993[160]. In July 1993, UNPROFOR noted that the HVO in Mostar was being supported by HV soldiers "in great numbers"[161]. Other written evidence attesting to the HV presence was detailed in the Prosecutor's brief. Some documents recall the HV's "massive presence" in Bosnia in Jablanica, Prozor and Gornji Vakuf[162] and provide clarification as to who the troops involved were and what materiel and weapons these troops had [163].

87. On 13 May 1993, the government of Bosnia-Herzegovina brought a complaint against the armed aggression upon its territory:

> The government of Bosnia and Herzegovina states, once again, that it wishes to develop all encompassing relations in co-operation with the Republic of Croatia on the basis of mutual trust and respect; however, unless the attacks are immediately stopped and the units of the state of Croatia are withdrawn immediately from the territory of Bosnia and Herzegovina, the government of the Republic of Bosnia and Herzegovina will be forced to turn to the international community and request protection from the aggression[164].

88. In a letter dated 4 September 1993 addressed to the UNPROFOR commander in Bosnia - Herzegovina, the Presidency of Bosnia-Herzegovina described the attack on certain towns by HVO and Croatian army forces[165]. Another letter, dated 28 January 1994 from the Permanent Representative of Bosnia -Herzegovina to the United Nations addressed to the Security Council President, contained an annex which included a description of the military intervention by the armed forces of the Republic of Croatia against Bosnia-Herzegovina[166].

89. The Trial Chamber also points to the existence of United Nations documents (hereinafter the "UN")

confirming the presence of the HV in BH. United Nations Security Council resolutions 752 of 15 May 1992[167] and 787 of 16 November 1992[168] demanded that the elements of the HV respect the territorial integrity of the BH and withdraw [169]. In correspondence dated 1 February 1994 and 17 February 1994, the Secretary-General informed the Security Council of the support lent to the HVO by Croatia[170]. In particular, the United Nations Secretary-General wrote to the Security Council on 1 February 1994:

> The Croatian army has directly supported the HVO in terms of manpower, equipment and weapons for some time. Initially the level of support was limited to individual and small sub-units, many of them volunteers. As the offensives of the Bosnia and Herzegovina Government forces against the HVO have become successful, the number of Croatian soldiers appears to have increased. It is assessed that in total there is the equivalent of three Croatian Brigades of regular army personnel in Bosnia and Herzegovina, approximately 3,000 to 5,000 (this is an estimation, as it is impossible with UNPROFOR's assets to obtain the required information for a more accurate account).

90. Other United Nations reports and correspondence dealt with the same subject[171] In a letter dated 11 February 1994 addressed to the Secretary-General, the Croatian Vice-Prime Minister and Minister for Foreign Affairs explained *inter alia* that his government was prepared to withdraw some units from the Bosnia-Herzegovina border areas but simultaneously urged the government of that Republic "immediately to order its army to cease all hostilities and offensive actions against Croatian population centres, especially *in the region of central Bosnia. Following the cessation of hostilities, we shall issue an appeal to all Croat volunteers in central Bosnia to lay down their arms and return to normal civilian lives*"[172].

91. The Trial Chamber is of the opinion that proof exists as to the presence of the HV within the CBOZ itself. Over the period in question, HV officers, in particular Colonel Vidosevic from the Split Brigade along with two other Croatian army officers , were "frequently" seen at the Hotel Vitez. In April 1993, representatives of the Croatian Defence Council, Dragan Curcic and Bozo Curcija, were seen there too [173] . Soldiers wearing insignia bearing the initials "HV" set up in a Dubravica school near the Hotel Vitez[174]. Soldiers from Croatia were also observed in Busovaca whilst the HVO forces were grouping between May 1992 and January 1993[175] and at the Vitez Health Centre in January 1993[176]. At the same time, soldiers wearing badges which identified them as members of the HV arrived in the Kiseljak zone[177]. The Muslim victims of the attacks launched against villages in the Vitez and Busova ca municipalities declared that they had seen members of HV units participating in the assaults[178].

92. One example of the presence of the HV is particularly significant. HV Colonel Miro Andric and members of the 101st National Guards Brigade of the President of the Republic of Croatia were sent to the BH southern front by the Croatian Defence Minister , Gojko Susak[179]. They continued to operate in central Bosnia in 1993[180]. Miro Andric, along with Tihomir Blaskic and Milivoj Petkovic, represented the HVO at meetings in Vitez on 28 and 29 April 1993 and during negotiations with the ECMM and the ABiH on the establishment of a joint command[181]. Blaskic declared that "Miro Andric [...] was the number two in the joint command of the armed forces of the Republic of Bosnia-Herzegovina on behalf of the HVO"[182]. Subsequently, Andric returned to the HV in Croatia.

93. In the CBOZ, several orders were given to the members of the HV serving in the HVO to remove their HV insignia so that observers would not detect their presence in BH[183]. Further, a helicopter from Croatia "frequently" landed at the quarry some two kilometres south of the UNPROFOR British

battalion base (hereinafter "BRITBAT") during the summer of 1993[184], apparently to provide direct communication between Croatia, in particular, and the HVO enclave in central Bosnia.

94. Ultimately, the evidence demonstrated that, although the HV soldiers were primarily in the Mostar, Prozor and Gornji Vakuf regions and in a region to the east of Capljina[185], there is also proof of HV presence in the Lasva Valley. The Trial Chamber adds that the presence of the HV in the areas outside the CBOZ inevitably also had an impact on the conduct of the conflict in that zone. By engaging the ABiH in fighting outside the CBOZ, the HV weakened the ability of the ABiH to fight the HVO in central Bosnia. Based on Croatia's direct intervention in BH, the Trial Chamber finds ample proof to characterise the conflict as international.

ii) Indirect intervention

95. Aside from the direct intervention by HV forces, the Trial Chamber observes that Croatia exercised indirect control over the HVO and HZHB.

96. In order to establish whether some of the participants in the armed internal conflict acted on behalf of another State, the Appeals Chamber in the *Tadic* Appeal Judgement took as its starting point Article 4 of the Third Geneva Convention which defines those situations in which militia and paramilitary groups may be likened to legitimate combatants. The Appeals Chamber deemed that the condition of belonging to another Party to the conflict provided for in this Article constituted an implicit reference to a control criterion[186]. Therefore, some degree of control exercised by a Party to a conflict over the perpetrators of the breaches is needed for them to be held criminally responsible[187] on the basis of Article 2 of the Statute. The question of determining the degree of control required then arises.

97. In this respect, the *Tadic* Appeal Judgement contains a meticulous analysis of the notion of control. Upon examining the reasoning and control criteria set forth by the International Court of Justice in the *Nicaragua* case[188], the majority of the Appeals Chamber ultimately rejected the position of the Court on the ground that the criteria in question agreed neither with "the logic of the law of State responsibility" nor with "judicial and State practice"[189]. The Defence contended that the *Tadic* Appeal Judgement wrongly dismissed the criterion of "effective control" set by the International Court of Justice in the *Nicaragua* case[190]. For the Defence, this is the appropriate criterion to apply in the instance, notwithstanding the conclusions of the *Tadic* Appeal Judgement. Nonetheless, this Trial Chamber is of the opinion that it is correct to follow the reasoning of the Appeals Chamber .

98. The Appeals Chamber concluded that although State and legal practice adopted the *Nicaragua* criterion for unorganised groups or individuals acting on behalf of a State, it applied another when military or paramilitary groups were at issue[191]. Thus:

> the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having a status of a State official under internal legislation can be regarded as a *de facto* organ of the State.[192]

99. The Appeals Chamber clearly laid out the three control criteria which allow the acts of individuals or groups to be ascribed to a foreign State, circumstances which transform what at first sight is an internal armed conflict into an international one. The first criterion is applicable to individuals or unorganised groups and demands the issuance of specific instructions for the acts at issue to be perpetrated or, in the

alternative, proof that the foreign State endorsed *a posteriori* the said acts.[193] Another criterion relates to a situation wherein, even though no instructions are given by a State , individuals may be likened to State organs because of their effective behaviour within the structure of the said State[194]. Neither of these criteria is relevant in this case and this is why we will not analyse them here.

100. The matter is one of possibly imputing the acts of the HVO to the Republic of Croatia which would then confer an international nature upon the conflict played out in the Lasva Valley. It is the third criterion[195] which applies in this instance. This criterion allows the degree of State control required by international law to be determined in order to be able to ascribe to a foreign State the acts of armed forces, militia and paramilitary units (hereinafter "organised groups"). The Appeals Chamber characterised it as a criterion of overall control when it stated:

> control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however , does not go as far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the party to the conflict) *has a role in organising, co-ordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group[196] .

101. How may it be established that a State exercises overall control over an organised military group? The Appeals Chamber stated numerous factors whose conjunction indicated that the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereinafter "the FRY") exercised an overall control over the Army of Republika Srpska (hereinafter the "VRS"), i.e. the transfer of non-Bosnian Serb former officers of the old Yugoslav National Army (hereinafter the "JNA") to BH, the payment of the wages of Bosnian Serbs by the FRY administration, the fact that the reorganisation and change of name of the JNA in no way altered the military objectives and strategies, the fact that the VRS had structures and ranks identical to those of the army of the FRY (hereinafter "the VJ") and that the VJ continued to direct and supervise the VRS (well beyond the generous financial, logistical and other support which it lent) and the persistence of the VJ's direct intervention[197]. However, for the Appeals Chamber, these factors do not define overall control but instead constitute indications thereof. Accordingly, the factors which permit the existence of overall control to be proved may vary depending on the circumstances .

102. In this instance, the direct intervention of the HV in Bosnia and in the CBOZ has already been demonstrated above. Mention may be made of several other indications of Croatia's involvement in the conflict which rebut the Defence argument that the HV did indeed direct HVO operations, but only between March and June 1992 before the HVO became organised and prior to the outbreak of the conflict in central Bosnia between the Croatian and Muslim forces[198]. The Trial Chamber concurs that the involvement of the HV and Croatia may appear more clear-cut at the start of the period under consideration but deems that it persisted throughout the conflict.

103. This involvement does not seem to be the result only of the particular circumstances prevailing at the time. In fact, according to one Defence witness, Croatia had harboured ambitions in respect of the Croatian territory of Bosnia-Herzegovina for 150 years [199]. President Tudjman aspired to partitioning

this neighbouring country. In his book entitled *Nationalism in Contemporary Europe* Franjo Tudjman argued that Bosnia-Herzegovina should form part of the federal Croatian unit because it was linked historically to Croatia. Moreover, Tudjman observed that from an ethnic and linguistic viewpoint most Muslims were of Croatian origin[200]. On the partitioning of Bosnia-Herzegovina, Tudjman wrote:

> But large parts of Croatia had been incorporated into Bosnia by the Turks. Furthermore , Bosnia and Herzegovina were historically linked with Croatia and together they comprise an indivisible, geographic and economic entity. Bosnia and Herzegovina occupy the central part of this whole, separating southern (Dalmatian) from northern (Pannonian) Croatia. The creation of a separate Bosnia and Herzegovina makes the territorial and geographic position of Croatia extremely unnatural in the economic sense and therefore in the broadest nationalist political sense very unfavourable for life and development and in the narrower administrative sense unsuitable and disadvantageous. These factors largely explain why the 1939 agreement between Belgrade and Zagreb included the following areas of Bosnia into the Banovina of Croatia: the whole of Herzegovina and Mostar and those Bosnian districts where the Croats have a clear majority[201].

104. Franjo Tudjman's nationalism and his desire to annex a part of BH were apparent to Lord David Owen to whom President Tudjman staked his claim that 17.5% of Bosnian territory should revert to a republic with a Croatian majority[202]. Witness P also confirmed that Franjo Tudjman had in mind the partition of BH[203].

105. These aspirations for a partition were furthermore displayed during the confidential talks between Franjo Tudjman and Slobodan Milosevic in Karadjordjevo on 30 March 1991[204] on the division of Bosnia -Herzegovina. No Muslim representative participated in these talks which were held bilaterally between the Serbs and Croats[205]. Following Karadjordjevo, Franjo Tudjman opined that it would be very difficult for Bosnia to survive and that the Croats were going to take over the Banovina plus Cazin, Kladusa and Bihac[206]. Preliminary secret negotiations were held using maps to come to an agreement with the Serbs on how to partition Bosnia[207]. An interview of the Defence witness Bilandzic published on 25 October 1996 by the Croatian weekly *Nacional* confirms that, following negotiations with Slobodan Milos evic, "it was agreed that two commissions should meet and discuss the division of Bosnia and Herzegovina"[208]. The agreement entered into by the Serbs and Croats on the partition of Bosnia was reportedly confirmed at a meeting between the Bosnian Serb and Bosnian Croat political leaders, Radovan Karadzic and Mate Boban, in Graz in Austria on 6 May 1992. They allegedly agreed to resort to arbitration to determine whether certain zones would fall within Serbian or Croatian "constituent entities"[209].

106. The aspirations of Franjo Tudjman to annex "Croatian" regions of Bosnia persisted throughout the conflict. On 6 May 1995, during a dinner at which he was sitting beside Mr. Paddy Ashdown, leader of the Liberal Democrat Party in the United Kingdom , who was called as a witness by the Prosecutor, President Tudjman clearly confirmed that Croatia had aspirations to territory in Bosnia. Having sketched on the back of a menu[210] a rough map of the former Yugoslavia showing the situation in ten years time, Franjo Tudjman explained to Mr. Ashdown that one part of Bosnia would belong to Croatia and the other part to Serbia. He also said that there would no longer be a Muslim region within the former Yugoslavia, that it would constitute only a "small element of the Croat State". Franjo Tudjman was convinced that the Serbs would ultimately exchange Banja Luka for Tuzla[211]. President Tudjman also said that he intended to retake Knin and the Krajina region[212] which Croatia did indeed subsequently do. According to the witness, Franjo Tudjman and Slobodan Milosevic seemed to have reached an

agreement on some territories[213].

107. The Defence claimed, however, that the opinions expressed by President Tudjman were purely personal and did not reflect the official position of the Republic of Croatia[214]. Admittedly, the distinction in principle between President Tudjman's personal comments and Croatia's official policy is justified. The Trial Chamber notes nonetheless that President Tudjman was so dominant in the government of Croatia that his personal opinions in fact represented the position of the official authorities. According to Witness P, President Tudjman exercised his responsibilities within an authoritarian regime where only he held the power[215]. For this reason , the distinction cannot apply in the case in point.

108. Furthermore, it appears that the HVO and Croatia shared the same goals. The HVO and some paramilitary or assimilated forces fought for Croatia, defended the "Croatian " people and territory and wanted the territory which they regarded as Croatian to be annexed to the Republic of Croatia[216]. The members of these armed forces saw Tudjman as their President[217]. Mate Boban, President of Herceg-Bosna, rejected the constitution of Bosnia-Herzegovina which he thought protected only the rights of the Muslims in Bosnia. According to Mate Boban, Herceg-Bosna was culturally, spiritually and economically part of Croatia and had only been separated from it for regrettable reasons[218]. For him, the HDZ was the Bosnian branch of the party founded by Franjo Tudjman[219].

109. The minutes of a meeting held on 12 November 1991 in Grude between the representatives of the regional communities of the Herzegovina and Travnik HDZ regional communities are particularly revealing. The two communities declared that they "have unanimously decided that the Croatian people in Bosnia and Herzegovina must finally embrace a determined and active policy which will realise our eternal dream – a common Croatian state" and that they must "show ... which territories in BH are Croatian territories [...]. Our *people will not accept*, under any conditions, any other solution *except* within the borders of a free Croatia"[220].

110. These common goals did indeed have consequences on the decision-making mechanism of the Croatian Community of Herceg-Bosna (hereinafter "the HZHB"). Croatia was able to control the decisions either through Croatian officers detached from the HV so as to serve in the HVO or through Bosnian Croats who shared the same goals as Croatia and who effectively followed the instructions issued by the Croatian government.

111. On 21 March 1992, Pasko Ljubicic, commander of the "HB Defence", requested the Defence Minister of the Republic of Croatia, Gojko Susak, for a meeting *inter alia* "to receive your *instructions for further actions* Sin central BosniaC"[221]. President Tudjman announced that Croatia officially recognised the independence of BH on 7 April 1992[222]. For this reason, any involvement of Croatia in the setting up of the HVO after that date was intervention in the internal affairs of BH. The Trial Chamber notes, however , that although Croatia's action in BH was less obvious after that date, it did not stop.

112. Croatia was thus directly involved in the control of the HVO forces which were created on 8 April by the HZHB presidency[223] . On 10 April 1992, President Tudjman appointed General Bobetko of the HV as commander of the "Southern Front"[224]. His duties included commanding HV and HVO units in Croatia and Bosnia-Herzegovina. Three of General Bobetko's subordinates, officers in the HV, subsequently took command of HVO units. On 21 April 1992, General Bobetko ordered General Ante Roso to take responsibility for the Livno region in BH[225]. By 19 May, General Bobetko had already

established a forward command post in Gornji Vakuf in BH[226]. On 14 June 1992, General Bobetko ordered offensive activities to commence, HVO forces to manoeuvre in a certain direction and specific operations to be launched as part of a military campaign[227]. On 27 June 1992 while still an HV General, Ante Roso promoted Tihomir Blaskic to the rank of HVO Colonel and made him commander of the CBOZ[228]. General Petkovic was replaced in his post as Chief-of-Staff by General Praljak, the former Croatian national Deputy Minister of Defence in Zagreb[229]. In October 1993, General Praljak was replaced by General Roso. The decisions to make these replacements were taken by the Croatian government[230] and affected an army in principle answering to a distinct sovereign State.

113. The HDZ in Croatia had overall control of the HDZ in Bosnia:

> formally the HDZ in Croatia was separate from the HDZ in Bosnia-Herzegovina – that is formally, but, in reality, all decisions are made in Zagreb and I think that there is no doubt about it. I do not think that – there is no question of the HDZ in Bosnia being an independent party in Bosnia-Herzegovina – formally yes, but not in reality.[231]

114. The Defence furthermore did not challenge the fact that the HVO shared personnel , often from BH, with the HV. According to Admiral Domazet, officers in the army of the Republic of Croatia voluntarily resigned from the HV in order to serve in Bosnia-Herzegovina. These officers needed official authorisation and were regarded as temporarily detached officers. It appears that these officers continued to receive their wage from Croatia[232]. Those who wished to rejoin the ranks of the Croatian army could do so if they obtained the official approval of the HV authorities which, bearing in mind how the Trial Chamber interpreted the elements of the case, was but a formality.

115. The Trial Chamber heard evidence indicating that Milivoj Petkovic, Ante Roso, Slobodan Praljak and General Tolj, all high-ranking officers within the Croatian army, went to serve in the HVO for a time before returning to the Croatian army[233]. Before becoming HVO Chief-of-Staff, General Milivoj Petkovic was a senior officer in the army of the Republic of Croatia. Slobodan Praljak left the army of the Republic of Croatia and became an HVO General. He then returned to the armed forces of the Republic of Croatia, was promoted to the rank of General and pensioned off[234]. It was only on 15 October 1993 that General Roso resigned from the HV to "leave for Bosnia-Herzegovina" and become the HVO Chief-of-Staff. On 23 February 1995, he requested to be taken back into the HV, a request which was granted[235]. Ivan Tolj was a deputy of the Sabor, a general, chief of the Croatian army's political department and also a member of the HVO[236]. The aforementioned HV Colonel, Miro Andric, also belonged to the HVO. Even at junior levels, the HVO was in part made up of Croats who had returned from Croatia after having fought in the Croatian army[237].

116. President Tudjman also ordered the replacement of Bosnian Croats who did not agree with him. Stepan Kljujic was President of the HDZ in Bosnia but was replaced because he was fighting for a united Bosnia. Lastly, Mate Boban was appointed President of Herceg-Bosna. Before taking an important decision related to Herceg-Bosna, Mate Boban always consulted Franjo Tudjman[238] and effectively followed his instructions. Delegations from the Bosnian HDZ regularly went to consult President Tudjman[239].

117. General Blaskic himself was appointed by a procedure which stressed the need to select loyal people prepared to implement the policy dictated by Zagreb. In order to implement the BH HDZ partisan policy, it was decided, during the meeting in Grude presided over by Mate Boban[240], to

"strengthen its membership, and select people who ScouldC see these tasks through to the end" and "to prepare better militarily for the struggle against all the forces trying to hinder the inevitable process of the creation of a free Croatian state "[241]. General Blaskic could not have been appointed to the post he held if he had not fully endorsed this policy .

118. The Bosnian Croat leaders followed the directions given by Zagreb or, at least, co-ordinated their decisions with the Croatian government[242]. Co-ordination was manifest at various levels. The day after the establishment of the Territorial Defence (hereinafter the "TO") on 9 April 1992 as the legitimate military organisation in Bosnia-Herzegovina, Mate Boban issued an order prohibiting the TO from entering HZHB territory[243]. The order was confirmed in a similar one issued by General Roso on 8 May 1992[244]. On 11 May 1992, in the municipality of Kiseljak, Tihomir Blaskic issued an order [245] to execute the one from Anto Roso by which the HVO became the sole legal military unit and which outlawed the TO. Dario Kordic allegedly issued a similar order in the municipality of Busovac a[246]. An order of HV General Anto Roso was therefore quickly put into effect. Even on the subject of control of the munitions factory in Vitez, President Tudjman and Tihomir Blaskic promoted the same policy by threatening to blow it up if the ABiH attacked[247].

119. Accordingly, the evidence demonstrates that there were regular meetings with President Tudjman and that the Bosnian Croat leaders, appointed by Croatia or with its consent , continued to direct the HZHB and the HVO well after June 1992.

120. Apart from providing manpower, Croatia also lent substantial material assistance to the HVO in the form of financial and logistical support[248]. The person responsible for all the intelligence services in Croatia publicly declared that Croatia had spent a million German marks (DM) a day on providing aid to all of Herceg-Bosna's structures including the HVO[249]. Croatia supplied the HVO with large quantities of arms and materiel in 1992, 1993 and 1994[250]. The presence of T-55 tanks and howitzers with the HV acronym was raised before the Trial Chamber. In September 1993, witness DX observed Croatian T-55 assault tanks in the Gornji Vakuf region being crewed by HV teams and that these tanks seemed to have been intended for participation in the hostilities between the HVO and the ABiH[251]. Equipment was also supplied to the ABiH but this ceased in 1993 during the conflict between the HVO and the ABiH[252] . HVO troops were trained in Croatia[253].

121. Finally, in the *Tadic* Appeal Judgement, the Appeals Chamber also found that :

> Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls , it may be easier to establish the threshold [254].

122. In the light of all the foregoing and, in particular, the Croatian territorial ambitions in respect of Bosnia-Herzegovina detailed above, the Trial Chamber finds that Croatia , and more specifically former President Tudjman, was hoping to partition Bosnia and exercised such a degree of control over the Bosnian Croats and especially the HVO that it is justified to speak of overall control. Contrary to what the Defence asserted, the Trial Chamber concluded that the close ties between Croatia and the Bosnian Croats did not cease with the establishment of the HVO.

123. Croatia's indirect intervention would therefore permit the conclusion that the conflict was international.

ARTICLE 17

Prosecutor v Hadzihasanovic and others, Decision on Form of Indictment, 7 December 2001.

2812

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding

Judge Florence Ndepele Mwachande Mumba

Judge Carmel Agius

Registrar:
Mr Hans Holthuis

Decision of:
7 December 2001

PROSECUTOR

v

ENVER HADZIHASANOVIC

MEHMED ALAGIC

AMIR KUBURA

DECISION ON FORM OF INDICTMENT

The Office of the Prosecutor:

Ms Jocelyne Bodson

Mr Ekkehard Withopf

Counsel for the Accused:

Ms Edina Residovic for Enver Hadzihasanovic
Mr Vasvija Vidovic and Mr John Jones for Mehmed Alagic

Mr Fahrudin Ibrisimovic and Mr Rodney Dixon for Amir Kubura

1. Background

1. The Trial Chamber is seized of a joint Defence Motion on the form of the indictment in the present case,[1] and the subsequent related filings.[2] A part of the Motion may be considered as a challenge to the Tribunal's jurisdiction. Since issues on the form of the indictment are substantially different from jurisdictional issues , the Trial Chamber considers them in separate decisions.[3] The objections on the form of the indictment are the subject of this decision.

2. The three accused, Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura, are charged with a number of crimes alleged to have been committed between 1 January 1993 and 31 January 1994 against Bosnian Croats and Bosnian Serbs in various municipalities in central Bosnia and Herzegovina.[4] All the charges are based on command responsibility provided for in Article 7(3) of the Tribunal's Statute. At the relevant time, Enver Hadzihasanovic is alleged to have been the commander of the 3rd Corps of the Army of Bosnia and Herzegovina ("ABiH"), the Chief of the Supreme Command Staff of the ABiH and Brigadier General of the ABiH.[5] Mehmed Alagic is alleged to have been the commander of the ABiH 3rd Corps Operational Group ("OG") "Bosanska Krajina" and the commander of the ABiH 3rd Corps.[6] Amir Kubura is alleged to have been the Assistant Chief of Staff for Operations and Instruction Matters of the ABiH 3rd Corps 7th Muslim Mountain Brigade and the Chief of Staff of that Brigade and to have acted as the

substitute for the commander of that Brigade before being appointed its commander.[7] None of the accused is charged with having personally committed any of the alleged crimes under Article 7(1) of the Statute.

3. The charges against the accused are based on Article 2 (grave breaches of the Geneva Conventions of 1949) and Article 3 (violations of the laws or customs of war) of the Statute. Specifically, all three the accused are charged with:

(a) Count 1, murder, a violation of Article 3 of the Statute, based on Article 3 (1)(a) common to the Geneva Conventions of 1949 ("common Article 3").

(b) Count 2, wilful killing, a violation of Article 2(a) of the Statute.

(c) Count 3, violence to life and person, a violation of Article 3 of the Statute , based on common Article 3(1)(a).

(d) Count 4, wilfully causing great suffering or serious injury to body or health , a violation of Article 2(c) of the Statute.

(e) Count 5, inhuman treatment, a violation of Article 2(b) of the Statute.

(f) Count 6, unlawful confinement of civilians, a violation of Article 2(g) of the Statute.

(g) Count 7, murder, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(h) Count 8, wilful killing, a violation of Article 2(a) of the Statute.

(i) Count 9, cruel treatment, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(j) Count 10, inhuman treatment, a violation of Article 2(b) of the Statute.

(k) Count 16, wanton destruction of cities, towns or villages, not justified by military necessity, a violation of Article 3(b) of the Statute.

(l) Count 17, plunder of public or private property, a violation of Article 3(e) of the Statute.

(m) Count 18, extensive destruction of property, not justified by military necessity , a violation of Article 2(d) of the Statute.

Enver Hadzihasanovic is additionally charged with:

(a) Count 11, unlawful labour, a violation of Article 3 of the Statute, based on customary international law, Articles 40 and 51 of Geneva Convention IV and Articles 49, 50 and 52 of Geneva Convention III.

(b) Count 12, taking of hostages, a violation of Article 3 of the Statute, based on common Article 3(1)(b).

(c) Count 13, taking of civilians as hostages, a violation of Article 2(h) of the Statute.

Enver Hadzihasanovic and Amir Kubura are further together charged with:

(a) Count 14, cruel treatment, a violation of Article 3 of the Statute, based on common Article 3(1)(a).

(b) Count 15, inhuman treatment, a violation of Article 2(b) of the Statute.

Finally, Enver Hadzihasanovic and Mehmed Alagic are together charged under count 19 with destruction or wilful damage done to institutions dedicated to religion, a violation of Article 3(d) of the Statute.

4. Two preliminary matters are to be addressed before turning to the specific objections on the form of the indictment.

2. Reply and Supplementary Response

5. The Trial Chamber's "Order on Filing of Motions" makes no mention of the right of a party to file a reply or to supplement a previous filing.[8] Counsel for the accused Alagic faxed an application for leave to reply to the Chamber , and leave was granted orally.[9] The Prosecution has applied for leave to file a supplement to its Response in the light of the recent *Kupreskic* Appeal

Judgment,[10] where issues relating to the form of indictment were addressed.[11] Leave is granted to the Prosecution to file the Supplementary Response. However , the Chamber has in the meantime issued a "Further Order on Filings of Motions", *inter alia* providing that a party must seek and be granted leave to file a reply or a supplement to a previous filing *prior* to the filing of such reply or supplement.[12] To ensure that both the other party and the Chamber are sufficiently put on notice as to what is sought, such filings must in future be made by way of formal motion.

3. Length of joint motions

6. The parties have previously been instructed to familiarise themselves with the " Practice Direction on the Length of Briefs and Motions" ("Practice Direction").[13] In the interests of expediting the proceedings the Trial Chamber, in the exceptional circumstances of the present case, grants leave to file the Motion and Reply in their present form.

4. The general pleading principles

7. The general pleading principles identified in *previous cases* and which may be applicable to the present are as follows.

8. Article 21(4)(a) of the Statute provides, as one of the minimum rights of an accused , that he/she shall be entitled to be informed in detail of the nature and cause of the charge against him/her, and this provision also applies to the form of indictments .[14] This entitlement translates into an obligation on the Prosecution to plead the material facts underpinning the charges in the indictment.[15] The pleadings in an indictment will therefore be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[16] The Prosecution is, however, not required to plead the evidence by which such material facts are to be proven.[17]

9. The basis of these pleading principles are to be found in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[18] The former, in relevant part, reads that "SiCn the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees , in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him S...C."[19] The latter essentially provides the same as the ICCPR.[20]

10. All legal prerequisites to the application of the offences charged constitute material facts, and must be pleaded in the indictment. The materiality of other facts (facts not directly going to legal prerequisites), which also have to be pleaded in the indictment, cannot be determined in the abstract. A decisive factor in determining their materiality is the nature of the alleged criminal conduct charged to the accused ,[21] which includes the proximity of the accused to the relevant events.[22] Each of the material facts must usually be pleaded expressly, although it may be sufficient in some circumstances if it is expressed by necessary implication.[23] This fundamental rule of pleading, however, is not complied with if the pleading merely assumes the existence of the pre-requisite.[24]

11. In a case based upon superior responsibility, the following are material facts that have to be pleaded in the indictment:

(a) The relationship between the accused and the others whose acts he is alleged to be responsible for.[25] In particular , the superior-subordinate relationship between the accused and those others, is a material fact that must be pleaded.

(b) The accused knew or had reason to know that the crimes were about to be or had been committed by those others,[26] and the related conduct of those others for whom he is alleged to be responsible .[27] The facts relevant to the acts of those will usually be stated with less precision,[28] the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue.[29]

(c) The accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.[30]

12. Generally, an *indictment*, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect.[31] In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief.[32] In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed.[33] The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[34] Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.[35]

5. Objections relating to the pleading of command responsibility

13. The Defence has raised six objections relating to the pleading of command responsibility of the three accused.[36]

14. The first objection is that the alleged superior-subordinate relationship between the accused and foreign Muslim fighters or Mujahedin is insufficiently pleaded in the indictment.[37] Paragraphs 11, 20, 62 and 67 of the indictment are, it is submitted, relevant to this objection . The Defence submits that the indictment fails to properly allege that the specific foreign Muslim individuals who committed the crimes were attached to or subordinated to the accused.[38] It is further submitted that paragraph 11 also fails to specify whether all or some foreign Muslim fighters referred to themselves as "Mujahedin" or only those who were attached to the ABiH 3rd Corps 7th Muslim Mountain Brigade.[39] The relief requested is that the Prosecution be ordered to plead that the specific foreign Muslim fighters or individual Mujahedin who committed the criminal acts referred to in the indictment were in a superior-subordinate relationship to each of the accused.[40] The Prosecution response is that this objection does not concern material facts, which must be pleaded , but rather evidence by which the relevant material facts could be proved, and that the relevant specificity requirements have been satisfied.[41]

15. Paragraphs 11, 20, 38, 62 and 67 are unclear as to whether all the foreign Muslim individuals who committed acts for which the accused are alleged to be responsible were subordinate to the accused, either individually or as members of units subordinate to their command. The rest of the indictment also does not assist in clarifying this matter. For example, paragraphs 17 and 20(a) refer to, *inter alia*, the 7th Muslim Mountain Brigade "and" Mujahedin who allegedly committed crimes. In a case such as the present, resting on command responsibility charges, the Defence is entitled to know whether it is alleged that the foreign Muslim fighters or Mujahedin who are alleged to have committed crimes for which the accused are charged with being responsible, were their subordinates. The objection is therefore upheld. The Prosecution is ordered to amend the indictment accordingly.[42]

16. The second objection is that the "attached to and subordinated to" formula used in the indictment is insufficient to plead command responsibility.[43] It is submitted that based on the Tribunal's jurisprudence the Prosecution has to plead as an essential element of command responsibility the exercise of "effective control" in all superior-subordinate relationships alleged in the indictment, including the relationship between the accused and the foreign Muslim fighters or Mujahedin .[44] It is submitted that the indictment must plead that the accused exercise effective control over those individuals carrying out crimes who are alleged to be their subordinates and specifically plead that the accused had the material ability to prevent or punish their criminal acts.[45] The Prosecution response is the same as with the first objection.[46]

17. The indictment alleges in various paragraphs that the three accused are criminally responsible for crimes committed by their "subordinates"[47] or forces "under [their] command and control".[48] It also alleges that the three accused "demonstrated or exercised both, formal de iure and de facto power" by their command and control over units and troops under their command.[49] The only instances in the indictment where what the Defence refers to as the "'attached to and subordinated to' formula" is used, are paragraphs 10 and 62, concerning the relationship between the Mujahedin and the 7th Muslim Mountain Brigade. The indictment does not expressly plead effective control of the accused over their subordinates - the requisite standard for establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute[50] - in those terms . Neither, in the view of the Trial Chamber, is the exercise of such control necessarily pleaded implicitly in the indictment, mainly because the pleading of the exercise of *de iure* and *de facto* power obscures what may, perhaps, otherwise have been a sufficiently precise pleading. For the purposes of criminal responsibility as a superior, *de iure* power is not synonymous with effective control, as the former may not in itself amount to the latter.[51] The same applies with respect to *de facto* power, since a *de facto* superior must be found to wield substantially similar powers of control as *de iure* superiors who exercise effective control over subordinates to be held criminally responsible for their acts.[52] It therefore cannot be said that pleading the exercise of both *de iure* and *de facto* amounts to pleading effective control. Thus, as a legal prerequisite , or element, of command responsibility, the exercise of the accused over their subordinates of effective control is, in the circumstances, a material fact which has to be pleaded in the indictment. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to plead that the accused exercised effective control over all subordinates alleged to have committed crimes for which they are said to be responsible.

18. The third Defence objection concerns the appearance in the indictment, in one and the same count, of both the allegations that the accused "knew" and "had reason to know" that a subordinate was about to commit crimes or had done so.[53] It is objected that these are distinct, mutually exclusive versions of events, that the Prosecution knows its case and should therefore be able to state either the one or the other version.[54] It is also submitted that at the very least, separate, alternative, counts should be drawn for each version, permitting alternative verdicts; the trial, it is asserted, will be more expeditious and fairer, enabling the accused to respond to separate counts , without being faced with a global and ambiguous charge.[55] The Defence also submits that the degree of culpability, and thus the basis for sentencing, will differ depending on which version of events, if either, is proven .[56] The specific relief requested is that the Prosecution must be ordered to amend the indictment by separating the counts alleging that the accused "knew" that crimes were committed or were about to be committed from counts alleging that the accused "should have known" of those crimes.[57] The Prosecution response is the same as with the first objection.[58]

19. The Prosecution is entitled to plead that the accused "knew" or "had reason to know " that their subordinates were about to

commit a specific crime or crimes or had done so. It need not as a matter of law – and in any event probably cannot as a matter of logic - establish both versions with respect to any one charge or any one crime underlying a charge in order to secure a conviction. The Prosecution cannot at this point know which version, if any, will be established on the evidence at trial. The pleading in the indictment with respect to this objection is, however , clear - the Defence is sufficiently apprised that it has to prepare its defence in relation to both versions. Furthermore, it is the Chamber's duty to finding, at trial, whether the accused either knew, or, had reason to know that their subordinates were about to or did commit the alleged crimes. This objection is therefore rejected .

20. The fourth Defence objection is that the Prosecution, in relation to the "reason to know" charges, has to specifically plead that information was available to the accused that put them on notice of offences committed or about to be committed by subordinates.[59] It is submitted that this is essential in order to place the burden on the Prosecution of adducing evidence of this element at trial and proving its existence beyond a reasonable doubt.[60] The relief requested is that in relation to those counts alleging that the accused "should have known", the Prosecution must be ordered to specifically plead that there was information available to the accused which would have put them on notice of offences committed by their subordinates.[61] The Prosecution response is the same as with the first objection.[62]

21. The Defence objection is not that the availability of the relevant information is a material fact, which for that reason, has to be pleaded in the indictment. Pleading the availability to the accused of the relevant information, or not, would not affect the burden upon the Prosecution to prove its case. In any event, what the Defence is requesting to be pleaded is evidence in relation to an element of an offence. This objection is therefore rejected.

22. The fifth Defence objection is that the Prosecution has failed to specify in the indictment, with respect to each incident and with respect to each accused, whether its case is that the accused failed to prevent the crimes or that the accused failed to punish the perpetrators, or both.[63] It is submitted that the disjunctive formulation in the indictment is ambiguous, and that since the Prosecution knows what its case is, it should accordingly indicate precisely what it intends to prove at trial.[64] The relief requested is that the Prosecution specifically plead, for each count, whether the accused failed to prevent the criminal acts of their subordinates or whether they failed to punish them, or both, but not to maintain the alternative formula in relation to any one count.[65] The Prosecution response is the same as with the first objection.[66]

23. There is no ambiguity in the use of the disjunctive formulation - the Prosecution is entitled to plead both versions and the Defence is sufficiently and clearly put on notice that it has to prepare its case to answer both versions. This objection is rejected.

24. The sixth Defence objection concerns the manner in which the Prosecution pleaded "necessary and reasonable measures".[67] It is submitted, that in order to avoid the imposition of strict liability, the phrase "necessary and reasonable measures" must have some meaningful content.[68] It is specifically submitted that the Prosecution must aver that there were necessary and reasonable measures that the accused could have taken, what these measures were and that they were necessary and reasonable.[69] It is asserted that the burden of proof remains throughout on the Prosecution to prove each of these elements; the burden is not on the Defence, for example, to prove that the accused did take the necessary and reasonable measures.[70] It is further submitted that the necessity of such a pleading is particularly acute when the matter concerns the acts of foreign Muslim fighters or Mujahedin,[71] apparently since they may have been irregular forces, with the accused lacking the ability to exercise control over them. It is asserted that the accused have a right to know at least the nature of the necessary and reasonable measures they are alleged to have taken and failed to take.[72] The Defence has made the general observation that merely reproducing the words of Article 7(3) of the Statute, as the Prosecution has done in the indictment, is insufficient ,[73] apparently to bolster the objection in issue, and to reinforce their point that Article 7(3) of the Statute does not create strict liability.[74] The relief requested is that in relation to counts alleging that the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, it be pleaded what specific measures the accused should have taken and failed to take.[75] The Prosecution response is the same as with the first objection.[76]

25. It is unclear what exactly the Defence objection is. It seems to be a concern that , as it is, the indictment may leave the door open to the Prosecution to lead a case of strict liability against the accused. The indictment and the jurisprudence of the Tribunal leave no room for the Prosecution to lead and establish such a case . The *Celebici* Appeals Chamber has rejected any notion of command responsibility being a form of strict liability,[77] as pointed out by the Defence.[78] The Defence submission mainly aims at pleading the evidence by which the material facts are to be proven by the Prosecution. This objection is therefore rejected .

6. Objections related to nature of armed conflict and partial occupation

26. The indictment alleges that at all relevant times, "a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina."[79] The Defence has raised a number of objections regarding this allegation.

27. The first objection is that the allegation fails properly and specifically to aver between which states the alleged international armed conflict existed.[80] The Prosecution has failed to respond to this specific objection, apparently misinterpreting the Defence submission as stating that it is necessary to plead or prove at trial that an international armed conflict occurred in the same location

where the accused committed the alleged offences.[81]

28. The indictment alleges that the ABiH participated in an armed conflict with the Croatian Defence Council ("HVO")[82] and the Army of the Republic of Croatia ("HV") until at least the end of January 1994.[83] It also alleges that the participation in that conflict took place subsequent to the Vance-Owen peace talks , which ended on 30 January 1993.[84] However, the indictment also contains allegations as to the transformation in 1992 of the Yugoslav People's Army ("JNA") units in Bosnia and Herzegovina into the Army of the Serbian Republic of Bosnia and Herzegovina ("VRS"), and on the strong links that continued to exist between the Yugoslav Army (the renamed JNA) and the VRS.[85]

29. The Prosecution is correct in submitting that it does not have to plead or prove at trial that an international armed conflict existed in the same location where an accused is alleged to have committed the charged offences. The Prosecution has pleaded the existence of an international armed conflict, as it was obliged to do for charges under Article 2 of the Statute. It has, however, failed to plead clearly between whom the alleged international armed conflict existed. This objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly state between which states it is alleging an international armed conflict existed.

30. The second Defence objection relates to the identity of the forces that allegedly partially occupied Bosnia and Herzegovina. The first issue taken is that the Prosecution has failed to specify which forces allegedly partially occupied Bosnia and Herzegovina .[86] It is submitted that it should be clearly stated which states were the occupying forces, and which zones, towns or villages were occupied by the neighbouring states on which dates.[87] The Prosecution has in the Trial Chamber's opinion responded that it is not required to plead or prove that the geographic areas in the indictment were partially occupied .[88] The second issue taken is that , if the allegation is that the ABiH occupied parts of Bosnia and Herzegovina, it is an error on the face of the indictment, as it is clearly established under international law that a state cannot occupy itself.[89] It is therefore requested that, in the event that by "partial occupation" was intended reference to Bosnia and Herzegovina or to forces of the ABiH, the words "partial occupation" be struck out.[90] The Prosecution Response appears to be that it views occupation as an act by a foreign state where it is asserted, in relation to another objection, that the Motion confuses the difference between "a partial occupation by *an international force*" and an area (or zone) of responsibility with respect to a military formation.[91]

31. It has already been stated that the pleadings in an indictment will be sufficiently particular when it concisely sets out the material facts of the Prosecution case with enough detail to inform the Defence clearly of the nature and cause of the charges against him/her to enable him/her to prepare a defence.[92] The pleading of "partial occupation" in this indictment manifestly fails to meet the said standard. Pleading "partial occupation" does not *clearly*, either expressly or by necessary implication, inform the Defence of the nature and cause of the charges against specifically these three accused in relation to that particular pleading. The point is not what the Trial Chamber or the Defence should understand the nature and cause of the case against the accused in relation to the pleading of partial occupation is.

32. The indictment fails to identify the forces that partially occupied Bosnia and Herzegovina , which means that the forces of Bosnia and Herzegovina itself may have been the occupiers that the Prosecution has in mind. This possibility is borne out by count 11. It charges Enver Hadzihasanovic with unlawful labour under Article 3 of the Statute, recognised by customary law and "Articles 40 and 51 of the Geneva Conventions IV and Articles 49, 50 and 52 of the Geneva Conventions III." Geneva Convention IV[93] applies, *inter alia*, to all cases of partial or total occupation of the territory of a party to that Convention , even if the said occupation meets with no armed resistance.[94] Article 51 of that Convention falls under the section specifically relating to occupied territories, and deals with work done by protected persons in such territories.[95] Geneva Convention III[96] applies, *inter alia*, to all cases of partial or total occupation of the territory of a party to that Convention, even if the said occupation meets with no armed resistance .[97] Articles 49, 50 and 52 of that Convention fall under the section dealing with labour of prisoners of war. The indictment also pleads that the victims of grave breaches of the Geneva Conventions were persons protected under the relevant provisions and that all acts and omissions charged as grave breaches of the Geneva Conventions occurred during the partial occupation of Bosnia and Herzegovina.[98] This particular basis of the charge in count 11 would appear to imply that these provisions applied to the three accused, who are alleged to have been commanders at the time of forces of Bosnia and Herzegovina. If it is not the Prosecution's case that the forces of Bosnia and Herzegovina occupied its own territory, the question arises as to the relevance of the said provisions of the Geneva Conventions for the criminal responsibility of these three accused, since those provisions on their face address the occupying forces, not the forces resisting such occupation.

33. The Defence did not complain about the indictment for all the reasons raised by the Trial Chamber in the two preceding paragraphs. However, since these issues are inseparably linked, the Trial Chamber considers it appropriate to raise these deficiencies in the indictment *ex officio*. The Prosecution is accordingly ordered to either strike out the pleading of partial occupation and the allegations and the charges or parts of charges based thereon, or to amend the indictment to *clearly* plead what its case against the accused is in relation to the pleading of partial occupation.

34. Should the Prosecution in amending the indictment as ordered elect to plead the partial occupation of Bosnia and Herzegovina, the identity of the occupying forces , the area or areas occupied, and the date or dates when that occupied is alleged to have existed, would, depending on the nature of the case against the accused in relation to the pleading of partial occupation, be material facts that

have to be pleaded in the amended indictment.

35. Whether or not as a matter of law a state, by its forces, can occupy its own territory , is a matter of substantive law which is inappropriate to be resolved in a decision on the *form* of the indictment. Should the Prosecution in amending the indictment as ordered elect to plead that the forces of Bosnia and Herzegovina occupied its own territory, this question would be determined at trial. This would put the Defence on sufficient notice of the nature and cause of the case against the accused in relation to that pleading to prepare its case, both with respect to the substantive legal issue raised and the evidentiary case to be answered.

36. Related to the second issue just dealt with, the third Defence objection is that the Prosecution appears to equivocate in the indictment between the notion of occupation and that of zones "listed under the ABiH 3rd Corps area of responsibility".[99] It is asserted that the purpose of this equivocation is to argue that the ABiH 3rd Corps and its commanders were responsible for the "areas of responsibility" in the same way that an occupying force would be responsible for occupied territory.[100] It is submitted that the relevant consideration is whether a foreign army occupied a territory, or whether an army was engaged in combat activities in a territory.[101] It is not pertinent, and it can only engender dangerous ambiguity, by suggesting that being "responsible", that is, tasked with an area, equates to criminal responsibility for all crimes committed within that area, to refer to the internal allocation of tasks or "responsibilities" within the ABiH.[102] It is requested that paragraph 58 be struck out from the indictment as being excessively vague and dangerously ambiguous.[103] The Defence also takes issue with the Prosecution being permitted to put forward in the *Kordic* case[104] that the HVO occupied some of the municipalities it pleads in this case as having been occupied by the ABiH.[105] The Prosecution has submitted in response that there is no such equivocation, that paragraphs 57 and 58, when read together, specify the division of Bosnia and Herzegovina into five geographical areas of responsibility by corps, including the geographical area of responsibility of the ABiH 3rd Corps.[106] It is submitted that the Motion confuses the difference between a partial occupation by an international force and an area (or zone) of responsibility with respect to a military formation.[107]

37. International *humanitarian* law distinguishes between the duties of a commander for occupied territory and commanders in general.[108] The authority of the former is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally.[109] It is unsettled whether this distinction has any bearing, as a matter of international *criminal* law , on the nature of the *criminal responsibility* of superiors for the acts of subordinates.[110]

38. The Trial Chamber considers that when, read as a whole, the indictment is not equivocal in the way submitted by the Defence. It is only when read in isolation that paragraph 58 may perhaps be interpreted as being equivocal. Paragraphs 57 and 58 refer to the geographical areas into which Bosnia and Herzegovina was divided for military purposes. Even assuming that the distinction between the responsibility of commanders of occupied territories and commanders in general has a bearing on the *criminal* responsibility of such commanders, the indictment does not charge or purport to charge the three accused in that broader sense. The objection in relation to this issue is therefore rejected. On the issue taken with the Prosecutor being permitted to put forward opposing versions of events in different case, the Trial Chamber considers that the *Kordic* Judgment cannot be read to have found that the HVO *occupied* the said municipalities, or even that the Prosecution put forward such a case. In any event, it is for the Prosecution to put forward whatever version of events it wants to, within the confines of the Statute and the Rules, even if that version is diametrically opposed to versions it put forward in other cases. The objection in relation to this issue is therefore rejected.

7. Cumulative charging

39. The Defence submits that the case law of the Tribunal clearly establishes that charges under Articles 2 and 3 of the Statute in relation to the same conduct are alternatives .[111] The indictment, it is submitted , should be amended to plead such charges in the alternative.[112] The Prosecution submits, *inter alia*, that the overwhelming practice of both *ad hoc* Tribunals, and in particular the practice of the Appeals Chamber, recognises the Prosecution's discretion to charge cumulatively or in the alternative based upon the same facts.[113] It is submitted that any perceived judicial duplicity incurred by cumulative charging or conviction may be addressed at the sentencing stage of the proceedings.[114]

40. Both the majority and minority in the *Celebici* Appeals Chamber expressly held that cumulative charging is to be allowed in light of the fact that, prior to the presentation of all the evidence, it is impossible for the Prosecution to determine to a certainty which of the charges brought against an accused will be proven.[115] There is, however, nothing in the *Celebici* Appeals Judgment, including the minority opinion, which suggests that Articles 2 and 3 charges based on the same conduct must be pleaded in the alternative . Following that Judgment, the Trial Chamber considers that this matter has been settled, at least insofar as Articles 2 and 3 of the Statute, the bases for the charges in the present case, are concerned.[116] This objection is therefore rejected.

8. Complaints relating to alleged imprecisions in indictment

41. The Defence has raised a number of objections relating to alleged imprecisions in the indictment.

42. The Defence objects to the use of the phrases "but are not limited to" and "on or about" in paragraphs 21 and 26.[117] It is submitted that the Prosecution should not be permitted to reserve for itself the possibility of introducing, at trial, evidence of other towns and villages that were attacked or the killing of other victims, since counsel would not have prepared the Defence case on that expanded basis.[118] It is also submitted that the Prosecution should be ordered to add specific dates , rather than merely months, to paragraph 26 of the indictment.[119] The Prosecution response is that when read as a whole, the indictment is sufficiently precise in relation to the locations, time periods and the identity of victims of the alleged crimes to put the accused on notice of the charges against which they must defend.[120]

43. The Prosecution is not required to provide exhaustive lists in the relevant paragraphs of the indictment of all the towns and villages attacked or victims killed. Where the Prosecution seeks to lead evidence of an incident which supports the general offences charged (the attacks and killings), but that particular incident has not been pleaded in the indictment in relation to those offences, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence.[121] Until such notice is given, the accused are entitled to proceed upon the basis that the details pleaded *are* the only case which they have to meet in relation to the offences charged.[122] Accordingly , at this stage and until given sufficient notice that evidence will be led of additional villages or towns or victims in relation to a particular offence charged, the accused are entitled to proceed upon the basis that the lists provided *are* exhaustive in nature. This fully addresses the submitted concern of the Defence. The particular objection is therefore rejected. With respect to the request that the Prosecution plead more specific dates in paragraph 26, the Trial Chamber considers that the indictment informs the accused in sufficient detail of the case they have to meet . The particulars sought are not required to be pleaded in the indictment; the particulars should be provided for in materials disclosed to the Defence. This objection is therefore rejected.

44. The second Defence objection relates to paragraph 65 of the indictment.[123] It is submitted that the term "initially" in the said paragraph is too vague, since the dates, including those on which the accused assumed various commands, are crucial .[124] The Prosecution's response to this objection is the same as the its response to the first objection.[125]

45. It is alleged that one of the operational groups created on 8 March 1993 within the ABiH 3rd Corps by Enver Hadzihasanovic, the commander of that Corps,[126] was OG "Bosanska Krajina",[127] with Mehmed Alagic appointed as that group's commander.[128] It is also alleged that on or around 15 April 1993, elements of the 7th Muslim Mountain Brigade were transferred and put under the direct command of the ABiH 3rd Corps.[129] It is further alleged that at the relevant dates Amir Kubura was the 7th Muslim Mountain Brigade Chief of Staff[130] and that he acted from 1 April 1993 to 20 July 1993 as the substitute for the absent assigned 7th Muslim Mountain Brigade commander.[131] Since the accused are charged with superior responsibility, the date or dates on which they are alleged to have become commanders of specific units is of considerable importance. Paragraph 65 is too imprecise as to the date or dates on which the 7th Muslim Mountain Brigade, the 17th Krajina Mountain Brigade, the 305th Mountain Brigade Jajce, the 27th Motorised Brigade and the Municipal Defence Headquarter Jajce with its units were placed under the command of OG "Bosanska Krajina". This objection is therefore upheld. The Prosecution is ordered to replace the word " initially" with a specific date or dates, or if that be impossible, an indication of the relevant time which is much less vague than the word "initially".

46. The third Defence objection relates to paragraph 66.[132] It is submitted that the term "elements" in the said paragraph to describe persons who may be alleged to be the accused's subordinates is too imprecise as a matter of pleading, in particular in the case of the accused Mehmed Alagic.[133] It is requested that the Prosecution be ordered to specify which individuals or units were transferred and put under the direct command of the ABiH 3rd Corps and whether any of these individuals or units was involved in the crimes referred to in the indictment.[134] The Prosecution's response to this objection is the same as the its response to the first objection .[135]

47. In the light of the alleged responsibility of the three accused in relation to the 7th Muslim Mountain Brigade and the ABiH 3rd Corps, the identity of the units, and if possible, individuals, at least by reference as an identifiable category, from the 7th Muslim Mountain Brigade that were transferred and put under the direct command of the ABiH 3rd Corps is a material fact. It is, however, unnecessary for the Prosecution to also plead that these transferred individuals or units were involved in the crimes alleged in the indictment, because the other allegations made or ordered to be made sufficiently plead that fact. This objection is therefore upheld in part. The Prosecution is ordered to specify which individuals or units were transferred and put under the direct command of the ABiH 3rd Corps. Where individuals, rather than units, were transferred, the Prosecution need not identify each by name. It can refer to them by a clearly identifiable category in order to sufficiently put the Defence on notice as to their identity to properly prepare its case.

48. The fourth Defence objection concerns counts 1 to 5 of the indictment, which charges the accused with various alleged killings of and injuries inflicted on surrendered HVO soldiers and/or Bosnian Croat and Bosnian Serb civilians.[136] It is submitted that with the exception of paragraph 17(ab), paragraph 17 only states which units attacked the relevant villages, and does not state which individuals or units committed the killings and injuries, rendering the indictment defective .[137] It is requested that the Prosecution be ordered to specify in paragraphs 17(aa), (b) and (c), which troops, units or individuals committed the killings or inflicted the injuries for which the accused are charged by virtue of command responsibility.[138] The Prosecution's response to this objection is the same as the its response to the first objection.[139]

49. Paragraph 17 should not be read in isolation. When read together, the only reasonable interpretation of paragraphs 17 and 18,

relevant to counts 1 to 5, is that the forces that attacked the relevant villages committed the alleged crimes. This objection is therefore rejected.

50. The fifth Defence objection concerns counts 1 to 5, 6 to 10, and 16 to 18.[140] It is submitted that the current form of these counts creates a real risk, if not an impossibility, of returning coherent verdicts, in that the various incidents referred to are lumped together without distinction as to the accused or as to place .[141] It is requested that that the counts be struck, or amended so as to permit a verdict to be returned with respect to each accused and in respect of each place.[142] The Prosecution's response to this objection is the same as its response to the first objection.[143]

51. Although it may have been clearer to both the Defence and the Trial Chamber had the Prosecution formulated the relevant charges differently, the current form is not defective for that. This objection is therefore rejected.

52. The sixth Defence objection concerns various asserted deficiencies in the pleading of counts 6 to 10.[144]

53. In relation to paragraph 19, it is submitted that it is unspecific as to which ABiH forces carried out the unlawful imprisonment and unlawful confinement of civilians in the relevant municipalities.[145] The Prosecution's response to this objection is the same as the its response to the first objection.[146]

54. Paragraph 19, even when read with paragraph 20, does not clearly identify which ABiH forces carried out the alleged unlawful imprisonment and unlawful confinement [147] of civilians in the relevant municipalities. It cannot safely be reasonably assumed that the forces that allegedly committed the other crimes to these counts, which are sufficiently identified, were also responsible for the *unlawful confinement*. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to plead which particular ABiH forces allegedly carried out the said unlawful confinement.

55. In relation to paragraph 20, it is submitted that no dates are provided, as should be done, since these are material averments.[148] The Prosecution's response to this objection is the same as the its response to the first objection.[149]

56. Paragraph 20 has to be read together with paragraph 19. The latter paragraph provides the dates accompanying the allegations made in the former.[150] This objection is therefore rejected.

57. In relation to counts 6 to 10 in general, it is submitted that the specific charges set out against Enver Hadzihasanovic in paragraph 19 go beyond 31 October 1993,[151] whilst the opening sentence of that paragraph alleges that he is responsible for crimes committed from about January 1993 to only 31 October 1993.[152] The Prosecution's response to this objection is the same as the its response to the first objection.[153]

58. The current pleading is obviously ambiguous in relation to this important matter . The objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly plead the period during which Enver Hadzihasanovic is alleged to have been responsible for crimes committed by his subordinates.

59. It is submitted that paragraph 21 does not state who carried out the killings of imprisoned and otherwise detained Bosnian Croats and Bosnian Serbs, a material averment which should have been pleaded.[154] The Prosecution's response to this objection is the same as the its response to the first objection.[155]

60. Reading paragraphs 19 and 20 together with paragraph 21 does not assist in providing the identity of the alleged killers of the relevant victims, which is a material fact. This objection is therefore upheld. The Prosecution is ordered to amend the indictment to identify the alleged killers, at least by category, to enable the Defence to prepare its case.

61. The seventh Defence objection concerns count 13, which charges Enver Hadzihasanovic with taking civilians as hostages.[156] It is submitted that the related paragraph 24, in referring to alleged Bosnian Croat hostages, does not aver, as it should, that these Croats were civilians.[157] The Prosecution's response to this objection is the same as the its response to the first objection.[158]

62. When charging an accused with the crime of taking civilians as hostages, it clearly is a material fact whether the alleged hostages were civilians or not. The related paragraph 24 does not plead this fact. The objection is therefore upheld, and the Prosecution is ordered to amend the indictment accordingly.

63. The eighth Defence objection concerns a number of asserted deficiencies in relation to allegations against the accused Amir Kubura.[159] The Prosecution's response to this objection is the same as the its response to the first objection.[160]

64. It is submitted that since the indictment charges that Amir Kubura fulfilled a command role only after 1 April 1993[161] and that

none of the counts allege that he failed to prevent or punish crimes until after the beginning of April 1993,[162] those counts alleging that he is responsible as a commander for crimes committed before 1 April 1993 should be struck.[163]

65. The submission that the indictment charges that Amir Kubura fulfilled a command role only after 1 April 1993 rests on its assertion that under international law "a Chief of Staff does not necessarily occupy a position of command and cannot be held criminally responsible as a commander."[164] The indictment alleges that Amir Kubura was the Chief of Staff of the 7th Muslim Mountain Brigade from 1 January 1993 till 1 April 1993.[165] The indictment very confusingly, where it sets out the specific counts against Amir Kubura, charges him with criminal responsibility for crimes committed both from "about April 1993",[166] *and* prior to that period (but after 1 January 1993).[167] The current pleading is obviously ambiguous in relation to this important matter . The objection is therefore upheld. The Prosecution is accordingly ordered to amend the indictment to clearly plead the period during which Amir Kubura is alleged to have been responsible for crimes committed by his subordinates.

66. It is also submitted that counts concerning Amir Kubura allege that troops from brigades other than the 7th Muslim Mountain Brigade - the only Brigade he is alleged to have commanded from 21 July 1993 to 15 March 1994 - were involved in the incidents that led to the commission of the offences.[168] The examples provided relate to counts 1 to 5 of the indictment, in particular the attack launched on Dusina, and the massacre in Bikosi.[169] It is asserted that it is not alleged that the accused had any command over the other brigades, nor is it alleged from which brigade the troops originated who perpetrated the alleged killings and injuries.[170] It is also complained that counts 6 to 10 suffer form the same defect, the example given relating to the activities at the Mehurici Elementary School, which does not mention the 7th Muslim Mountain Brigade.[171] It is further submitted that some of the counts do not specify which brigades were involved in the commission of crimes, the example given being counts 16 to 18 wherein it is simply alleged that the ABiH 3rd Corps forces committed certain offences, with no mention made of the 7th Muslim Mountain Brigade or any other brigade.[172] It is submitted that as a matter of law, a commander of one brigade cannot *per se* be held responsible for violations committed by troops of another brigade if the brigades were involved in joint operations; the indictment does not allege that Amir Kubura was in command of all of the brigades in joint operations.[173]

67. With respect to the issue taken with referring in the paragraphs relevant to the specific charges against Amir Kubura to brigades or units which are not alleged to have been commanded by him, the Trial Chamber considers that such pleading is not defective when read against the indictment as a whole. The indictment clearly charges Amir Kubura as having been the ABiH 3rd Corps 7th Muslim Mountain Brigade Chief of Staff from 1 January 1993 to 20 July 1993; as having acted from 1 April 1993 to 20 July 1993 as the substitute for Asim Koricic, the then assigned ABiH 3rd Corps 7th Muslim Mountain Brigade Commander who was absent during this period ; and as the ABiH 3rd Corps 7th Muslim Mountain Brigade Commander from 21 July 1993 to 15 March 1994.[174] This particular objection is therefore rejected.

68. With respect to the issue taken with the 7th Muslim Mountain Brigade not being mentioned at all in counts 6 to 10 insofar as they relate to Amir Kubura, the following finding is made. Paragraph 20(c) relates to crimes allegedly committed in the Mehurici Elementary School, for which Amir Kubura is charged in paragraph 19(ba). The former paragraph makes no explicit reference to that brigade, but mentions the Mujahedin that were allegedly involved. Paragraph 62, to be amended, alleges that the "Mujahedin " were attached to and subordinated to the 7th Muslim Mountain Brigade and were heavily involved in combat activities with that brigade. It would therefore appear that Amir Kubura is charged for the said alleged crimes on the basis of the involvement of the Mujahedin. However, this is not sufficiently clear, and the objection in relation to this issue is upheld. The Prosecution is ordered to amend the indictment accordingly. Paragraph 20(d) relates to crimes allegedly committed in the Blacksmith Shop Mehurici, for which Amir Kubura is charged in paragraph 19(bb). The former paragraph, however, makes no mention of either the 7th Muslim Mountain Brigade or the Mujahedin. The indictment is defective in this regard, as the Defence is entitled to know on what basis the accused is said to be responsible for these acts. This specific objection is therefore upheld, and the Prosecution is ordered to either strike paragraph 19(bb), or to amend the indictment to make clear on what basis it is alleging that Amir Kubura is responsible for the acts committed in the Blacksmith Shop Mehurici.

69. With respect to the issue taken that counts 16 to 18 do not mention any specific brigade, including the 7th Muslim Mountain Brigade, the Trial Chamber finds that the indictment is not defective for that. Although paragraph 26 refers to the ABiH 3rd Corps forces in general, paragraph 27 refers to ABiH forces under the command and control of the three accused as having been responsible for the relevant crimes . This pleading is sufficient to put the Defence on notice as to the nature and cause of the relevant charges against them. This specific objection is therefore rejected.

9 Pre-trial brief and materials disclosed to Defence

70. The Prosecution has submitted that the supporting material accompanying the indictment and other materials disclosed to the Defence pursuant to the Rules, as well as the pre-trial brief, will provide the Defence with facts, details of the offences allegedly committed, and the nature of the alleged criminal responsibility of the accused.[175] The Defence objected to this submission.[176] The Trial Chamber rejects the Prosecution submission, for the reasons set out above .[177]

10. Request for oral hearing

71. The Defence has requested an oral hearing on the Motion at the earliest opportunity in view of the complexity and importance of the issues raised.[178]

72. The general practice of the Tribunal is not to hear oral argument on motions prior to the trial unless good reason is shown for its need in the particular case.[179] A general assertion that the issues are complex and important is not, in the circumstances , such a reason. The Defence has not suggested that it could for some reason not fully address the issues in the written filings. The Trial Chamber also sees no need for oral argument upon this Motion. This request is therefore refused.

11. Reorganisation of indictment

73. The placing of the sections on the "Individual criminal responsibility" of the three accused, "General allegations", and "Additional facts" at the back of the indictment , following the specific counts, does not make for an easy understanding and use of the indictment. The indictment is also unnecessarily repetitive in certain instances . Although not defective for that, the Trial Chamber considers that the Prosecution be directed to reorganise the indictment and to redraft it to minimise the repetition of information and material facts. With respect to reorganising the indictment, the "General allegations" and "Additional facts" sections are to be moved to the front of the indictment to follow directly on the section on "The accused". The section on "Individual criminal responsibility" is also to be moved to the front of the indictment to directly follow the "Charges" section, but preceding the specific counts. Where necessary, the cross-references to other sections and paragraphs of the indictment must accordingly be changed.

12. Disposition

74. Pursuant to Rule 72, the Motion is hereby:

(a) Denied in part.

(b) Granted in part.

(c) The Prosecution is ordered to amend the indictment in the terms set out in this decision, and to reorganise and redraft the indictment in accordance with paragraph 73 of this decision.

(d) The amended and reorganised indictment is to be filed no later than 12:00 on 11 January 2002. A table indicating all the amendments and changes made to the indictment shall be filed by the same time (reorganisation table).

(e) The Defence is to file any complaints resulting from the amendments ordered to be made within fourteen days of the filing of the amended and reorganised indictment .

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

Done the seventh day of December 2001

At The Hague

The Netherlands

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Wolfgang Schomburg

Presiding Judge

[Seal of the Tribunal]

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1 - "Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 8 Oct 2001.
2 - "Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 22 Oct 2001 ("Response"); "Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment", 29 Oct 2001 ("Reply") (the Reply was filed by counsel for Mehmed Alagic, but counsel for the other accused on 5 Nov 2001 joined that Reply by filing the "Joint Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment"); "Request for Leave to File Supplement to Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment", 30 Oct 2001 ("Supplementary Response").
3 - *See* Decision on Challenge to Jurisdiction, 7 Dec 2001.
4 - Indictment, par 45 ("All acts and omissions alleged in this indictment occurred between 1 January 1993 and 31 January 1994 on the territory of

Bosnia and Herzegovina.").
5 - *Ibid*, pars 3, 29.
6 - *Ibid*, pars 6, 34, 35.
7 - *Ibid*, pars 9, 40, 41.
8 - Of 11 Sept 2001.
9 - Fax dated 26 Oct 2001 (filed with the Registry on 7 Dec 2001).
10 - *Prosecutor v Kupreskic and Others*, Case IT-95-16-A, Appeal Judgement, 23 October 2001.
11 - Supplementary Response, pars 1 and 13.
12 - Of 9 Nov 2001.
13 - The Practice Direction, IT/184 of 19 Jan 2001.
14 - *Kupreskic* Appeal Judgment, par 88.
15 - *Ibid* (with reference to Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute and Rule 47(C)).
16 - See *Ibid*; Arts 18(4), 21(2) and 21(4)(a) and (b) of the Statute; and Rule 47(C), which essentially restates Art 18(4).
17 - *Kupreskic* Appeal Judgment, par 88. It can be left open whether the view expressed by the Appeals Chamber is an *obiter dictum* only, and whether there may not be exceptional cases in which the Prosecution may be required to plead the evidence in an indictment. If the evidentiary material provided by the Prosecution during the pre-trial discovery process does not sufficiently identify the *evidence* upon which the prosecution relies to establish those material facts (see Rule 66), then – and only then – is it appropriate for an application to be made to the Trial Chamber for an order that the Prosecution supply particulars (and even then only if a request to the Prosecution for such particulars has not been satisfactorily answered) (*Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 Sept 2001, par 8; *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("Third *Brdjanin & Talic* Decision"), par 19; *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("First *Brdjanin & Talic* Decision"), par 27).
18 - *See also* Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993), p 255; and Frowein und Peukert, *Europäische MenschenRechtsKonvention: EMRK-Kommentar* (1996), p 295.
19 - Article 14(3)(a) of the ICCPR.
20 - Article 6(3)(a) of the ECHR provides in relevant part: "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him [...]."
21 - *Kupreskic* Appeal Judgment, par 89.
22 - First *Brdjanin & Talic* Decision, par 18. It is essential for the accused to know from the indictment just what that alleged proximity is: *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment, 23 Feb 2001 ("Second *Brdjanin & Talic* Decision"), par 13.
23 - *Prosecutor v Brdjanin & Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 12; First *Brdjanin & Talic* Decision, par 48.
24 - First *Brdjanin & Talic* Decision, par 48.
25 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19; *Prosecutor v Krajisnik*, Case IT-00-39-PT, Decision Concerning Preliminary Motion on the Form of the Indictment, 1 Aug 2000 ("*Krajisnik* Decision"), par 9; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 9.
26 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19; *Krajisnik* Decision, par 9.
27 - Statute, Art 21(4)(a) of the Statute; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 38.
28 - First *Brdjanin & Talic* Decision, par 19.
29 - See *Ibid*; *Prosecutor v Kvocka*, Case IT-99-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr 1999, par 17; *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18(A); *Krajisnik* Decision, par 9.
30 - Statute, Art 7(3); see First *Brdjanin & Talic* Decision, par 19 (rolling facts (b) and (c) together); *Krajisnik* Decision, par 9.
31 - *Kupreskic* Appeal Judgment, par 114.
32 - If the Defence is denied the material facts as to the nature of the nature of the accused's responsibility for the events pleaded until the pre-trial brief is filed, it is almost entirely incapacitated from conducting any meaningful investigation for trial until then (*see* Second *Brdjanin & Talic* Decision, pars 11-13).
33 - *Kupreskic* Appeal Judgment, par 92.
34 - *Ibid.*
35 - *Ibid.*
36 - Motion, pars 3-30.
37 - *Ibid*, pars 10-16; Reply, pars 7-10.
38 - Motion, pars 10, 12-15, 75(1).
39 - *Ibid*, par 14, fn 5.
40 - *Ibid*, par 75(1).
41 - Response, pars 7, 11 and 14.
42 - This amendment will make amending par 11 to specify whether all or some foreign Muslim fighters referred to themselves as "Mujahedin" or only those who were attached to the ABiH 3rd Corps Muslim Mountain Brigade unnecessary.
43 - Motion, pars 17-19; Reply, pars 11-14.
44 - Motion, pars 18-19.
45 - *Ibid*, par 75(2).
46 - Response, pars 7 and 11.
47 - Indictment, par 50.
48 - *Ibid*, pars 18, 19, 22, 24, 25, 27, 28, 49.
49 - Indictment, pars 32, 38.
50 - *Celebici* Appeal Judgment, par 256 (see also pars 196-198 and 266).
51 - *Ibid*, par 197.
52 - *Ibid.*
53 - Motion, pars 20-21; Reply, par 14.
54 - Motion, par 20.
55 - *Ibid.*
56 - *Ibid.*
57 - *Ibid*, par 75(3).

58 - Response, pars 7 and 11.
59 - Motion, pars 22-23; Reply, pars 15-16.
60 - Motion, par 23.
61 - *Ibid*, par 75(4).
62 - Response, pars 7 and 11.
63 - Motion, par 25; Reply, par 17. Although not referred to by the Defence, pars 18, 19, 22, 24, 25, 27 and 28 of the indictment appear to be relevant to this objection.
64 - Motion, par 25.
65 - *Ibid*, par 75(5).
66 - Response, pars 7 and 11.
67 - Motion, pars 26-30; Reply, par 18. Although not referred to by the Defence, pars 18, 19, 22, 24, 25, 27 and 28 of the indictment appear to be relevant to this objection.
68 - Motion, par 26.
69 - *Ibid.*
70 - *Ibid.*
71 - *Ibid*, par 27 (reference is made to the acts of "extremist" foreign Muslim fighters or Mujahedin. The Trial Chamber has nothing before it that would suggest that these fighters were "extremist". The use of discriminatory language is counter-productive to the maintenance of the decorum required for judicial proceedings).
72 - *Ibid.*
73 - Motion, pars 28-30 (with reference to indictment, par 19, as an example).
74 - Motion, par 30, fn 15.
75 - *Ibid*, par 75(6).
76 - Response, pars 7 and 11.
77 - *Celebici* Appeal Judgment, pars 239 and 313.
78 - Motion, par 26, fn 12.
79 - Indictment, par 46.
80 - Motion, par 44 (see also Reply, pars 25-26).
81 - Response, par 18.
82 - The army of the Bosnian Croat community in Bosnia and Herzegovina.
83 - Indictment, par 74.
84 - *Ibid*, par 73. Paragraphs 73 and 74 have to be read in conjunction with par 68 of the indictment.
85 - *Ibid*, par 72.
86 - Motion, par 44.
87 - *Ibid*, pars 44; 45 and 75(8).
88 - Response, par 18.
89 - Motion, par 46.
90 - *Ibid.*
91 - Response, par 19 (emphasis added).
92 - *See* par 8 of this decision.
93 - Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
94 - Geneva Convention IV, Art 2.
95 - Article 40 of Geneva Convention IV falls under the section concerned with aliens in the territory of a party to the conflict and it deals with work done by protected persons.
96 - Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
97 - Geneva Convention III, Art 2.
98 - Indictment, pars 47 and 48.
99 - Motion, par 47 (quoting from indictment, par 58).
100 - Motion, par 47.
101 - *Ibid*, par 50.
102 - *Ibid.*
103 - *Ibid.*
104 - Case IT-95-14/2-T, Judgement, 26 Feb 2001 ("*Kordic* Judgment").
105 - Motion, par 49.
106 - Response, par 19.
107 - *Ibid.*
108 - *Celebici* Appeal Judgment, par 258.
109 - *Ibid.*
110 - *Ibid.*
111 - Motion, par 51; Reply, pars 28-30.
112 - Motion, pars 52 and 75(9).
113 - Response, pars 21 and 22.
114 - *Ibid*, par 23.
115 - *Celebici* Appeal Judgment, par 400; *Prosecution v Delalic and Others*, Case IT-96-21-A, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, 20 Feb 2001, par 12. The *Kupreskic* Appeals Chamber recently confirmed this ruling (*Kupreskic* Appeal Judgment, pars 385 and 386).
116 - *See also* First *Brdjanin & Talic* Decision, pars 31-43.
117 - Motion, pars 54-56.
118 - *Ibid*, pars 54 and 55.
119 - *Ibid*, par 53.
120 - Response, pars 24-28.
121 - Third *Brdjanin & Talic* Decision, par 62.
122 - *Ibid.*
123 - *Ibid*, par 57.
124 - *Ibid.*
125 - *See* par 42 of this decision.

126 - From 14 Nov 1992 to 31 Oct 1993: indictment, par 29.
127 - Indictment, par 63.
128 - *Ibid*, par 64.
129 - *Ibid*, par 66.
130 - From 1 Jan 1993 to 20 July 1993; indictment, par 40.
131 - Indictment, par 40.
132 - Motion, par 58.
133 - *Ibid.*
134 - *Ibid.*
135 - *See* par 42 of this decision.
136 - Motion, pars 59-62. See par 3 of this decision for exact charges.
137 - *Ibid*, pars 59 and 60.
138 - *Ibid*, par 61.
139 - *See* par 3 of this decision.
140 - Motion, par 62.
141 - *Ibid.*
142 - *Ibid.*
143 - *See* par 42 of this decision.
144 - Motion, pars 63-66.
145 - *Ibid*, par 63.
146 - *See* par 42 of this decision.
147 - The specific relevant charge is count 6 (unlawful confinement of civilians, punishable under Arts 2(g) and 7(3) of the Statute. The other charges do not specifically relate to what the Defence refers to as "unlawful imprisonment", although "imprisonment" is referred to, *inter alia*, in the first sentence of par 19 of the indictment.
148 - Motion, par 64.
149 - *See* par 42 of this decision.
150 - Paragraph 21 provides very precise dates on which it is alleged that certain victims were killed (on 18 June 1993; 5 Aug 1993; and 20 Oct 1993 in relation to pars 21(b), (c) and (e), respectively), bar two allegations, namely, pars 21(a) and (d) (in May 1993; and in the beginning of Aug 1993, respectively).
151 - Paragraphs 19(a) (to at least Jan 1994); (ba) (to at least 23 Dec 1993); (bc) (to at least Dec 1993); (dd) (to at least 19 Mar 1994)
152 - Motion, par 65.
153 - *See* par 42 of this decision.
154 - Motion, par 66.
155 - *See* par 42 of this decision.
156 - Motion, par 67.
157 - *Ibid*, par 67.
158 - *See* par 42 of this decision.
159 - Motion, pars 68-74.
160 - *See* par 42 of this decision.
161 - Motion, par 68.
162 - *Ibid.*
163 - *Ibid*, pars 68 and 69 (reference is made to counts 1 to 6 (it appears to be an error, since count 6 does not include Dusina; it probably should have read as counts 1 to 5), which include Dusina, 26 Jan 1993; counts 6 to 10, which include Zenica Music School from 26 Jan 1993; counts 14 to 15, which include Zenica, Jan 1993; and counts 16 to 18, which include Dusina, Jan 1993.
164 - Motion, par 68.
165 - Indictment, pars 9 and 40.
166 - *Ibid*, pars 18 (counts 1 to 5), 19 (counts 6 to 10), 25 (counts 14 and 15), 27 (counts 16 to 18).
167 - *Ibid*, pars 18 (counts 1 to 5), which include a charge in relation to crimes allegedly committed in Dusina (Zenica municipality) on 26 Jan 1993; 19 (counts 6 to 10), which include a charge in relation to crimes allegedly committed in Zenica Music School from 26 Jan 1993; 25 (counts 14 to 15), which include a charge in relation to crimes allegedly committed in Zenica, Jan 1993; and 27 (counts 16 to 18), which include a charge in relation to crimes allegedly committed in Dusina, Jan 1993.
168 - Motion, par 70.
169 - *Ibid.*
170 - *Ibid.*
171 - *Ibid*, par 71.
172 - *Ibid*, par 73.
173 - *Ibid*, par 72.
174 - Indictment, pars 40 and 41.
175 - Response, pars 28-29.
176 - Reply, par 33.
177 - *See* par 12 of this decision.
178 - Motion, par 77.
179 - *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000, par 31.