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International Criminal Law

Mr. Kevin Riordan

Codification Division of the United Nations Office of Legal Affairs

INTERNATIONAL CRIMINAL LAW
MR. KEVIN RIORDAN

REQUIRED READINGS *(printed format)*

Legal instruments and documents

15. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006 228

Case law

16. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3 240

17. *Prosecutor* v. *Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ICTY Appeals Chamber, 2 October 1995 258

18. *Prosecutor* v. *Jean-Paul Akayesu, Judgement*, ICTR Trial Chamber 1, 2 September 1998 (summary) 284

19. *Prosecutor* v. *Anto Furundžija, Judgement*, ICTY Trial Chamber, 10 December 1998 (summary) 294

20. *Prosecutor* v. *Zejnil Delalić* et al., *Judgement*, ICTY Appeals Chamber, 20 February 2001 (summary) 298

21. *Prosecutor* v. *Dario Kordić and Mario Čerkez, Judgement*, ICTY Trial Chamber, 26 February 2001 (summary) 304

22. *Prosecutor* v. *Enver Hadžihasanović and Amir Kubura, Judgement*, ICTY Appeals Chamber, 22 April 2008 (summary) 308

23. *Prosecutor* v. *Alfred Musema, Judgement*, ICTR Trial Chamber, 27 January 2000 (summary) 314

24. *Prosecutor* v. *Thomas Lubanga Dyilo (ICC-01/04-01/06), Judgment*, ICC Trial Chamber I, 14 March 2012 (summary) 320

25. *Prosecutor* v. *Ante Gotovina and Mladen Markać, Judgement*, ICTY Appeals Chamber, 16 November 2012 (summary) 330

26. *Prosecutor* v. *Mathieu Ngudjolo Chui (ICC-01/04-02/12), Judgment*, ICC Trial Chamber II, 18 December 2012 (summary in French only) 336

    (for an unofficial summary of the case in English, please see http://www.internationalcrimesdatabase.org/Case/873/Ngudjolo/)

RECOMMENDED READINGS *(electronic format)*

Legal instruments and documents

1. Statute of the International Criminal Tribunal for the former Yugoslavia (as amended), 1993

2. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (as amended), 2010

3. Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, UNTAET/REG/2000/15, 6 June 2000

4. Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (with Statute) (United Nations Security Council resolution 1757 (2007) of 30 May 2007, annex)

5. United Nations Security Council resolution 1966 (2010) of 22 December 2010

Case law

6. *Prosecutor* v. *Zejnil Delalić* et al*., ICTY, 16 November 1998 ("Čelebići")* (summary)

COURSE OUTLINE - INTERNATIONAL CRIMINAL LAW

Course description

The course will focus on the four crimes most generally recognized as comprising international criminal law, namely: genocide, war crimes, crimes against humanity and aggression.

The course will examine the jurisprudence of international criminal tribunals, including the Nuremberg, Tokyo, Rwanda, and former Yugoslavia tribunals. More recent "hybrid" tribunals will be examined as will the genesis of the International Criminal Court. The course will consider the Rome Statute of the International Criminal Court, in particular the crimes set out in that Statute.

The course will also look at the special elements of international criminal liability including universal jurisdiction, command responsibility, joint criminal enterprise, duress and superior orders.

Objectives

At the conclusion of the course, students should be able to:

- Display an understanding of the underlying principles of international criminal law.
- Apply the principles of international criminal law to contemporary issues of concern to the international community.

Course content

The course structure will include the following topics:

1. Sources and principles of international criminal law
2. The concept of international criminal responsibility including individual responsibility, joint criminal enterprise and command responsibility
3. Aggression (crimes against the peace)
4. Crimes against humanity
5. Genocide
6. War crimes
7. Defences and excuses in international criminal law including superior orders
8. International criminal law – discussions and perspectives

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 1945

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945.

Full text

AGREEMENT

Whereas the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice;
And whereas the Moscow Declaration of 30 October 1943, on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;
And whereas this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;
Now therefore the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Art. 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Art. 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Art. 4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Art. 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Art. 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Art. 7. This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

In witness whereof the undersigned have signed the present Agreement.

Done in quadruplicate in London this eighth day of August 1945, each in English, French and Russian, and each text to have equal authenticity.

(Here follow signatures)

CHARTER

I : CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on 8 August 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Art. 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Art. 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

Art. 4.
(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.
(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.
(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive; provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of theTribunal.

Art. 5. In case of need and depending on the numbers of the matters to be Lied, other Tribunals may be set up; and the establishment, functions and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II : JURISDICTION AND GENERAL PRINCIPLES

Art. 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) ' Crimes against peace: ' namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) ' War crimes: ' namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) ' Crimes against humanity.- ' namely, 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 connection with any crime within the jurisdiction of the

Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Art. 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Art. 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.
After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Art. 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Art. 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Art. 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Art. 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III : COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Art. 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.
The Chief Prosecutors shall act as a committee for the following purposes:
(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
(b) to settle the final designation of major war criminals to be tried by the Tribunal,
(c) to approve the Indictment and the documents to be submitted therewith,
(d) to lodge the Indictment and the accompanying documents with the Tribunal,
(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.
The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Art. 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:
(a) investigation, collection and production before or at the Trial of all necessary evidence,
(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
(c) the preliminary examination of all necessary witnesses and of the Defendants,
(d) to act as prosecutor at the Trial,
(e) to appoint representatives to carry out such duties as may be assigned to them,
(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.
It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV : FAIR TRIAL FOR DEFENDANTS

Art. 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:
(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.
(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.
(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution.

V : POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Art. 17. The Tribunal shall have the power:
(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,
(b) to interrogate any Defendant,
(c) to require the production of documents and other evidentiary material,
(d) to administer oaths to witnesses,
(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Art. 18. The Tribunal shall:
(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,
(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Art. 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Art. 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Art. 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Art. 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Art. 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.
The function of Council for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Art. 24. The proceedings at the Trial shall take the following course:
(a) The Indictment shall be read in court.
(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or " not guilty."
(c) The Prosecution shall make an opening statement.
(d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.
(f) The Tribunal may put any question to any witness and to any Defendant, at any time.
(g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
(h) Defence shall address the court.
(i) The Prosecution shall address the court.
(j) Each Defendant may make a statement to the Tribunal.
(k) The Tribunal shall deliver judgment and pronounce sentence.

Art. 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI : JUDGMENT AND SENTENCE

Art. 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Art. 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Art. 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Art. 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof for such action as they may consider proper, having regard to the interests of justice.

VII : EXPENSES

Art. 30. The expenses of the Tribunal and of the Trials shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly resolution 95 (I) of 11 December 1946)

Requests the Secretary-General to provide such assistance as the Committee may require for its work.

Fifty-fifth plenary meeting,
11 December 1946.

• • •

At the same plenary meeting, the General Assembly, on the recommendation of the President, appointed the following States to serve on the Committee:

Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Yugoslavia.

95 (I). Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946,[1] to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

Fifty-fifth plenary meeting,
11 December 1946.

96 (I). The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the

[1] See page 187.

Invite le Secrétaire général à fournir à la Commission toute l'aide dont elle pourrait avoir besoin pour l'accomplissement de ses travaux.

Cinquante-cinquième séance plénière,
le 11 décembre 1946.

• • •

A la même séance plénière, l'Assemblée générale, sur la recommandation de son Président, décida de nommer membres de cette Commission les Etats suivants:

Argentine, Australie, Brésil, Chine, Colombie, Egypte, France, Inde, Pays-Bas, Panama, Pologne, Suède, Union des Républiques socialistes soviétiques, Royaume-Uni, Etats-Unis d'Amérique, Venezuela, Yougoslavie.

95 (I). Confirmation des principes de droit international reconnus par le statut de la Cour de Nuremberg

L'Assemblée générale,

Reconnaît l'obligation qui lui incombe aux termes de l'Article 13, paragraphe 1, alinéa a, de la Charte, de provoquer des études et de faire des recommandations en vue d'encourager le développement progressif et la codification du droit international;

Prend acte de l'Accord relatif à la création d'une Cour militaire internationale chargée de poursuivre et de châtier les grands criminels de guerre de l'Axe européen, Accord signé à Londres le 8 août 1945, ainsi que du statut joint en annexe; prend acte également du fait que des principes analogues ont été adoptés dans le statut de la Cour militaire internationale chargée de juger les grands criminels de guerre en Extrême-Orient, statut promulgué à Tokyo, le 19 janvier 1946;

En conséquence,

Confirme les principes de droit international reconnus par le statut de la Cour de Nuremberg, et par l'arrêt de cette Cour;

Invite la Commission chargée de la codification du droit international, créée par la résolution de l'Assemblée générale en date du 11 décembre 1946,[1] à considérer comme une question d'importance capitale les projets visant à formuler, dans le cadre d'une codification générale des crimes commis contre la paix et la sécurité de l'humanité ou dans le cadre d'un Code de droit criminel international, les principes reconnus dans le statut de la Cour de Nuremberg et dans l'arrêt de cette Cour.

Cinquante-cinquième séance plénière,
le 11 décembre 1946.

96 (I). Le crime de génocide

Le génocide est le refus du droit à l'existence à des groupes humains entiers, de même que l'homicide est le refus du droit à l'existence à un individu; un tel refus bouleverse la conscience hu-

[1] Voir page 187.

Convention on the Prevention and Punishment of the Crime of Genocide, 1948

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au Secrétariat de l'Organisation des Nations Unies

No. 1021

AUSTRALIA, BULGARIA, CAMBODIA, CEYLON, CZECHOSLOVAKIA, etc.

Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948

Official texts: Chinese, English, French, Russian and Spanish.
Registered ex officio *on 12 January 1951.*

AUSTRALIE, BULGARIE, CAMBODGE, CEYLAN, TCHÉCOSLOVAQUIE, etc.

Convention pour la prévention et la répression du crime de génocide. Adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1948

Textes officiels anglais, chinois, espagnol, français et russe.
Enregistrée d'office le 12 janvier 1951.

No. 1021. CONVENTION[1] ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948

THE CONTRACTING PARTIES,

HAVING CONSIDERED the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946[2] that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

RECOGNIZING that at all periods of history genocide has inflicted great losses on humanity; and

BEING CONVINCED that, in order to liberate mankind from such an odious scourge, international co-operation is required,

HEREBY AGREE AS HEREINAFTER PROVIDED:

[1] Came into force on 12 January 1951, the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession, in accordance with article XIII.

The following States deposited with the Secretary-General of the United Nations their instruments of ratification or accession on the dates indicated:

Ratifications

AUSTRALIA . . . . . 8 July 1949
By a notification received on 8 July 1949 the Government of Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia is responsible.
*CZECHOSLOVAKIA . . . . . 21 December 1950
ECUADOR . . . . . 21 December 1949
EL SALVADOR . . . . . 28 September 1950
ETHIOPIA . . . . . 1 July 1949
FRANCE . . . . . 14 October 1950
GUATEMALA . . . . . 13 January 1950
HAITI . . . . . 14 October 1950
ICELAND . . . . . 29 August 1949
ISRAEL . . . . . 9 March 1950
LIBERIA . . . . . 9 June 1950
NORWAY . . . . . 22 July 1949
PANAMA . . . . . 11 January 1950
*PHILIPPINES . . . . . 7 July 1950
YUGOSLAVIA . . . . . 29 August 1950

Accessions

BULGARIA . . . . . 21 July 1950
CAMBODIA . . . . . 14 October 1950
CEYLON . . . . . 12 October 1950
COSTA RICA . . . . . 14 October 1950
JORDAN . . . . . 3 April 1950
KOREA . . . . . 14 October 1950
LAOS . . . . . 8 December 1950
MONACO . . . . . 30 March 1950
POLAND . . . . . 14 November 1950
ROMANIA . . . . . 2 November 1950
SAUDI ARABIA . . . . . 13 July 1950
TURKEY . . . . . 31 July 1950
VIET-NAM . . . . . 11 August 1950

* With reservations. For text of reservations, see pp. 314-322 of this volume.

[2] United Nations, document A/64/Add. 1. 31 January 1947.

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, 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.

Article III

The following acts shall be punishable:

(*a*) Genocide;

(*b*) Conspiracy to commit genocide;

(*c*) Direct and public incitement to commit genocide;

(*d*) Attempt to commit genocide;

(*e*) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory

of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation[1] to sign has been addressed by the General Assembly.

[1] In accordance with resolution 368 (IV) (United Nations, document A/1251, 28 December 1949), adopted by the General Assembly at its 266th meeting on 3 December 1949, the Secretary-General was requested to despatch invitations to sign and ratify or to accede to the Convention..."to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice".

Accordingly, invitations were addressed to the following States on the dates indicated below:

6 December 1949
Albania
Austria
Bulgaria
Ceylon
Finland
Hungary
Ireland
Italy
Korea
Monaco
Portugal
Romania
Switzerland
Hashimite Kingdom of the Jordan

27 March 1950
Indonesia

10 April 1950
Liechtenstein

31 May 1950
Cambodia
Laos
Viet-Nam

20 December 1950
Germany

28 May 1951
Japan

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation[1] as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal*[2] and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

[1] See note page 282.
[2] See p. 312 of this volume.

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(*a*) Signatures, ratifications and accessions received in accordance with article XI;

(*b*) Notifications received in accordance with article XII;

(*c*) The date upon which the present Convention comes into force in accordance with article XIII;

(*d*) Denunciations received in accordance with article XIV;

(*e*) The abrogation of the Convention in accordance with article XV;

(*f*) Notifications received in accordance with article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 1973

Treaty Series

Treaties and international agreements
registered
or filed and recorded
with the Secretariat of the United Nations

VOLUME 1015

Recueil des Traités

Traités et accords internationaux
enregistrés
ou classés et inscrits au répertoire
au Secrétariat de l'Organisation des Nations Unies

United Nations · Nations Unies
New York, 1984

No. 14861

MULTILATERAL

International Convention on the Suppression and Punishment of the Crime of *Apartheid*. Adopted by the General Assembly of the United Nations on 30 November 1973

Authentic texts: English, French, Chinese, Russian and Spanish.

Registered ex officio *on 18 July 1976.*

MULTILATÉRAL

Convention internationale sur l'élimination et la répression du crime d'*apartheid*. Adoptée par l'Assemblée générale des Nations Unies le 30 novembre 1973

Textes authentiques : anglais, français, chinois, russe et espagnol.

Enregistrée d'office le 18 juillet 1976.

INTERNATIONAL CONVENTION[1] ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF *APARTHEID*

The States Parties to the present Convention,

Recalling the provisions of the Charter of the United Nations, in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering the Universal Declaration of Human Rights,[2] which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin,

Considering the Declaration on the Granting of Independence to Colonial Countries and Peoples,[3] in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Observing that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination,[4] States particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction,

Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide,[5] certain acts which may also be qualified as acts of *apartheid* constitute a crime under international law,

[1] Came into force on 18 July 1976 in respect of the following States, i.e. the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, in accordance with article XV (1). The instruments of ratification or accession were deposited as follows:

State	Date of deposit of the instrument of ratification or accession (a)
Benin	30 December 1974
Bulgaria	18 July 1974
Byelorussian Soviet Socialist Republic	2 December 1975
Chad	23 October 1974
Czechoslovakia	25 March 1976
Ecuador	12 May 1975
German Democratic Republic	12 August 1974
Guinea	3 March 1975
Hungary	20 June 1974
Iraq*	9 July 1975
Mongolia	8 August 1975
Poland	15 March 1976
Qatar	19 March 1975
Somalia	28 January 1975
Syrian Arab Republic	1 June 1976
Ukrainian Soviet Socialist Republic	10 November 1975
Union of Soviet Socialist Republics	26 November 1975
United Arab Emirates*	15 October 1975
United Republic of Tanzania	11 June 1976 a
Yugoslavia	1 July 1975

Subsequently, the Convention came into force in respect of the following State on the thirtieth day after the date of the deposit of its instrument of accession, in accordance with article XV (2).

State	Date of deposit of the instrument of accession
Libyan Arab Republic	9 July 1976

(With effect from 8 August 1976.)

* For the texts of the declarations made upon ratification, see p. 296 of this volume.

[2] United Nations, *Official Records of the General Assembly, Third Session*, Part I, p. 71.

[3] *Ibid., Fifteenth Session, Supplement No. 16* (A/4684), p. 66.

[4] United Nations, *Treaty Series*, vol. 660, p. 195

[5] *Ibid.*, vol. 78, p. 227.

Observing that, in the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity,[1] "inhuman acts resulting from the policy of *apartheid*" are qualified as crimes against humanity,

Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of *apartheid* are condemned as a crime against humanity,

Observing that the Security Council has emphasized that *apartheid* and its continued intensification and expansion seriously disturb and threaten international peace and security,

Convinced that an International Convention on the Suppression and Punishment of the Crime of *Apartheid* would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of *apartheid*,

Have agreed as follows:

Article I. 1. The States Parties to the present Convention declare that *apartheid* is a crime against humanity and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of *apartheid*.

Article II. For the purpose of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(*a*) denial to a member or members of a racial group or groups of the right to life and liberty of person:

  (i) by murder of members of a racial group or groups;

  (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

  (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(*b*) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

[1] United Nations, *Treaty Series*, vol. 754, p. 73.

(*d*) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

Article III. International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(*a*) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(*b*) directly abet, encourage or co-operate in the commission of the crime of *apartheid*.

Article IV. The State Parties to the present Convention undertake:

(*a*) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime;

(*b*) to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

Article V. Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

Article VI. The States Parties to the present Convention undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council aimed at the prevention, suppression and punishment of the crime of *apartheid*, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention.

Article VII. 1. The States Parties to the present Convention undertake to submit periodic reports to the group established under article IX on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention.

2. Copies of the reports shall be transmitted through the Secretary-General of the United Nations to the Special Committee on *Apartheid*.

Article VIII. Any State Party to the present Convention may call upon any competent organ of the United Nations to take such action under the Charter of the United Nations as it considers appropriate for the prevention and suppression of the crime of *apartheid*.

Article IX. 1. The Chairman of the Commission on Human Rights shall appoint a group consisting of three members of the Commission on Human Rights, who are also representatives of States Parties to the present Convention, to consider reports submitted by States Parties in accordance with article VII.

2. If, among the members of the Commission on Human Rights, there are no representatives of States Parties to the present Convention or if there are fewer than three such representatives, the Secretary-General of the United Nations shall, after consulting all States Parties to the Convention, designate a representative of the State Party or representatives of the States Parties which are not members of the Commission on Human Rights to take part in the work of the group established in accordance with paragraph 1 of this article, until such time as representatives of the States Parties to the Convention are elected to the Commission on Human Rights.

3. The group may meet for a period of not more than five days, either before the opening or after the closing of the session of the Commission on Human Rights, to consider the reports submitted in accordance with article VII.

Article X. 1. The States Parties to the present Convention empower the Commission on Human Rights:

(*a*) to request United Nations organs, when transmitting copies of petitions under article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination, to draw its attention to complaints concerning acts which are enumerated in article II of the present Convention;

(*b*) to prepare, on the basis of reports from competent organs of the United Nations and periodic reports from States Parties to the present Convention, a list of individuals, organizations, institutions and representatives of States whicb are alleged to be responsible for the crimes enumerated in article II of the Convention, as well as those against whom legal proceedings have been undertaken by States Parties to the Convention;

(*c*) to request information from the competent United Nations organs concerning measures taken by the authorities responsible for the administration of Trust and Non-Self-Governing Territories, and all other Territories to which General Assembly resolution 1514 (XV) of 14 December 1960 applies, with regard to such individuals alleged to be responsible for crimes under article II of the Convention who are believed to be under their territorial and administrative jurisdiction.

2. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV), the provisions of the present Convention shall in no way limit the right of petition granted to those peoples by other international instruments or by the United Nations and its specialized agencies.

Article XI. 1. Acts enumerated in article II of the present Convention shall not be considered political crimes for the purpose of extradition.

2. The States Parties to the present Convention undertake in such cases to grant extradition in accordance with their legislation and with the treaties in force.

Article XII. Disputes between States Parties arising out of the interpretation, application or implementation of the present Convention which have not been settled by negotiation shall, at the request of the States Parties to the dispute, be brought before the International Court of Justice, save where the parties to the dispute have agreed on some other form of settlement.

Article XIII. The present Convention is open for signature by all States. Any State which does not sign the Convention before its entry into force may accede to it.

Article XIV. 1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XV. 1. The present Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article XVI. A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article XVII. 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article XVIII. The Secretary-General of the United Nations shall inform all States of the following particulars:

(*a*) signatures, ratifications and accessions under articles XIII and XIV;

(*b*) the date of entry into force of the present Convention under article XV;

(*c*) denunciations under article XVI;

(*d*) notifications under article XVII.

Article XIX. 1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

United Nations Security Council resolution 827 (1993) of 25 May 1993

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/827 (1993)
25 May 1993

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on
25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective

functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

United Nations Security Council resolution 955 (1994) of 8 November 1994

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/955 (1994)*
8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting,
on 8 November 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

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* Reissued for technical reasons.

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. Considers that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. Requests the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6. Decides 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, and subject to the conclusion of appropriate arrangements between

the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and

decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. Decides to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. Decides to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. 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.

3. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(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.

Article 4

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

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. 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 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 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

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 person, 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 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 International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9

Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only 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 International Tribunal for Rwanda 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

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

Article 12

Qualification and election 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. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of 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 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such

staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

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 International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. 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 may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

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, the accused 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 International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

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 persons, as designated by the International Tribunal for Rwanda. Such

imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

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.

Article 28

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29

The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

The crime of aggression (Resolution RC/Res.6, Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010)

Resolution RC/Res.6*

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6
The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

* See Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at http://treaties.un.org.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*

2. *The following text is inserted after article 8 of the Statute:*

Article 8 *bis*
Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) 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 the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. *The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. *The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Annex II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), 2002

[ENGLISH TEXT — TEXTE ANGLAIS]

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 who bear the greatest responsibility 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 a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where 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) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) 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 three-year term and shall be eligible for re-appointment.

5. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge 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 three-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 prosecutions 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 three-year term and shall be eligible for re-appointment.

Article 5. Premises

The Government shall assist in the provision of 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

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Article 7. Management Committee

It is the understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

The management committee will include representatives of interested States that contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary-General.

Article 8. 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 9. 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 10. 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.

Article 11. 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 12. 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 13. 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 14. 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.

d. Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Article 15. 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. The provisions of article 13, paragraph 2(a) and (d), shall apply to them.

Article 16. 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 17. 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 18. Working language

The official working language of the Special Court shall be English.

Article 19. 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 of those already in custody shall be initiated.

3. In the initial phase, judges of the Trial Chamber and the Appeals Chamber shall be convened on an ad hoc basis for dealing with organizational matters, and serving when required to perform their duties.

4. Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed.

Article 20. 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 21. 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 requirements for entry into force have been complied with.

Article 22. Amendment

This Agreement may be amended by written agreement between the Parties.

Article 23. Termination

This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

In witness whereof, the following duly authorized representatives of the United Nations and of the Government of Sierra Leone have signed this Agreement.

Done at Freetown, on 16 January 2002 in two originals in the English language.

For the United Nations:

HANS CORELL

For the Government of Sierra Leone:

Solomon E. Berewa

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

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

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) Conscripting or enlisting children under the age of 15 years into armed forces or groups or 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, contrary 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 no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she 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, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall 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 to 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 one or more 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 not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber, 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 Chamber, 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. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge 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 three-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 who bear the greatest responsibility 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 three-year term and shall be eligible for re-appointment. 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 prosecutions 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 three-year term and be eligible for re-appointment.

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 the 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 Criminal 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.

United Nations Security Council resolution 1400 (2002) of 28 March 2002

United Nations S/RES/1400 (2002)

Security Council

Distr.: General
28 March 2002

Resolution 1400 (2002)

Adopted by the Security Council at its 4500th meeting, on 28 March 2002

The Security Council,

Recalling its previous resolutions and the statements of its President concerning the situation in Sierra Leone,

Affirming the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone,

Welcoming the meeting of the Mano River Union Presidents held in Rabat on 27 February 2002 at the invitation of His Majesty the King of Morocco,

Welcoming the further progress made in the peace process in Sierra Leone, including the lifting of the state of emergency, commending the positive role of the United Nations Mission in Sierra Leone (UNAMSIL) in advancing the peace process, and calling for its further consolidation,

Encouraging the Mano River Union Women's Peace Network and other civil society initiatives to continue their contribution towards regional peace,

Determining that the situation in Sierra Leone continues to constitute a threat to peace and security in this region,

Expressing its concern at the fragile situation in the Mano River region, the substantial increase in refugees and the humanitarian consequences for the civilian, refugee and internally displaced populations in the region,

Emphasizing the importance of free, fair, transparent and inclusive elections, and welcoming the progress made by the Government of Sierra Leone and the National Electoral Commission of Sierra Leone in preparing for elections, particularly with voter registration,

Reiterating the importance of the effective extension of State authority throughout the country, the reintegration of ex-combatants, voluntary and unhindered return of refugees and internally displaced persons, full respect for human rights and the rule of law, and effective action on impunity and accountability, paying special attention to the protection of women and children, and stressing continued United Nations support for the fulfilment of these objectives,

Welcoming the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the recommendations of the Planning Mission on the Establishment of the Special Court for Sierra Leone (S/2002/246) and the report of the Secretary-General of 14 March 2002 (S/2002/267) that UNAMSIL should provide administrative and related support to the Special Court,

Emphasizing the importance of the continuing support of UNAMSIL to the Government of Sierra Leone in the consolidation of peace and stability after the elections,

Having considered the report of the Secretary-General of 14 March 2002 (S/2002/267),

1. *Decides* that the mandate of UNAMSIL shall be extended for a period of six months from 30 March 2002;

2. *Expresses its appreciation* to those Member States providing troops and support elements to UNAMSIL and those who have made commitments to do so;

3. *Welcomes* the military concept of operations for UNAMSIL for 2002 outlined in paragraph 10 of the Secretary-General's report of 14 March 2002 (S/2002/267), and requests the Secretary-General to inform the Council at regular intervals on progress made by UNAMSIL in the implementation of its key aspects and in the planning of its subsequent phases;

4. *Encourages* the Government of Sierra Leone and the Revolutionary United Front (RUF) to strengthen their efforts towards full implementation of the Ceasefire Agreement signed in Abuja on 10 November 2000 (S/2000/1091) between the Government of Sierra Leone and the RUF and reaffirmed at the meeting of the Economic Community of West African States (ECOWAS), the United Nations, the Government of Sierra Leone and the RUF at Abuja on 2 May 2001;

5. *Encourages* the Government of Sierra Leone and the RUF to continue to take steps towards furthering of dialogue and national reconciliation, and, in this regard, stresses the importance of the reintegration of the RUF into Sierra Leone society and the transformation of the RUF into a political party, and demands the immediate and transparent dismantling of all non-government military structures;

6. *Welcomes* the formal completion of the disarmament process, expresses concern at the serious financial shortfall in the multi-donor Trust Fund for the disarmament, demobilization and reintegration programme, and urges the Government of Sierra Leone to seek actively the urgently needed additional resources for reintegration;

7. *Emphasizes* that the development of the administrative capacities of the Government of Sierra Leone is essential to sustainable peace and development, and to the holding of free and fair elections, and therefore urges the Government of Sierra Leone, with the assistance of UNAMSIL, in accordance with its mandate, to accelerate the restoration of civil authority and public services throughout the country, in particular in the diamond mining areas, including the deployment of key government personnel and police and the deployment of the Sierra Leone Army on border security tasks, and calls on States, international organizations and non-governmental organizations to assist in the wide range of recovery efforts;

8. *Welcomes* the establishment of the electoral component of UNAMSIL and the recruitment of 30 additional civilian police advisers to support the Government of Sierra Leone and the Sierra Leone police in preparing for elections;

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9. *Welcomes* the signature on 16 January 2002 of the Agreement between the Government of Sierra Leone and the United Nations on the Establishment of a Special Court for Sierra Leone, as envisaged by resolution 1315 (2000) of 14 August 2000, urges donors urgently to disburse their pledges to the Trust Fund for the Special Court, looks forward to the Court expeditiously beginning its operations and endorses UNAMSIL's providing, without prejudice to its capabilities to perform its specified mandate, administrative and related support to the Special Court on a cost-reimbursable basis;

10. *Welcomes* progress made by the Government of Sierra Leone, together with the Secretary-General, the United Nations High Commissioner for Human Rights and other relevant international actors, in establishing the Truth and Reconciliation Commission, and urges donors urgently to commit funds to it;

11. *Welcomes* the summit meeting of the Mano River Union Presidents held in Rabat on 27 February 2002, urges the Presidents to continue dialogue and to implement their commitments to building regional peace and security, and encourages the ongoing efforts of ECOWAS towards a lasting and final settlement of the crisis in the Mano River Union region;

12. *Expresses its serious concern* at the violence, particularly sexual violence, suffered by women and children during the conflict in Sierra Leone, and emphasizes the importance of addressing these issues effectively;

13. *Expresses its serious concern* at the evidence UNAMSIL has found of human rights abuses and breaches of humanitarian law set out in paragraphs 38 to 40 of the Secretary-General's report of 14 March 2002 (S/2002/267), encourages UNAMSIL to continue its work and in this context requests the Secretary-General to provide a further assessment in his September report, particularly regarding the situation of women and children who have suffered during the conflict;

14. *Expresses its serious concern* at allegations that some United Nations personnel may have been involved in sexual abuse of women and children in camps for refugees and internally displaced people in the region, supports the Secretary-General's policy of zero tolerance for such abuse, looks forward to the Secretary-General's report on the outcome of the investigation into these allegations, and requests him to make recommendations on how to prevent any such crimes in future, while calling on States concerned to take the necessary measures to bring to justice their own nationals responsible for such crimes;

15. *Encourages* the continued support of UNAMSIL, within its capabilities and areas of deployment, for returning refugees and displaced persons, and urges all stakeholders to continue to cooperate to this end to fulfil their commitments under the Abuja Ceasefire Agreement;

16. *Welcomes* the Secretary-General's intention to keep the security, political, humanitarian and human rights situation in Sierra Leone under close review and to report to the Council, after due consultations with troop-contributing countries, with any additional recommendations, and requests in particular the Secretary-General to submit before 30 June 2002 an interim report assessing the post-electoral situation and the prospects for peace consolidation;

17. *Decides* to remain actively seized of the matter.

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006

Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

CHAPTER I
GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II
COMPETENCE

Article 2 new

Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3 new

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;

- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

Article 6
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

Article 7
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER III
COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9 new
The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

CHAPTER IV
APPOINTMENT OF JUDGES

Article 10 new
The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11 new
The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12
All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

Article 13
Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS

Article 14 new
1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

Article 15
The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

CHAPTER VI
CO-PROSECUTORS

Article 16
All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17 new
The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

Article 18 new
The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19
The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20 new
The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

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In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21 new
The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings.
In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

Article 22 new
Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

CHAPTER VII
INVESTIGATIONS

Article 23 new
All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24 new
During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

Article 25
The Co-Investigating Judges shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26
The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. These Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

Article 27 new
All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

Article 28
The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

CHAPTER VIII
INDIVIDUAL RESPONSIBILITY

Article 29
Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior 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.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX
OFFICE OF ADMINISTRATION

Article 30
The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31 new
The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

Article 32
All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS

Article 33 new
The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 34 new
Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

Article 35 new
The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
c. to be tried without delay;
d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
g. not to be compelled to testify against themselves or to confess guilt.

Article 36 new
The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

Article 37 new
The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

CHAPTER XI
PENALTIES

Article 38
All penalties shall be limited to imprisonment.

Article 39
Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

CHAPTER XII
AMNESTY AND PARDONS

Article 40 new
The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES

Article 41
The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961

Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42 new
1. Cambodian judges, the Co-Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded 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 Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded in addition:
   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 co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
   b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
   c. immunity from immigration restriction;
   d. 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 Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:
   a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
   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 their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration and in general all

documents and materials made available to, belonging to, or used by them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV
LOCATION OF THE EXTRAORDINARY CHAMBERS

Article 43 new
The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

CHAPTER XV
EXPENSES

Article 44 new
The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;
2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;
3. The defence counsel may receive fees for mounting the defence;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

CHAPTER XVI
WORKING LANGUAGES

Article 45 new
The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

CHAPTER XVII
ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR PROSECUTORS

Article 46 new
In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates, or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII
EXISTENCE OF THE COURT

Article 47
The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.

CHAPTER XIX
AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA

Article 47 bis new
Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of

Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

FINAL PROVISION

Article 48
This law shall be proclaimed as urgent.

International Court of Justice

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo *v.* Belgium)
Judgment

I.C.J. Reports 2002

INTERNATIONAL COURT OF JUSTICE

YEAR 2002

2002
14 February
General List
No. 121

14 February 2002

CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia *" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.*

* *

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita *rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.*

* *

Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

* *

Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: *President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges* ad hoc BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic,
Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain,
Mr. Moka N'Golo, Bâtonnier,
Mr. Djeina Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,

as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,

as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,

as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as "the Congo") filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as "Belgium") in respect of a dispute concerning an "international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi".

In that Application the Congo contended that Belgium had violated the "principle that a State may not exercise its authority on the territory of another State", the "principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations", as well as "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

In order to found the Court's jurisdiction the Congo invoked in the aforementioned Application the fact that "Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo".

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition"

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request

by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Kombe,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

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10. In its Application, the Congo formulated the decision requested in the following terms:

> "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

> "In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

in the Counter-Memorial:

> "For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.
>
> If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

> "In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
>
> 1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
> 2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
> 3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
> 4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-

rant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant *in absentia*" against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which

the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form [of these Belgian proposals]." It added that "these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a

"[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been

recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* *

23. The first objection presented by Belgium reads as follows:

> "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute

existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia* v. *France*) (*New Zealand* v. *France*), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "[seek] an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently

become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 23-24, para. 38; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17, para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised

of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

> "That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case."

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be "without object" (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw "no reason to allow the continuance of proceedings which it knows are bound to be fruitless" (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Mont-*

real Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

> "That the case as it now stands is materially different to that set out in the [Congo]'s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

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36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (*Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

> "That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed

(see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

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41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo]'s final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

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43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (*Asylum, Judgment, I.C.J. Reports 1950*,

p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

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44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

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47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability

and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

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51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain

holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

> "The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for

example, Article 7, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a "private" capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

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56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

> "[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

"no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related" to that of the Belgian State. The Congo observes that, in such circumstances, "there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere".

65. Belgium rejects the Congo's argument on the ground that "the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]".

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly "to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium", the warrant had no legal effect unless it was validated or completed by some prior act "requiring the arrest of Mr. Yerodia by the relevant authorities in a third State". Belgium further argues that "[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia's] criminal immunity", but that "the Party directly responsible for that infringement would have been that State and not Belgium".

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67. The Court will first recall that the "international arrest warrant *in absentia*", issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,

stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

> "— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
> — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

> "These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.
>
> The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials."

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement" and explains as follows:

> "Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this

undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority . . . to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringe[ment of] the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

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72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points

out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

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75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

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78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges* ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge* ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: *President* Guillaume; *Vice-President* Shi *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge* ad hoc Bula-Bula;

AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge* ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.

(Initialled) Ph.C.

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Duško Tadić a/k/a "Dule"
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995

Case No. IT-94-1

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

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

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

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

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

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

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

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

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

B. Jurisdiction Of The Appeals Chamber

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

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

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

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

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

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision

which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.

[. . .]

So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

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

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

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

C. Grounds Of Appeal

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

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

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

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

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

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

A. Meaning Of Jurisdiction

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

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

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (*ratione temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word itself, *jurisdictio* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

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

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

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

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

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

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

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

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

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

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But this is beside the point. The question before the Appeals Chamber is whether the International Tribunal, in exercising this "incidental" jurisdiction, can examine the legality of its establishment by the Security Council, solely

for the purpose of ascertaining its own "primary" jurisdiction over the case before it.

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

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

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

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

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

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

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

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

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

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

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

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

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

This dictum applies almost literally to the present case.

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

C. The Issue Of Constitutionality

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

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

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

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

> 1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
> 2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
> 3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

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

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

this Chapter. It provides:

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

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

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

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

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

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

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

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

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

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

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

2. The Range of Measures Envisaged Under Chapter VII

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

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

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

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

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

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

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

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that

Chapter, and more particularly in Articles 41 and 42 which detail these measures;

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

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

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

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

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such

measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

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

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

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

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

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

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

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

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

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

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando*.

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

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

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

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

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

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

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by

the Counsel for Du{ko Tadic, that the said Du{ko 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 Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

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

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

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

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

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

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

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

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

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

Appellant added that:

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

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

B. Sovereignty Of States

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

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

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

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

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *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), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

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

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

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

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

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

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

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

collaborated with, the International Tribunal, as witnessed by:

> a) Letter dated 10 August 1992 from the President of the Republic of Bosnia and Herzegovina addressed to the Secretary-General of the United Nations (U.N. Doc. E/CN.4/1992/S-1/5 (1992));
>
> b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
>
> c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

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

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

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

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

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

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

> "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]
>
> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

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

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

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

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

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

The Trial Chamber was fully justified in writing:

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

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

C. *Jus De Non Evocando*

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

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

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

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

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

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

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

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

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

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

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

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

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

IV. LACK OF SUBJECT-MATTER JURISDICTION

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

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

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

A. Preliminary Issue: The Existence Of An Armed Conflict

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

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

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

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

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12

December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter *Protocol I*).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

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

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

The same provision specifies in paragraph 2 that:

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

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

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

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

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

1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument *a contrario* based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (*see below*, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions

suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

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

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

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

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

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

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

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

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

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

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

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

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

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

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

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

(b) Article 3

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

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

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

(i) The Interpretation of Article 3

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

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

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

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

The American delegate stated the following:

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

The British delegate stated:

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

It should be added that the representative of Hungary stressed:

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

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

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

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

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

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

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

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

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

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

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

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (see below, para. 143);
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

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

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the

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

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

a. **General**

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

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

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

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

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

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

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

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

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no

military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

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

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

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

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

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

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

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

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

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

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

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

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

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

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international

armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

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

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

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

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

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

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

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

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

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

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

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

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

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

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

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

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

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

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

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

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

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

> "The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." (4 European Political Cooperation Documentation Bulletin, (1988) at 92.)

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

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

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

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

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

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

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

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

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

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

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. (On these and other limitations of international humanitarian law governing civil strife, see the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 **Annuaire Suisse de Droit International** (1982) 137 at 145-49.))

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

(iv) **Individual Criminal Responsibility In Internal Armed Conflict**

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

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

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

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

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2). Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. (Socialist Federal Republic of Yugoslavia, Federal Criminal Code, arts. 142-43 (1990).) (It should be noted that by a decree having force of law, of 11 April 1992, the Republic of Bosnia and Herzegovina has adopted that Criminal Code, subject to some amendments.) (2 Official Gazette of the Republic of Bosnia and Herzegovina 98 (11 April 1992)(translation).) Furthermore, on 26 December 1978 a law was passed by the Yugoslav Parliament to implement the two Additional Protocols of 1977 (Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, Medunarodni Ugovori, at 1083 (26 December 1978).) as a result, by virtue of Article 210 of the Yugoslav Constitution, those two Protocols are "directly applicable" by the courts of Yugoslavia. (Constitution of the Socialist Federal Republic of Yugoslavia, art. 210.) Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (***infractions graves***) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" (***[c]onstituent des crimes de droit international***) within the jurisdiction of Belgian criminal courts (Article 7). (*Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge, (5 August 1993).)

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

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

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

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

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

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

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

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

(v) **Conclusion**

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

(c) Article 5

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

> "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
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> (a) murder;
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> (b) extermination;
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> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts."

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

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it

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

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

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

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

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

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

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

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

V. DISPOSITION

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

The Appeals Chamber

(1) By 4 votes to 1,

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

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

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

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

(4) By 4 votes to 1

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

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

AGAINST: *Judge* Sidhwa

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

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

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

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow

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1 "Trattasi di norme [concernenti i reati contro le leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli orrori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi delinque, dovunque esso si trovi....
..[I] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poichè non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).
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2 ."..[E]n raison de leur nature, les crimes contre l'humanité (...) ne relèvent pas seulement du droit interne français, mais encore d'un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

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

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

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

6 "Dentro de esta l'nea de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a&uacuten no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, comœn a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano encualquier tiempo y lugar."
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7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."
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8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffend sein könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nunmehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entschiedenheit die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
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9 "1209. Schwere Verletzungen des humanitären Völkerrechts sind insbesondere; -Straftaten gegen geschützte Personen (Verwundete, Kranke, Sanitätspersonal, Militärgeistliche, Kriegsgefangene, Bewohner besetzter Gebiete, andere Zivilpersonen), wie vorsätzliche Tötung, Verstümmelung, Folterung oder unmenschliche Behandlung einschliesslich biologischer Versuche, vorsätzliche Verursachung grosser Leiden, schwere Beeinträchtingung der körperlichen Integrität oder Gesundheit, Geiselnahme (1 3, 49-51; 2 3, 50, 51; 3 3, 129, 130; 4 3, 146, 147; 5 11 Abs. 2, 85 Abs. 3 Buchst. a)
[. . .]
-Verhinderung eines unparteiischen ordentlichen Gerichtsverfahrens (1 3 Abs. 3 Buchst. d; 3 3 Abs. 1d; 5 85 Abs. 4 Buschst. e)."
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International Criminal Tribunal for Rwanda

Prosecutor *v.* Jean-Paul Akayesu
Judgement of 2 September 1998 (summary)

Case No. ICTR-96-4-T

ICTR - Jean-Paul Akayesu, summary of the Judgement

Source: ICTR-96-4-T Delivered on 2 September 1998

1. Trial Chamber 1 is sitting on this day, 2 September 1998, to deliver its judgment in the case " The Prosecutor versus Jean-Paul Akayesu", case no. ICTR-96-4-T.

2. The Judgment, which is already available in French and English, the two official languages of the Tribunal, is a voluminous document of almost three hundred pages. The Chamber therefore considers that it would be appropriate to limit its delivery to a summary of the content of its Judgment and its Verdict as regards the guilt of Jean-Paul Akayesu on each count with which he is charged.

3. In its Judgment, the Chamber first presents a brief profile of the International Criminal Tribunal for Rwanda, which was established by the United Nations Security Council for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994. The proceedings before the Tribunal are governed by its Statute annexed to Resolution 955 of the Security Council and its Rules of Procedure and Evidence .The ratione materiae jurisdiction of the Tribunal is to prosecute persons charged with genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of Victims in Times of War and of Additional Protocol II thereto of 8 June 1977.

4. The Chamber then summarizes the proceedings of the case. It is shown that Jean-Paul Akayesu was arrested in Zambia on 10 October 1995. On 16 February 1996, Judge William Sekule confirmed the Indictment submitted by the Prosecutor against Jean-Paul Akayesu. In all, the said Indictment covers 13 counts relating to genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977.

5. At the time he confirmed the Indictment, Judge William Sekule also issued a warrant of arrest, accompanied by an order for the continued detention of the Accused. Pursuant to this order, Akayesu was transferred from Zambia to Arusha on 26 May 1996, to be detained at the Detention Facility of the Tribunal.

6. Jean-Paul Akayesu made his initial appearance before this Chamber on 30 May 1996. At that time, he pleaded not guilty to each of the counts charged. The trial on the merits opened on 9 January 1997. During the trial, the Chamber heard forty-two witnesses called by the parties. The proceedings generated more than 4000 pages of transcripts and 125 documents entered in evidence.

7. In the course of the trial on 17 June 1997, the Chamber granted the Prosecutor leave to amend the Indictment in order to add three new counts relating to allegations of rape and sexual violence, to which several witnesses had testified earlier during their appearance before the Chamber. Jean-Paul Akayesu also pleaded not guilty to the counts of rape and other inhumane acts constituting crimes against humanity and other outrages upon personal dignity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

8. In its Judgment, the Chamber then gives a profile of the Accused, the responsibilities he had in Taba and the line of defence that he adopted during his trial.

9. Jean-Paul Akayesu, a Rwandan national, was born in 1953. He is married, with five children. Prior to becoming bourgmestre of Taba commune, in the prefecture of Gitarama, in Rwanda, he was a teacher, then an inspector of schools. Akayesu entered politics in 1991, during the establishment of the Mouvement Démocratique Républicain (MDR), of which he is one of the founding members. He was Chairman of the local wing of the MDR in Taba commune, which a vast majority of the population joined. In April 1993, Akayesu, whose candidacy was supported by several key figures and influential groups in the commune, was elected bourgmestre of Taba. He held that position until June 1994, when he fled Rwanda.

10. Based on the evidence submitted to it, the Chamber notes that, in Rwanda, the bourgmestre was traditionally treated with a lot of deference by the people and that he had extensive powers. Akayesu appears to have discharged his various responsibilities relatively well until the period of the events described in the Indictment and to have been a respected bourgmestre.

11. In the opinion of the Chamber, the Defence case, in essence, is that he did not commit , order to be committed or in any way aid and facilitate the acts with which he is charged in the Indictment. Akayesu concedes, nonetheless, that massacres aimed mainly at the Tutsi took place in Taba commune in 1994. The Defence argues that Jean-Paul Akayesu was helpless to prevent the commission of such acts, because the balance of force in the commune was in favour of the Interahamwe, who were under the strict authority of one Silas Kubwimana. The Defence argues further that the Accused was allegedly so harassed by the Interahamwe that he himself had to flee Taba temporarily. It submits that as soon as the massacres became widespread, the Accused was stripped of all authority and lacked the means to stop the killings. The Defence stated further that Jean-Paul Akayesu could not be required to be a hero, to lay down his life in futile attempt to prevent the massacres. As concerns acts of sexual violence and rape which were allegedly committed in Taba, Jean-Paul Akayesu maintains that he never heard of them and considers that they never even took place.

12. Before rendering its findings on the acts with which Akayesu is charged and the applicable law, the Chamber is of the opinion that it would be appropriate, for a better understanding of the events alleged in the Indictment, to briefly summarise the history of Rwanda. To this end, it recalled the most important events in the country's history, from the pre-colonial period up to 1994, reviewing the colonial period and the "Revolution" of 1959 by Grégoire Kayibanda. The Chamber most particularly highlighted the military and political conflict between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic

Front(RPF) and its armed wing, from 1990. This conflict led to the signing of the Arusha Peace Accords and the deployment of a United Nations peacekeeping force, UNAMIR.

13. The Chamber then considered whether the events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, as some maintain, or whether the massacres that occurred between April and July 1994 constituted genocide. To that end, and even if the Chamber later goes back on its definition of genocide, it should be noted that genocide means, as defined in the Convention for the Prevention and Punishment of the Crime of Genocide, as the act of committing certain crimes, including the killing of members of the group or causing serious physical or mental harm to members of the group with the intent to destroy, in in whole or in part, a national, ethnical, racial or religious group, as such.

14. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings took place during this period throughout the country. Dr. Zachariah, who appeared as an expert witness before this Tribunal, described the piles of bodies he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. He saw many wounded people who, according to him, were mostly Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, the ankle and also to the Achilles' tendon to prevent them from fleeing. Similarly, the testimony of Major-General Dallaire, former Commander of UNAMIR, before the Chamber indicated that, from 6 April 1994, the date of the crash that claimed the life of President Habyarimana, members of FAR and the Presidential Guard were going into houses in Kigali that had been previously identified in order to kill. Another witness, the British camer
aman, Simon Cox, took photographs of bodies in various localities in Rwanda, and mentioned identity cards strewn on the ground, all of which were marked "Tutsi".

15. Consequently, in view of these widespread killings the victims of which were mainly Tutsi, the Trial Chamber is of the opinion that the first requirement for there to be genocide has been met, to wit, killing and causing serious bodily harm to members of a group. The second requirement is that these killings and serious bodily harm be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

16. In the opinion of the Chamber, many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi people. In this connection, Alison DesForges, a specialist historian on Rwanda, who appeared as an expert witness, stated as follows: " on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that- as they said on certain occasions- their children , later on , should not know what a Tutsi looked like , unless they referred to history books". This testimony given by Dr. DesForges was confirmed by two prosecution witnesses, who testified separately before the Tribunal that one Silas Kubwimana said during a public meeting chaired by the Accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like. Dr. Zachariah also testified
that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Dr. Alison DesForges stated that numerous Tutsi corpses were systematically thrown into the River Nyabarongo, a tributary of the Nile, as seen, incidentally, in several photographs shown in court throughout the trial. She explained that the intent in that gesture was "to send the Tutsi back to their origin", to make them "return to Abyssinia", in accordance with the notion that the Tutsi are a "foreign" group in Rwanda, believed to have come from the Nilotic regions.

17. Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Many testimonies given before the Chamber concur on the fact that it was the Tutsi as members of an ethnic group who were targeted in the massacres. General Dallaire, Doctor Zachariah and, particularly, the Accused himself, unanimously stated so before the Chamber.

18. Numerous witnesses testified before the Chamber that the systematic checking of identity cards, on which the ethnic group was mentioned, made it possible to separate the Hutu from the Tutsi, with the latter being immediately arrested and often killed, sometimes on the spot, at the roadblocks which were erected in Kigali soon after the crash of the plane of President Habyarimana, and thereafter everywhere in the country.

19. Based on the evidence submitted to the Chamber, it is clear that the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters. The Chamber concludes that, alongside the conflict between the RAF and the RPF, genocide was committed in Rwanda in 1994 against the Tutsi as a group. The execution of this genocide was probably facilitated by the conflict, in the sense that the conflict with the RPF forces served as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together through the notion widely disseminated, particularly by Radio Television Libre des Mille Collines (RTLM), to the effect that every Tutsi was allegedly an accomplice of the RPF soldiers or "Inkotanyi". However, the fact that the genocide
occurred while the RAF were in conflict with the RPF, obviously, cannot serve as a mitigating circumstance for the genocide.

20. Consequently, the Chamber concludes from all the foregoing that it was, indeed, genocide that was committed in Rwanda in 1994, against the Tutsi as a group. The Chamber is of the opinion that the genocide appears to have been meticulously organized. In fact, Dr. Alison Desforges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres". Some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr. Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names.

21. The Chamber holds that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children.

22. Having said that, the Chamber then recalled that the fact that genocide was, indeed, committed in Rwanda in 1994, and more particularly in Taba, cannot influence it in its findings in the present matter. It is the Chamber's responsibility alone to assess the individual criminal responsibility of the Accused, Jean-Paul Akayesu, for the crimes alleged against him, including genocide, for which the Prosecution has to show proof. Despite the indisputable atrociousness of the crimes and the emotions evoked in the international community, the judges have examined the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.

23. The Chamber then turned to the question of assessment of evidence. The evidence produced by the parties to the case was mainly testimonial. Yet, human testimony often has the shortcoming of being eminently fragile and fallible. The Chamber considered the credibility of the testimonies, all the more so as three problems were posed: firstly, the fact that most of the witnesses directly experienced the terrible events they were narrating, and that such trauma could have an impact on their testimonies; secondly, the impact of cultural and social factors on communication with the witnesses; and thirdly, the difficulties in interpreting the statements made by the witnesses, most of whom spoke in Kinyarwanda. Despite the difficulties experienced, the Chamber wishes, in this regard, to thank each witness, once again, for his/her deposition at the hearing and commends the strength and courage of survivors, who have narrated the extremely traumatic experiences they had, sometimes rekindling extremely painful emotio
ns. Their testimonies were invaluable to the Tribunal in its search for the truth on the events that happened in Taba commune in 1994.

24. The Chamber then ruled on the admissibility of some evidence. It concluded, in essence, in accordance with the Statute and Rules of Procedure and Evidence, that the Chamber applies the rules which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law. It noted, in particular that when only one testimony is presented on a fact, it is not bound to apply the adage Unus Testis, Nullus Testis) whereby corroboration of evidence is required if it is to be admitted. The Chamber determined to freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, subject to it being in accordance with the requisites of a fair trial. The Chamber also found that hearsay evidence is not inadmissible per se, but that such evidence should be considered with caution.

25. Having made all these preliminary remarks, the Chamber dealt with the specific facts of the case. It rendered its detailed factual conclusions, by scrupulously analyzing, for each fact, all the related prosecution and defence testimonies, including that of the accused himself. It emerges that for each of the events described in paragraphs 12 to 23 of the Indictment, the Chamber is convinced beyond a reasonable doubt of the following:

26. The Chamber finds that, as pertains to the acts alleged in paragraph 12, it has been established that, throughout the period covered in the Indictment, Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proven that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, date after which he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings,
and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi.

27. With regard to the acts alleged in paragraphs 12 (A) and 12 (B) of the Indictment, the Prosecutor has shown beyond a reasonable doubt that between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you". Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. Furthermore, it is proven that on several occasions, by his pre
sence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that "never ask me again what a Tutsi woman tastes like" "Ntihazagire umbaza uko umututsikazi yari ameze, ngo kandi mumenye ko ejo ngo nibabica nta kintu muzambaza.". In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed.

28. Regarding the facts alleged in paragraph 13 of the Indictment, the Prosecutor failed to demonstrate that they are established.

29. As regards the facts alleged in paragraphs 14 and 15 of the Indictment, it is established that in the early hours of 19 April 1994, Akayesu joined a gathering in Gishyeshye and took this opportunity to address the public; he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the Inkotanyi; and the population understood that he was thus urging them to kill the Tutsi. Indeed, Akayesu himself knew of the impact of his statements on the crowd and of the fact that his call to

fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general. Akayesu who had received from the Interahamwe documents containing lists of names did, in the course of the said gathering, summarize the contents of the same to the crowd by pointing out in particular that the names were those of RPF accomplices. He specifically indicated to the participants that Ephrem Karangw a's name was on one of the lists. Akayesu admitted before the Chamber that during the period in question, that to publicly label someone as an accomplice of the RPF would put such a person in danger. The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Taba.

30. With respect to the allegations in paragraph 16 of the Indictment, it is also established that on 19 April 1994, Akayesu on two occasions threatened to kill victim U, a Tutsi woman, while she was being interrogated. He detained her for several hours at the Bureau communal, before allowing her to leave. In the evening of 20 April 1994, during a search conducted in the home of victim V, a Hutu man, Akayesu directly threatened to kill the latter. Victim V was thereafter beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and one Francois, a member of the Interahamwe militia, in the presence of the accused. One of victim V's ribs was broken as a result of the beating.

31. Regarding the acts alleged in paragraph 17, proof has not been provided by the Prosecutor to establish them.

32. As for the allegations made in paragraph 18 of the Indictment, it is established that on or about 19 April 1994, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and that of his mother . They then went to search the house of Ephrem Karangwa's brother- in- law, in Musambira commune and found his three brothers there. When the three brothers, namely Simon Mutijima, Thaddee Uwanyiligira and Jean-Chrysostome Gakuba, tried to escape, Akayesu ordered that they be captured, and ordered that they be killed, and participated in their killing.

33. Regarding the allegations in paragraph 19, the Chamber is satisfied that it has been established that on or about 19 April 1994, Akayesu took from Taba communal prison eight refugees from Runda commune, handed them over to Interahamwe militiamen and ordered that they be killed. They were killed by the Interahamwe using various traditional weapons, including machetes and small axes, in front of the Bureau communal and in the presence of Akayesu who told the killers "do it quickly". The refugees were killed because they were Tutsi.

34. The Prosecutor has proved that, as alleged in paragraph 20 of the Indictment, on that same day, Akayesu ordered the local people to kill intellectuals and to look for one Samuel, a professor who was then brought to the Bureau communal and killed with a machete blow to the neck. Teachers in Taba commune were killed later, on Akayesu's instructions. The victims included the following: Tharcisse Twizeyumuremye, Theogene, Phoebe Uwineze and her fiancé whose name is unknown. They were killed on the road in front of the Bureau communal by the local people and the Interahamwe with machetes and agricultural tools. Akayesu personally witnessed the killing of Tharcisse.

35. The Chamber finds that the acts alleged in paragraph 21 have been proven. It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Ntereye, the teacher. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.

36. Furthermore, as regards the allegations in paragraphs 22 and 23 of the Indictment, it has been established that on the evening of 20 April 1994, in the course of an interrogation, Akayesu forced victim W to lay down in front of a vehicle and threatened to drive over her . That same evening, Akayesu, accompanied by Mugenzi, a communal policeman, and one Francois, an Interahamwe militiaman, interrogated victims Z and Y. The Accused put his foot on the face of victim Z, causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. The militiaman forced victim Z to beat victim Y with a stick. The two victims were tied together. Victim Z was also beaten on the back with the blade of a machete.

37. Having made its factual findings, the Chamber analysed the legal definitions proposed by the Prosecutor for each of the facts. It thus considered the applicable law for each of the three crimes under its jurisdiction, which is all the more important since this is the very first Judgement on the legal definitions of genocide on the one hand, and of serious violations of Additional Protocol II of the Geneva Conventions, on the other. Moreover, the Chamber also had to define certain crimes which constitute offences under its jurisdiction, in particular, rape, because to date, there is no commonly accepted definition of this term in international law.

38. In the opinion of the Chamber, rape is a form of aggression the central elements of which cannot be captured in a mechanical description of objects and body parts. The Chamber also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of the sexual violence they endured. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The Chamber notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.

39. The Chamber reviewed Article 6 (1) of its Statute, on the individual criminal responsibility of the accused for the three crimes constituting ratione materiae of the

Chamber. Article 6(1)enunciates the basic principles of individual criminal liability which are probably common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), an exception which derives from military law, particularly the principle of the liability of a commander for the acts of his subordinates or "command responsibility". Article 6(3) does not necessarily require the superior to have had knowledge of such to render him criminally liable. The only requirement is that he had reason to know that his subordinates were about to commit or had committed and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof.

40. The Chamber then expressed its opinion that with respect to the crimes under its jurisdiction, it should adhere to the concept of notional plurality of offences (cumulative charges)which would render multiple convictions permissible for the same act. As a result, a particular act may constitute both genocide and a crime against humanity.

41. On the crime of genocide, the Chamber recalls that the definition given by Article 2 of the Statute is echoed exactly by the Convention for the Prevention and Repression of the Crime of Genocide. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. 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.

42. Contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2 of the Statute is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group. 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 requires that the perpetrator clearly seek to produce the act charged. 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".

43. Specifically, 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 being a member of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, targeted as such; hence, the victim of the crime of genocide is the group itself and not the individual alone.

44. 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.

45. Apart from the crime of genocide, Jean-Paul Akayesu is charged with complicity in genocide and direct and public incitement to commit genocide.

46. In the opinion of the Chamber, an Accused is an accomplice in genocide if he knowingly aided and abetted or provoked a person or persons to commit genocide, knowing that this person or persons were committing genocide, even if the Accused himself lacked the specific intent of destroying in whole or in part, the national, ethnical, racial or religious group, as such.

47. Regarding the crime of direct and public incitement to commit genocide, the Chamber defines it mainly on the basis of Article 91 of the Rwandan Penal Code, as directly provoking another to commit genocide, either 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 by any other means of audiovisual communication. The moral element of this crime lies in the intent to directly encourage or provoke another to commit genocide. It presupposes the desire of the guilty to create, by his actions, within the person or persons whom he is addressing, the state of mind which is appropriate to the commission of a crime. In other words, the person who is inciting to commit genocide must have the specific intent of genocide: that of destroying in whole or in part, a national, ethnical, rac
ial or religious group, as such. The Chamber believes that incitement is a formal offence, for which the mere method used is culpable. In other words, the offence is considered to have been completed once the incitement has taken place and that it is direct and public, whether or not it was successful.

48. The second crime which comes within the jurisdiction of the Tribunal and of which Jean-Paul Akayesu is charged is that of crimes against humanity. On the law applicable to this crime, the Chamber reviewed the case law on this crime, from the judgements rendered by the Nuremberg and Tokyo Tribunals to more recent cases, including the Touvier and Papon cases in France notably, and the Eichmann trial in Israel. It indicated the circumstances under which the charge of crimes against humanity would be leveled, as provided for by Article 3 of the Statute, under which the act must be committed as part of a widespread or systematic attack directed against a civilian population on discriminatory grounds.

49. The third crime on which the Chamber rendered its conclusions is that for which it has competence pursuant to article 4 of the Statute, which provides that the Tribunal is

empowered 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 the Additional Protocol II thereto of June 8 1977. The said 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. The Chamber decided to analyse separately, the respective conditions of applicability of Article 3 Common to the Geneva Conventions and the Additional Protocol II thereto. It then analysed the conflict which took place in Rwanda in 1994 in the light of those conditions and concluded that each of the two legal instruments was applicable in this case. Furthermore, the Chamber is of the opinion that all the norms set forth under article 4 of its Statute constitute a part of customary International Law. It finally recalled that the violation of the norms defined in article 4 of the Statute, may, in principle, commit criminal responsibility of civilians and that, the Accused belongs to the category of individuals who could be held responsible for serious infringement of international humanitarian law, particularly for serious violations of article 3 common to the Geneva Conventions and the Additional Protocol II thereto.

50. On the basis of the factual findings just shown, the Chamber delivered the following legal findings.

51. With regard to count one on genocide, the Chamber having regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims See above, the findings of the Trial Chamber on the Chapter relating to the law applicable to the crime of genocide, in particular, the definition of the constituent elements of genocide. and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed s
olely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

52. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women". The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman tastes like". As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask again what a Tutsi woman tastes like".

53. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say "tomorrow they will be killed" and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

54. The Chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment2 See above, the findings of the Trial Chamber on the occurrence of genocide against the Tutsi group in Rwanda in 1994.. Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes; to the extent that the actions and words of Akayesu during the period of the facts alleged in the Indictment, the Chamber is convinced beyond reasonable doubt, on the basis of evidence adduced before it during the hearing, that he repeatedly made statements more or less explicitly calling for the commission of genocide. Yet, according to the Chamber, he who incites another to commit genocide must have the specific intent to commit genocide: that of destroying in whole or in part, a national, ethnical, racial, or religious group, as such.

55. In conclusion, regarding Count One on genocide, the Chamber is satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the Chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment, constitute the crimes of killing members of the Tutsi group and causing serious bodily and mental harm to members of the Tutsi group. Furthermore, the Chamber is satisfied beyond reasonable doubt that in committing the various acts alleged, Akayesu had the specific intent of destroying the Tutsi group as such.

56. Regarding Count Two, on the crime of complicity in genocide, the Chamber indicated supra that, in its opinion, the crime of genocide and that of complicity in genocide were two

distinct crimes, and that the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence. Given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act. However, since the Prosecutor has charged the accused with both genocide and complicity in genocide for each of the alleged acts, the Chamber deems it necessary, in the instant case, to rule on Counts 1 and 2 simultaneously, so as to determine, as far as each proven fact is concerned, whether it constituted genocide or complicity in genocide.

57. Count 3 of the Indictment on crimes against humanity, extermination, the Chamber concludes that the murder of the eight refugees described in paragraph 19 of the Indictment as well as the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome Gakuba, Samuel, Tharcisse, Théogène, Phoebe Uwineze and her fiancé, facts described in paragraph 20 of the Indictment, constitute, beyond reasonable doubt, a crime of extermination, perpetrated during a widespread and systematic attack against a civilian population on ethnic grounds and, as such, constitutes a crime against humanity for which Akayesu is individually criminally responsible.

58. Regarding Count Four, on the basis of the facts described in paragraphs 14 and 15 of the Indictment and which it believes are well founded, the Chamber is satisfied beyond reasonable doubt that by the speeches made in public, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group as such. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide. In addition, the Chamber finds that the direct and public incitement to commit genocide engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.

59. On Count five of the Indictment, the Accused is charged of crimes against humanity(murder) for the acts alleged in paragraphs 15 and 18 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, was committed as part of a widespread and systematic attack against a civilian population of Rwanda on ethnic grounds, and therefore, a crime against humanity. Akayesu thereby incurs individual criminal responsibility for having ordered and participated in the commission of this crime.

60. On Count seven of the Indictment, crimes against humanity (murder) for the acts alleged in paragraph 19 of the Indictment, the Chamber finds beyond reasonable doubt that the killing of the eight refugees constitutes murder committed as part of a widespread or systematic attack on civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber concludes that the Accused, having ordered the said killings, has incurred individual criminal responsibility as charged in Count Seven of the Indictment.

61. On Count Nine of the Indictment the Accused is charged with a crime against humanity (murder), pursuant to Article 3(a) of the Statute for the acts alleged in paragraph 20 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of the five individuals does indeed constitute murder as part of a widespread or systematic attack against a civilian population of Rwanda on ethnic grounds and as such constitutes a crime against humanity. Accordingly Akayesu has incurred individual criminal responsibility for having ordered, aided and abetted the planning and execution of the crime.

62. Under Count 11, Akayesu is charged with crimes against humanity (torture), acts alleged in paragraphs 16, 17, 21, 22 and 23 of the indictment. Based on the above factual findings, the Chamber is satisfied beyond reasonable doubt that the acts described in those paragraphs constitute torture. Having being committed as part of a wide spread and systematic attack against a civilian popuation on ethnic grounds, they constitute crimes against humanity and render Akayesu criminally liable for having ordered, aided and abetted in their commission.

63. With regard to Counts 13 and 14, relating to the acts described in paragraphs 12A and 12B of the indictment and which it considers proven, the Chamber is also satisfied beyond a reasonable doubt that they constitute acts of rape and other inhumane acts, committed as part of a widespread and systematic attack against a civilian population on ethnic grounds and therefore constitute a crime against humanity. Consequently, the Chamber finds the Accused individually criminally liable for the said acts described in counts 13 and 14 and for having through his presence tacitly abetted their commission.

64. With respect to Counts 6, 8, 10, 12 and 15, Akayesu is charged with violations of Common Article 3 of the Geneva Conventions of 1949 in counts 6, 8, 10 and 12, and with violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II thereto of 1977 under count 15. The Chamber finds that it has been established beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF at the time of the facts alleged in the Indictment, and that the said conflict was well within the provisions of Common Article 3 and of the Additional Protocol II. The Chamber however finds that the Prosecution has failed to show beyond reasonable doubt that Akayesu was a member of the armed forces and that he was duly mandated and expected, in his capacity as a public official or agent or person otherwise vested with public authority or a de facto representative of the Government, to support and carry out the war effort.

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows:

Count 1: Guilty of Genocide

Count 2: Not guilty of Complicity in Genocide

Count 3: Guilty of Crime against Humanity (Extermination)

Count 4: Guilty of Direct and Public Incitement to Commit Genocide

Count 5: Guilty of Crime against Humanity (Murder)

Count 6: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 7: Guilty of Crime against Humanity (Murder)

Count 8: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 9: Guilty of Crime against Humanity (Murder)

Count 10: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 11: Guilty of Crime against Humanity (Torture)

Count 12: Not guilty of Violation of Article 3 common to the Geneva Conventions (Cruel Treatment)

Count 13: Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts)

Count 15: Not guilty of Violation of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (Outrage upon personal dignity, in particular Rape, Degrading and Humiliating Treatment and Indecent Assault)

Done in English and French,

Signed in Arusha, 2 September 1998,

Laïty Kama Lennart Aspegren Navanethem Pillay

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Anto Furundžija
Judgement of 10 December 1998 (summary)

Case No. IT-95-17/1-T

United Nations
Nations Unies

International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

CHAMBERS

(Exclusively for the use of the media. Not an official document)

The Hague, 10 December 1998

STATEMENT OF THE TRIAL CHAMBER AT THE JUDGEMENT HEARING

The Prosecutor v. Anto Furundzija
10 December 1998

Good afternoon ladies and gentleman.

Would the Registrar please call the case?

Mr. Furundzija, are you able to hear me in a language which you understand?

May we have the appearances for the Prosecution and the Defence please?

Thank you.

This afternoon, Trial Chamber II delivers its Judgement in this case, *Prosecutor v. Anto Furundzija*. The trial of Mr. Furundzija commenced on 8 June 1998 and the proceedings continued until 22 June 1998, at which time the hearing was closed with judgement reserved to a later date. Subsequently, upon a motion filed by the Defence, the Trial Chamber ordered that the proceedings be reopened. The reopened proceedings covered a period of four days and the hearing was finally closed on 12 November 1998.

The accused, Anto Furundzija, stands charged with serious violations of international humanitarian law namely, torture as a Violation of the Laws or Customs of War, and outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War. The Amended Indictment alleges that the accused was the local commander of a special unit of the military police of the HVO known as the "Jokers", in which capacity he, and another soldier, Accused B, interrogated Witness A. During the questioning, Witness A had a knife rubbed against her inner thigh and lower stomach, and the perpetrator threatened to put his knife inside her vagina should she not tell the truth. The Amended Indictment further alleges that the accused continued to interrogate Witness A and Victim B while they were beaten on the feet with a baton and further, that the accused stood by, failing to intervene in any way, while Witness A was forced to have oral and vaginal sexual intercourse with Accused B.

The Judgement of the Trial Chamber in this case is some one hundred pages in length. Accordingly, instead of presenting the Judgement in its entirety, we will provide a brief summary of the Trial Chamber's findings as to the charges against the accused before delivering the disposition.

The Judgement comprises nine sections, including the disposition. We shall briefly address each of these in turn, emphasising the main theme characterising each section and the pertinent findings therein.

Section I contains a detailed description of the procedural history of the case, including the nature of the accused's arrest, surrender to the International Tribunal and initial appearance before the Trial Chamber, as well as a discussion of the more substantial procedural issues that arose over the course of these proceedings.

Section II contains a summary of the submissions of the parties in relation to the charges against the accused in the Amended Indictment and the underlying facts.

Section III addresses the jurisdictional prerequisites for the application of Article 3, namely the existence of an armed conflict. In this context, the Trial Chamber finds that the test formulated by the Appeals Chamber of the International Tribunal in *Tadic* is the correct test to apply in determining the existence of an armed conflict. Based on the evidence submitted by both parties, the Trial Chamber finds that, at the material time, a state of armed conflict existed in central Bosnia and Herzegovina between the Croatian Defence Council (the "HVO") and the Army of Bosnia and Herzegovina (the "AbiH"). In Section IV, the Trial Chamber finds a nexus between this armed conflict and the acts underlying the charges against the accused.

Section V addresses the evidence relating to the charges in the Amended Indictment. This section begins with an overview of the relevant evidence and the arguments of the parties relating thereto, then proceeds to examine the background and circumstances leading up to the critical events alleged to have occurred at the Bungalow and the Holiday Cottage in Nadioci. The evidence relating to those acts giving rise to individual criminal liability of the accused, including the evidence identifying Anto Furundzija as one of the persons involved in those criminal acts, is then discussed. The following sub-section places the re-opening proceedings in procedural context and examines the evidence relating to the central issue of those proceedings, namely the extent to which the reliability of Witness A's evidence may have been affected by any psychological disorder arising out of her traumatic ordeal. In this respect, the Trial Chamber examines the evidence presented through expert witnesses for both the Prosecution and the Defence, on the issue of post-traumatic stress disorder (PTSD) and its potential effect on memory. It is found that Witness A's memory regarding material aspects of the events through which she suffered has not been affected by any disorder she may have had. The Trial Chamber notes that the expert evidence demonstrates that even when a person is suffering from PTSD she or he may still be a reliable witness, and accepts Witness A's testimony that she has sufficiently recollected the material aspects of the relevant events. The Trial Chamber then examines the inconsistencies in Witness A's testimony and makes a finding as to its general reliability. Section V concludes with the Trial Chamber's factual findings in relation to the events alleged in the Amended Indictment.

In Section VI, the Trial Chamber commences a discussion of the elements of each of the offences charged in the Amended Indictment. This section contains a comprehensive analysis of the nature and status of the prohibition against torture under conventional and customary international law, as well as providing a definition of torture under international humanitarian law. In this regard, the Trial Chamber finds that the prohibition against torture has attained the status of *jus cogens*. Further, the requisite elements of the offence of torture are found to be as follows:

The intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, for the purpose of obtaining information or a confession or of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating on any ground against the victim or a third person. For such an act to constitute torture, one of the parties thereto must be a public official or must, at any rate, act in a non-private capacity, e.g. as a *de facto* organ of a State or any other authority wielding entity.

This section continues with a discussion of the prohibition against rape and other serious sexual assaults under international law. The Trial Chamber finds it is indisputable that rape and other serious sexual assaults in situations of armed conflict entail criminal liability of the perpetrators. In this context, the Trial Chamber upholds the recent finding by Trial Chamber II

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of the ICTY in *Prosecutor v. Delali} et al.,* that in certain circumstances, rape may amount to torture under international law. However, this Trial Chamber has seen fit to expand the definition of rape first formulated by Trial Chamber I of the ICTR in *Akayesu* and followed in the *Delali}* Judgement. Thus, the Trial Chamber finds that the following comprise what may be accepted as the requisite elements of the offence of rape under international criminal law:

The sexual penetration, however slight, either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person.

In Section VI(B), the Trial Chamber turns its attention to analysing the content of the various heads under which individual criminal liability may be incurred pursuant to Article 7(1) of the Statute of the International Tribunal. In this regard, the Trial Chamber finds the necessary elements of aiding and abetting under international criminal law to comprise: an *actus reus* requiring practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and a complementary *mens rea* requiring knowledge that such acts assist the commission of the offence.

The Trial Chamber further elaborates the principles of individual criminal responsibility in the context of torture by finding that an accused, who would otherwise be liable as an aidor and abettor to torture under the foregoing standard, will be held responsible as a co-perpetrator of torture, where the accused participates in an integral part of the torture and partakes of the prohibited purpose behind the torture, i.e. the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

Section VII of the Judgement sets forth the legal findings of the Trial Chamber with respect to each of the charges against the accused in the Amended Indictment.

Mr. Furundzija, will you please stand to receive the Judgement of this Trial Chamber.

For the foregoing reasons, having considered all of the evidence, the submissions of the parties and the Statute and Rules by which it is bound, the Trial Chamber finds as follows with respect to the accused, Anto Furundzija:

Count 13: As a co-perpetrator, GUILTY of a Violation of the Laws or Customs of War (torture).
Count 14: For aiding and abetting, GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity, including rape).

Pursuant to sub-Rule 85(A)(vi) of the Rules of Procedure and Evidence, the Trial Chamber heard the oral submissions of the Prosecution and the Defence on sentencing in this case, on 22 June 1998. It sets out its discussion and findings in this regard in Section VIII of the Judgement. The Trial Chamber considers that the imposition of sentence must take account of various mitigating and aggravating factors as well as the sentencing practices of the courts of the former Yugoslavia.

The Trial Chamber imposes sentence as follows:

Count 13: For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences you, Anto Furundzija, to ten years' imprisonment.

Count 14: For outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War, the Trial Chamber sentences you, Anto Furundzija, to eight years' imprisonment.

The Trial Chamber has determined that the foregoing sentences are to be served concurrently, *inter se*. In addition, pursuant to sub-Rule 101(D) of the Rules of Procedure and Evidence, persons convicted by the International Tribunal are entitled to credit for time spent in custody pending surrender to the Tribunal and time spent in detention pending trial or appeal. Accordingly, eleven months and twenty-two days shall be deducted from the sentence today imposed on Anto Furundzija, together with such additional time as he may serve pending the determination of any appeal. In accordance with Rule 102 of the Rules of Procedure and Evidence, Anto Furundzija's sentence, subject to the above mentioned deduction, shall begin to run from today.

Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Anto Furundzija shall serve his sentence in a State designated by the President of the International Tribunal. The transfer of Anto Furundzija to the designated State shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused, Anto Furundzija, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the appeal by the Appeals Chamber. Until such time as his transfer is effected, Anto Furundzija shall remain in the custody of the International Tribunal, in accordance with Rule 102.

This concludes the Judgement of the Trial Chamber.

Thank you. The Trial Chamber now stands adjourned.

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Zejnil Delalić et al. ("Čelebići")
Judgement of 20 February 20012 (summary)

Case No. IT-96-21

United Nations
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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

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APPEALS CHAMBER
CHAMBRE D'APPEL
The Hague, 20 February 2001
JL/P.I.S./564-e

APPEAL JUDGEMENT IN THE *ČELEBIĆI* CASE

- **Acquittal of Zejnil Delalić affirmed**
- **Dismissal for cumulative convictions of all counts charging Zdravko Mucić, Hazim Delić and Esad Landžo with violations of the laws or customs of war**
- **Remaining sentences of the convicted accused to be reconsidered by a Trial Chamber for possible adjustment**

Please find below the full text of the summary of the conclusions of the Appeals Chamber, read out by presiding Judge David Hunt at today's Judgement hearing

"The Appeals Chamber is sitting today to deliver judgment in the appeal from a judgment of a Trial Chamber, given in a case which has been known as the *Čelebići* Case. The Trial Chamber was constituted by Judge Karibi-Whyte, who presided, Judge Odio Benito and Judge Jan.

The trial

The trial related to events which took place in 1992 in a prison camp near the town of Čelebići, in central Bosnia and Herzegovina. The four accused in this case, Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, were charged with numerous counts of grave breaches of the Geneva Conventions of 1949 under Article 2 of the Tribunal's Statute and of violations of the laws or customs of war under Article 3. The victims were the Bosnian Serb detainees in the Čelebići camp.

Delalić was alleged to have co-ordinated the activities of the Bosnian Muslim and Bosnian Croat forces in the area and later to have been the Commander of the First Tactical Group of the Bosnian Army. He was alleged in that capacity to have had authority over the Čelebići camp. The Trial Chamber found him not guilty on all counts, on the basis that he did not have sufficient command and control over the Čelebići camp and its guards to found his criminal responsibility as a superior for the crimes which they committed in the camp.

Mucić was found by the Trial Chamber to be the Commander of the Čelebići camp, and he was found guilty under the principles of superior responsibility for crimes committed by his subordinates, including murder, torture and inhuman treatment. He was also found guilty of personal responsibility for the unlawful confinement of civilians. Mucić was given a total sentence of seven years.

Delić was found by the Trial Chamber to have acted as the Deputy Commander of the camp, and he was found guilty on the basis of personal responsibility for crimes including murder, torture and inhuman treatment. He was given a total sentence of twenty years.

Landžo was found by the Trial Chamber to have been a guard at the camp, and he was found guilty of committing offences including murder, torture and cruel treatment. He was given a total sentence of fifteen years imprisonment.

The appeal

The three convicted accused, Mucić, Delić and Landžo, filed appeals against the Trial Chamber's judgment. The prosecution also filed an appeal against the judgment on a number of grounds, including grounds of appeal relating to the acquittal of Delalić. The four appellants between them filed a total of forty-eight grounds of appeal. Certain of the grounds of appeal of the three convicted appellants related to the same subject matter, and they were therefore dealt with together in the hearing of oral submissions and in the written judgment delivered today.

For the purposes of this hearing, I propose to summarise briefly the conclusions of the Appeals Chamber on the various grounds of appeal, grouped in the same order as they are dealt with in the judgment. I emphasise that this is a *summary* only, and that it forms no part of the judgment which is delivered. The only authoritative account of the Appeals Chamber's conclusions, and of its reasons for those conclusions, is to be found in the written judgment, copies of which will be made available to the parties at the conclusion of this hearing.

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Article 2 of the Statute

The convicted appellants raised three issues in relation to the legal conditions for the application of Article 2 of the Statute, which gives to the Tribunal jurisdiction over grave breaches of the Geneva Conventions of 1949.

- It is established in the Tribunal's jurisprudence that the prosecution must prove the existence of an international armed conflict in relation to any offences charged under Article 2. The Trial Chamber found that the armed conflict in Bosnia and Herzegovina at the relevant time was international, as the Bosnian Serb forces fighting in Bosnia and Herzegovina were under the control of the Federal Republic of Yugoslavia. The Appeals Chamber has re-affirmed its *Tadić* Conviction Appeal Judgment, which had been followed in its *Aleksovski* Appeal Judgment, and which held that what must be established by the prosecution is that the foreign intervening party was in "*overall* control" of the local forces.

The Appeals Chamber has reiterated that it will follow the *ratio decidendi* of its previous decisions unless there are "cogent reasons in the interests of justice to depart from them." It considers that there is no reason to depart from the decision in its *Tadić* Conviction Appeal Judgment as to the relevant standard of control for this purpose. The Appeals Chamber has expressed additional reasons as to why that interpretation was correct, and it is satisfied that the Trial Chamber's factual determination on this issue was consistent with the overall control standard which had been stated.

- The appellants also challenged the Trial Chamber's finding that, for the purposes of Article 2 of the Statute, the victims were persons protected under the relevant Geneva Convention. In the Tadić Conviction Appeal Judgment, the Appeals Chamber held that "a person may be accorded protected person status, notwithstanding the fact that he is of the same nationality as his captors", a ruling subsequently endorsed by the Appeals Chamber in Aleksovski. The Appeals Chamber has concluded that there is no reason to depart from this interpretation, and it has confirmed that "the nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations", but that the nationality should take into account the differing ethnicities of the victims and the perpetrators and their bonds with a foreign intervening State. The Appeals Chamber is satisfied that the Trial Chamber's findings were consistent with this interpretation.

- Delić also challenged the Tribunal's jurisdiction to prosecute grave breaches of the Geneva Conventions because, it was submitted, Bosnia and Herzegovina was not a party to the Conventions until after the relevant events, having acceded to them subsequently. The Appeals Chamber has held that Bosnia and Herzegovina succeeded to the Geneva Conventions, with the effect that it is considered to be a party to the treaty from the date of its succession or independence, which was prior to the relevant events. The Appeals Chamber has also stated that, even without a formal act of succession, Bosnia and Herzegovina would automatically have succeeded to the Geneva Conventions, as they are treaties of a universal multilateral character relating to fundamental human rights.

Common Article 3 and Article 3 of the Statute

The appellants also challenged the jurisdiction of the Tribunal to prosecute violations of Article 3 common to the Geneva Conventions under Article 3 of the Statute. The Appeals Chamber has concluded that there is no reason to depart from its *Tadić* Jurisdiction Decision, which held that the violations of the laws or customs of war which may fall within Article 3 of the Statute of the Tribunal include violations of common Article 3, that these violations give rise to individual criminal responsibility, and that they may be prosecuted whether committed in internal or international conflicts. It has expressed additional reasons as to why that decision was correct.

Command responsibility

- Mucić was convicted under Article 7.1 for his superior authority as commander of the Čelebići camp for the crimes committed there. He argued that command responsibility is limited to de jure commanders, or those superiors with control over subordinates equivalent to such de jure authority. The Appeals Chamber has rejected that argument, accepting that a position of de facto command may be sufficient to establish the necessary superior-subordinate relationship, as long as the relevant degree of control over subordinates is established. The relevant superior-subordinate relationship is established where the superior has effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent or punish the commission of these offences.

- Mucić also challenged the sufficiency of the evidence to establish that he was a de facto commander. The Appeals Chamber has held that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that Mucić exercised powers of control sufficient to constitute the exercise of de facto

authority over the camp, and therefore that no basis for reviewing the Trial Chamber's findings of fact had been made out.

• The prosecution appealed against the Trial Chamber's interpretation of the requirement, in Article 7.3, that a superior "knew or had reason to know" that a subordinate is about to commit crimes or had done so. The Appeals Chamber has concluded that the phrase "reason to know" in Article 7.3 means that a superior will be charged with knowledge of subordinates' offences if information of a general nature was available to him which would have put him on notice of those offences. The Appeals Chamber is satisfied that the Trial Chamber's conclusions on this issue were consistent with that interpretation.

• The prosecution also contended that the ability of an accused to exercise forms of influence should suffice to establish the relevant superior-subordinate relationship. The Appeals Chamber has concluded that, whilst indirect as well as direct relationships of subordination will suffice, the relevant standard of effective control over subordinates must be established, and that any forms of influence which fall short of such control would not suffice. The Appeals Chamber is satisfied that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to acquit Delalić on the basis that he was not a superior in relation to the Čelebići camp and those working there.

Unlawful confinement of civilians

• Both Mucić and the prosecution filed grounds of appeal relating to the charges of unlawful confinement of civilians. Mucić challenged his conviction for that offence, and the prosecution challenged the acquittal of Delalić and Delić of those offences.

The Trial Chamber concluded that the offence of unlawful confinement of civilians is committed:
- first, when civilians are involuntarily confined in breach of Article 42 of Geneva Convention IV, which provides that civilians may only be detained where there are reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary, and
- secondly, when civilians are detained without compliance with Article 43 of the Geneva Convention, which provides that their detention must be reviewed by an appropriate court or administrative board.

The Appeals Chamber has confirmed the Trial Chamber's definition of the offence, and it has accepted that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that the detainees in the Čelebići camp were unlawfully detained.

• The Appeals Chamber has also confirmed that the prosecution does not have to establish that a person is in a position of superior authority before he can be found guilty of direct responsibility for this offence under Article 7.1 of the Statute, but that a prison guard with no authority to release prisoners will not be guilty of the offence by virtue only of his failure to take unauthorised steps to release them.

• The Appeals Chamber has dismissed the prosecution appeal against the acquittal of Delalić and Delić on this charge, on the basis that the prosecution has failed to identify any evidence before the Trial Chamber which demonstrated that a finding of guilty was the only reasonable conclusion to be drawn. As to the appeal by Mucić against his conviction on this charge, the Appeals Chamber has held that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that he had some authority to release prisoners, that he had failed to release those civilians whom he knew to be unlawfully detained because they had not received the necessary procedural review of their detention, and that he was therefore guilty of this offence.

Cumulative convictions

• Delić and Mucić challenged their convictions upon charges based upon the same conduct and alleging both grave breaches of the Geneva Conventions under Article 2 of the Statute and violations of the laws or customs of war under Article 3. This was the first time that the issue of cumulative convictions has arisen for the express consideration of the Appeals Chamber.

The Appeals Chamber has concluded that reasons of fairness to the accused, and the consideration that only distinct crimes justify cumulative convictions, require that cumulative convictions are permissible only if each statutory provision involved has a materially distinct element not contained in the other. The Appeals Chamber has concluded, by majority, that this assessment of the elements of the offences must take into account all of the elements of the offences, including the *chapeaux* (or legal pre-requisite elements) of each Article of the Statute.

Where this test is not met, a decision must be made in relation to which offence it will enter a conviction, on the basis that the conviction must be for the offence containing the more specific provision. Where, as in the present case, the evidence establishes the guilt of an accused based upon the same conduct under both Article 2 and Article 3 of the Statute, the conviction must be entered for the offence under Article 2.

The challenge by Delić and Mucić has therefore been upheld, and the charges against them under Article 3 have been dismissed. As Landžo similarly received cumulative convictions under Articles 2 and 3, the charges against him under Article 3 have also been dismissed, notwithstanding that he did not challenge them.

• In a separate and dissenting opinion, Judge Hunt and Judge Bennouna have agreed with the majority that cumulative convictions should be permissible only where each offence has a materially different element not contained in the other, but they have proposed different tests for determining whether this was so in the particular case and, where cumulative convictions are not permissible, for determining which offence should carry the conviction. These tests would in some cases have produced a different result.

• As the sentencing outcome in respect of each of the three convicted accused may have been different had the Trial Chamber not imposed multiple convictions, the issue of re-sentencing has been remitted to a new Trial Chamber to be designated by the President of the Tribunal.

Delić – factual issues

Delić challenged his convictions upon ten of the counts against him, involving five separate incidents, on the basis that the Trial Chamber had erred in its relevant factual findings.

In relation to the murder of Šćepo Gotovac, one of the detainees in the Čelebići camp, the Appeals Chamber has concluded that the Trial Chamber's conclusion that Delić participated in the beating which was responsible for Mr Gotovac's death was not open on the evidence before it. The convictions relating to this incident have been quashed, and verdicts of not guilty entered. In relation to the other four incidents, the Appeals Chamber has concluded that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find him guilty of the offences charged.

The prosecution interviews with Mucić

Mucić challenged the admission into evidence of interviews conducted with him by investigators from the Office of the Prosecutor following his arrest. He submitted that the Trial Chamber should have found that he had not voluntarily waived his right to counsel under the Tribunal's Statute and Rules, and that it should therefore have excluded the evidence obtained as a result of the interviews. Mucić also claimed that the Trial Chamber erred in refusing to issue a subpoena to the interpreter present at these interviews to give evidence of any conversation between the investigators and himself which took place before the interviews started and which may have led to the waiver.

The Appeals Chamber is not satisfied that any error has been demonstrated in the Trial Chamber's refusal to issue a subpoena to the interpreter to give evidence. It has stated that a *voir dire* procedure could be of assistance, in appropriate cases, in determining any factual issues relating to the admissibility of evidence such as these, but that the Trial Chamber committed no error in the exercise of its discretion in not adopting that procedure in the absence of any clear indication that the accused would give evidence in relation to those issues.

The Appeals Chamber is satisfied that, on the evidence before the Trial Chamber, it was open to a reasonable tribunal of fact to find that Mucić had expressed the wish to be interviewed without counsel, and that the Trial Chamber had accordingly not erred in the exercise of its discretion to allow the evidence to be tendered on that basis.

Diminished mental responsibility

Before the trial, Landžo gave notice under the Tribunal's Rules of Procedure and Evidence that he would be relying upon the "special defence" of diminished mental responsibility, and he submitted that such a defence amounted to a complete defence to the offences with which he had been charged, leading to an acquittal.

Landžo argued that the Trial Chamber erred by refusing to define the "special defence" in advance of evidence being given in support of it. The Appeals Chamber has held that it is no part of a Trial Chamber's obligation to define such issues in advance, and that in any event no prejudice had been established as resulting from that refusal.

Landžo also challenged the Trial Chamber's rejection of the "special defence" as having been "inconsistent with the great weight of the evidence". The Appeals Chamber has held that an accused's diminished mental responsibility is relevant to the sentence to be imposed, but it is not a defence to offences charged under the Tribunal's Statute. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is raised by the defendant as a matter in mitigation of sentence. The Appeals Chamber has also held that, in any event, on the evidence before the Trial Chamber it was open to a reasonable tribunal of fact to reject the evidence of Landžo as to his state of mind upon which his psychiatrist witnesses

relied, and therefore – as the Trial Chamber did – to reject their opinion that he had suffered from a diminished mental responsibility.

Selective prosecution

Landžo challenged his conviction upon the basis that he was the victim of selective prosecution based on discriminatory grounds.

In 1998, the Office of the Prosecutor withdrew indictments against a number of low ranking accused as a result of a changed prosecutorial strategy. Landžo alleged that the continued maintenance of the charges against him was discriminatory, as he was a young Muslim camp guard and the others against whom indictments had been withdrawn were all non-Muslims of Serb ethnicity. He contends that he was prosecuted as a "representative" of the Bosnian Muslims.

The Appeals Chamber has held that, whilst the Prosecutor has a wide discretion in relation to prosecutorial strategy, this discretion is not unlimited. However, Landžo has not discharged his burden of establishing any abuse of the prosecutorial discretion. He has not demonstrated that his prosecution was continued for any impermissible motive, or that other accused, similarly situated to himself, were not prosecuted. At the time of the dismissal of the indictments against other accused, none of whom was in the custody of the Tribunal, Landžo's trial was well underway. The continuation of the proceedings against him was consistent with the policy of the Prosecutor to prosecute not only those holding higher levels of responsibility, but also those "personally responsible for exceptionally brutal or otherwise extremely serious offences".

Judge Karibi-Whyte

Landžo challenged the fairness of his trial upon the basis that the Presiding Judge, Judge Karibi-Whyte, had been "asleep during substantial portions of the trial". At a late stage of the appellate proceedings, Delić and Mucić adopted this ground of appeal. The burden of the argument, however, was left to Landžo. The parties agreed that the relevant principle was that proof that a judge slept through part of the proceedings, or was otherwise not completely attentive to them, is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to such a degree as to give rise to a right to a new trial or other adequate remedy.

Both Landžo and the prosecution selected, from the audio-visual records of the trial produced by the courtroom cameras generally focussed on the judges' bench, those portions of the records upon which they relied in support of this ground of appeal, and in opposition to it. The written submissions filed by Landžo contained extensive and detailed descriptions of what was said to be seen and heard on the videotapes. Before the oral hearing, the Appeals Chamber viewed those portions upon which the parties relied. The Appeals Chamber has concluded that the descriptions given were both highly coloured and gravely exaggerated, and that they appeared to have been given with a reckless indifference to the truth.

The Appeals Chamber has found that the appellants have manifestly failed to establish the allegation that Judge Karibi-Whyte was "asleep during substantial portions of the trial", but that the portions of the videotapes relied upon by Landžo nevertheless demonstrated a recurring pattern of behaviour where the judge appears not to have been fully conscious of the proceedings for short periods of time. These periods were usually five to ten seconds long, and sometimes up to thirty seconds – but they were repeated over extended periods of ten to fifteen minutes. On one occasion only, the judge appeared to be asleep for approximately thirty minutes. The Appeals Chamber has proceeded to consider whether, notwithstanding their failure to establish the factual basis of these grounds of appeal, the appellants nevertheless have a valid cause for complaint as to the fairness of the trial.

The Appeals Chamber has stated, firmly, that Judge Karibi-Whyte's conduct cannot be accepted as appropriate conduct for a judge. It has also said that, if a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case. However, before a judgment will be quashed upon this basis, it must be established that some identifiable prejudice was caused by that conduct to the appellant, and the failure of counsel to object at the trial to the conduct in question is relevant to whether such prejudice has been established. The requirement that the issue be raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief.

The Appeals Chamber has not been satisfied that any specific prejudice was suffered by Landžo or the other appellants. In the absence of any actual prejudice, the Appeals Chamber has rejected the ground of appeal.

Judge Odio Benito and Vice-Presidency of Costa Rica

During the course of the trial, Judge Odio Benito was elected Vice-President of Costa Rica, and she took an oath of office as such. All three convicted accused challenged her qualifications to remain as a judge of

the Tribunal during the rest of the trial, and they alleged that, in any event, she should have disqualified herself as a judge by reason of those facts because she was no longer independent.

The Appeals Chamber has held that, because the judges of the Tribunal must necessarily come from a wide variety of legal systems, the requirement of Article 13 in the Tribunal's Statute (as it was at the relevant time) that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices" was intended to ensure that the *essential* qualifications did not differ from judge to judge, and that it was not intended to include within the required *legal* qualifications any constitutional disqualifications peculiar to a particular country. The Appeals Chamber has in any event rejected the argument that, by virtue of her election as Vice-President of Costa Rica, Judge Odio Benito was constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the constitution of that country.

The Appeals Chamber has also rejected the argument that Judge Odio Benito should nevertheless have disqualified herself as a judge because she was no longer independent. The Appeals Chamber has not accepted that the judge exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. The appellants have failed to establish that the reaction of the hypothetical observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that she might not bring an impartial and unprejudiced mind to the issues arising in the *Čelebići* case.

Judge Odio Benito and the Victims of Torture

All three convicted accused also alleged that Judge Odio Benito was automatically disqualified as a judge of the Tribunal because she was, at the time this case was heard, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture. They contended that, since the indictment in this case included allegations of torture, there was a strong appearance of bias on the part of the judge against those accused who were the subject of those allegations.

The Appeals Chamber has held that the same hypothetical observer would be aware that the objects of this fund are solely focussed on fundraising to enable material assistance to be given to the victims of torture – through the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of torture and their relatives – and would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons *responsible* for torture should be punished. It has accepted the statement that "it is […] important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour".

Sentencing

All of the parties, with the exception of Delalić, filed grounds of appeal in relation to sentencing. The **Prosecution** challenged the sentences imposed on Mucić of seven years, to be served concurrently, as "manifestly inadequate". **Mucić** challenged his sentence as too long in all the circumstances.

The Appeals Chamber has concluded that the Trial Chamber failed to take adequate account of the gravity of offences for which Mucić was convicted and that, in a number of respects, it failed to take into account, or gave inadequate weight to, various matters in aggravation. The Appeals Chamber has rejected one complaint by the prosecution, that the Trial Chamber erred when it did not take into account criminal conduct which was not specifically alleged in the indictment and in relation to which the prosecution had not requested the Trial Chamber to make specific findings. The Appeals Chamber has accepted one complaint by Mucić, that the Trial Chamber erred in making an adverse reference in its sentencing considerations to the fact that Mucić had declined to give oral testimony at the trial, but it has otherwise rejected his complaints.

The Appeals Chamber has indicated that, taking into account the various considerations relating to the gravity of his offences, all the aggravating circumstances, the mitigating circumstances to which the Trial Chamber referred, and the "double jeopardy" element involved in re-sentencing, it would have imposed on Mucić a heavier sentence, of a total of around ten years' imprisonment. This is a figure to which the new Trial Chamber to consider sentencing issues may have regard in its own determination.

Delić challenged his sentence on the basis that the Trial Chamber contravened the principles of legality, by imposing sentences on him which were greater than the sentences which would have been permitted at the relevant time under the sentencing laws and practice of the former Yugoslavia. The Appeals Chamber has rejected that challenge. It has also stated that, whilst Trial Chambers must, as required by Article 24.1 of the Statute, have *recourse to* the general practice regarding sentencing in the courts of the former Yugoslavia, they are not *bound* by that practice. The Appeals Chamber has also concluded that the sentences imposed on Delić have not been shown to be excessive or in any way outside of the Trial Chamber's sentencing discretion.

Landžo challenged his sentence on the basis that it was manifestly excessive. He sought to show a disparity between his sentence and sentences imposed on persons convicted in other cases before the Tribunal. The Appeals Chamber has not accepted that the comparisons made by him are valid. It has also concluded that the Trial Chamber adequately considered the mitigating factors applicable to Landžo.

Disposition

The formal orders made by the Appeals Chamber in the Disposition section of the judgment are as follows:

1. In relation to Counts 1 and 2 of the Indictment, the Appeals Chamber ALLOWS the ninth and tenth grounds of appeal filed by Hazim Delić, it QUASHES the verdict of the Trial Chamber accordingly, and it enters a verdict that Hazim Delić is NOT GUILTY upon those counts.
2. In relation to the grounds of appeal relating to cumulative convictions, the Appeals Chamber ALLOWS the twenty-first ground of appeal filed by Hazim Delić and the seventh ground of appeal filed by Zdravko Mucić; it DISMISSES Counts 14, 34, 39, 45 and 47 against Zdravko Mucić; it DISMISSES Counts 4, 12, 19, 22, 43 and 47 against Hazim Delić, and it DISMISSES Counts 2, 6, 8, 12, 16, 25, 31, 37, and 47 against Esad Landžo. It REMITS to a Trial Chamber to be nominated by the President of the Tribunal[1] the issue of what adjustment, if any, should be made to the sentences imposed on Hazim Delić, Zdravko Mucić, and Esad Landžo to take account of the dismissal of these counts.
3. In relation to the eleventh ground of appeal filed by Zdravko Mucić, the Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that he had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić.
4. The Appeals Chamber ALLOWS the fourth ground of appeal filed by the Prosecution alleging that the sentence of seven years imposed on Zdravko Mucić was inadequate, and it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucić to the Reconstituted Trial Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the counts referred to, it would have imposed a sentence of around ten years.
5. *The Appeals Chamber DISMISSES each of the remaining grounds of appeal filed by each of the appellants.*

The Appeals Chamber's reasons for these orders are now published.

The accused are to remain in custody in the Detention Unit until further order".

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[1] Hereafter, "Reconstituted Trial Chamber".

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Dario Kordić and Mario Čerkez
Judgement of 26 February 2001 (summary)

Case No. IT-95-14/2

United Nations
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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

Press Release . Communiqué de presse
(Exclusively for the use of the media. Not an official document)

TRIAL CHAMBER
CHAMBRE DE 1ère INSTANCE
The Hague, 26 February 2001
JL/P.I.S./567-e

JUDGEMENT OF TRIAL CHAMBER III IN THE KORDIĆ AND ČERKEZ CASE

DARIO KORDIĆ SENTENCED TO 25 YEARS
MARIO ČERKEZ SENTENCED TO 15 YEARS

- **Croatia's intervention in the armed conflict in Central Bosnia established**
- **HVO attacks " followed a common design or plan … to ethnically cleanse the (Lašva) valley of Muslims"**
- **Dario Kordić " was a regional leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority"**
- **Mario Čerkez "as commander of the Viteška Brigade, participated in the attacks on Vitez, Stari Vitez and Večeriska … and failed to take the necessary measures to prevent those attacks, failed to punish those who were responsible for them"**

Please find below the full text of the summary of the Judgement of Trial Chamber III, read out by presiding Judge Richard May at today's Judgement hearing:

"This hearing is for the Trial Chamber to deliver its Judgement. This is the fifth case to be heard by the International Tribunal concerning events in the Lašva Valley in 1992 and 1993. However, it is the first involving a high ranking politician.

The background is the conflict between the Bosnian Muslims and Bosnian Croats which took place during those years in Central Bosnia. The accused both played prominent parts in that conflict. Dario Kordić was a politician, described as the most important in the area. Mario Čerkez was a military man, Commander of a Brigade in the Bosnian Croat armed forces. The charges against them arise from events during the conflict.

The Indictment contains 44 Counts; and charges each accused with eight grave breaches of the Geneva Conventions, ten violations of the laws or customs of war and four crimes against humanity. The first two Counts charge the accused with persecution, a crime against humanity. The other Counts charge offences relating to murder, inhuman treatment, detention and destruction. The Indictment alleges that the accused participated in a widespread or systematic campaign of persecution of the Bosnian Muslims in that region culminating in a series of attacks over a two year period on towns and villages in the Lašva Valley and surroundings. Many Muslim civilians were killed, seriously wounded or detained. Meanwhile, their homes were burned, their towns, villages and places of worship destroyed, and their property plundered.

The defence case for both accused amounts to a complete denial of the prosecution case. Not only is the responsibility of the accused for the crimes alleged against them disputed, there is an issue whether the crimes were committed at all. The Trial Chamber, therefore, has had to determine whether these crimes were committed; and, if so, whether the accused were guilty of those charged against them.

The result has been an extremely long trial lasting 20 months in which a great deal of evidence was put before the court. In all, 241 witnesses gave evidence and over 4,500 exhibits were produced. The transcript runs to 28,000 pages.

What follows is a summary of the written Judgement and forms no part of it. That Judgement is available today.

First, some matters of law. The Trial Chamber finds that there was a general state of armed conflict in Central Bosnia at the relevant time. It also finds that there is a clear connection between this conflict and the alleged crimes set out in the Indictment. The Trial Chamber finds that due to the intervention of the Republic of Croatia, this conflict was international.

The Trial Chamber also finds that persecution may include conduct not specifically listed as a crime against humanity in Article 5 of the Statute of the International Tribunal. However, such conduct must reach the same level of gravity as the other crimes listed in the Article. In this case, the Trial Chamber finds that two alleged acts do not rise to that level of gravity, namely, persecution in the form of encouraging and promoting hatred, by propaganda and otherwise, and persecution in employment.

Turning now to the facts. The relevant history begins with the founding in 1990 of a Bosnian Croat political party, the Croatian Democratic Union of Bosnia and Herzegovina, or "HDZ-BiH". This was an offshoot of its Croatian parent, the nationalist HDZ party. In late 1991 the HDZ-BiH set up a separate Croat community within Bosnia, the HZ H-B, which the Trial Chamber finds was established with the intention that it should, in due course, become part of the Republic of Croatia. The HZ H-B thereafter created another body, the Croatian Defence Council, "the HVO", as the executive and defence authority of the Bosnian Croat community. Local municipal HVOs were then set up as the executive and military power in the municipalities.

Meanwhile, Dario Kordić rose rapidly in the HDZ-BiH political party, becoming its President in his home-town, Busovača; President of his Regional Community; and Vice-President of the HZ H-B. Mario Čerkez for his part was one of the founders of the HVO in Vitez and Commander of its local Brigade, known as the Viteška Brigade.

In 1992 the HVO began taking over all power in the municipalities in Central Bosnia, in particular in Busovača, Vitez and Kiseljak. They met little armed resistance except in Novi Travnik and the village of Ahmići. In these incidents Dario Kordić demonstrated both his political and military authority; and the Trial Chamber finds that by the end of 1992, on the eve of the conflict, Dario Kordić combined both forms of authority. His military authority did not involve a formal rank but was a position which he had won for himself. Accordingly, a precise position in the chain of command cannot be ascribed to him; it is not suggested that he had power to discipline or punish troops, and the Trial Chamber finds that he has no liability under Article 7(3) of the Statute concerning command responsibility.

We come now to the most important year in the conflict, 1993. That year began with peace talks and the Vance-Owen Peace Plan. However, the situation soon degenerated into conflict, first in Gornji Vakuf and thereafter in Busovača. The HVO attacked the latter municipality in January 1993, using artillery and infantry on civilian targets, and setting a pattern for subsequent attacks on towns and villages. The evidence shows that Dario Kordić was implicated in this attack.

In April 1993 it was the turn of Vitez and the Muslim villages of the Lašva Valley to come under attack. The Trial Chamber finds that the evidence points to a well-organised and planned HVO attack upon these locations, in particular the village of Ahmići where the attack early in the morning of 16 April resulted in a massacre in which more than 100 people were murdered, including 32 women and 11 children, and the village was destroyed. There were similar attacks on the villages up and down the Lašva Valley and on the town of Vitez. The Trial Chamber finds that these attacks followed a common design or plan conceived and executed by the Bosnian Croat leadership to ethnically cleanse the valley of Muslims.

Dario Kordić, as the local political leader was part of this design or plan, his principal role being that of a planner and instigator. In addition, the Trial Chamber finds that Dario Kordić was present at a meeting of politicians in the headquarters of Colonel Blaškić on the 15 April when the attacks on Ahmići and the other villages were authorised; that Mario Čerkez was present at a subsequent military meeting when plans were drawn up; and also that Dario Kordić was associated with an order given by Colonel Blaškić to kill all the military-aged men, expel the civilians and set fire to the houses in Ahmići.

As for Mario Čerkez's role on 16 April, the Trial Chamber finds that during this period the Viteška Brigade was in the thick of the fighting and that Mario Čerkez was in command of the Brigade. As Commander, he participated in the attacks on Vitez, Stari Vitez and Večeriska. However, in spite of his presence at the military meeting on 15 April, the Trial Chamber is not satisfied beyond reasonable doubt that Mario Čerkez bears any responsibility for the attack on Ahmići. This attack was the responsibility of the 4th Battalion Military Police, which was not under his command.

The fighting around Vitez continued after 16 April. On 18 April a truck bomb exploded near the mosque in Stari Vitez, killing at least 6 people and injuring 50 others. The Trial Chamber finds that this was an act of pure terrorism committed by elements within the HVO in Vitez but that there is no evidence to connect either of the accused with this action.

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On 18 April the HVO attacked the villages in the Kiseljak municipality. These attacks were part of the general offensive launched by the HVO against the Muslims in this area and Dario Kordić as the local political leader was associated with them.

On 19 April the market-place in Zenica was shelled, killing 15 people and injuring many others. The Trial Chamber finds that the HVO was responsible but that this was not consistent with the pattern of the other attacks and thus falls outside the common design or plan. No political connection has been demonstrated and consequently the Trial Chamber cannot draw the inference that Dario Kordić was implicated in this unlawful attack.

By the end of April there was a cease-fire in place, but in June further fighting broke out in Central Bosnia. The HVO launched another series of attacks: this time on villages in the Kiseljak municipality, including the village of Tulica where 12 people were killed and the village destroyed. The Trial Chamber finds that these offensives were another manifestation of the HVO design to subjugate the Muslims of Central Bosnia. As with the offensives against the villages in April, the Trial Chamber finds that the attacks would not have been launched without the approval of the local political leadership in the person of Dario Kordić.

In October 1993, events moved to Vareš municipality. The village of Stupni Do is located about a kilometre south of the town of Vareš. On 23 October the village was attacked and 38 people lost their lives. It was not disputed that Ivica Rajić and his troops from Kiseljak were responsible for this massacre. Some defence was offered in the village but there can be no justification for what happened. However, the Trial Chamber finds that Dario Kordić's influence and authority which were concentrated in the Lašva Valley did not extend to Stupni Do, which was thus outside his sphere of authority, and the attack on the village was not part of any common plan or design to which he was a party.

During the HVO offensives many hundreds of Bosnian Muslim civilians were rounded up and detained in makeshift camps where conditions varied from camp to camp but were generally inhuman. The Trial Chamber finds that the detainees were subject to arbitrary and unlawful imprisonment (which was part of the common design or plan) and that they were forced without justification to dig trenches and were used as hostages and human shields. The Trial Chamber also finds that as Commander of the Viteška Brigade Mario Čerkez was responsible for the unlawful imprisonment and inhuman treatment of the detainees in the Vitez detention facilities, and that Dario Kordić was responsible for the unlawful imprisonment of detainees in the areas for which he had authority. However, the camps were run by the military and the evidence is not such as to allow an inference to be safely drawn that Dario Kordić was connected with the way in which the detainees were treated or that the treatment was part of the common plan or design.

The Trial Chamber finds that there was a pattern of destruction and plunder in all the places attacked by the HVO and that the HVO deliberately targeted mosques and other religious and educational institutions. All this was part of the common plan and the accused were implicated in the offences where they have been found to be responsible for attacks.

In relation to those Counts alleging persecution the Trial Chamber finds on overwhelming evidence, that there was a campaign of persecution aimed at the Bosnian Muslims throughout the Indictment period in Central Bosnia. It took the form of the most extreme expression of persecution, *i.e.* attacking towns and villages with the concomitant destruction and plunder, killing, injury and detention. The purpose of the campaign was the subjugation of the Bosnian Muslim population. Thus, the Trial Chamber rejects the defence case that these events amounted to a civil war and that the Bosnian Croats were on the defensive and themselves subject to persecution. For these purposes, the fact that individual atrocities were committed against Bosnian Croats is irrelevant although they may be the subject of other criminal proceedings.

The Trial Chamber makes the following findings about the participation of the accused in the campaign of persecution. Whatever positions he may have held, the evidence does not support the contention that Dario Kordić was in the very highest echelons of the Bosnian Croat leadership or that he conceived the campaign of persecution. He was a regional leader and lent himself enthusiastically to the common design of persecution by planning, preparing and ordering those parts of the campaign which fell within his sphere of authority.

As already noted, the Trial Chamber finds that Mario Čerkez, as the Commander of the Viteška Brigade, participated in the attacks on Vitez, Stari Vitez and Večeriska. This was a high point of the campaign of persecution. The accused played his part in that campaign by commanding the troops involved in some of the incidents; as such he was a co-perpetrator.

We turn now to the allegation that the accused are also guilty by reason of their superior responsibility and failure to prevent these crimes and to punish the perpetrators. The Trial Chamber notes that such responsibility may attach to civilians once it is established that the requisite power to prevent and punish exists.

However, as already noted, the Trial Chamber finds that Dario Kordić did not possess the authority either to prevent the crimes or to punish the perpetrators and cannot therefore be liable under Article 7(3) of the Statute. On the other hand, Mario Čerkez knew of the impending attacks on Vitez, Stari Vitez and Večeriska by the troops under his command. He failed to take the necessary measures to prevent those attacks, failed to punish those who were responsible for them, and is therefore liable under Article 7(3) in respect of the offences arising from attacks on those three locations.

Finally, the Trial Chamber applies the practice approved by the Appeals Chamber recently in relation to cumulative convictions. As a result the accused will be acquitted of those Counts for which a cumulative conviction would be inappropriate.

The Trial Chamber's findings on the Counts of the Indictment are as follows.

Counts 1 and 2: crimes against humanity: persecutions
Count 1: Dario Kordić - GUILTY
Count 2: Mario Čerkez - GUILTY

Counts 3 - 6: violations of the laws or customs of war (unlawful attack on civilians).
Counts 3 and 4: Dario Kordić – GUILTY
Counts 5 and 6: Mario Čerkez – GUILTY

Counts 7 - 20: crimes against humanity, grave breaches of the Geneva Conventions, and violations of the laws or customs of war (murder, wilful killing, inhumane acts, wilfully causing great suffering or serious injury, inhuman treatment).
Dario Kordić:
Counts 7, 8, 10 and 12: - GUILTY
Counts 9, 11, 13: – NOT GUILTY
Mario Čerkez:
Counts 14, 15, 17 and 19: - GUILTY
Counts 16, 18 and 20: - NOT GUILTY

Counts 21 and 22: a crime against humanity and a grave breach of the Geneva Conventions (imprisonment, unlawful confinement).
Dario Kordić – GUILTY

Counts 23 - 28: grave breaches of the Geneva Conventions and violations of the laws or customs of war (inhuman treatment, use of human shields, taking of hostages).
Dario Kordić – NOT GUILTY

Counts 29 - 31: a crime against humanity and grave breaches of the Geneva Conventions (imprisonment, unlawful confinement, inhuman treatment).
Mario Čerkez - GUILTY

Counts 32 - 36: violations of the laws or customs of war and grave breaches of the Geneva Conventions (cruel treatment, taking of hostages, inhuman treatment).
Mario Čerkez:
Counts 32, 34 and 36: – NOT GUILTY
Counts 33 and 35: – GUILTY

Counts 37 - 42: grave breaches of the Geneva Conventions; violations of the laws or customs of war (extensive destruction of property, wanton destruction, plunder).
Count 37: Dario Kordić – NOT GUILTY
Counts 38 and 39: Dario Kordić – GUILTY
Count 40: Mario Čerkez – NOT GUILTY
Counts 41 and 42: Mario Čerkez - GUILTY

Counts 43 and 44: violations of the laws or customs of war (destruction or damage to religious or educational institutions).
Count 43: Dario Kordić – GUILTY
Count 44: Mario Čerkez - GUILTY

Turning now to the question of sentence, the Trial Chamber makes some general points. The Trial Chamber will consider the appropriate sentences in the case of the accused, emphasising that the sentences

reflect the evidence in this case and the role of these accused as found by this Trial Chamber. Both accused have been convicted of numerous offences. They all arise from the same common design which led to the persecution and the "ethnic cleansing" of the Bosnian Muslims of the Lašva Valley and surroundings. The resulting sustained campaign involved a succession of attacks on villages and towns which were characterised by a ruthlessness and savagery and in which no distinction was made as to the age of its victims: young and old were either murdered or expelled and their houses were burned. The total number of dead may never be known, but it runs into hundreds, with thousands expelled. Offences of this level of barbarity could not be more grave and those who participate in them must expect sentences of commensurate severity to mark the outrage of the international community.

Dario Kordić: Your role in the offences was an important one. As a regional political leader in Central Bosnia, with particular authority in the Lašva Valley, you were the effective political commander in the area where the majority of the offences were committed. As already noted, the Trial Chamber has not accepted the full extent of the Prosecution case and has not found that you were in the highest echelons of the leadership of the campaign of persecution. Likewise, you have been acquitted of some of the offences arising from individual acts of terror and the massacre at Stupni Do. Therefore, you are not to be sentenced as an architect of the persecution or the prime mover in it. Nonetheless, you joined the campaign enthusiastically and played an instrumental part in the Lašva Valley offensives in 1993, in particular in ordering the attack of Ahmići and the other villages in April 1993. For your part in that dreadful episode you deserve appropriate punishment. The fact that you were a politician and took no part in the actual execution of the crimes makes no difference; you played your part as surely as the men who fired the guns. Indeed, the fact that you were a leader aggravates the offences. You have offered no mitigation and there is none. The Trial Chamber considers that your overall criminality can be best reflected in a single sentence. Dario Kordić, you are sentenced to **25** years imprisonment.

Mario Čerkez: Your position is different from that of your co-accused. You were a soldier and a middle-ranking HVO commander. The Trial Chamber notes that you have no previous experience of command and that nothing in your earlier life could have prepared you for it. However, you were the Commander of the Viteška Brigade during the time of the terrible events in the Lašva Valley and led it in the assaults which resulted in civilian death and destruction. While the Trial Chamber has found that your troops were not involved in the massacre at Ahmići, you played your part in the campaign of persecution, aggravated because of your role as a commander. While there was positive testimony as to your character and personality, none of the matters submitted as mitigating circumstances amount to mitigation of these international crimes. The Trial Chamber considers that your overall criminality can be best reflected in a single sentence. Mario Čerkez, you are sentenced to **15** years imprisonment.

The period of time the accused have spent in custody of the International Tribunal, that is the period from 6 October 1997 to the date of this Judgement, shall be deducted from the sentences".

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International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Enver Hadžihasanović and Amir Kubura
Judgement of 22 April 2008 (summary)

Case No. IT-01-47

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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

(Exclusively for the use of the media. Not an official document)

The Hague, 22 April 2008

APPEALS JUDGEMENT SUMMARY FOR THE CASE OF HADŽIHASANOVIĆ AND KUBURA.

Please find below the summary of the appeals judgement today read out by Judge Pocar:

BACKGROUND OF THE CASE

This case concerns certain events that unfolded in Central Bosnia in 1993, particularly in the municipalities of Bugojno, Vareš and Zenica. During the period relevant for the Indictment, the Appellant Enver Hadžihasanović was Commander of the 3rd Corps of the Army of Bosnia and Herzegovina. The Appellant Amir Kubura was Commander of the 3rd Corps 7th Muslim Mountain Brigade. On 15 March 2006, the Trial Chamber found Hadžihasanović guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed in his duty as a superior to prevent or punish the murder by his subordinates of Mladen Havranek at the *Slavonija* Furniture Salon in the Bugojno Municipality (Count 3); the murder by his subordinates of Dragan Popović at the Orašac Camp (Count 3); and the cruel treatment by his subordinates at the Zenica Music School, at the Orašac Camp and at various detention centres in Bugojno (Count 4). The Trial Chamber acquitted Hadžihasanović on all other counts of the Indictment. Kubura was found guilty, pursuant to Articles 3 and 7(3) of the Statute, for having failed in his duty as a superior to prevent or punish the plunder by his subordinates in the Ovnak area and in Vareš (Count 6). The Trial Chamber acquitted Kubura on all other counts of the Indictment. Hadžihasanović was sentenced to five years of imprisonment; Kubura was sentenced to two years and six months of imprisonment. Hadžihasanović appealed on 18 April 2006, seeking the reversal of the convictions against him. Kubura appealed on 13 April 2006, challenging both his conviction and the sentence imposed on him. The Prosecution appealed the sentence imposed on Hadžihasanović but not the acquittals. The Prosecution appealed Kubura's acquittal under Count 5 of the Indictment, regarding wanton destruction in the town of Vareš in November 1993, and the sentence imposed on him. The Appeals Chamber heard oral submissions of the Parties regarding these appeals on 4 and 5 December 2007.

Following the practice of the International Tribunal, I will not read out the text of the Judgement except for the Disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. I emphasise that this summary is not part of the written Judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written Judgement will be made available to the Parties at the conclusion of this hearing.

GROUNDS OF APPEAL

I will now address the Parties' grounds of appeal. First, I will address Hadžihasanović's arguments regarding the alleged infringement on his right to a fair trial. Second, I will address the Parties' arguments concerning Hadžihasanović's individual criminal responsibility as a superior. Third, I will address the Parties' arguments concerning Kubura's individual criminal responsibility as a superior. Finally, I will turn to the Parties' arguments regarding the sentences imposed on Hadžihasanović and Kubura.

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A. Hadžihasanović's appeal concerning the fairness of the trial and evidentiary issues

In his first, second, and as part of his third and sixth grounds of appeal, Hadžihasanović submits that the Trial Chamber committed numerous errors infringing upon his right to a fair trial under Article 21 of the Statute.

For the reasons set out in the Judgement, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that the Trial Chamber erred in law or in fact and that his right to a fair trial was infringed.

B. Appeal concerning Hadžihasanović's individual criminal responsibility as a superior

I now turn to Hadžihasanović's individual criminal responsibility as a superior. **Under his third ground of appeal,** Hadžihasanović argues that the Trial Chamber erred by finding that he failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993, as well as to prevent similar crimes in the other detention facilities in Bugojno.

The Appeals Chamber concurs with the Trial Chamber's finding that the evidence before it provided a sufficient basis to conclude that the perpetrators of the 5 August 1993 *Slavonija* Furniture Salon crimes were held responsible for breaches of military discipline by the military disciplinary organ in Bugojno and that no criminal report was filed with the District Military Prosecutor's Office regarding the matter. The Appeals Chamber agrees with the Trial Chamber that, given the gravity of the offences for which the perpetrators were being punished – murder and cruel treatment – Hadžihasanović could not consider as acceptable punishment the disciplinary sanction of a period of detention not exceeding 60 days.

The Appeals Chamber however finds that no reasonable trier of fact could have found beyond reasonable doubt that the 3rd Corps failed to initiate an investigation or criminal proceedings against the perpetrators of the murder and cruel treatment by filing a report with the Bugojno municipal public prosecutor. The report of 20 August 1993 from the chief of the civilian police in Bugojno regarding alleged war crimes committed against Croats, which establishes that the Bugojno municipal public prosecutor met with European Community observers to discuss alleged war crimes committed against Croats, including the murder of Mladen Havranek, indeed raises a reasonable doubt as to whether the 307th Brigade, subordinated to the 3rd Corps headed by Hadžihasanović, filed a criminal report regarding the 5 August 1993 *Slavonija* Furniture Salon crimes with the Bugojno municipal public prosecutor.

The Appeals Chamber recalls that a superior need not dispense punishment personally and may discharge his duty by reporting the matter to the competent authority. In the present case, the Appeals Chamber finds that the reporting of the 5 August 1993 *Slavonija* Furniture Salon crimes to the Bugojno municipal public prosecutor, in conjunction with the disciplinary sanctions imposed by the military disciplinary organ, constituted necessary and reasonable measures to punish the perpetrators.

For the reasons set out in the Judgement, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take the adequate measures required to punish those responsible for the murder of Mladen Havranek and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993.

Under his third ground of appeal, Hadžihasanović also contends that the Trial Chamber erred in finding that he had reason to know of the acts of mistreatment committed in the Bugojno Detention Facilities as of 18 August 1993.

To reach this conclusion, the Trial Chamber mainly relied on its previous finding that Hadžihasanović had failed to take adequate measures to punish the perpetrators of the 5

August 1993 crimes. However, the Appeals Chamber found that this latter finding was in error. Considering that none of the Trial Chamber's remaining findings, whether taken individually or collectively, sufficiently supports the Trial Chamber's conclusion that Hadžihasanović had reason to know of the acts of cruel treatment in the Bugojno Detention Facilities as of 18 August 1993, the Appeals Chamber finds that no reasonable trier of fact could have concluded, given the evidence, that Hadžihasanović possessed the requisite knowledge under Article 7(3) of the Statute, which would trigger his responsibility to prevent or punish such acts.

For the reasons set out in the Judgement, the Appeals Chamber reverses Hadžihasanović's convictions for having failed to take adequate measures to prevent or punish the acts of mistreatment in the Bugojno Detention Facilities as of 18 August 1993.

Under his fourth ground of appeal concerning the cruel treatment at the Zenica Music School from May to September 1993, Hadžihasanović argues that the Trial Chamber erred by finding that he failed to take the reasonable measures necessary to punish the perpetrators and prevent such acts.

First, Hadžihasanović argues that the Trial Chamber failed to properly consider the evidence provided by Witness Džemal Merdan – his Deputy-Commander – and Witness HF – a senior officer of the 3rd Corps Command – that measures were taken by the 3rd Corps to investigate allegations of mistreatment at the Zenica Music School. The Appeals Chamber notes that the Trial Chamber did not ignore the testimony of these two witnesses but, after reviewing the totality of the evidence before it, decided to accord greater weight to other evidence. The Trial Chamber found, based on the many accounts by former prisoners at the Music School, that the Zenica Music School's basement consistently housed between ten and thirty detainees from 18 April 1993 until 20 August 1993. The Trial Chamber further found that Hadžihasanović received alarming information from other sources, which established the need for further inquiry based on allegations of mistreatment. Thus, the Trial Chamber's finding that an investigation of the allegations of cruel treatment would have enabled Hadžihasanović to identify the persons responsible for the violence does not turn solely on the truthfulness of Witnesses Džemal Merdan and HF.

Second, Hadžihasanović argues that the Trial Chamber failed to properly consider evidence that the arrest, detention and alleged mistreatment of detainees at the Music School was concealed by some members of the 7th Brigade. The Appeals Chamber finds that the Trial Chamber noted that there was an intention on the part of the soldiers present at the School to conceal the mistreatment inflicted on the detainees but concluded that this had no bearing on Hadžihasanović's criminal responsibility. Indeed, the Trial Chamber found that Hadžihasanović had received information that his subordinates were committing mistreatment at the Zenica Music School from sources outside the 7th Brigade, such that any attempted concealment by members of the 7th Brigade was rendered secondary.

Third, Hadžihasanović submits that the measures he took with respect to the Zenica Music School were necessary and reasonable. The Trial Chamber considered Hadžihasanović's arguments that he had taken preventive measures to ensure that civilians and prisoners of war were treated in accordance with international humanitarian law and that he took steps to investigate allegations of mistreatment. The Trial Chamber nevertheless concluded that Hadžihasanović did not make genuine efforts to initiate an appropriate investigation into the allegations of cruel treatment whereas such an investigation would have enabled him to discover the identity of the persons responsible for the violence.

For the reasons set out in the Judgement, the Appeals Chamber finds that Hadžihasanović failed to demonstrate that no reasonable trier of fact could have concluded that, given the evidence, he failed to take necessary and reasonable measures to punish the perpetrators of the cruel treatment at the Zenica Music School and prevent further mistreatment.

I now turn to Hadžihasanović's arguments under his fifth ground of appeal concerning the murder and cruel treatment in Orašac in October 1993.

Hadžihasanović submits that the Trial Chamber erred by finding that he failed to take necessary and reasonable measures to prevent the murder of Dragan Popović and the cruel treatment committed by the *El Mujahedin* detachment in the Orašac Camp against five civilians abducted on 19 October 1993. He argues that the Trial Chamber erred in finding that he had *de jure* authority over the members of the *El Mujahedin* detachment and in finding that he exercised effective control over the *El Mujahedin* detachment. Since *de jure* authority is only one factor that helps to establish effective control, and because the question is resolvable on the basis of effective control alone, the Appeals Chamber declines to address whether Hadžihasanović had *de jure* authority over the *El Mujahedin* detachment.

The Trial Chamber found that Hadžihasanović exercised effective control over the *El Mujahedin* detachment on the basis that the evidence before it showed that three types of indicia of effective control were satisfied, namely: the power to give orders to the *El Mujahedin* detachment and have them executed, the conduct of combat operations involving the *El Mujahedin* detachment, and the absence of any other authority over the *El Mujahedin* detachment.

First, the Appeals Chamber recognises that the power to give orders and have them executed can serve as an indicium of effective control. In the present case, the Trial Chamber took certain orders of re-subordination into account, though to varying degrees, as indicia of effective control. However, for the reasons set out in the Judgement, the Appeals Chamber finds that none of the re-subordination orders, either individually or collectively, is sufficient to establish the existence of effective control.

Second, the Appeals Chamber finds that while the findings relied upon by the Trial Chamber confirm that the *El Mujahedin* detachment took part in several combat operations in September and October 1993 and that this occurred within the framework established by the Operational Group *Bosanska Krajina* and the 3rd Corps, they do not necessarily provide sufficient support for the conclusion that Hadžihasanović had effective control over the *El Mujahedin* detachment in the sense of having the material ability to prevent or punish its members should they commit crimes. Notably, several findings of the Trial Chamber demonstrate that the *El Mujahedin* detachment maintained a significant degree of independence from the units it fought alongside on various issues, which belies the Trial Chamber's conclusion that the *El Mujahedin* detachment was under the effective control of the 3rd Corps. The Trial Chamber found, for example, that the detachment members were anxious to maintain their independence and reserved the right to decide whether they would take part in combat operations.

Thus, while these Trial Chamber's findings indicate that the 3rd Corps cooperated with the *El Mujahedin* detachment, they are insufficient to establish the existence of a relationship of effective control between the 3rd Corps and the *El Mujahedin* detachment.

Third, with regard to the absence of any other authority over the *El Mujahedin* detachment, the Appeals Chamber finds that some of the Trial Chamber's findings suggest that the *El Mujahedin* detachment was more under the influence of Muslim clerics, than under that of the 3rd Corps. However, the Appeals Chamber disputes the relevance of the criterion identified by the Trial Chamber as an indicator of the existence of effective control. Hadžihasanović's effective control cannot be established by process of elimination. The absence of any other authority over the *El Mujahedin* detachment in no way implies that Hadžihasanović exercised effective control in this case.

Last, I turn to Hadžihasanović's argument that he could not have effective control over the *El Mujahedin* detachment if the only way for the 3rd Corps to obtain the release of the civilians abducted on 19 October 1993 was to use force.

The Appeals Chamber finds that the military operation that the Trial Chamber expected the 3rd Corps to undertake to rescue those hostages would be comparable to that necessary to obtain the release of hostages from an enemy force rather than a force under its effective control. Regardless of whether the use of force was materially feasible or advisable to save the lives of the hostages, the facts of the case reveal a situation in which the relationship between the *El Mujahedin* detachment and the 3rd Corps was not one of subordination. Instead, it was close to overt hostility since the only way to control the *El Mujahedin* detachment was to attack them as if they were a distinct enemy force. This scenario is at odds with the premise of the Trial Chamber that the *El Mujahedin* detachment was subordinated to the 3rd Corps. This conclusion further confirms that Hadžihasanović did not have effective control over the *El Mujahedin* detachment.

For the reasons set out in the Judgement, the Appeals Chamber concludes that no reasonable trier of fact could have concluded that it was established beyond reasonable doubt that Hadžihasanović had effective control over the *El Mujahedin* detachment between 13 August and 1 November 1993. As a result, the Appeals Chamber reverses Hadžihasanović's conviction for having failed to prevent the crimes of cruel treatment committed between 19 and 31 October 1993 and the murder of Dragan Popović.

C. Kubura's and Prosecution's appeals concerning Kubura's individual criminal responsibility as a superior

I now turn to Kubura's individual criminal responsibility as a superior. Under his first ground of appeal, Kubura submits that the Trial Chamber erred in convicting him of failing to take necessary and reasonable measures to punish the acts of plunder committed in June 1993 in the Ovnak area. He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the plunder committed in the Ovnak area and/or that he knew of **First,** the Appeals Chamber notes that the Trial Chamber examined Kubura's claim that members of the 7th Brigade could not have been responsible for the plunder because they had already left the Ovnak area on 8 June 1993 but, following its review of the evidence, concluded otherwise. While, as Kubura argues, the Trial Chamber indeed found that members of the 7th Brigade did not enter the villages where the plunder was committed and left the sector on 9 June 1993, it also found that, following the end of combat operations, members of the 7th Brigade's military police units entered and systematically plundered the Ovnak area as of 9 June 1993 prior to their departure.

The Appeals Chamber finds that Kubura failed to establish that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in the Ovnak area in June 1993.

Second, with regard to Kubura's argument that the Trial Chamber only relied on one witness to conclude that he had knowledge of the plunder committed in the Ovnak area on 9 June 1993, the Appeals Chamber finds that he ignores the additional evidence considered by the Trial Chamber and its resulting findings. Moreover, the Trial Chamber noted that Kubura received orders alerting him to plunder in the Ovnak area generally, which Kubura acknowledged and responded to. In addition, the Trial Chamber found that Kubura issued a report on 20 June 1993 to the 3rd Corps Command acknowledging that a standardised procedure for war booty had been implemented by the 7th Brigade. The Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that he had knowledge of plunder by his subordinates in the Ovnak area in June 1993.

In light of the foregoing, the Appeals Chamber accordingly upholds Kubura's conviction for failing to take necessary and reasonable measures to punish the plunder committed by his subordinates in June 1993 in the Ovnak area.

Under his second ground of appeal, Kubura submits that the Trial Chamber erred in convicting him of failing to take necessary and reasonable measures to prevent or punish the plunder which took place in Vareš in November 1993. He argues that the Trial Chamber erred in finding that the 7th Brigade was involved in the commission of acts of plunder in Vareš in November 1993 and/or that he knew or had reason to know of these acts.

First, with regard to the 7th Brigade's involvement, the Appeals Chamber finds that the documents relied upon by the Trial Chamber in reaching the finding that Kubura's subordinates engaged in plunder in Vareš specifically refer to the 7th Brigade's involvement in these acts. The Appeals Chamber finds that Kubura failed to demonstrate that, given the evidence, no reasonable trier of fact could have concluded that members of the 7th Brigade committed plunder in Vareš in November 1993.

Second, with regard to Kubura's knowledge of the acts of plunder in Vareš triggering his duty to prevent them, the Appeals Chamber notes that the Trial Chamber focused its reasoning on Kubura's failure to punish his subordinates' plunder in the Ovnak area some five months earlier. While portions of the Trial Judgement demonstrate that the Trial Chamber considered factors other than Kubura's past failure to punish his subordinates in determining whether he had reason to know of their acts of plunder in Vareš on 4 November 1993, the Trial Judgement suffers, at the very least, from a lack of clarity as to whether and, if so, how the Trial Chamber took into account the circumstances of the case in determining that Kubura had reason to know sufficient to trigger a duty to prevent his subordinates' plunder in Vareš. The Appeals Chamber deems it of significant import that the Trial Chamber found that, irrespective of the measures taken by Kubura to stop the acts of plunder in Vareš once he had knowledge of them, Kubura remained responsible for failing to prevent these acts in the first place based *exclusively* on his past failure to punish similar acts in the Ovnak area. Such a conclusion implies that the Trial Chamber considered Kubura's knowledge of and past failure to punish his subordinates' acts of plunder in the Ovnak area as automatically entailing that he had reason to know of their future acts of plunder in Vareš. The Appeals Chamber finds that this constitutes an error of law.

Having applied the correct legal standard to the evidence contained in the trial record, the Appeals Chamber recognises that Kubura's knowledge of and failure to punish his subordinates' past acts of plunder was likely to be understood by his subordinates at least as acceptance, if not encouragement of such conduct, such that it increased the risk that further acts of plunder, such as those in Vareš, would be committed again. The Appeals Chamber notes, however, that the acts of plunder committed by Kubura's subordinates in the Ovnak area on 9 June 1993 and in Vareš on 4 November 1993 were separated by some five months and some 40 kilometres. While the plunder was widespread on each of these two occasions, Kubura's subordinates were not found to have engaged in plunder on a frequent basis while under his command. The Appeals Chamber recalls that the Trial Chamber did not find that Kubura had any other knowledge regarding his subordinates' acts of plunder in Vareš prior to their commission, other than the knowledge it inferred from his past failure to punish.

However, with respect to Kubura's knowledge of his subordinates' acts of plunder whilst they were ongoing, the Appeals Chamber recalls that Kubura received orders on 4 November 1993 alerting him to the ongoing acts of plunder in Vareš and holding him responsible for stopping them. Indeed, the Trial Chamber found that Kubura received orders from the 3rd Corps Command directing him to use military police to prevent property from being plundered in Vareš, as well as instructions from the Operational Group East to cease all unauthorised acts, stop anything from being removed and withdraw his troops from the town.

While Kubura's knowledge of his subordinates' past plunder in Ovnak and his failure to punish them did not, in itself, amount to actual knowledge of the acts of plunder in Vareš, the Appeals Chamber concurs with the Trial Chamber that the orders he received on 4 November 1993 constituted, at the very least, sufficiently alarming information justifying further inquiry.

The Appeals Chamber accordingly finds that Kubura possessed knowledge sufficient to trigger a duty to prevent his subordinates from committing further plunder in Vareš as of his receipt of the orders alerting him to the ongoing plunder. For the reasons set out in the Judgement, the Appeals Chamber also finds that Kubura's knowledge of his subordinates' acts of plunder in Vareš was also sufficient to trigger his duty to punish them.

With regard to the measures taken by Kubura to prevent his subordinates from committing further acts of plunder in Vareš, the Appeals Chamber recalls that, following the order of 4 November 1993 from the Operational Group *Istok* Command, Kubura withdrew his troops from Vareš the very same day and then forbade the members of the 7th Brigade from entering or staying in Vareš on 5 November 1993.

For the reasons set out in the Judgement, the Appeals Chamber finds that Kubura took necessary and reasonable measures, given the circumstances of the case, to *prevent* the plunder by putting a stop to the plunder once it had started so it would not be repeated. The Appeals Chamber however upholds the Trial Chamber's finding that Kubura failed to take necessary and reasonable measures to *punish* his subordinates' acts of plunder in Vareš on 5 November 1993. Kubura's conviction as a superior under Article 7(3) of the Statute for the plunder in Vareš is accordingly maintained.

I now turn to the Prosecution's second ground of appeal that Kubura should have been convicted under Article 7(3) of the Statute for the wanton destruction committed by his subordinates in Vareš on 4 November 1993.

The Trial Chamber found that Kubura's subordinates committed wanton destruction in Vareš on 4 November 1993 but that it was not proven beyond reasonable doubt that he knew or had reason to know of this crime.

First, as to whether Kubura received information concerning the destruction of property in Vareš, the Trial Chamber found, as correctly remarked by the Prosecution, that the Operational Group *Istok* issued a combat report to the 3rd Corps Command on 4 November 1993 noting the chaotic situation in Vareš. In this report, the Operational Group *Istok* requested that the 3rd Corps Command send police military units to the town of Vareš. In response, the 3rd Corps Command issued a combat report stating that it had issued orders that brigades use military police forces to prevent chaos and the destruction of property in Vareš. The Trial Chamber found that the 7th Brigade neither received the 4 November 1993 Operational Group *Istok* combat report to the 3rd Corps Command nor the 3rd Corps Command's combat report in response. Yet, from the content of the 3rd Corps Command combat report, it inferred that the 7th Brigade "must have received" orders to use military police forces to prevent chaos and the destruction of property in Vareš given that the 7th Brigade was subordinated to the 3rd Corps Command and present in Vareš. The 3rd Corps Command combat report, however, failed to make explicit the identity of the perpetrators of the acts of wanton destruction in Vareš. The Appeals Chamber notes that other brigades were also present in Vareš on 4 November 1993.

The Trial Chamber also found that the Operational Group *Istok* issued a separate order on 4 November 1993, specifically directed to the 7th Brigade Commander, which explicitly refers to activities of plunder and the need to prevent them but does not mention acts of destruction. The Appeals Chamber concurs with the Trial Chamber that, given the evidence taken as a whole, the inference that the 7th Brigade must have received orders from the 3rd Corps Command on 4 November 1993 does not establish, by itself, Kubura's knowledge of his subordinates' acts of wanton destruction.

Second, the Appeals Chamber considers that Kubura's knowledge of the acts of wanton destruction cannot automatically be inferred from his awareness of the plunder in Vareš on 4 November 1993. Indeed, the Trial Chamber's finding regarding Kubura's knowledge of the plunder in Vareš on 4 November 1993 rests on a much broader evidentiary basis. Furthermore, the Trial Chamber relied on Kubura's knowledge of and failure to punish his subordinates' past acts of plunder. The Trial Chamber made no such findings with respect to any past acts of wanton destruction by Kubura's subordinates. Thus, while there was a sufficient evidentiary basis for the Trial Chamber to conclude that Kubura had knowledge of the acts of plunder in Vareš, it was reasonable for it to conclude that his knowledge as regards the acts of wanton destruction was not established beyond reasonable doubt.

In light of the foregoing, the Appeals Chamber finds that the Prosecution failed to establish that no reasonable trier of fact could have concluded, on the basis of all the admitted evidence, that Kubura's knowledge of wanton destruction in Vareš on 4 November 1993 was not established beyond reasonable doubt. Kubura's acquittal is confirmed.

D. Appeals concerning the sentences imposed on Hadžihasanović and Kubura

Finally, I turn to the appeals concerning the sentences rendered. Hadžihasanović did not specifically appeal his sentence but alleged that the Trial Chamber erred in that the Disposition of the Trial Judgement does not adequately reflect some of the findings made by the Trial Chamber in the body of the Trial Judgement. Kubura appealed his sentence as manifestly excessive, and the Prosecution appealed both Hadžihasanović and Kubura's sentences as manifestly inadequate.

The Appeals Chamber allows Hadžihasanović's arguments and corrects the Disposition of the Trial Judgement concerning the temporal scope of the cruel treatment at the Zenica Music School to render it consistent with the Trial Chamber's findings. As regards the impact of this shorter period of responsibility on Hadžihasanović's sentence, the Appeals Chamber first recalls that the Trial Chamber, in its sentencing determination, correctly determined that the cruel treatment at the Zenica Music School took place over approximately seven months and not nine months as erroneously indicated in the Disposition of the Trial Judgement. The Appeals Chamber further notes that the Trial Chamber's finding regarding the large number of victims involved in the detention facilities in Zenica, which was considered an aggravating circumstance, remains valid for the relevant period. Thus, these factors remain unaffected by the above correction to the Disposition of the Trial Judgement and there is no impact on the sentence.

For the reasons set out in the Judgement, the Appeals Chamber dismisses the Prosecution's and Kubura's arguments. The Appeals Chamber finds that the Trial Chamber properly considered the gravity of the crimes, the relevant aggravating and mitigating factors, and the sentencing practices in the former Yugoslavia.

I will now read out in full the operative paragraphs of the Appeals Chamber's Judgement, that is, the Disposition. Mr. Hadžihasanović and Mr. Kubura, will you please stand.

DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearings of 4 and 5 December 2007;

SITTING in open session, unanimously:

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 3; **REVERSES** his conviction for failing to take the necessary and reasonable measures to punish those responsible for the murder of Mladen Havranek (Count 3 of the Indictment) and the cruel treatment of six prisoners at the *Slavonija* Furniture Salon on 5 August 1993 (Count 4 of the

Indictment), as well as his conviction for failing to take the necessary and reasonable measures to prevent or punish the cruel treatment at the *Gimnazija* School Building, the *Slavonija* Furniture Salon, the *Iskra* FC Stadium and the *Vojin Paleksić* Elementary School in Bugojno as of 18 August 1993 (Count 4 of the Indictment);

ALLOWS Hadžihasanovic's appeal, in part, with respect to Ground 4, concerning certain errors in the Disposition of the Trial Judgement with regard to his conviction entered under Count 4 of the Indictment for his failure to prevent or punish the cruel treatment at the Zenica Music School; **SETS ASIDE** the related portion of the Disposition of the Trial Judgement and **REPLACES** it with the following:

> COUNT 4: GUILTY of failure to prevent or punish cruel treatment at the Zenica Music School from 8 May 1993 to 20 August 1993 or 20 September 1993, in addition to failure to punish cruel treatment at the Zenica Music School from 26 January 1993 to 8 May 1993.

ALLOWS Hadžihasanović's appeal, in part, with respect to Ground 5; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent the murder of Dragan Popović on 21 October 1993 (Count 3 of the Indictment) and his conviction for failing to take the necessary and reasonable measures to prevent cruel treatment at the Orašac camp from 15 October 1993 to 31 October 1993 (Count 4 of the Indictment);

REDUCES the sentence of five years of imprisonment imposed on Hadžihasanović by the Trial Chamber to a sentence of three years and six months of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Hadžihasanović has already spent in detention; and

DISMISSES Hadžihasanović's appeal in all other respects;

ALLOWS Kubura's appeal, in part, with respect to Ground 2; **REVERSES** his conviction for failing to take the necessary and reasonable measures to prevent, though not to punish, plunder in Vareš on 4 November 1993 (Count 6 of the Indictment);

REDUCES the sentence of thirty months of imprisonment imposed on Kubura by the Trial Chamber to a sentence of two years of imprisonment; and

DISMISSES Kubura's appeal in all other respects;

DISMISSES the Prosecution's appeal in its entirety;

ORDERS that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules.

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International Criminal Tribunal for Rwanda

Prosecutor *v.* Alfred Musema
Judgement of 27 January 2000 (summary)

Case No. ICTR-96-13-T

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

SUMMARY

of the Judgement in the Alfred Musema Case, ICTR-96-13-T,

27 January 2000

1. Trial Chamber I of the United Nations International Criminal Tribunal for Rwanda, composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama, and Judge Navanethem Pillay, is sitting this 27th day of January 2000 to render its Judgement in the matter of "The Prosecutor versus Alfred Musema".

2. The Judgement, which will be available in written form and on the Tribunal's website in English and French, after this hearing, covers over 300 pages. The Chamber will limit its oral delivery to a summary of the content of the Judgement and its Verdict on each of the counts charged against Musema. The Judgement, and not this summary, is the authoritative text.

3. Attached to the Judgement are two separate opinions which we will also summarize here.

Introduction

4. In the Judgement, the Chamber provides an overview on the International Tribunal, established by the United ations Security Council. The proceedings before the Tribunal are governed by its Statute, annexed to Security Council Resolution 955, and its own Rules of Procedure and Evidence. The jurisdiction of the Tribunal is to rosecute persons charged with genocide or other serious violations of humanitarian law, committed in Rwanda during 1994.

The Indictment and Procedural Background

5. On 11 February 1995, Musema was arrested in Switzerland.

6. After the Prosecutor submitted an Indictment against Musema on 11 July 1996, which was confirmed by Judge Ostrovsky on 15 July 1996, he was transferred to the Tribunal's Detention Facility in Arusha on 20 May 1997. On 18 November 1997, he pleaded not guilty to all the counts preferred against him.

7. On 20 November 1998 the Prosecutor submitted an amended Indictment. The Chamber confirmed it on 14 December 1998; on the same day, Musema pleaded not guilty to the new charges.

8. The trial commenced on 25 January 1999. The Prosecutor submitted a further amended Indictment on 29 April 1999. The Chamber granted leave to amend this Indictment on 6 May 1999, at which time Musema pleaded not guilty to the new charges.

9. This Indictment, which is the basis of the present Judgement, charges Musema with genocide, with crime against humanity and with serious violations of Article 3 common to the Geneva Conventions and their Additional Protocol II.

10. During the trial, both parties presented extensive evidence to the Chamber, including thirty witnesses and 182 documents.

11. The parties made their closing arguments on 25 and 28 June 1999, after which the Chamber adjourned for deliberation.

The Accused

12. The accused, Alfred Musema-Uwimana, was born on 22 August 1949 in the Byumba *Préfecture*. He began his university studies in 1968 in Belgium and graduated in 1974. He married in 1975 and has three children.

13. Musema began his career in the Rwandan Ministry of Agriculture & Livestock Breeding. In 1984, by a presidential decree, he was appointed director of a public enterprise, the Gisovu Tea Factory.

14. This tea factory was in production for only a short time before Musema assumed responsibility, which encompassed the *Préfectures* of Kibuye and Gikongoro. By 1993 the tea factory was one of the most successful in Rwanda.

15. Musema was a member of the "*conseil préfectorial*" in Byumba *Préfecture* and a member of the Technical Committee in the Butare *Commune*. Both positions involved socio-economic and developmental matters and did not focus on *préfectorial* politics.

The Applicable Law

16. By his participation in the events described in the Indictment, Musema is alleged to be individually criminally responsible under **Articles 6(1)** and **6(3)** of the Statute.

17. The Chamber, in its Judgement, considers these two sub-Articles.

18. The Chamber recalls the constitutive elements under **Articles 2** and **3** of the Statute. Count 1 charges Musema with *genocide.* The Chamber recalls that the definition found in **Article 2** of the Statute is taken *verbatim* from the 1948 Genocide Convention. The Chamber adheres to the definition of genocide in the *Akayesu* Judgement.

19. In the alternative to Count 1, the Prosecutor, in Count 2, charges Musema with *complicity in genocide*. The Chamber finds that an accused cannot be convicted of both genocide and complicity in genocide for the same act. The Chamber adheres to the definition of complicity in genocide in the *Akayesu* Judgement.

20. Count 3 charges Musema with *conspiracy to commit genocide* under **Article 2(3)(b)** of the Statute. The Chamber defines conspiracy to commit genocide as an agreement between two or more persons to commit genocide.

21. Counts 4 to 7 charge Musema with *crime against humanity* under **Article 3** of the Statute. The Chamber recalls the case law on this crime and discusses the elements required to establish the crime.

22. With respect to crime against humanity, Musema is indicted for *murder*, *extermination*, *rape* and *other inhumane acts*. The Chamber adopts the definitions of murder and extermination articulated in the *Akayesu* and *Rutaganda* Judgements. The Chamber also concurs with the definition of rape, as a crime against humanity, articulated in the *Akayesu* Judgement.

23. Finally, Counts 8 and 9 charge Musema under **Article 4** of the Statute, with *serious violations of Article 3 common to the Geneva Conventions and the Additional Protocol II thereto*. Common Article 3 extends a minimum threshold of humanitarian protection to all persons affected by non-international conflicts.

24. The Chamber holds, *firstly*, that this protection is afforded throughout Rwanda, *secondly*, that the protection afforded extends to all civilians who do not take a direct part in the hostilities and, *thirdly*, that Musema, as a civilian, may be held responsible for serious violations of this kind.

25. The Chamber endorses the principle of *cumulative charges*. Multiple offences may be charged on the basis of the same acts, in order to capture the full text of the crimes committed by an accused. In this regard, the Chamber recalls that in Rwanda a doctrine exists which allows multiple charges for the same act under certain circumstances.

The Defence

26. In the Judgement, the Chamber thoroughly discusses the defences presented by Musema. The Defence put particular emphasis on Musema's alibi, developing it in detail.

27. The Defence argued that the Prosecution did not discharge its burden of proving Musema guilty, that it did not satisfy the Trial Chamber beyond reasonable doubt of Musema's guilt, and that it did not rebut the Defence alibi.

28. In addition, the Defence argued that Musema had no case to answer on Counts 7, 8 and 9 of the Indictment, since the Indictment containing those counts was never served on him.

29. The Chamber finds that Musema does have a case to answer on the Counts 7, 8, and 9, noting that Musema entered pleas of not guilty to these counts, establishing his knowledge and possession of the amended Indictment. Additionally, the presentation of the defence made it clear that the lack of service of the amended indictment did not significantly impede Musema's ability to defend himself.

30. The Defence also argued that Musema's political activity was minimal and that no evidence was presented with respect to his alleged influence, importance or civic authority. It was the Defence's position that Musema was not part of the *interim* government, politically or in any other manner.

31. Finally, the Defence argued against the reliability of the evidence presented by the Prosecution, alleging weaknesses in the investigations which produced the Prosecution evidence, and challenging the reliability of the testimony of Prosecution witnesses.

Factual Findings

32. In *Section 5.1* of the Judgement, the Chamber, in light of the admissions made by Musema, finds that the general allegations set forth in *paragraphs 4.1, 4.2* and *4.3* of the Indictment have been proved. The Chamber thus finds that in 1994 widespread or systematic attacks were directed against civilians on the grounds of ethnic or racial origin. The massacres in 1994 were targeted and directed against the Tutsi civilians not as individuals but as members of the said group. In the days following the crash of the plane transporting Rwandan President Juvénal Habyarimana, Musema witnessed massacres, the destruction of houses and the displacement of people from Kigali, marking the beginning of massacres which he described as constituting genocide.

33. In *Section 5.2* of the Judgement, with respect to the events alleged in *paragraphs 4.4, 4.5, 4.6* and *4.11*, the Chamber first recalls the testimony of Prosecution witnesses relevant to the events as they occurred, in chronological order. If there is a case to answer, the Chamber then, day by day, reviews the alibi presented by Musema, after which its factual findings are presented.

34. With respect to *15 April 1994*, the Chamber notes that the testimony supporting the allegation that Musema was present in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes is hearsay corroborated by no other witnesses. Consequently this allegation has not been established beyond reasonable doubt.

35. With respect to the events which took place at the Karongi Hill FM Station on *18 April 1994,* although a credible witness was heard, the Chamber finds that Musema's alibi, that he had left Gisovu and was in Rubona and Gitarama at this time, creates doubt in the facts alleged by the Prosecutor. The Chamber thus finds that it has not been proven beyond reasonable doubt that Musema was present at the meeting on Karongi hill on 18 April 1994 or that he participated in an attack on a refugee camp in Gitwa immediately thereafter.

36. It is alleged that on or about *20 April 1994*, Musema transported armed attackers in the vicinity of the Gisovu Tea Factory to the Bisesero region to kill *Inyenzi.* The Chamber finds that the evidence presented is insufficient and that the allegations are therefore not proved.

37. With regard to the events that took place on Gitwa Hill on *26 April 1994*, during which it is alleged that Musema took part in a large scale attack, the Chamber finds, on the evidence presented, that Musema took part in this attack. The Chamber does not accept Musema's alibi that he was in Gitarama at this time.

38. With regard to the alleged attacks at *the end of April and the beginning of May 1994*, the Chamber is not satisfied beyond reasonable doubt that Musema participated in the alleged attacks between 17 and 30 April. However, the Chamber is convinced that on one day between 27 April and 3 May Musema participated in an attack on Rwirambo hill.

39. With respect to the attack alleged to have taken place on *13 May 1994 on Muyira hill*, the Chamber finds that attackers from Gisovu, Gishyita, Gitesi, Cyangugu, Rwamatamu and Kibuye arrived at Muyira hill in an array of vehicles, including Daihatsu vehicles belonging to the Gisovu Tea Factory. Among the attackers were communal policemen, workers from the tea factory wearing their uniforms, *Interahamwe*, prison guards, armed civilians and soldiers. Musema was one of the leaders of the attack. It was estimated that only 10,000 of the 40,000 to 50,000 Tutsi refugees survived the attack. The Chamber finds that the attackers, including Musema, launched the attack with gunfire and shot at refugees.

40. As pertains to the alleged attack of *14 May 1994 on Muyira hill,* the Chamber finds that Musema was one of the leaders of a large scale attack against Tutsis, in which the assailants were armed with firearms, grenades and traditional weapons, singing "Let's exterminate them." However, the Chamber is not convinced that Musema shot at Ntambiye or Iamuremye during this attack.

41. With respect to the two other attacks alleged to have taken place in *mid-May 1994*, the Chamber finds that Musema led attackers from Gisovu, including *Interahamwe*, and factory workers in uniform in an attack against Tutsi refugees on Muyira hill. Musema launched the attack with a gunshot and personally shot at refugees. The Chamber is also convinced that Musema took part in an attack near the middle of May on Mumataba hill and in Birembo, in which the assailants attacked a place of refuge for 2000 to 3000 Tutsis, most of whom were killed.

42. As pertains to Musema's alibi for the period of 7 to 19 May 1994, the Chamber rejects Musema's alibi for 13 and 14 May and the rest of mid-May 1994, as there were a number of inconsistencies and material discrepancies in the evidence presented in support of the alibi.

43. As pertains to the alleged attack at *the end of May 1994* at the Nyakavumu cave, the Chamber finds that Musema participated in an attack on approximately 300 to 400 Tutsis seeking refuge in the cave, by ordering, along with others, that the entrance to the cave be sealed with wood and set on fire. Only one person survived the attack. The Chamber rejects Musema's alibi for this time.

44. With respect to the attack of *31 May 1994* at Biyiniro, the Chamber finds that Musema's alibi and the documents tendered in support thereof, including copies of Musema's passport stamped by Rwandan and Zairean immigration authorities on 31 May 1994, cast doubt on the allegations of the Prosecutor. Therefore the Chamber does not find that Musema participated in the attack on Biyiniro hill on 31 May 1994.

45. With regard to the attack of *5 June 1994* near Muyira Hill, the Chamber finds that the alibi presented by Musema for this period, that he was in Shagasha with his family until 10 June 1994, casts doubt on the allegations of the Prosecutor. As such, the Chamber finds that it has not been proven beyond reasonable doubt that Musema participated in the attack.

46. With regard to the attack at Nyarutovu *cellule* on *22 June 1994*, the Chamber finds that Musema's alibi for this date casts doubt on the allegations of the Prosecutor. Evidence was presented that Musema was in Gisenyi from 22 to 27 June 1994, during which period he also visited Goma, Zaire. As a result, the Chamber finds that it has not been proven beyond reasonable doubt that Musema led or participated in the attack of 22 June 1994.

47. In *Section 5.3* of the Judgement, with respect to the *sexual crimes* with which Musema has been charged, under *paragraphs 4.7, 4.8, 4.9* and *4.10* of the Indictment, the Chamber finds that the allegations that Musema ordered the rape of Tutsi women on Karongi hill on 18 April 1994, are not proved by the evidence presented. The evidence does not prove beyond reasonable doubt that Musema was present at the meeting on 18 April 1994 on Karongi hill.

48. In regard to the alleged *rape and murder of Annunciata Mujawayezu on 14 April 1994*, the Chamber finds that it has been proved beyond reasonable doubt that Musema ordered the rape and the cutting off of her breast to be fed to her son. No evidence was introduced that Musema ordered her to be killed. There is no conclusive evidence that she was raped or that her breast was cut off.

49. With respect to the alleged *rape and murder of Immaculée Mukankuzi on 13 May 1994* by Musema, in concert with others, and the allegations that Musema thereafter ordered others accompanying him to rape and kill Tutsi women seeking refuge from attacks, the Chamber finds unexplained inconsistencies in the testimony presented in support of this allegation. While the Chamber recognizes that it is especially difficult to testify about rape and sexual violence in a public forum, the Chamber must question the accuracy of this evidence. Recalling the high burden of proof on the Prosecutor and the lack of any corroborating evidence, the Chamber cannot find beyond reasonable doubt that these allegations have been proved.

50. With respect to the alleged *rape of a woman called Nyiramusugi on 13 May 1994* by Musema, acting in concert with others, and his alleged encouragement of others to rape and kill her, the Chamber finds that before the attack, Musema ordered a policeman to bring Nyiramusugi to him and that after bringing her to Musema, four youths held her down while Musema raped her. The Chamber accepts that after Musema left, the four took turns raping her and then left her for dead. Concerning Musema's alibi, the Chamber finds that it does not stand with respect to this time period. The Chamber finds that Musema raped Nyiramusugi and by his example encouraged others to rape her. However, there is no evidence that he encouraged them to kill her.

51. In *Section 5.4* of the Judgement, with respect to any *individual criminal responsibility* on the part of Musema, in terms of **Article 6(3)** the Chamber is satisfied beyond reasonable doubt that Musema exercised both *de facto* and *de jure* authority over employees of the Gisovu Tea Factory, and the resources of the tea factory.

52. The Chamber finds it proved beyond a reasonable doubt that at the time of the events alleged in the Indictment, a *de jure* superior-subordinate relationship existed between Musema and the employees of the Gisovu Tea Factory.

53. The Chamber is not satisfied beyond reasonable doubt that Musema exercised *de jure* and *de facto* power over other members of the population of Kibuye *Préfecture*.

Legal Findings

54. In *Section 6.1* of the Judgement, the Chamber reviews its legal findings with respect to Count 1, genocide, and Count 2, complicity in genocide.

55. The Chamber reviews the factual findings regarding whether Musema committed the alleged acts to determine if Musema incurs individual responsibility for those acts. The Chamber then determines whether those acts are constituent elements of genocide or complicity in genocide.

56. The Chamber finds beyond reasonable doubt that Musema participated in an attack on *Gitwa hill on 26 April, on Rwirambo hill between 27 April and 3 May, on Muyira hill on 13 May, 14 May and mid-May, on Mumataba in mid-May,* and at the *end of May at Nyakavumu cave*. The Chamber finds that Musema incurs individual criminal responsibility for these acts under **Article 6(1)** of the Statute for having ordered, and by his presence and articipation, aided and abetted in the murder of members of the Tutsi ethnic group and the causing of serious bodily and mental harm to the members of the group.

57. Additionally, the Chamber finds Musema criminally responsible for these acts under **Article 6(3)** of the Statute. The Chamber finds that: (1) employees of the tea factory, over whom Musema had not only *de jure* but also *de facto* control, among others, participated in the above-mentioned attacks and their participation resulted, inevitably, in the commission of acts referred to under **Articles 2** to **4** of the Statute; (2) Musema was present at the attack sites, thus he knew or had reason to know the employees were committing these crimes; and (3) Musema failed to take any measures to prevent or punish the commission of these crimes, rather he abetted in their commission by his presence and, in some cases, his participation.

58. With respect to the allegation of the *rape of Annunciata Mujawayezu*, although it has been proven that Musema ordered the rape, he does not incur individual criminal responsibility for this act because no evidence was adduced to show that a rape took place as a result of the order. Furthermore it has not been shown that Musema ordered the killing of Annunciata Mujawayezu and her son.

59. With respect to the alleged *rape of Nyiramusugi*, the Chamber finds that Musema incurs individual criminal responsibility under **Article 6(1)** for having raped her, for having caused serious bodily and mental harm to a member of the Tutsi group, and for having abetted others to rape by his example. However, the Prosecutor did not establish that the assailants who attacked Nyiramusugi were Musema's subordinates. Thus, the Chamber holds that Musema does not incur individual criminal responsibility as a superior under **Article 6(3)** for the rape.

60. The Chamber then reviews the evidence adduced to determine whether the acts were committed by Musema with genocidal intent. Musema acknowledged that the genocide against the Tutsis took place at the time of the events alleged in the Indictment and at the sites where the acts with which he is charged were committed. The Chamber notes that these acts were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. The Chamber finds that anti-Tutsi slogans made during the attacks, and humiliating utterances made during acts of serious bodily and mental harm, including rape and other forms of sexual violence, demonstrate that the objective of Musema and other attackers was the destruction of the Tutsis.

61. Thus the Chamber finds that, *firstly*, Musema incurs individual criminal responsibility for these acts which are the constituent elements of genocide, *secondly*, Musema committed these acts with the specific intent to destroy the Tutsi group, and *thirdly*, the Tutsi group constitutes a protected group within the meaning of the Genocide Convention and **Article 2** of the Statute. Thus Musema incurs individual criminal responsibility under **Articles 6 (1)** and **6(3)** of the Statute for genocide, punishable under **Article 2(3)(a)** of the Statute.

62. Considering that the Chamber finds that these acts constitute genocide as charged in Count 1, the Chamber does not consider whether these acts constitute complicity in genocide, as charged in Count 2.

63. In *Section 6.2* of the Judgement, the Chamber considers Count 3 of the Indictment, which charges Musema with *conspiracy to commit genocide*, punishable under **Article 2(3)(b)** of the Statute.

64. The Chamber holds that conspiracy to commit genocide is defined as an agreement between two or more persons to commit genocide. The Chamber finds that the Prosecutor neither has alleged, nor has adduced evidence that Musema conspired with others to commit genocide nor that he and such persons reached an agreement to act to that end.

65. Furthermore, the alleged facts on which the Prosecutor based the count of conspiracy to commit genocide are the same as those adduced by the Prosecutor to establish Musema's participation in the commission of genocide, the substantive offence in relation to the conspiracy.

66. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide.

67. In *Section 6.*3 of the Judgement, the Chamber considers Count 5 of the Indictment which charges Musema with *crime against humanity (extermination),* pursuant to **Articles 3(b)**, **6(1)** and **6(3)** of the Statute.

68. The Chamber notes that the Defence admitted: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between January 1 and 31 December 1994; and that these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. Thus, the Chamber finds that these elements of crime against humanity have been proved.

69. The Chamber finds that Musema had knowledge of a widespread or systematic attack directed against the civilian population in Rwanda in 1994 and that his participation in the events in which he has been found to be involved was consistent with the pattern of this attack and formed part of this attack.

70. The Chamber finds that Musema's conduct in ordering and participating in the attacks on Tutsi civilians who sought refuge on Muyira hill and on Mumataba hill, in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to the Gisovu Tea Factory for the transport of attackers to Muyira hill and Mumataba hill, and his participation in attacks on Tutsi civilians who sought refuge in the Nyakavumu cave, Gitwa hill and Rwirambo hill, renders Musema individually criminally responsible for crime against humanity (extermination), pursuant to **Articles 3(b)** and **6(1)** of the Statute, with respect to these acts.

71. Additionally the Chamber finds that at the time of the events alleged in the Indictment, Musema exercised *de jure* control over the employees of the Gisovu Tea Factory. The Chamber has found that Musema failed to prevent or punish participation by these employees, or use of the tea factory property, in the attacks. Thus, the Chamber finds that Musema is also individually criminally responsible for crime against humanity (extermination) pursuant to **Article 6(3)** of the Statute for these acts.

72. In *Section 6.*4 of the Judgement, the Chamber considers Count 4 of the Indictment which charges Musema with *crime against humanity (murder)*, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment, pursuant to **Articles 3(a)**, **6(1)** and **6(3)** of the Statute.

73. The Chamber notes that Musema is also charged with crime against humanity (extermination) under Count 5 of the Indictment for the same alleged acts.

74. The Chamber concurs with the reasoning in the *Akayesu* Judgement that it is acceptable to convict an accused of two offences in relation to the same set of facts where: the offences have different elements; the provisions creating the offences protect different interests; or it is necessary to record a conviction for both offences in order to describe fully what the accused did. However the Chamber finds that it cannot convict an accused of two offences in relation to the same facts where one offence is a lesser and included offence of the other.

75. The Chamber finds that Musema cannot be held criminally responsible for both crime against humanity (murder) and crime against humanity (extermination), for the same acts, on the basis that murder and extermination, as crimes against humanity, share the same constituent elements of the offence.

76. The Chamber finds that the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and the yakavumu cave represent killings of a collective group of individuals, hence they constitute extermination and not murder. Therefore, Musema is not individually criminally responsible for crime against humanity (murder) in respect of these killings.

77. In *Section 6.5* of the Judgement, the Chamber reviews the allegations of *crime against humanity (other inhumane acts),* pursuant to **Articles 3(i), 6(1)** and **6(3)** of the Statute, as set out in Count 6 of the Indictment. The Chamber finds that the Prosecutor has failed to specify which acts constitute this offence and to prove the relevant allegations beyond reasonable doubt.

78. In *Section 6.6* of the Judgement, the Chamber reviews the allegations of *crime against humanity (rape),* ursuant to **Articles 3(g)**, **6(1)** and **6(3)** of the Statute, as set out in Count 7 of the Indictment.

79. The Chamber has found that on 13 May 1994, Musema raped Nyiramusugi. Based on the finding of Musema's knowledge of a widespread or systematic attack on the civilian population and the finding that his participation was consistent with the pattern of this attack and formed part of the attack, the Chamber finds Musema individually criminally responsible for crime against humanity (rape), pursuant to **Articles 3(g)** and **6(1)** of the Statute. However, the Chamber finds that the Prosecutor has failed to establish beyond reasonable doubt the individual criminal responsibility of Musema pursuant to **Article 6(3)** of the Statute.

80. In *Section 6.7* of the Judgement, with respect to Counts 8 and 9 alleging serious violations of Common Article 3 to the Geneva Conventions and the Additional Protocol II thereto, the Chamber finds that the Prosecutor failed to establish the existence of a nexus between the acts for which Musema is individually criminally responsible under **Articles 6(1)** and **6(3)** and the internal armed conflict. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3.

Verdict

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER finds Musema:

Count 1: Guilty of Genocide

Count 2: Not Guilty of Complicity in Genocide

Count 3: Not Guilty of Conspiracy to Commit Genocide

Count 4: Not Guilty of Crime against Humanity (Murder)

Count 5: Guilty of Crime against Humanity (Extermination)

Count 6: Not Guilty of Crime against Humanity (Other Inhumane Acts)

Count 7: Guilty of Crime against Humanity (Rape)

Count 8: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and the Additional Protocol II thereto, Article 4(a) of the Statute

Count 9: Not Guilty of Violation of Common Article 3 to the Geneva Conventions

and the Additional Protocol II thereto, Article 4(e) of the Statute

Sentence

81. Regarding sentencing, the Chamber summarizes the legal provisions relating to sentences and penalties and their enforcement, and discusses the scale of sentences and general principles applicable in the determination of penalties. The Chamber also reviews the submissions of the parties concerning the determination of the sentence.

82. *The Prosecutor* submitted a number of aggravating circumstances to be taken into account.

83. The Prosecutor asked for a separate sentence for each of the counts on which Musema is found guilty in order to fully recognize the severity of each crime and Musema's particular role in its commission. The Prosecutor recommended life imprisonment for each count on which Musema is convicted.

84. *The Defence* submitted that the Prosecutor failed to prove Musema's guilt and that Musema should be found not guilty and released. In the alternative, the Defence submitted certain mitigating circumstances in the event that he is found guilty of any of the alleged crimes.

85. *The Chamber*, with respect to *aggravating circumstances*, considers the following:

(i) The offences of which Musema is guilty are extremely serious, as the Chamber pointed out when it described genocide as the "crime of crimes".

(ii) Musema led attackers who killed a large number of Tutsi refugees in the Bisesero region in mid-May 1994, including on 13 and 14 May 1994. Musema was armed with a rifle and used the weapon during the attacks. He took no steps to prevent the participation of tea factory employees or the use of its vehicles in the attacks. Moreover, Musema raped a young Tutsi woman and by his example encouraged others to rape her.

(iii) Musema did nothing to prevent the commission of the crimes and he took no steps to punish the perpetrators over whom he had control. Musema had the power enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were a perpetrator of crimes punishable under the Statute.

86. With respect to *mitigating circumstances*, the Chamber considered that Musema admitted that a genocide occurred against the Tutsi people in Rwanda in 1994, expressed his distress about the deaths of so many innocent people, paid tribute to all victims of the tragic events in Rwanda and expressed regret that the Gisovu Tea Factory facilities may have been used by the perpetrators of atrocities. Additionally, Musema's co-operation, through his admission of facts, continued during the trial and facilitated expeditious proceedings.

87. Having reviewed all the circumstances of the case, the Chamber *concludes* that the aggravating factors outweigh the mitigating factors, especially as Musema personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the commission of the atrocities.

TRIAL CHAMBER I

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, *inter partes* and in the first instance;

PURSUANT to **Articles 22, 23** and **26** of the Statute of the Tribunal and **Rules 101** to **104** of the Rules;

NOTING the general practice regarding prison sentences in Rwanda;

NOTING that Musema has been found guilty of:

Genocide - Count 1,

Crime Against Humanity (extermination) - Count 5, and

Crime Against Humanity (rape) - Count 7;

OTING the closing briefs submitted by the Prosecutor and the Defence; and

HAVING HEARD the Prosecutor and the Defence;

IN PUNISHMENT OF THE ABOVE-MENTIONED CRIMES,

SENTENCES Alfred Musema to:

A SINGLE SENTENCE OF LIFE IMPRISONMENT

FOR ALL THE COUNTS ON WHICH HE HAS BEEN FOUND GUILTY;

RULES that imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber, and that the Government of Rwanda and the Government of the designated State shall be notified of such designation by the Registrar;

RULES that this Judgement shall be enforced immediately, and that, however,

(i) Until his transfer to the designated place of imprisonment, Musema shall be kept in detention under the present conditions;

(ii) Upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

88. The Judgement was signed in Arusha, on the 27th day of January 2000, by the three Judges.

89. Judge Aspegren and Judge Pillay attach their separate opinions to the Judgement.

Separate Opinion of Judge Aspegren

90. In a separate opinion, Judge Aspegren expresses his dissent from the majority concerning certain events during 1994 in respect of which he remains unconvinced that Musema participated, as alleged.

91. Judge Aspegren concurs with all the Chamber's factual findings except those made in *Section 5.2* of the Judgement with regard to the alleged events of 26 April at Gitwa hill, 27 April to 3 May at Rwirambo hill, and the end of May at Nyakavumu cave, and the findings made in *Section 5.3* with regard to the alleged events of 14 April 1994. Judge Aspegren remains unconvinced that it has been established beyond reasonable doubt that Musema articipated in the events as alleged.

92. With respect to *26 April 1994, Gitwa hill*, Judge Aspegren finds that Musema's alibi casts reasonable doubt on the allegation that Musema was involved in this attack.

93. In respect of *27 April to 3 May 1994, Rwirambo hill*, Judge Aspegren finds that the evidence that the Prosecutor presented to show that Musema participated in the attack is unreliable due to material contradictions in the testimony of the sole witness. Judge Aspegren finds these contradictions to be serious enough to cast doubt on its credibility. Thus he finds that it has not been established beyond reasonable doubt that Musema participated in the alleged attack on Rwirambo hill.

94. With respect to the alleged attack at *the end of May 1994 at Nyakavumu cave*, Judge Aspegren finds that doubt revails in the matter as it cannot be adduced from the evidence when the attack occurred. Moreover, an inability to specify the date of the attack does not allow Musema to fully answer the relevant charges against him. Therefore Judge Aspegren finds that Musema's participation in the attack is not proved beyond reasonable doubt.

95. With respect to the alleged *rape of Annunciata Mujawayezu*, Judge Aspegren is not convinced beyond reasonable doubt that Musema ordered or encouraged the rape.

96. Regarding the legal findings (Section 6 of the Judgement), Judge Aspegren, concurs to the extent that they pertain to acts other than these events. Being overruled concerning Musema's ordering of the rape, he joins the majority in its legal finding that the order, as such, is not punishable.

97. Judge Aspegren agrees with the majority's findings of guilt to the extent that they pertain to the acts other than those above. Being partially overruled as to the factual and legal findings, he concurs with the verdict (Section 7) and the sentence (Section 8).

Separate Opinion of Judge Pillay f

98. In her separate opinion, Judge Pillay expresses her dissent from the majority solely with respect to a number o factual findings in Sections 5.2 and 5.3 of the Judgement.

99. With respect to the *alibi* presented by Musema, Judge Pillay assesses the evidence presented in support of the alibi as a whole, rather than day by day. Judge Pillay reviews the evidence given by the Prosecution witnesses and the evidence presented by the Defence and evaluates its credibility, as well as the credibility of the alibi, generally. Musema denied his presence at the alleged attacks. A number of documents were tendered in support of this position, along with the testimony of Musema, and other witnesses, which Judge Pillay does not find persuasive. She notes numerous inconsistencies between Musema's evidence at trial and evidence he gave prior to trial. Judge Pillay notes that the testimony of Musema's wife does not specifically corroborate his account of his whereabouts. Finally she questions the probative value, and in some cases, the authenticity, of documents produced in support of the alibi. In light of the evidence presented by the Prosecutor with respect to Musema's whereabouts, she rejects Musema's alibi.

100. With respect to *18 April, Karongi hill*, Judge Pillay finds that Musema's alibi does not stand, and thus she finds that it has been proved beyond reasonable doubt that Musema took part in the meeting and the attack, at which he encouraged the rape of Tutsi women, as alleged. Judge Pillay holds that these findings should be considered as cumulative evidence when assessing culpability for genocide and crime against humanity (extermination and rape).

101. With respect to *31 May, Biyiniro hill*, *5 June near Muyira hill* and *22 June at Nyarutovu cellule,* Judge Pillay concurs with the findings of the majority, but for different reasons. She finds reasonable doubt in the evidence presented by the Prosecutor but this doubt has not been created by the defence of alibi.

102. On all other issues in the Judgement, including the verdict and sentence, Judge Pillay is in agreement with the majority.

International Criminal Court

Prosecutor *v.* Thomas Lubanga Dyilo
Judgment pursuant to Article 74 of the Statute, 14 March 2012 (summary)

Case No. ICC-01/04-01/06

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **14 March 2012**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

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SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v .THOMAS LUBANGA DYILO

Public

Summary of the "Judgment pursuant to Article 74 of the Statute"

Decision/Order/Judgment to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), issues the following Summary of the "Judgment pursuant to Article 74 of the Statute":

A. Introduction

1. This is the summary of the Chamber's Judgment under Article 74 of the Rome Statute as to whether the Prosecutor has proved the guilt of the accused.

B. Charges against the accused

2. On 29 January 2007 the Pre-Trial Chamber issued its Decision on the Confirmation of Charges. The Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

> Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003.

Additionally, the Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

> Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003.

C. Jurisdiction

3. Pursuant to Article 19 of the Statute, the "Court shall satisfy itself that it has jurisdiction in any case brought before it." The Democratic Republic

of the Congo ("DRC") became a State party on 11 April 2002 and, pursuant to Article 14 of the Statute, President Kabila referred the situation in the DRC to the Prosecutor in March 2004. Pre-Trial Chamber I concluded that the case falls within the Court's jurisdiction, and the Appeals Chamber confirmed the Pre-Trial Chamber's Decision on the accused's challenge to the jurisdiction of the Court. The personal, temporal, territorial and subject-matter elements that are relevant to the Court's jurisdiction have not altered since the Decision on the Confirmation of the Charges, and the issue has not been raised by the parties or any State before the Trial Chamber.

D. Brief case history

4. The first status conference before the Trial Chamber was held on 4 September 2007, and thereafter there were 54 status conferences prior to the commencement of the trial. The following is a summary of the main procedural events which had a significant impact on the course of the proceedings.

5. The trial was stayed twice as a consequence of disclosure issues. The first stay was imposed by the Chamber on 13 June 2008, and it was lifted on 18 November 2008. A second stay was imposed on 8 July 2010. The presentation of evidence resumed on 25 October 2010.

6. The parties and the legal representatives of victims made their opening statements on 26 and 27 January 2009. The prosecution called its first witness on 28 January 2009. The prosecution's oral evidence concluded on 14 July 2009.

7. On 3 September 2009, the Chamber adjourned the presentation of evidence pending an interlocutory appeal. The Appeals Chamber issued its judgment on the matter on 8 December 2009 and the evidence resumed on 7 January 2010.

8. The defence presented a bifurcated case. In the first part the defence in essence called into question the testimony of all the prosecution's child soldier witnesses, a process that included the presentation of rebuttal witnesses by the prosecution. On 10 December 2010, the defence filed an application seeking a permanent stay of the proceedings. The Chamber issued a Decision dismissing the defence application on 23 February 2011.

9. The second part of the defence evidence was introduced thereafter and on 20 May 2011 the presentation of evidence formally closed.

10. The Trial Chamber heard 67 witnesses, and there were 204 days of hearings. The prosecution called 36 witnesses, including 3 experts, and the defence called 24 witnesses. Three victims were called as witnesses following a request from their legal representatives. Additionally, the Chamber called four experts. The prosecution submitted 368 items of evidence, the defence 992, and the legal representatives 13 (1373 in total). In addition to the written submissions, the oral closing arguments of the parties and participants were heard on 25 and 26 August 2011. Since 6 June 2007, when the record of the case was transmitted to the Trial

Chamber, the Chamber has delivered 275 written decisions and orders and 347 oral decisions.

11. In accordance with Article 68(3) of the Statute, victims have participated in the case, and in particular they have applied to introduce evidence, they have questioned witnesses and they have advanced written and oral submissions with the leave of the Chamber and with the assistance of their legal representatives. The total number of individual victims authorised to participate in the proceedings is 129 (34 female and 95 male victims).

12. At the request of the accused and in accordance with Article 76(2) of the Statute, the Chamber in an oral Decision ruled that there would be a separate sentencing hearing if the accused is convicted.

E. Factual overview

13. The Trial Chamber heard the testimony of several expert witnesses and it reviewed documentary evidence that relates to the existence of an inter-ethnic conflict in Ituri between 1999 and 2003.

14. Against this background, the Union des Patriotes Congolais ("UPC") was created on 15 September 2000. Although Thomas Lubanga was one of the UPC's founding members and its President from the outset, the nature of the group when it was created is a matter of dispute in this case. These topics are analysed in greater detail below when the

Chamber deals with the individual criminal responsibility of the accused.

15. The UPC and its military wing, the *Force Patriotique pour la Libération du Congo* ("FPLC"), took power in Ituri in September 2002.

F. The Burden and Standard of Proof

16. Under Article 66 of the Statute, the accused is presumed to be innocent until the Prosecutor has proved his guilt. For a conviction, each element of the crime charged must be established "beyond reasonable doubt".

G. Intermediaries

17. An issue that occupied the Chamber for a significant part of this trial concerned the use by the prosecution of local intermediaries in the DRC. The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries as analysed in the judgment, notwithstanding the extensive security difficulties that it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on.

18. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution's negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the

Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber's conclusions regarding the credibility and reliability of the alleged former child soldier witnesses, given their youth and likely exposure to conflict, they were vulnerable to manipulation.

19. The Chamber has withdrawn the right of six dual status witnesses to participate in the proceedings, as a result of the Chamber's conclusions as to the reliability and accuracy of these witnesses.

20. Likewise, the Chamber has not relied on the testimony of the three victims who testified in Court (a/0225/06, a/0229/06, and a/0270/07), because their accounts are unreliable. Given the material doubts that exist as to the identities of two of these individuals, which inevitably affect the evidence of the third, the Chamber decided to withdraw the permission originally granted to them to participate as victims.

21. The Chamber has concluded that there is a risk that intermediaries P-0143, P-316 and P-321 persuaded, encouraged, or assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute. Pursuant to Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution. Investigations can be initiated on the basis of information communicated by a Chamber or any reliable source. The Chamber communicates the relevant information to the

OTP, and the Prosecutor should ensure that the risk of a conflict of interest is avoided for the purposes of any investigation.

H. Armed conflict and its nature

22. Although the Pre-Trial Chamber in its Confirmation of Charges Decision determined that for part of the relevant period the conflict was international in character, the Chamber concludes that the UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the Armée Populaire Congolaise ("APC") and other Lendu militias, including the *Force de Résistance Patriotique en Ituri* ("FRPI"), between September 2002 and 13 August 2003. Accordingly, applying Regulation 55 of the Regulations of the Court, the Chamber has changed the legal characterisation of the facts to the extent that the armed conflict relevant to the charges was non-international in character.

I. Legal definition of conscription, enlistment and use

23. The charges against the accused include three distinct criminal acts. The Chamber has concluded that the crimes of conscription and enlistment are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion. These offences are continuous in nature. They end only when the child reaches 15 years of age or leaves the force or group.

24. As regards the offence of using children under the age of 15 to participate actively in hostilities, the Chamber has concluded that this includes a wide range of activities, from those children on the front line

(who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them.

J. The facts relating to the conscription and enlistment of children under the age of 15 and using them to participate actively in the hostilities

25. It is alleged that the accused, jointly with others, conscripted and enlisted children under the age of 15 years into the armed group of the UPC/FPLC and that he used them to participate actively in hostilities between 1 September 2002 and 13 August 2003.

26. The Chamber has concluded that the UPC/FPLC was an armed group.

27. The Chamber finds that between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis.

28. Multiple witnesses testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence clearly shows recruits under the age of 15 in the Rwampara camp.

29. The evidence demonstrates that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments. The evidence also establishes that children, mainly girls, were used by UPC/FPLC commanders to carry out domestic work. The Trial Chamber heard evidence from witnesses that girl soldiers were subjected to sexual violence and rape. Witnesses specifically referred to girls under the age of 15 who were subjected to sexual violence by UPC/FPLC commanders. Sexual violence does not form part of the charges against the accused, and the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.

30. The evidence has established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003.

31. The testimony of multiple witnesses and the documentary evidence have demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence proves that children were deployed as soldiers in Bunia,

Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. It has been established that the UPC/FPLC used children under the age of 15 as military guards. The evidence reveals that a special "Kadogo Unit" was formed, which was comprised principally of children under the age of 15. The evidence of various witnesses, as well as video footage, demonstrates that commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards. The accounts of several witnesses, along with the video evidence, clearly prove that children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga.

32. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003.

K. Legal analysis of Articles 25(3)(a) and 30 of the Statute

33. The Chamber has concluded that pursuant to Articles 25(3)(a) and 30 of the Statute, the prosecution must prove in relation to each charge that:

(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that

by implementing the common plan these consequences "will occur in the ordinary course of events";

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and

(v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

L. The facts relating to the individual criminal responsibility of Mr Thomas Lubanga

34. The evidence has confirmed that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. In the ordinary course of events, this resulted in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.

35. The Chamber has concluded that from late 2000 onwards Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchaligonza, Bagonza and Kasangaki. Mr Lubanga's involvement with the soldiers (including young children) who were sent to Uganda for training is of significance. Although these events fall outside the period covered by the charges and are outwith the temporal jurisdiction of the Court, they provide evidence on the activities of this group, and they help establish the existence of the common plan before and throughout the period of the charges.

36. The accused was in conflict with Mr Mbusa Nyamwisi and the *Rassemblement Congolais pour la Démocratie - Mouvement de Libération* ("RCD-ML") from at least April 2002, and he led a group that sought to bring about political change in Ituri, including the removal of Mr Mbusa Nyamwisi by force, if necessary. The accused remained in control, by delegated authority, whilst he was detained during the summer of 2002 and he sent Chief Kahwa and Mr Beiza to Rwanda to obtain arms. During that period, Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused's principal alleged co-perpetrators, were generally responsible for recruitment and training, which included girls and boys under the age of 15.

37. The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were active in mobilisation drives and recruitment campaigns in order to persuade Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group and a number of military training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment

exercise directed at young people, including children under the age of 15, on both voluntary and coercive bases.

38. The Chamber is satisfied beyond reasonable doubt that as a result of the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. Similarly, the Chamber is satisfied beyond reasonable doubt that the UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused.

39. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their

military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

40. The Chamber is satisfied beyond reasonable doubt, as set out above, that Thomas Lubanga acted with the intent and knowledge necessary to establish the charges (the mental element required by Article 30). He was aware of the factual circumstances that established the existence of the armed conflict. Furthermore, he was aware of the nexus between the said circumstances and his own conduct, which resulted in the conscription, enlistment and use of children below the age of 15 to participate actively in hostilities.

M. Conclusion of the Chamber

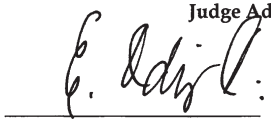
41. Although Judges Odio Benito and Fulford have written separate and dissenting opinions on particular discrete issues, the Chamber has reached its decision unanimously.

42. The Chamber concludes that the prosecution has proved beyond reasonable doubt that Mr Thomas Lubanga Dyilo is guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the

meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.

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

Judge Adrian Fulford



Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 14 March 2012

At The Hague, The Netherlands

International Criminal Tribunal for the former Yugoslavia

Prosecutor *v.* Ante Gotovina and Mladen Markác
Judgement of 16 November 2012 (summary)

Case No. IT-06-90

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

JUDGEMENT SUMMARY

APPEALS CHAMBER

(Exclusively for the use of the media. Not an official document)

The Hague, 16 November 2012

Appeals Judgement Summary for Ante Gotovina and Mladen Markač

Please find below the summary of the Judgement read out today by Judge Meron.

As the Registrar announced, the case on our agenda today is *Prosecutor v. Ante Gotovina and Mladen Markač*. In accordance with the Scheduling Order issued on 2 November 2012, today the Appeals Chamber will deliver its judgement.

Following the practice of the Tribunal, I will not read out the text of the Appeal Judgement, except for the disposition, but instead will summarise the essential issues on appeal and the central findings of the Appeals Chamber. This oral summary does not constitute any part of the official and authoritative judgement of the Appeals Chamber, which is rendered in writing and will be distributed to the parties at the close of this hearing.

Background of the Case

This case concerns events that occurred from at least July 1995 to about 30 September 1995 in the Krajina region of Croatia. During this period, Croatian leaders and officials initiated "Operation Storm", a military action aiming to take control of territory in the Krajina region.

During the period relevant to the Indictment, Mr. Gotovina was a Colonel General in the Croatian Army or "HV", the commander of the HV's Split Military District, and the overall operational commander of Operation Storm in the southern portion of the Krajina region. The Trial Chamber concluded that Mr. Gotovina shared the objective of and significantly contributed to a Joint Criminal Enterprise, or "JCE", whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering unlawful artillery attacks on Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed by his subordinates against Serb civilians in the Krajina. The Trial Chamber found Mr. Gotovina guilty, pursuant to both the first and third forms of JCE, of crimes against humanity and violations of the laws or customs of war. He was sentenced to 24 years of imprisonment.

During the period relevant to the Indictment, Mr. Markač was the Assistant Minister of the Interior and Operation Commander of the Special Police in Croatia. The Trial Chamber found that Mr. Markač shared the objective of and significantly contributed to a JCE, whose common purpose was to permanently remove the Serb civilian population from the Krajina region, by ordering an unlawful artillery attack on Gračac and by creating a climate of impunity through his failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians. The Trial Chamber found Mr. Markač guilty, pursuant to the first and third forms of JCE, of crimes against humanity and violations of the laws or customs of war. He was sentenced to 18 years of imprisonment.

The Trial Chamber acquitted the third Accused, Ivan Čermak, of all charges against him.

Mr. Gotovina submitted four grounds of appeal and Mr. Markač submitted eight grounds of appeal. Both of the Appellants challenge their convictions in their entirety. Mr. Markač also challenges his sentence. The Appeals Chamber now turns to the Appellants' contentions, addressing first their submissions regarding unlawful artillery attacks and the existence of a JCE.

Grounds of appeal

Unlawful Artillery Attacks and Existence of a JCE

Mr. Gotovina, in his First and Third Grounds of Appeal, and Mr. Markač, in his First and Second Grounds of Appeal, in part, submit that the artillery attacks on Knin, Benkovac, Obrovac, and Gračac, or the "Four Towns", were not unlawful and that without a finding that the artillery attacks were unlawful, the Trial Chamber's conclusion that a JCE existed cannot be sustained.

The Prosecution responds that the Trial Chamber did not err in finding either that unlawful artillery attacks against the Four Towns took place or that a JCE existed.

The Appeals Chamber recalls that the Trial Chamber concluded that the Appellants were members of a JCE whose common purpose was to permanently remove Serb civilians from the Krajina by force or threat of force. The Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that the touchstone of the Trial Chamber's analysis concerning the existence of a JCE was its

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conclusion that unlawful artillery attacks targeted civilians and civilian objects in the Four Towns, and that these unlawful attacks caused the deportation of large numbers of civilians from the Krajina region.

The Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful was heavily premised on its analysis of individual impact sites within the Four Towns, which I will refer to as the "Impact Analysis". This Impact Analysis was in turn based on the Trial Chamber's finding a 200 metre range of error for artillery projectiles fired at the Four Towns, which I will refer to as the "200 Metre Standard". Based on this range of error, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack. In identifying legitimate targets, the Trial Chamber took into account, in part, its finding that the HV could not identify targets of opportunity, such as moving police or military vehicles, in the Four Towns.

The Appeals Chamber unanimously holds that the Trial Chamber erred in deriving the 200 Metre Standard. The Trial Judgement contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error, and it is devoid of any specific reasoning as to how the Trial Chamber derived this margin of error. The Trial Chamber considered evidence from expert witnesses who testified as to factors, such as wind speed and air temperature, that could cause variations in the accuracy of the weapons used by the HV against the Four Towns, and the Trial Chamber explicitly noted that it had not received sufficient evidence to make findings about these factors with respect to each of the Four Towns. In its Impact Analysis, however, the Trial Chamber applied the 200 Metre Standard uniformly to all impact sites in each of the Four Towns.

In these circumstances, the Appeals Chamber is unanimous in finding that the Trial Chamber erred in adopting a margin of error that was not linked to the evidence it received.

With respect to targets of opportunity in the Four Towns, the Appeals Chamber holds that the Trial Chamber did not err in determining that the HV had no ability to strike targets of opportunity in the towns of Benkovac, Gračac, and Obrovac. However, the Appeals Chamber notes that the Trial Chamber was presented with, and did not clearly discount, evidence of targets of opportunity in the town of Knin. In this context, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that the Trial Chamber erred in concluding that attacks on Knin were not aimed at targets of opportunity.

The Appeals Chamber, Judge Agius and Judge Pocar dissenting, recalls that, while the Trial Chamber considered a number of factors in assessing whether particular shells were aimed at lawful military targets, the distance between a given impact site and the nearest identified artillery target was the cornerstone and organising principle of the Trial Chamber's Impact Analysis. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained. Although the Trial Chamber considered additional evidence in finding that the attacks on the Four Towns were unlawful, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that, absent the Impact Analysis, this remaining evidence is insufficient to support a finding that the artillery attacks on the Four Towns were unlawful.

In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that no reasonable trial chamber could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks. Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Mr. Gotovina's First Ground of Appeal, in part, and Mr. Markač's Second Ground of Appeal, in part, and reverses the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful.

With respect to liability via JCE, the Appeals Chamber observes that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, but the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that the Trial Chamber's findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns. While the Trial Chamber also considered evidence concerning the planning and aftermath of the artillery attacks to support its finding that a JCE existed, it explicitly considered this evidence in light of its conclusion that the attacks on the Four Towns were unlawful. Furthermore, the Trial Chamber did not find that either of the Appellants was directly implicated in Croatia's adoption of discriminatory policies.

In these circumstances, having reversed the Trial Chamber's finding that artillery attacks on the Four Towns were unlawful, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that no reasonable trial chamber could conclude that the only reasonable interpretation of the circumstantial evidence on the record was the existence of a JCE with the common purpose of permanently removing the Serb population from the Krajina by force or threat of force.

In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, grants Mr. Gotovina's First and Third Grounds of Appeal and Mr. Markač's

First and Second Grounds of Appeal, in part, and reverses the Trial Chamber's finding that a JCE existed to permanently remove the Serb civilian population from the Krajina by force or threat of force. It is therefore unnecessary to address the Appellants' remaining contentions regarding the JCE's existence. The Appeals Chamber notes that all of the Appellants' convictions were entered pursuant to the mode of liability of JCE. All of the Appellants' convictions are therefore reversed.

Convictions Under Alternate Modes of Liability

Having quashed, Judge Agius and Judge Pocar dissenting, the Appellants' convictions, all of which were entered pursuant to the mode of liability of JCE, the Appeals Chamber now considers the submissions of the parties regarding the possibility of entering convictions under alternate modes of liability. The Appeals Chamber recalls that, in its Order for Additional Briefing of 20 July 2012, it determined that aiding and abetting and superior responsibility are the alternate modes of liability most relevant to the Trial Chamber's findings.

The Appellants challenge the Appeals Chamber's jurisdiction to enter convictions under alternate modes of liability, and assert that, in any event, the Prosecution waived its right to seek convictions under alternate modes of liability because it did not appeal the Trial Judgement.

The Appeals Chamber observes, Judge Pocar dissenting, that it has, on multiple occasions, entered convictions on the basis of alternate modes of liability. In this respect, the Appeals Chamber notes that Article 25(2) of the Statute, specifically the power it vests in the Appeals Chamber to "revise" a decision taken by a trial chamber, grants the Appeals Chamber's authority to enter convictions on the basis of alternate modes of liability.

The Appeals Chamber, Judge Pocar dissenting, is not convinced that the Appellants have presented cogent reasons requiring departure from its practice of entering convictions on the basis of alternate forms of liability in certain circumstances. The Appeals Chamber notes, however, that it will not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute.

In considering whether to enter convictions pursuant to alternate modes of liability in this case, the Appeals Chamber will assess the Trial Chamber's findings and other evidence on the record *de novo*. The Appeals Chamber recalls that the Trial Chamber's analysis was focused on whether particular findings were sufficient to enter convictions pursuant to JCE as a mode of liability. Accordingly, the Appeals Chamber will consider, but will not defer to, the Trial Chamber's relevant analysis.

Turning first to the Appellants' liability for the artillery attacks on the Four Towns, the Appeals Chamber recalls that it has reversed, Judge Agius and Judge Pocar dissenting, the Trial Chamber's finding that the artillery attacks on the Four Towns were unlawful. The Appeals Chamber recalls the Trial Chamber's determination that in the context of the specific factual circumstances before it, it would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians. In these factual circumstances, the Trial Chamber's reasoning would preclude finding that departures from the Four Towns concurrent with lawful artillery attacks constituted deportation. Having assessed the evidence, the Appeals Chamber agrees with the relevant analysis of the Trial Chamber, and finds that in the factual context of this case, departures of civilians concurrent with lawful artillery attacks cannot be qualified as deportation.

The Appeals Chamber further observes that given its reversal of the finding that a JCE existed and absent a finding of unlawful attacks, the Trial Judgement does not include any explicit alternative findings setting out the requisite *mens rea* for deportation which could be ascribed to the Appellants on the basis of lawful artillery attacks. In these circumstances, the Appeals Chamber is not satisfied that the artillery attacks the Appellants were responsible for are sufficient to prove them guilty beyond reasonable doubt for deportation under any alternate mode of liability pled in the Indictment.

Turning to Mr. Gotovina's potential responsibility under alternate modes of liability based on additional findings of the Trial Chamber, the Appeals Chamber recalls that, in addition to its findings regarding the artillery attacks on the Four Towns, the Trial Chamber found: that Mr. Gotovina was aware of crimes allegedly being committed in the Four Towns before and after the artillery attacks; that these crimes required investigation; and that Mr. Gotovina failed to follow up on the crimes. Moreover, the Trial Chamber specifically noted three "additional measures" that Mr. Gotovina could have taken, namely contacting and seeking assistance from "relevant people"; making public statements; and diverting "available capacities" towards following up on these crimes. The Trial Chamber concluded that Mr. Gotovina failed to make a serious effort to investigate the crimes and to prevent future crimes. The Appeals Chamber observes that the Trial Chamber relied on its finding of the unlawfulness of artillery attacks in assessing Mr. Gotovina's responsibility for additional conduct and failure to act.

However, the Appeals Chamber, Judge Agius dissenting, considers that the Trial Chamber's description of the additional measures that Mr. Gotovina should have taken was terse and vague, and it failed to specifically identify how these measures would have addressed Mr. Gotovina's perceived shortcomings in following up on crimes. The Appeals Chamber recalls that the Trial Chamber explicitly considered evidence that Mr. Gotovina adopted numerous measures to prevent and minimise crimes and general disorder among the HV troops under his control. The Appeals Chamber further recalls that expert testimony at trial indicated that Mr. Gotovina took all necessary and reasonable measures to maintain order among his subordinates. In this context, the Appeals Chamber, Judge Agius dissenting, considers that the evidence on the record does not prove beyond reasonable doubt that any failure to act on Mr. Gotovina's part was so extensive as to give rise to criminal liability pursuant to aiding and abetting or superior responsibility.

In this context, the Appeals Chamber, Judge Agius dissenting, can identify no remaining Trial Chamber findings that would constitute the *actus reus* supporting a conviction pursuant to an alternate mode of liability. Accordingly, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Mr. Gotovina on the basis of alternate modes of liability.

Turning to Mr. Markač's potential responsibility under alternate modes of liability based on Trial Chamber findings which have not been reversed, the Appeals Chamber recalls that the Trial Chamber found that Mr. Markač failed to order investigations of alleged criminal acts committed by members of the Special Police. The Trial Chamber concluded that, through this failure to act, Mr. Markač created a climate of impunity among members of the Special Police, which encouraged subsequent crimes committed by the Special Police, including murder and destruction of property.

The Appeals Chamber notes that the Trial Chamber did not explicitly find that Mr. Markač made a substantial contribution to relevant crimes committed by the Special Police or that he possessed effective control over the Special Police. Moreover the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that all of the Trial Chamber's findings on Mr. Markač's culpability were made in the context of its finding of unlawful artillery attacks on the Four Towns.

Consequently, the Appeals Chamber finds that the Trial Chamber did not make findings sufficient, on their face, to enter convictions against Mr. Markač on the basis of either aiding and abetting or superior responsibility. In the absence of such findings, and considering the circumstances of this case, the Appeals Chamber, Judge Agius dissenting, declines to assess the Trial Chamber's remaining findings and evidence on the record. Doing so would require the Appeals Chamber to engage in excessive fact finding and weighing of the evidence. The Appeals Chamber, Judge Agius and Judge Pocar dissenting, recalls that the existence of a JCE and unlawful artillery attacks underpin all of the material findings of the Trial Judgement. In this context, any attempt to derive inferences required for convictions under alternate modes of liability would risk substantially compromising Mr. Markač's fair trial rights.

In light of the above, the Appeals Chamber, Judge Agius dissenting, will not enter convictions against Mr. Marka~ on the basis of alternate modes of liability.

Disposition

I shall now read out the full operative text of the Appeals Chamber's disposition. Mr. Gotovina and Mr. Markač, will you please stand.

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the parties and the arguments they presented at the hearing of 14 May 2012;

SITTING in open session;

GRANTS, Judge Agius and Judge Pocar dissenting, Ante Gotovina's First Ground of Appeal and Third Ground of Appeal, in part; **REVERSES**, Judge Agius and Judge Pocar dissenting, Ante Gotovina's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and **ENTERS**, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Ante Gotovina's remaining grounds of appeal;

GRANTS, Judge Agius and Judge Pocar dissenting, Mladen Markač's First and Second Grounds of Appeal, in part; **REVERSES**, Judge Agius and Judge Pocar dissenting, Mladen Markač's convictions for persecution, deportation, murder, and inhumane acts as crimes against humanity, and of plunder of public and private property, wanton destruction, murder, and cruel treatment as violations of the laws or customs of war; and **ENTERS**, Judge Agius and Judge Pocar dissenting, a verdict of acquittal under Counts 1, 2, 4, 5, 6, 7, 8, and 9 of the Indictment;

DISMISSES, Judge Agius and Judge Pocar dissenting, as moot Mladen Markač's remaining grounds of appeal;

ORDERS in accordance with Rules 99(A) and 107 of the Rules, the immediate release of Ante Gotovina and Mladen Markač, and **DIRECTS** the Registrar to make the necessary arrangements.

Judge Theodor Meron appends a separate opinion.

Judge Carmel Agius appends a dissenting opinion.

Judge Patrick Robinson appends a separate opinion.

Judge Fausto Pocar appends a dissenting opinion.

Mr. Gotovina and Mr. Markač, you may be seated.

This hearing of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stands adjourned.

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International Criminal Court

Prosecutor *v.* Mathieu Ngudjolo Chui
Judgment of 18 December 2012
(summary in French only)

Case No. ICC-01/04-02/12

Cour
Pénale
Internationale

International
Criminal
Court

Résumé du jugement rendu en application de l'article 74 du Statut dans l'affaire Le Procureur c. Mathieu Ngudjolo le 18 décembre 2012 par la Chambre de première instance II

Seul le prononcé fait foi

A. Introduction

1. La Chambre entend donner connaissance d'un résumé du jugement qu'elle rend aujourd'hui, en application de l'article 74 du Statut, sur la question de savoir si le Procureur a prouvé, au-delà de tout doute raisonnable, la culpabilité de l'accusé Mathieu Ngudjolo.

B. Charges retenues contre l'accusé

2. Le 26 septembre 2008, la Chambre préliminaire I a rendu la Décision relative à la confirmation des charges. Elle a alors confirmé, à l'unanimité, l'existence de preuves suffisantes donnant des motifs substantiels de croire que, lors de l'attaque lancée le 24 février 2003 contre la localité de Bogoro, située en Ituri au Nord Est de la République Démocratique du Congo (la « RDC »), Mathieu Ngudjolo et Germain Katanga :

   - ont commis conjointement par l'intermédiaire d'autres personnes, au sens de l'article 25-3-a du Statut, les crimes suivants, avec l'intention de les commettre :

   - le crime de guerre d'homicide intentionnel visé à l'article 8-2-a-i du Statut ;

   - le meurtre constitutif d'un crime contre l'humanité, visé à l'article 7-1-a du Statut ;

   - le crime de guerre consistant à diriger une attaque contre une population civile en tant que telle ou contre des civils qui ne participent pas directement aux hostilités, visé à l'article 8-2-b-xiii du Statut ;

   - le crime de guerre de pillage visé à l'article 8-2-b xvi du Statut, en sachant que ce crime adviendrait dans le cours normal des événements ; et

   - que Mathieu Ngudjolo et Germain Katanga ont commis conjointement, au sens de l'article 25-3-a du Statut, le crime consistant à utiliser des enfants de moins de 15 ans pour les faire participer activement à des hostilités, constitutif d'un crime de guerre, visé à l'article 8-2-b-xxvi du Statut.

3. La Chambre préliminaire a également confirmé, mais à la majorité, qu'il existait des preuves suffisantes donnant des motifs de croire que, lors de l'attaque précitée, Mathieu Ngudjolo et Germain Katanga ont commis conjointement par l'intermédiaire d'autres personnes, au sens de l'article 25-3-a du Statut, les crimes suivants en sachant qu'ils adviendraient dans le cours normal des événements :

   - le crime de guerre de réduction en esclavage sexuel, visé à l'article 8-2-b xxii du statut ;

   - le crime de réduction en esclavage sexuel constitutif de crime contre l'humanité, visé à l'article 7-1-g du Statut ;

   - le crime de guerre de viol, visé à l'article 8-2-b-XXII du Statut ; et

   - le crime de viol constitutif de crime contre l'humanité, visé à l'article 7-1-g du Statut.

C. Compétence

4. Conformément à l'article 19-1 du Statut, la « Cour s'assure qu'elle est compétente pour connaître de toute affaire portée devant elle ». La RDC est

devenue partie au Statut de Rome le 11 avril 2002. Au mois de mars 2004, faisant application de l'article 14 du Statut, son gouvernement a déféré au Bureau du Procureur la situation en RDC, à savoir l'ensemble des événements relevant de sa compétence commis sur ce territoire depuis l'entrée en vigueur du Statut de Rome le 1er juillet 2002. La Chambre préliminaire I s'est assurée que la Cour était bien compétente pour connaître des poursuites exercées contre Mathieu Ngudjolo. Les critères de compétence personnelle, temporelle, territoriale et matérielle n'ont pas varié depuis que cette décision a été rendue.

D. Bref rappel de la procédure

5. La Chambre a été constituée le 24 octobre 2008 et elle a tenu la première conférence de mise en état les 27 et 28 novembre 2008. Elle en a tenu 24 autres par la suite et elle a rendu 201 ordonnances et décisions écrites et orales avant que ne s'ouvrent les débats au fond. La Chambre entend limiter la présentation qu'elle compte faire à cet instant aux phases essentielles de la procédure ainsi qu'aux événements ayant pu avoir un effet significatif sur son déroulement. Elle rappelle toutefois dès à présent qu'elle a disjoint le cas de Mathieu Ngudjolo de celui de Germain Katanga par une décision rendue le 21 novembre 2012 et que, jusqu'à ce qu'intervienne cette décision, la procédure a été suivie contre ces deux accusés. Les débats se sont donc déroulés, dans leur intégralité, en leur présence commune.

6. Les débats sur le fond ont été ouverts le 25 novembre 2009, les parties et les participants ont alors présenté leurs déclarations liminaires et les deux accusés ont réitéré qu'ils plaidaient « non coupables ».

7. La présentation des éléments de preuve a débuté le 25 novembre 2009 et s'est achevée le 11 novembre 2011. Les 18 et 19 janvier 2012, la Chambre a effectué, en présence des parties, des participants et de représentants du greffe de la

Cour, un transport judiciaire contradictoire en RDC. La présentation des moyens de preuve a été déclarée officiellement close le 7 février 2012.

8. Au cours des débats, la Chambre a entendu 54 témoins et elle a siégé 265 jours. Le Procureur a cité 24 témoins qui ont déposé entre le 26 novembre 2009 et le 8 décembre 2010. La Défense de Germain Katanga a appelé 17 témoins qui ont comparu entre le 24 mars et le 12 juillet 2011 et celle de Mathieu Ngudjolo a cité 11 témoins qui ont déposé entre le 15 août et le 16 septembre 2011. Trois des témoins de la Défense étaient communs aux deux équipes. Le représentant légal du groupe principal de victimes a cité deux victimes qui ont été entendues entre le 21 et le 25 février 2011. La Chambre a elle-même cité deux témoins.

9. Il convient également de souligner qu'une fois ces dépositions entendues, les deux accusés ont fait le choix de déposer eux aussi, en qualité de témoins et sous serment, et Mathieu Ngudjolo, en ce qui le concerne, a déposé durant sept audiences tenues entre le 27 octobre et le 11 novembre 2011.

10. Le Procureur et les représentants légaux des victimes ont déposé leurs conclusions finales le 24 février 2012 et l'équipe de la Défense de Mathieu Ngudjolo a fait de même le 30 mars 2012. Les parties et les participants ont ensuite développé leurs conclusions orales au cours d'audiences tenues entre le 15 et le 23 mai 2012. Enfin les deux accusés ont, en application de l'article 67-1-h du Statut, fait l'un et l'autre une déclaration orale.

11. Le Procureur a versé 261 pièces au dossier et la Défense de Mathieu Ngudjolo en a versé 132, celle de Germain Katanga en ayant, pour sa part, produit 240. Cinq pièces ont été versées par la Chambre et elle a autorisé les représentants légaux des victimes à en produire également cinq, ce qui représente un total de 643 pièces.

12. Conformément à l'article 68-3 du Statut, les victimes, au nombre de 366 dont 11 enfants soldats, ont été autorisées à participer à la procédure par l'intermédiaire de leurs représentants légaux. Ces derniers ont ainsi pu poser des questions aux témoins cités devant la Chambre, déposer des écritures en cours de procédure et, comme cela vient d'être rappelé, faire une déclaration liminaire, demander le versement de pièces au dossier, présenter par écrit des conclusions finales et développer oralement d'ultimes conclusions.

13. Enfin, comme cela vient également d'être rappelé, la Chambre, par décision du 21 novembre 2012 et statuant à la majorité, a décidé de mettre en œuvre la norme 55 du Règlement de la Cour en ce qui concerne le coaccusé Germain Katanga. Par voie de conséquence, elle a ordonné la disjonction des charges portées contre Mathieu Ngudjolo. Le présent résumé ne concerne donc que la seule situation de ce dernier.

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F. Fardeau et norme d'administration de la preuve

14. Aux termes de l'article 66 du Statut, l'accusé est présumé innocent jusqu'à ce que le Procureur ait prouvé sa culpabilité. Pour condamner l'accusé, la Chambre doit être convaincue de sa culpabilité au-delà de tout doute raisonnable. Elle rappelle, sur ce point, que le principe d'établissement de la preuve « au-delà de tout doute raisonnable » doit être appliqué s'il s'agit d'établir l'existence d'un élément du crime ou du mode de responsabilité retenu contre l'accusé ou encore s'il s'agit d'établir l'existence d'un fait indispensable pour entrer en voie de condamnation.

15. La Chambre tient également à souligner que le fait qu'une allégation ne soit, selon elle, pas prouvée au-delà de tout doute raisonnable n'implique pas pour autant qu'elle mette en cause l'existence même du fait allégué. Cela signifie seulement qu'elle estime, au vu du standard de preuve, ne pas disposer de

suffisamment de preuves fiables pour se prononcer sur la véracité du fait ainsi allégué. Dès lors, déclarer qu'un accusé n'est pas coupable ne veut pas nécessairement dire que la Chambre constate son innocence. Une telle décision démontre simplement que les preuves présentées au soutien de la culpabilité ne lui ont pas permis de se forger une conviction « au-delà de tout doute raisonnable. »

G. Démarche adoptée par la Chambre

16. La Chambre estime utile de donner quelques indications sur la manière dont a été conçu le jugement ainsi que sur la démarche qu'elle a adoptée. Après une « présentation générale » permettant de localiser Bogoro, de décrire l'accusé Mathieu Ngudjolo et de rappeler les charges que la Chambre préliminaire avait estimées suffisantes, la Chambre s'est livrée à un « bref historique de l'affaire » avant de préciser les « critères qu'elle a entendu retenir pour évaluer les preuves » produites devant elle.

17. Elle a ensuite consacré un développement à la « présentation des arguments des parties et des participants » puis elle a exposé la « démarche qu'elle a suivie et ses conclusions principales ». Elle a ensuite estimé nécessaire de formuler les observations qu'appelaient de sa part « les enquêtes » conduites, dans cette affaire, par le Bureau du Procureur avant de se concentrer sur les deux questions, qui sont au coeur même du jugement : « l'analyse de la crédibilité de certains témoins » et le rôle qu'a joué Mathieu Ngudjolo à l'époque des faits de la cause.

18. Au vu de l'évaluation qu'elle a faite de la crédibilité des témoins, la Chambre a analysé l'ensemble des éléments de preuve dont elle disposait afin d'établir quels faits étaient effectivement prouvés au-delà de tout doute raisonnable. Par ailleurs, elle ne s'est prononcée que dans la mesure où cela s'avérait

nécessaire pour parvenir, en l'espèce, à une décision sur la culpabilité ou l'innocence de l'accusé. Cette approche lui est également apparue d'autant plus nécessaire et opportune que, eu égard à la Décision précitée du 21 novembre 2012 relative à la mise en œuvre de la norme 55 du Règlement de la Cour et disjoignant les charges portées contre Mathieu Ngudjolo, un jugement distinct devra être ultérieurement prononcé, au vu des mêmes éléments de preuve, en ce qui concerne Germain Katanga.

H. Analyse de la crédibilité de certains témoins

19. Il convient de souligner que, dans l'affaire qui concerne Mathieu Ngudjolo, la cause du Procureur, s'agissant de la responsabilité pénale de ce dernier, repose quasi-exclusivement sur les dépositions de trois témoins que la Chambre a qualifiés de « témoins clés ». Il s'agit des témoins P-250, P-279 et P-280 qui, pour le Procureur, auraient tous trois été membres de la milice de Bedu-Ezekere à l'époque des faits et auraient tous trois participé à l'attaque de Bogoro. Ces trois témoins ont tous bénéficié de mesures de protection de la Cour.

20. La crédibilité de ces témoins-clés a été vivement contestée en audience ainsi que dans les conclusions écrites de la Défense. Le Procureur leur a également consacré plusieurs pages dans ses Conclusions écrites afin de démontrer qu'ils étaient crédibles comme, et la Chambre reprend ses propres termes « ayant été au meilleur de leur capacité et de leur situation personnelle ». Au terme de l'examen auquel la Chambre s'est livrée, elle a considéré qu'indépendamment de certaines déclarations ou certains témoignages faisant douter de l'aptitude de ces témoins à déposer sur les faits de l'affaire, les propos qu'ils ont tenus s'avéraient, en définitive, par trop contradictoires ou imprécis pour qu'elle puisse prendre appui sur l'ensemble de leur déposition. Elle a donc estimé ne pouvoir se fonder sur leurs témoignages pris dans leur intégralité. La

Chambre a jugé nécessaire de s'expliquer longuement sur la position qu'elle a ainsi entendu adopter en analysant très longuement les conditions dans lesquelles ces trois témoins ont déposé comme, bien entendu le contenu même de leur témoignage.

21. La Chambre s'est également attachée à analyser de près la crédibilité d'autres témoins, tels que P-28, P-219 et P-317, également cités par le Procureur. En ce qui concerne le témoin P-219, elle n'à, là encore, pas estimé pouvoir retenir l'ensemble de son témoignage. S'agissant du témoin P-28, elle est parvenue à une conclusion plus nuancée, tout en ne le considérant pas comme crédible lorsqu'il affirme avoir été milicien. En revanche, la Chambre a estimé qu'elle pouvait, dans l'ensemble, se fonder sur la déposition particulièrement crédible du témoin P-317.

22. La Chambre s'est enfin arrêtée sur les propos tenus par le témoin D03-88, chef du groupement de Bedu Ezekere où se trouvait l'accusé à l'époque des faits. Elle a estimé que ce témoin, cité par la Défense de Mathieu Ngudjolo, pouvait être globalement considéré comme crédible tout en soulignant que certains aspects de sa déposition, relatifs notamment à la responsabilité de l'accusé, méritaient d'être traités avec beaucoup de prudence.

I. Constatations factuelles sur le rôle de Mathieu Ngudjolo

23. Comme la Chambre l'a rappelé[1], conformément à la Décision relative à la confirmation des charges, Mathieu Ngudjolo est accusé d'avoir commis les crimes de meurtre, d'homicide intentionnel, d'attaque contre une population civile, de destruction de biens et de pillage, de viol et de réduction en esclavage sexuel, lors de l'attaque lancée contre Bogoro le 24 février 2003, et ce

[1] RÉFÉRENCE à la partie Charges.

conjointement avec Germain Katanga par l'intermédiaire d'autres personnes, au sens de l'article 25-3-a du Statut. Il s'agit d'une forme de responsabilité qui combine la coaction avec la commission par l'intermédiaire d'une autre personne, autrement appelée, s'agissant de cette dernière, commission indirecte. Il est également accusé d'avoir commis conjointement avec Germain Katanga, au sens de l'article 25-3-a du Statut, le crime de guerre consistant à utiliser des enfants de moins de 15 ans pour les faire participer activement à des hostilités.

24. Pour évaluer la responsabilité pénale de l'accusé, la Chambre a choisi d'examiner en premier lieu, comme le Procureur a d'ailleurs lui-même estimé utile de le faire, l'aspect indirect de la forme de responsabilité alléguée, à savoir la commission par l'intermédiaire d'une autre personne. Elle s'est donc posée la question de savoir si Mathieu Ngudjolo avait commis les crimes qui lui sont reprochés par l'intermédiaire des commandants et des combattants lendu du groupement de Bedu-Ezekere, dont il aurait été le commandant en chef. Pour le Procureur en effet, l'accusé était le commandant en chef des commandants et des combattants lendu ayant participé à l'attaque de Bogoro le 24 février 2003.

25. Souhaitant procéder à une présentation des faits qui soit la plus neutre possible et la plus indépendante possible des critères juridiques développés par la Décision relative à la confirmation des charges au soutien de l'article 25-3-a du Statut, la présente Chambre a présenté ses conclusions factuelles relatives à l'ensemble des éléments de preuve concernant l'organisation et la structure des combattants lendu de Bedu-Ezekere dans la période pertinente ainsi que le rôle et les fonctions de Mathieu Ngudjolo.

26. À la lumière de tous les éléments de preuve en sa possession, la Chambre a tout d'abord constaté que, dans le contexte d'attaques incessantes lancées

contre le groupement de Bedu-Ezekere entre 2001 et 2003 et compte tenu des conditions de vie très difficiles que de telles attaques imposaient aux habitants, un mouvement d'autodéfense s'est développé au sein du groupement. Elle n'a pas souscrit à la thèse de la Défense selon laquelle cette autodéfense ne relevait que d'un « comité de jeunes » constitué au sein d'une structure plus globale créée dans le groupement et appelée « Comité de base ». Les éléments de preuve dont elle disposait ne lui ont toutefois pas permis de déterminer avec précision la structure de cette autodéfense. Ils ne lui ont pas non plus permis de conclure, au-delà de tout doute raisonnable, que ce mouvement d'autodéfense s'était développé en prenant la forme d'une structure militaire dotée d'une chaîne hiérarchique définie, au sens où l'a allégué le Procureur.

27. La Chambre a cependant conclu, au delà de tout doute raisonnable, qu'à une certaine époque, entre 2001 et 2003, les combattants lendu du groupement de Bedu-Ezekere se sont regroupés autour de différentes positions qui, pour certaines, avaient à leur tête des commandants. Il est également ressorti de la preuve présente au dossier que ces combattants ne se bornaient pas à défendre le territoire du groupement en cas d'attaques mais qu'ils étaient en mesure de lancer eux aussi des attaques.

28. En ce qui concerne le rôle que jouait Mathieu Ngudjolo et les fonctions qu'il assumait dans ce mouvement, la Chambre a considéré qu'à la fin de l'année 2002, il avait une certaine importance au sein du groupement de Bedu-Ezekere du fait du statut de notable de sa famille, de ses relations haut placées en Ituri, des études qu'il avait suivies et de la formation militaire qu'il avait acquise dans la garde civile.

29. Après s'être arrêtée sur les activités qu'exerçait Mathieu Ngudjolo au sein du groupe de combattants, la Chambre, au vu des éléments de preuve mis à sa disposition, a considéré qu'il pratiquait effectivement la profession d'infirmier

à Kambutso avant que ne se produise l'attaque de Bogoro. Elle a cependant tenu à souligner que ce statut d'infirmier n'excluait pas pour autant que Mathieu Ngudjolo ait pu occuper, en même temps, une position d'autorité au sein du groupe de combattants de Bedu-Ezekere, ce qui est la question essentielle de l'affaire qui le concerne.

30. Au surplus, la Chambre a relevé qu'un certain nombre d'interventions faites à cette époque par Mathieu Ngudjolo démontraient de sa part une très bonne connaissance de ce qui se passait en Ituri et qu'elles n'avaient pu être improvisées par un infirmier peu au fait de la situation de ce district. Dans un entretien, qui s'est déroulé à la fin du mois de mars 2003, il a en effet affirmé qu'un bureau de liaison avait été ouvert à Bunia pour recevoir les rapports faits sur tout incident important, il a confirmé que la sécurité de cette région était entre ses mains et il a montré qu'il était tenu informé de l'évolution d'un dossier préoccupant concernant une prise d'otage à Bogoro. La Chambre a analysé ces déclarations en corrélation avec la position d'autorité que les autorités ougandaises reconnaissaient à Mathieu Ngudjolo au cours de cette même période. En effet, le témoin P-317, enquêtrice de la MONUC, a déclaré que c'était à Mathieu Ngudjolo que les militaires de l'UPDF avaient demandé une autorisation pour qu'elle puisse accéder le 26 mars 2003 à la zone de Bogoro. L'accusé a également affirmé lui-même que le général en chef des forces ougandaises, Kale Kahiyura, était passé par son intermédiaire pour entrer en contact avec le commandant Dark à Bogoro afin de s'entretenir de la disparition d'un véhicule ainsi, comme cela vient d'être évoqué, du sort de certains otages Hema qui accompagnaient ce convoi.

31. La Chambre n'a donc pas entendu souscrire à la thèse de la Défense selon laquelle Mathieu Ngudjolo n'était qu'un imposteur ayant réussi à tromper tous les responsables de l'Ituri qu'il avait alors rencontrés. Elle rappelle en effet qu'au cours du mois de mars 2003, Mathieu Ngudjolo a traité avec

plusieurs personnes qui jouaient un rôle important en l'Ituri et, pour elle, il est exclu qu'il ait pu toutes les induire en erreur sur son statut exact. Il s'agit tout d'abord du commandant Dark, qui a pris part aux combats de Bogoro, mais aussi du général Kale Kayihura, chef des forces armées ougandaises en Ituri et puissance occupante à l'époque, ou encore de responsables de la MONUC impliquée dans le processus de pacification de l'Ituri, enfin de Floribert Ndjabu, président du FNI qui a d'ailleurs nommé Mathieu Ngudjolo à un poste militaire clé au sein de l'alliance FNI/FRPI.

32. Au vu des éléments de preuve en sa possession, la Chambre a donc considéré que les propos tenus par l'accusé sur les circonstances dans lesquelles il avait pu accéder à un grade militaire élevé, ce qui, selon lui, serait le fruit d'un mélange de hasard et d'opportunisme carriériste n'étaient pas crédibles.

33. En ce qui concerne la fonction que Mathieu Ngudjolo aurait réellement occupée à la veille de l'attaque de Bogoro, la Chambre a relevé que, si certains témoins ont confirmé, en substance, que l'accusé était le chef de la milice de Bedu-Ezekere, tous, à l'exception de P-28, que la Chambre n'a toutefois pas estimé crédible sur ce point, et de P-317, l'ont fait par ouï-dire et ce, sans qu'aucun d'entre eux n'ait été présent dans le groupement de Bedu-Ezekere avant le 24 février 2003. Elle entend également souligner que ces propos obtenus par ouï-dire doivent être considérés avec la plus grande prudence dans la mesure où, de surcroît, ils ont trait à une question qui revêt une importance essentielle pour la cause du Procureur. Elle observe sur ce point que les témoins concernés n'ont donné aucun autre détail sur l'autorité dont aurait alors, selon eux, disposé Mathieu Ngudjolo pas plus que sur la manière dont il l'exerçait. Elle ne peut également exclure que certains témoins aient associé le statut de Mathieu Ngudjolo au sein du FNI à la fin du mois de mars 2003 à la position qu'il occupait réellement avant l'attaque de Bogoro. Pour

toutes ces raisons, la Chambre ne peut donc accorder à leur propos qu'une très faible valeur probante.

34. En ce qui concerne des révélations que l'accusé aurait faites à deux reprises, une première fois au témoin P-317, en lui disant qu'il aurait organisé les attaques de Bogoro et de Mandro, et une seconde fois, à un membre du Ministère public congolais dans le cadre d'une procédure distincte, en indiquant qu'il avait « dirigé l'opération du 6 mars 2003 à Bunia seulement », la Chambre, tout en relevant que les propos qu'a alors tenus Mathieu Ngudjolo étaient à la fois incertains et insuffisamment précis, ne peut en outre que noter l'existence d'un certain manque de cohérence entre ces deux éléments de preuve. En effet, l'un ne mentionne pas la participation de Mathieu Ngudjolo à la bataille de Bunia et l'autre ne fait pas état de sa participation aux combats de Bogoro et de Mandro. Dès lors, et bien que ne remettant aucunement en cause la crédibilité de P-317 ni la fiabilité du document remis par les autorités congolaises, elle a estimé ne pouvoir considérer qu'avec circonspection les révélations alors faites par Mathieu Ngudjolo.

35. La Chambre a également examiné avec attention, comme le Procureur l'a d'ailleurs invité à le faire, tous les éléments de preuve démontrant que Mathieu Ngudjolo avait eu un rôle actif, comme cela vient d'être rappelé, lors de plusieurs manifestations officielles ayant eu lieu en Ituri au cours du mois de mars 2003.

36. Mais ces éléments de preuve, tous postérieurs à l'attaque de Bogoro, ne lui ont pas permis d'inférer, au-delà de tout doute raisonnable, que cet accusé était effectivement le commandant en chef des combattants Lendu de Bedu-Ezekere présents à Bogoro le 24 février 2003.

37. Si la Chambre a retenu le fait que, dès ses premières apparitions publiques au mois de mars 2003 et, en particulier, lors de la première réunion tenue avec le général Kale Kayihura, l'accusé portait un uniforme militaire, elle a aussi remarqué que le grade de colonel, que l'accusé affirme s'être lui-même attribué, n'était mentionné que lors de la signature de l'Accord de cessation des hostilités du 18 mars 2003. Et elle ne dispose d'aucun autre élément de preuve fiable, antérieur à cette date, qui lui permette d'inférer, au-delà de tout doute raisonnable, que Mathieu Ngudjolo était le commandant en chef des combattants lendu de Bedu-Ezekere. On ne peut, par ailleurs, nécessairement et totalement exclure, dans le contexte politico-militaire de l'époque, que Mathieu Ngudjolo ait pu s'imposer, en tant que militaire, comme un interlocuteur incontournable après la bataille de Bogoro et après celle-ci seulement. Au surplus, la Chambre estime que sa nomination le 22 mars 2003 à un poste aussi élevé que celui de chef d'état-major adjoint chargé des opérations au sein de l'alliance FNI-FRPI ne démontre pas obligatoirement qu'il était déjà un important chef militaire auparavant, notamment le 24 février 2003.

38. En concluant cette partie de son jugement, la Chambre a considéré que, dans le contexte qui prévalait alors dans le groupement de Bedu-Ezekere, Mathieu Ngudjolo, en raison de son statut social, de l'expérience qu'il avait acquise en matière militaire et des relations qu'il entretenait avec différents responsables régionaux était tout naturellement conduit à jouer un rôle dépassant le strict cadre de son activité médicale. Et sa participation, active et en qualité de colonel, aux diverses réunions dont il a déjà été fait état et qui se sont tenues après le 18 mars 2003 ainsi que le contenu des témoignages relatifs à son rôle précédant l'attaque, ont effectivement conduit la Chambre à s'interroger sur ce qu'étaient ses activités militaires exactes à cette époque.

39. A cet égard, elle a estimé ne pouvoir exclure qu'il ait été, lors des faits soumis à son examen, l'un des commandants militaires ayant occupé une place importante parmi les combattants lendu du groupement de Bedu-Ezekere mais elle a souligné qu'elle n'était pas en mesure de l'établir au-delà de tout doute raisonnable.

40. De plus, la Chambre a entendu ajouter qu'en tout état de cause, elle ne disposait pas, compte tenu de son analyse, d'éléments de preuve crédibles permettant de considérer que Mathieu Ngudjolo aurait donné des ordres et des directives militaires ou pris des mesures pour en faire assurer le respect ou encore engagé des procédures disciplinaires ou prononcé des sanctions de cette nature.

41. Au vu de l'ensemble des éléments de preuve figurant au dossier, la Chambre n'a dès lors pas pu conclure, au-delà de tout doute raisonnable, que l'accusé était le chef des combattants lendu ayant participé à l'attaque de Bogoro le 24 février 2003.

J. L'utilisation d'enfants soldats de moins de 15 ans

42. La Chambre préliminaire a conclu qu'il existait des preuves suffisantes donnant des motifs substantiels de croire que Mathieu Ngudjolo a utilisé des enfants de moins de 15 ans à des fins multiples et « pour les faire participer activement […] avant, pendant et après l'attaque » menée le 24 février 2003 contre le village de Bogoro[2]. Selon elle les enfants étaient incorporés dans les milices, recevaient une formation militaire sur ordre de l'accusé, effectuaient fréquemment des parades en sa présence et étaient utilisés par Mathieu Ngudjolo soit dans son escorte soit comme gardes du corps personnels[3].

[2] Décision relative à la confirmation des charges, par. 256.
[3] Décision relative à la confirmation des charges, par. 253 à 263, 553 à 554 et 564.

43. Au vu des différents éléments de preuve en sa possession, la Chambre a considéré que la présence d'enfants dans les groupes de combattants existant en Ituri était, au moment des faits, un phénomène généralisé et que cette présence concernait également le territoire de Djugu dans lequel se trouve le groupement de Bedu-Ezekere. La Chambre a par ailleurs constaté que des enfants de moins de 15 ans, venant du groupement de Bedu-Ezekere, étaient présents lors de l'attaque de Bogoro du 24 février 2003. Mais elle n'a pu aussi que constater qu'elle ne disposait pas de suffisamment d'éléments de preuve démontrant, par exemple, l'existence de formations militaires données à des enfants de moins de 15 ans sur ordre de l'accusé, leur utilisation, par ce dernier, en tant que gardes du corps personnels ou à toute autre fin, avant, pendant et après l'attaque, ce qui ne lui a pas permis d'établir, au-delà de tout doute raisonnable, l'existence d'un lien entre ce dernier et les enfants présents à Bogoro le 24 février 2003.

K. Autres allégations du Procureur

44. En ce qui concerne les allégations factuelles relatives à l'implication de Mathieu Ngudjolo dans l'élaboration et la mise en œuvre du plan visant à « effacer » Bogoro, la Chambre a constaté que, selon la Chambre préliminaire, l'implication de l'accusé était étroitement liée à la position d'autorité ainsi qu'au contrôle qu'il aurait exercé sur l'ensemble des commandants et des combattants de Bedu-Ezekere ayant participé à l'attaque du 24 février 2003[4]. Il convient de souligner que la Décision relative à la confirmation des charges n'envisage pas la coaction pour les crimes confirmés, en dehors, bien entendu, du crime consistant à utiliser des enfants de moins de 15 ans pour les faire participer activement à des hostilités. Au vu des conclusions factuelles auxquelles elle est parvenue sur le rôle que jouait l'accusé au sein du

[4] Conclusions écrites du Procureur, par. 525, 570 et 626.

groupement de Bedu-Ezekere, la présente Chambre n'a dès lors pas estimé nécessaire d'analyser l'existence d'un plan commun ou d'un accord entre l'accusé et Germain Katanga ni sa contribution à la réalisation des éléments objectifs des crimes.

45. Toujours au vu des constatations factuelles effectuées sur le rôle que jouait alors l'accusé, la Chambre n'a pas estimé devoir développer de conclusions au-delà de tout doute raisonnable, ni en fait, ni en droit, en ce concerne les éléments des crimes reprochés en l'espèce dans la mesure où ces questions sont sans conséquence sur l'issue de la présente affaire. Cette approche lui est apparue d'autant plus justifiée que de telles conclusions pourraient avoir une incidence sur la poursuite du procès en ce qui concerne Germain Katanga. Pour autant, la démarche que la Chambre a entendu adopter ne signifie en aucun cas, pour elle, que des crimes n'auraient pas été commis à Bogoro le 24 février 2003, pas plus qu'elle ne saurait remettre en cause ce qu'a subi ce jour-là la population de cette localité.

46. Dans son jugement, la Chambre a d'ailleurs jugé nécessaire de donner une description générale du déroulement de l'attaque de Bogoro et des actes de violence qui y auraient été perpétrés le 24 février 2003, étant entendu que, comme cela vient d'être souligné, cette démarche ne consiste pas à présenter des conclusions au-delà de tout doute raisonnable sur les éléments matériels des crimes.

Conclusion

47. La Chambre a pris sa décision à l'unanimité. La juge Van Den Wyngaert a entendu joindre au jugement une opinion concordante relative à l'interprétation de l'article 25-3-a du Statut.

48. Au vu des constatations factuelles auxquelles elle s'est livrée et après avoir examiné l'ensemble des éléments de preuve figurant au dossier, la Chambre conclut que le Procureur n'a pas prouvé au-delà de tout doute raisonnable que Mathieu Ngudjolo a commis, sur le fondement de l'article 25-3-a du Statut, les différents crimes allégués.

Dispositif

PAR CES MOTIFS, la Chambre,

DÉCLARE Mathieu Ngudjolo,

Non coupable, au sens de l'article 25-3-a du Statut, d'homicide intentionnel (article 8-2-a-i), d'attaque contre une population civile (article 8-2-b-i), de destruction de biens (article 8-2-b-xii), de pillage (article 8-2-b-xvi), de réduction en esclavage sexuel (article 8-2-b-xxii), de viol (article 8-2-b-xxii) et d'utilisation d'enfants de moins de 15 ans pour les faire participer activement à des hostilités (article 8-2-b-xxvi), constitutifs de crimes de guerre;

Non coupable, au sens de l'article 25-3-a du Statut, de meurtre (article 7-1-a), de réduction en esclavage sexuel (article 7-1-g) et de viol (article 7-1-g), constitutifs de crimes contre l'humanité.

En conséquence, elle

ACQUITTE Mathieu Ngudjolo de toutes les charges retenues contre lui dans la présente affaire ;

ORDONNE au Greffier de prendre les mesures nécessaires en vue de la mise en liberté immédiate de Mathieu Ngudjolo ; et

ORDONNE à l'Unité d'aide aux victimes et témoins de prendre les mesures nécessaires pour, en application de l'article 68 du Statut, assurer la protection des témoins.