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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-95-17/1-T
		Date:	10 December 1998
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Antonio Cassese
Judge Richard May

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **10 December 1998**

PROSECUTOR

v.

ANTO FURUNDŽIJA

JUDGEMENT

The Office of the Prosecutor:

Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

Counsel for the Accused:

Mr. Luka Misetić
Mr. Sheldon Davidson

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I. INTRODUCTION

The trial of Anto Furundžija, hereafter "accused", a citizen of Bosnia and Herzegovina who was born on 8 July 1969, before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 8 June 1998 and came to a close on 12 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",[1] and by the Rules of Procedure and Evidence of the International Tribunal, hereafter "Rules", adopted by the Judges of the International Tribunal on 11 February 1994, as amended.[2] Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[3] Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

B. Procedural Background

2. On 10 November 1995 Judge Gabrielle Kirk McDonald confirmed the Indictment against the accused, charging him with a grave breach of the Geneva Conventions and violations of the laws or customs of war. The accused was charged with three individual counts of (a) torture and inhumane treatment; (b) torture; and (c) outrages upon personal dignity including rape. These charges were in respect of acts alleged to have been committed at the headquarters of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council, hereafter "HVO". In her Decision confirming the Indictment, Judge McDonald ordered, pursuant to Rule 53 of the Rules,[4] that there be no public disclosure of the Indictment.

3. The accused was arrested on 18 December 1997 by members of the multinational Stabilisation Force, hereafter "SFOR", acting pursuant to a warrant for arrest issued by the International Tribunal. The accused was immediately transferred to the International

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[1] S/RES/827 (1993).
[2] IT/32/Rev. 13.
[3] Art. 1 of the Statute.

Tribunal and detained in its detention unit in The Hague, the Netherlands. The same day, the President of the International Tribunal assigned this case to Trial Chamber II, comprising Judge Antonio Cassese, presiding, Judge Richard May and Judge Florence Ndepele Mwachande Mumba. The Trial Chamber remained thus constituted throughout the preliminary proceedings before the trial. On 11 March 1998 Judge Mumba replaced Judge Cassese as Presiding Judge.

4. The initial appearance of the accused, pursuant to Rule 62 of the Rules, was held on 19 December 1997. The accused, represented on this occasion by Mr. Srdjan Joka, a member of the Bar of the Republic of Croatia, entered a plea of not guilty to all counts of the Indictment and was remanded in detention pending trial. In a subsequent Decision effective from 14 January 1998, made pursuant to the Directive of the International Tribunal on the Assignment of Counsel, as amended,[5] the Registrar of the International Tribunal determined the accused to be indigent and assigned Mr. Luka S. Mišetić, practising in Chicago, in the United States of America, as defence counsel to the accused with his fees to be paid by the International Tribunal.

5. On 13 January 1998 the Prosecution, filed a confidential motion seeking measures for the protection of victims and witnesses. The Defence filed a confidential response on 26 January 1998, opposing the motion, in part on the ground that the measures sought would deny the accused his right to a fair and public hearing as guaranteed by Article 21 of the Statute. Oral argument was heard on the motion during a closed session hearing on 12 February 1998. The Trial Chamber thereupon issued an Order on 13 February 1998 granting the motion in part and deferring consideration of the further measures sought until such time as the Prosecution was able to provide additional information. At a status conference on the same day, the Trial Chamber consulted the parties with a view to enabling it to better manage the case and expedite proceedings. The Prosecution was ordered to provide the Trial Chamber with *inter alia* the witness statements, other documentary material upon which it intended to rely at trial and a pre-trial brief setting

[4] The Rules referred to in this Judgement are those that were in force at the time of the relevant motion, order or decision, in accordance with sub-Rule 6(C).
[5] IT/73/Rev. 5, 17 Nov. 1997.

out in full the details of the case and the points at issue. The Order was detailed in a Scheduling Order of 13 February 1998.

6. On 11 February 1998 the Defence filed a confidential motion to compel the production of certain documents by the Prosecution. There followed the Prosecution's confidential response opposing the motion, filed on 23 February 1998. On 4 March 1998 the Trial Chamber instructed the Prosecution to disclose to it the material that was the subject matter of the motion so as to enable the Trial Chamber to adequately consider the matter. The Prosecution, in a confidential and *ex parte* submission to the Trial Chamber, complied with this Order on 5 March 1998. The following day the Defence filed a confidential reply in support of its motion of 11 February 1998.

7. The Defence, on 26 February 1998, submitted a preliminary motion to dismiss all counts against the accused (Counts 12, 13 and 14), alleging that the Indictment was defective in that it did not contain a concise statement of the facts and the crimes with which the accused was charged. On 27 February 1998 the Defence filed an additional motion to dismiss the count of the Indictment charging the accused with a grave breach of the Geneva Conventions (Count 12), on the ground that the Indictment failed to adequately allege the existence of an international armed conflict. In its response filed on 6 March 1998 the Prosecution opposed the motions; without conceding the arguments of the Defence, the Prosecution declared that it would not pursue Count 12 of the Indictment in the interests of a fair and expeditious trial and the judicial economy of the Trial Chamber.

8. Oral arguments on the three motions were heard in closed session on 9 March 1998 and the Trial Chamber gave its oral ruling on the motions. A closed session status conference was then held, at which the Trial Chamber and the parties discussed discovery matters and the state of preparedness for trial. A written Order confirming the Trial Chamber's oral Decision was issued on 13 March 1998. The Trial Chamber denied the motion to compel the production of documents on the basis that the requested material was irrelevant to the case against the accused. The Trial Chamber also granted the Prosecution leave to withdraw Count 12 of the Indictment but rejected the motion seeking to dismiss all counts against the accused based on defects in the form of

the Indictment. The Prosecution was furthermore ordered to file a document specifying the manner in which the accused was alleged to have breached Article 7(1) of the Statute. The Prosecution responded to this Order by filing the said document on 31 March 1998.

9. The Trial Chamber issued an Order on 31 March 1998, setting 8 June 1998 as the date for the commencement of trial. Following the Order, the Defence, on 6 April 1998, filed a motion seeking to dismiss Counts 13 and 14 of the Indictment on the basis of defects in the form of the Indictment, lack of subject-matter jurisdiction and failure to establish a *prima facie* case. This motion was accompanied by a separate motion filed the same day, in which the Defence sought leave to file the former motion *instanter*. In a response filed out of time on 22 April 1998, the Prosecution opposed the former motion.

10. In a motion filed on 24 April 1998 the Defence sought to preclude the testimony of all witnesses for whom the Prosecution had witness statements in its possession prior to 8 April 1998 and which the Prosecution had failed to disclose to the Defence. In the motion the Defence noted the Prosecution's obligation under sub-Rule 66(A)(ii) of the Rules to provide the Defence with copies of the statements of all witnesses which it intends to call at trial no later than 60 days before the date set for trial. Also on 24 April 1998, the Prosecution filed an *ex parte* and confidential motion concerning discovery of transcripts of proceedings. A further confidential motion seeking protective measures for a number of witnesses anticipated to be called at trial was submitted by the Prosecution on 29 April 1998.

11. On 29 April 1998, oral arguments were heard in open session on the Defence motion to dismiss Counts 13 and 14 of the Indictment. Thereafter a closed session status conference was held at which, *inter alia*, matters relating to the Prosecution's failure to comply with its obligations of disclosure under Rule 66 were discussed. On that day the Trial Chamber issued three separate Decisions in which it granted the Prosecution's motion for protective measures; dismissed the Defence motion to preclude the testimony of certain Prosecution witnesses; and dismissed the Defence motion on Counts 13 and 14 of the Indictment. In this Decision the Trial Chamber held that the relevant motion raised substantive legal issues which were only suitable for determination at trial. In a Scheduling Order issued the same day, the Trial Chamber also expressed its grave

concern over the Prosecution's failure to comply with its obligations under sub-Rule 66(A)(ii) and ordered it to provide full disclosure to the Defence pursuant to that Rule no later than 1 May 1998. The Prosecution was further ordered to file, by 4 May 1998, a supplementary document specifying *inter alia* the acts or omissions that were alleged against the accused and the legal grounds upon which the Prosecution would rely at trial. The Defence was also required to inform the Trial Chamber, by 15 May 1998, whether in consideration of the need to ensure an expeditious trial, it would be in a position to waive its right to timely disclosure under sub-Rule 66(A)(ii) and to proceed with the trial on 8 June 1998, keeping in mind that in the circumstances, postponement of the trial date would not be attributed to the Defence.

12. The Prosecution's confidential reply to the Trial Chamber's Order was filed on 1 May 1998, with a further supplemental document submitted three days later. On 6 May 1998, the Trial Chamber issued an Order directing the Prosecution to file its pre-trial brief no later than 22 May 1998. Also on that day, the Defence filed what it termed an emergency petition in which it stated its belief that the Prosecution was in contempt of the International Tribunal and sought a reconsideration of its motion of 6 April 1998 to dismiss Counts 13 and 14 of the Indictment. Following a response filed by the Prosecution on 11 May 1998, the Defence replied on 12 May 1998. In its Decision on the motion, issued on 13 May 1998, the Trial Chamber found that sufficient information regarding the case against the accused had been provided by the Prosecution to enable the accused to develop his defence. In the circumstances, the Trial Chamber found it unnecessary to rule on the allegation that the Prosecution was in contempt of the International Tribunal and also declined to reconsider its previous Decision on the Defence motion to dismiss Counts 13 and 14 of the Indictment.

13. On 15 May 1998 the Defence filed its response to the Trial Chamber's Order of 29 April 1998 in which it explained that it intended to proceed with trial on 8 June 1998 and objected to any postponement of that date. The Defence also indicated that it would waive neither its right to full disclosure under sub-Rule 66(A)(ii) nor the right of the accused under Article 21 of the Statute to a trial without undue delay. Also on that day, the Prosecution, pursuant to Rule 67 of the Rules, notified the Defence of the names of the witnesses which it intended to call to testify at trial. On 22 May 1998 the

Prosecution's pre-trial brief was filed. The Defence filed a supplemental response to the Trial Chamber's Order of 29 April 1998 on 22 May 1998. Therein, in view of its earlier stance, the Defence agreed to file all its pre-trial motions by 22 May 1998 provided the Prosecution would respond to all such motions by 27 May 1998. The Trial Chamber granted this request on 22 May 1998 and the Prosecution was ordered to respond accordingly.

14. On 21 May 1998, the Defence filed a preliminary motion seeking to dismiss Counts 13 and 14 of the Indictment on the ground that the International Tribunal lacked subject-matter jurisdiction to try the charges alleged against the accused under Article 3 of the Statute. Following the Prosecution's response opposing the motion, filed on 27 May 1998, the Trial Chamber issued its Decision denying the motion on 29 May 1998. Rejecting the Defence's interpretation of the Appeals Chamber's Decision in the case of *Prosecutor v. Duško Tadić*,[6] hereafter *Tadić Jurisdiction Decision*, the Trial Chamber emphasised that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute; that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved; and that the allegations charged in the Indictment can indeed be prosecuted under Article 3.

15. Also on 29 May 1998, the Prosecution filed a confidential motion. The Prosecution sought the Trial Chamber's determination as to its obligations of disclosure in respect of transcripts in any other trial in which its intended witnesses may have testified and which may have been redacted by order of the Trial Chamber before which the trial in question was heard. A status conference was held in closed session the same day, at which this and other matters relating to the Prosecution's fulfilment of its duty of disclosure were discussed. Following its oral ruling on the same day, the Trial Chamber subsequently issued a written Decision. The Prosecution was ordered *inter alia*, to turn over to the Defence, by 2 June 1998, all trial transcripts in their redacted form, of the testimony in proceedings before other Trial Chambers given by the witnesses it intended to call at this trial; to decide on whether it would call a particular material witness at

[6] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995.

trial; and by 2 June 1998 to issue a redacted version of the amended Indictment against the accused. In addition, the Defence was ordered to confirm in writing by 4 June 1998 whether it was fully prepared and ready to proceed to trial on 8 June 1998 on Counts 13 and 14 of the Indictment, it being understood that in the circumstances, postponement of the trial date would not be attributed to the Defence. Declaring that it was appalled by what it considered to be conduct close to negligence in the Prosecution's preparation of the case, the Trial Chamber undertook to issue a separate decision on the Prosecution's handling of this matter. Accordingly, on 5 June 1998, the Trial Chamber issued a formal complaint to the Prosecutor concerning the conduct of the Prosecution. In a communication dated 8 June 1998, the Prosecutor acknowledged the complaint and undertook to investigate the matter.

16. Since the Indictment remains sealed against the other indicted persons, it has not been publicly revealed in its entirety and has required redaction. An amended Indictment, hereafter "Amended Indictment", withdrawing the one grave breach count and associated allegations was filed on 2 June 1998 and is set forth in Annex A to this Judgement. The Defence, on 4 June 1998, informed the Trial Chamber that, due to the continued confinement of the accused it wished to proceed with the trial on the scheduled date of 8 June 1998. However, it continued to assert that the proper remedy for the Prosecution's abuse of the discovery rules was a bar on any witness whose statements had not been supplied to it prior to 8 April 1998. A Prosecution response to this communication was filed on 5 June 1998. On that day the Prosecution also filed a motion *in limine* regarding the examination of evidence in cases of sexual assault and a further confidential motion requesting protective measures at trial for a number of Prosecution witnesses. Oral arguments on the motions were heard at a closed session hearing on 8 June 1998, during which the Defence presented an oral motion requesting the sequestration of witnesses. Issuing its oral rulings on the motions, which were subsequently confirmed in writing, the Trial Chamber ordered both the Prosecution and the Defence to make every effort to prevent contact between their witnesses prior to and during trial. A number of protective measures at trial, including the use of pseudonyms, were ordered in respect of four Prosecution witnesses, two witnesses being granted leave to testify in closed session and the use of image-distortion being permitted in respect of

two others. The Trial Chamber thereafter, in open session, reiterated its willingness to adjourn the proceedings in order to give the Defence such time as it might require and requested the Defence to unequivocally state its readiness to proceed to trial. The Defence informed the Trial Chamber that it was prepared to go forward with the trial.

17. The trial of the accused commenced on 8 June 1998. By then Mr. Sheldon Davidson had been assigned as co-counsel for the Defence. The Prosecution team was lead by Ms. Patricia Viseur-Sellers, assisted by Mr. Michael Blaxill and Ms. Ijeoma Udogaranya. The presentation of the Prosecution case-in-chief lasted four sitting days. During this time, six witnesses testified before the Trial Chamber and four Prosecution exhibits were admitted into evidence.

18. On 11 June 1998, the Defence filed a confidential motion to dismiss the Indictment or, in the alternative, to preclude the Prosecution from adding the accused to Counts 9, 10 and 11 of the Amended Indictment. Following a response from the Prosecution the Trial Chamber issued a Decision the same day dismissing the motion as being misconceived, the Prosecution having made no application to amend the Indictment. On 12 June 1998, the Trial Chamber granted an oral motion by the Defence to disregard the testimony given by Witness A, a witness for the Prosecution who testified earlier that day, relating to acts with which the accused was not charged in the Indictment. The Trial Chamber held that it would only consider as relevant Witness A's evidence in so far as it related to paragraphs 25 and 26 of the Amended Indictment. Following a confidential request for clarification of that Decision filed by the Prosecution on 15 June 1998, the Trial Chamber on that day issued a confidential Decision detailing the extent to which the evidence given by Witness A was held to be admissible.

19. During the trial, the Prosecution, on 17 June 1998, filed a confidential motion seeking *inter alia,* protective measures for a witness intended to be called in rebuttal. The Defence filed a response opposing the motion on 19 June 1998. Holding that it would be a misuse of the right of rebuttal under Rule 85 of the Rules to permit the Prosecution to introduce such evidence in this instance, the Trial Chamber, in a confidential Decision issued on 19 June 1998, dismissed the motion.

20. The defence case-in-chief commenced on 15 June 1998 and continued over one and a half sitting days. Two witnesses, one an expert witness, appeared on behalf of the Defence and 22 defence exhibits were admitted into evidence. Upon the request of the Defence, protective measures were granted in respect of one witness who was designated by a pseudonym and permitted to give evidence in closed session. With the agreement of the parties and with a view to issuing a combined judgement on the merits and on sentence, if any, the parties during trial also addressed sentencing matters. The Defence called one witness in this regard. Both parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date.

21. After the close of the hearings, on 29 June 1998, the Prosecution disclosed two documents to the Defence. One was a redacted certificate dated 11 July 1995 and the other was a witness statement dated 16 September 1995 from a psychologist from the Medica Women's Therapy Centre, hereafter "Medica", in Zenica, Bosnia and Herzegovina,[7] concerning Witness A and the treatment that she had received at Medica.

22. On 10 July 1998 the Defence filed a motion to either strike the testimony of Witness A due to what it considered to be misconduct on the part of the Prosecution or, in the event of a conviction, for a new trial. The Prosecution filed its response to the motion on 13 July 1998. The Trial Chamber, on 14 July 1998, after having heard the oral submissions of the parties, issued an oral Decision re-opening the case. The Trial Chamber rejected the Defence request to reconsider its oral Decision on the grounds that the re-opening of the case was an inappropriate remedy. On 16 July 1998 the Trial Chamber issued its written Decision on the matter. It found that there had been serious misconduct on the part of the Prosecution in breach of Rule 68, and that the Defence consequently was prejudiced. It therefore ordered that the proceedings were to be re-opened only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993, and the Prosecution was ordered to disclose any other connected documents.

[7] After the Dayton Peace Agreement of 1995, the Republic of Bosnia and Herzegovina became Bosnia and Herzegovina. The latter designation is used in this Judgement to refer to the entity that declared itself independent on 6 March 1992.

23. On 20 July 1998, the Defence filed a confidential request for the production of documents pursuant to sub-Rule 66(B). The Prosecution responded thereto on 31 July 1998. On 23 July 1998 however, the Defence filed an application for leave to appeal the Trial Chamber's Decision of 16 July 1998. On 29 July 1998, it also filed a confidential application for the issuance of a *subpoena duces tecum* to Medica, to which the Prosecution responded on 12 August 1998. The Trial Chamber, on 10 August 1998, stayed its Decision on these motions pending the Appeals Chamber's Decision on the application for leave to appeal. The Defence also filed two *ex parte, in camera* and sealed motions on 30 July 1998. The one was a request pursuant to Rule 71 for leave to take the deposition of a certain person, and the other concerned an application for the issuance of a *subpoena ad testificandum* and a letter of request to the Government of the USA. On 10 August 1998, the Trial Chamber issued an *ex parte* and confidential Order in response to these motions, also staying its Decisions thereto pending the Appeals Chamber's Decision on the application for leave to appeal. In a separate Order, on 10 August 1998 the Trial Chamber issued an *ex parte* and confidential Order staying its Decision relating to the Prosecution's submission of 31 July 1998, for an *ex parte* review of material pursuant to the Decision of 16 July 1998.

24. On 24 August 1998, the Appeals Chamber unanimously decided to refuse the Defence request for leave to appeal the Trial Chamber's Decision of 16 July 1998. The Appeals Chamber found that the sub-Rule 73(B) requirements for interlocutory appeals had not been met.

25. The Trial Chamber, on 27 August 1998, issued five Orders relating to the matters stayed pending the Appeals Chamber's determination of the application for leave to appeal the Trial Chamber's Decision of 16 July 1998. In a confidential Order the Trial Chamber dismissed the Defendant's request for the production of documents pursuant to sub-Rule 66(B). In another confidential Order the Trial Chamber allowed the application for the issuance of a *subpoena duces tecum* to Medica, ordering that any information recovered pursuant to the subpoena be submitted to the Trial Chamber for *in camera* review. The Defendant's *ex parte* and confidential request to take the deposition of a certain person was dismissed on the basis that the matters on which the person was expected to testify were beyond the scope of the Trial Chamber's 16 July 1998 ruling.

The Trial Chamber accepted the Prosecution's submission for an *ex parte* review of material in another *ex parte* and confidential Order, holding that certain exhibits should not be disclosed to the Defence. As to the Defendant's application for issuance of a *subpoena ad testificandum* and a letter of request to the Government of the USA, the Trial Chamber issued an *ex parte* and confidential Order dismissing the application.

26. On 9 September 1998 the Defence filed an *ex parte*, *in camera* and sealed application for the issuance of a *subpoena duces tecum* and a letter of request to the Government of Bosnia and Herzegovina. The Trial Chamber issued an Order in response on 21 September 1998, in which the application to issue a *subpoena duces tecum* to a certain person and the corresponding request for assistance to the Government of Bosnia and Herzegovina was allowed. It also ordered that any information recovered pursuant to the subpoena must be submitted to the Trial Chamber for *in camera* review to determine its relevance and whether it should be disclosed to the parties. The confidential *subpoena duces tecum* and the confidential and *ex parte* request for assistance were issued on 21 September 1998 as well.

27. The reply of Medica in connection with the *subpoena duces tecum* of 27 August 1998 was filed on 22 September 1998. The Trial Chamber reviewed the Medica documents *in camera*. After having balanced the interests of medical confidentiality and fairness to the accused the Trial Chamber decided on 24 September 1998 that the Medica documents must be disclosed to both the Prosecution and the Defence in confidence. On 1 October 1998 the Trial Chamber ordered that the re-opening of the proceedings should commence on 9 November 1998.

28. The Defence filed a motion on 1 October 1998 requesting the Trial Chamber to order the Prosecution to disclose the identities of various witnesses, interpreters and interviewers, which were redacted by the Prosecution in five documents. The Prosecution's response to the motion was filed on 8 October 1998 following an Order of the Trial Chamber to that effect. On 14 October 1998, the Trial Chamber, in a confidential Decision, noted that following the Prosecution's agreement in its response, the authenticity and admission into evidence of the said documents were no longer at issue. Having noted the purpose of the re-opening of the proceedings and its previous

Orders concerning protective measures for witnesses, the Trial Chamber ordered that the Prosecution must disclose to the Defence the identity of certain witnesses and the author of a certificate of psychological treatment.

29. The Government of Bosnia and Herzegovina, on 5 October 1998, filed a confidential and *ex parte* response to the request for assistance of 21 September 1998. In a confidential Decision of 9 October 1998, the Trial Chamber decided that the response must be disclosed to both parties. According to the response, the sought after information was not in the possession of the person in question.

30. The Defence filed a confidential submission on 9 October 1998 containing a list of the witnesses it intended to call at the re-opening of the proceedings and a summary of the facts on which each would testify. On 13 October 1998, the Trial Chamber issued a confidential Decision on the proposed calling by the Defence of a certain person as an adverse witness. It noted that according to its Decision of 16 July 1998 the Defence may call new evidence only to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. The Trial Chamber decided that the testimony of the intended adverse witness would not be relevant and that he could not be called as a witness.

31. Also on 9 October 1998, the Defence filed a confidential, *ex parte* and *in camera* motion for permission, *nunc pro tunc*, to disclose the trial testimony of Witnesses A and D to two of its intended expert witnesses, Dr. C.A. Morgan and Dr. J. Younggren. The Trial Chamber subsequently issued a confidential and *ex parte* Order on 13 October 1998. Having considered its Decision on the protective measures for Witnesses A and D at trial issued on 11 June 1998, the Trial Chamber granted the motion. It allowed the trial testimony to be disclosed to the Defence experts, but only to the extent that it was relevant for the preparation of the expert testimony required by the Defence.

32. On 16 October 1998 the Prosecution filed a confidential submission pursuant to the Trial Chamber orders of 31 August 1998 and 21 September 1998. The Prosecution *inter alia* requested that the Defence disclose the full statements of the expert witnesses it intended to call at the re-opening of the proceedings instead of the summaries of facts only. The motion also named Dr. D. Brown and Dr. C.C. Rath as the Prosecution's

intended expert witnesses. The Trial Chamber issued a Scheduling Order on 20 October 1998, ordering both the Prosecution and Defence to comply with sub-Rule 94 *bis* (A) and (B)(i) and (ii). The Defence filed their full expert witness statements on 26 October 1998, while the Prosecution likewise submitted the full statements of its two expert witnesses on 30 October 1998. On 30 October 1998 the Defence filed a confidential motion notifying the Trial Chamber that it intended to recall both its expert witnesses in rejoinder. On 2 November 1998 the Prosecution filed a notice pursuant to sub-Rule 94 *bis* (B) that it wished to cross-examine both the Defence expert witnesses.

33. On 3 November 1998 the Prosecution filed a confidential motion *in limine* to limit expert evidence. The Defence responded to the Prosecution's motion on 5 November 1998. The Prosecution then, on 6 November 1998, filed a motion requesting leave to file a response to the Defendant's reply to the Prosecution's motion *in limine*. The Trial Chamber issued two Orders on 6 November 1998. In its confidential Order on the Prosecution motion *in limine* to limit expert evidence, the Trial Chamber dismissed the Prosecution motion of 3 November 1998. The Trial Chamber, in another confidential Order, also denied the Prosecution leave to file a reply to the Defendant's response of 5 November 1998.

34. The proceedings re-opened on 9 November 1998. Mr. Luka Misetić and Mr. Sheldon Davidson appeared as counsel for the accused. The Prosecution team comprised Ms. Brenda Hollis, Ms. Patricia Viseur-Sellers and Mr. Michael Blaxill. The Defence called four witnesses, including two expert witnesses, while the Prosecution called two expert witnesses.

35. On 9 November 1998 the Trial Chamber received an application to file an *amicus curiae* brief with the brief attached thereto. The eleven applicants were scholars of the international human rights of women or representatives of non-governmental organizations. The Trial Chamber, on 10 November 1998, issued an Order granting leave to file the *amicus curiae* brief. On 11 November 1998, another application to file an *amicus curiae* brief was filed by three applicants on behalf of the Center for Civil and Human Rights of the Notre Dame Law School in Indiana, USA. The Trial Chamber issued an Order granting the applicants leave to file the brief on 11 November 1998. The

Trial Chamber orally notified the Prosecution and Defence about these briefs on 11 November 1998 and invited the parties to make written submissions regarding the briefs by 20 November 1998, should they so wish.

36. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments. On 20 November 1998, the Defence filed a response to the *amicus curiae* briefs.

37. On 24 November 1998, the Prosecution filed an *ex parte* and confidential request to redact certain portions from the transcripts of the closing statements delivered on 22 June 1998 to comport with the order for non-disclosure of 10 November 1998. The Trial Chamber granted the request on 25 November 1998. Also on 25 November 1998, the Prosecution filed a motion to expunge certain portions of the 22 June 1998 closing arguments to conform with the decision on protective measures for Witnesses A and D issued by the Trial Chamber on 11 June 1998. On 26 November 1998, the Prosecution filed a confidential motion to conform the Defendant's response to the *amicus curiae* briefs to various decisions of the Trial Chamber dealing with protective measures for witnesses. The Defence, on 1 December 1998, filed a confidential response to the Prosecution's motions dated 25 and 26 November 1998. The Trial Chamber, on 3 December 1998, issued an Order granting the Prosecution's motions.

C. The Amended Indictment

38. Paragraphs 1 to 7 of the Amended Indictment set out the background and general context in which the alleged crimes are said to have been committed. The accused is identified in paragraph 9, whilst paragraphs 12 to 17 set forth the general allegations relevant to the specific crimes alleged. The specific charges against the accused are based upon the following factual allegations, which are set out in paragraphs 25 and 26 of the Amended Indictment:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDŽIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDŽIJA, [REDACTED] rubbed his

knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.

26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDŽIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDŽIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

In relation to these alleged acts, the Amended Indictment charges the accused with two counts of violations of the laws or customs of war, as recognised by Article 3 of the Statute of the International Tribunal: torture (Count 13) and outrages upon personal dignity including rape (Count 14).

II. THE SUBMISSIONS OF THE PARTIES

A. The Prosecution

1. Factual Allegations

39. The Prosecution's factual allegations, substantiating those set out in the Amended Indictment, may briefly be set forth as follows. It is alleged that, on or around 15 May 1993, Witness A, a female Moslem civilian residing in Vitez, was arrested by members of a special unit of the military police of the HVO known as the 'Jokers'. The headquarters of the Jokers was in a well-known local hostelry in the village of Nadioci, known as the 'Bungalow'. The Jokers took Witness A to a house adjacent to the Bungalow, the 'Holiday Cottage', where their living quarters were, and she was detained in a large room, hereafter "large room", in the company of a group of soldiers.

40. The accused, a local commander of the Jokers, arrived at the Holiday Cottage and immediately began to interrogate Witness A about a list of Croatian names and the activities of her sons. During the questioning by the accused, one of the soldiers forced Witness A to undress and then rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth. The accused continued to interrogate Witness A throughout this threatening conduct.

41. Thereafter, Witness A was moved to another room in the Holiday Cottage. A Croatian soldier, known to Witness A and identified in the Amended Indictment as Victim B, but referred to hereafter as Witness D, because he so appeared as a witness in these proceedings, was also brought into the room. He appeared to have been badly beaten. While the accused continued to interrogate Witness A and Witness D, the same soldier who had earlier assaulted Witness A beat both of them with a baton on their feet and then forced Witness A to have oral and vaginal intercourse with him. The accused did nothing to prevent these acts.

2. Legal Arguments

(a) The Individual Criminal Responsibility of the Accused

42. The Prosecution submits that the accused may be held individually responsible for his participation in the alleged crimes pursuant to Article 7(1) of the Statute, which reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles. 2 to 5 of the present Statute, shall be individually responsible for the crime." The Prosecution contends that such liability can be established by showing that the accused had intent to participate in the crime and that his act contributed to its commission. It is further submitted that such contribution does not necessarily require participation in the physical commission of the crime, but that liability accrues where the accused is shown to have been intentionally present at a location where unlawful acts were being committed.[8] Accordingly, the Prosecution argues that the accused's alleged acts of encouragement, and his omissions, were sufficient to trigger his individual criminal responsibility under Article 7(1) for the crimes alleged.[9]

(b) Violations of Common Article 3 of the Geneva Conventions of 1949 (torture)

43. Specifically in relation to the accused, the Prosecution submits that his alleged acts constitute the crime of torture, as recognised in article 3 common to the four Geneva Conventions of 1949, hereafter "common article 3". The Prosecution contends that by his conduct under the factual circumstances alleged, the accused, acting in an official capacity as a uniformed soldier on duty, intentionally inflicted severe physical or mental pain or suffering on Witness A, a non-combatant, during an interrogation for the purpose of obtaining information and for the purpose of intimidation, thereby committing torture. As it is asserted that these events took place in the context of, and were directly linked to, an armed conflict between the armed forces of the Government of the Republic of Bosnia and Herzegovina, which declared itself independent on 6 March 1992, and the armed forces of the Croatian Community of Herzeg-Bosna, which considered itself an

[8] Prosecutor's Pre-Trial Brief, 22 May 1998, p. 5.

independent political entity inside the Republic of Bosnia and Herzegovina, the Prosecution submits that the elements of the crime of torture under common article 3 are met.

(c) Violations of Additional Protocol II of 1977 (outrages upon personal dignity including rape)

44. The Prosecution further submits that the accused is individually criminally responsible for the alleged acts under article 4(2)(e) of Additional Protocol II to the Geneva Conventions, hereafter "Additional Protocol II", which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". With reference to the *Tadić Jurisdiction Decision* 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",[10] it was submitted that the substantive offences prohibited by article 4 of Additional Protocol II are part of customary law and that they enhance the protection afforded by common article 3.

45. It is argued that by his interrogation of Witness A, a non-combatant in the hands of an adverse party during a conflict, throughout which she was "maintained in a state of forced nudity",[11] "obligated to submit to several sexual assaults",[12] and was "humiliated by attacks on her personal, including sexual, integrity",[13] the accused committed outrages upon personal dignity, within the meaning of article 4(2)(e) of Additional Protocol II.

46. Similarly, the Prosecution argues that, by the accused's conduct during the time that "Witness A, a non-combatant in the hands of an adverse party during an armed conflict, was subjected to vaginal, anal and oral forcible sexual penetration",[14] the accused is criminally responsible for rape, as recognised under article 4(2)(e) of Additional Protocol II.

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[9] Prosecution's Pre-Trial Brief, p. 6.
[10] Case No. IT-94-1-AR72, para. 134.
[11] Prosecution's Pre-Trial Brief, p. 14.
[12] *Ibid.*, p. 14.

B. The Defence

47. The Defence did not concede the existence of an armed conflict for the purposes of bringing the alleged crimes within the jurisdictional scope of Article 3 of the Statute.

48. As to the specific allegations in the Amended Indictment, the Defence contended that the accused is not guilty of the crimes alleged. It was asserted that the accused was not present for any sexual assault on Witness A, and submitted that Witness A's recollection of the events, which form the basis for the charge against the accused, is unreliable.

49. In support of these submissions, the Defence relied upon alleged inconsistencies in the testimony of Witness A. For example, the Defence stated that in Witness A's original statement to the Prosecution's investigators in 1995, she did not state that the accused was present while she was being beaten and sexually assaulted during the first phase of the interrogation in the Holiday Cottage.[15] Furthermore, the Defence asserted that Witness D, a Prosecution witness, would directly contradict Witness A's recollection of the events alleged.[16]

50. The findings of the Trial Chamber are set out in the following sections of the Judgement.

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[13] *Ibid.*, p. 14.
[14] *Ibid.*, p. 16.
[15] Defence Counsel's Opening Statement, Transcript of trial proceedings, p. 83 (T. 83). All transcript page numbers are hereafter referred to as "T.".
[16] Defence Counsel's Opening Statement, T. 84.

III. THE EXISTENCE OF AN ARMED CONFLICT

A. The Prosecution Case

51. The Prosecution case, as stated in the Amended Indictment, is that from about January 1993 until mid-July 1993 the HVO was engaged in an armed conflict with the Army of Bosnia and Herzegovina, hereafter "ABiH". The Croatian Community of Herzeg-Bosna had declared itself an independent political entity inside the Republic of Bosnia and Herzegovina on 3 July 1992. During this time, the HVO attacked villages inhabited mainly by Bosnian Moslems in the Lašva River Valley region in central Bosnia and Herzegovina, including the municipality of Vitez. The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmići. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians. The Prosecution alleges that this was the context in which the crimes, which the accused is alleged to have committed, took place.

52. Evidence of the existence of an armed conflict was given by Prosecution witnesses, including Dr. Muhamed Mujezinović, a medical doctor in Vitez. According to the witness, the Croatian Democratic Union, hereafter "HDZ", won the first multi-party elections in Vitez in November 1990; the Party of Democratic Action, hereafter "SDA", came second.[17] Throughout 1991, relations between the ethnic groups seemed harmonious.[18] It was only late in 1991 that Dr. Muhamed Mujezinović first heard about the political entity of Herzeg-Bosna.[19] This witness, a member of the SDA, became vice-president of its executive committee in Vitez in September 1991, and in this capacity he interacted with the HVO on a regular basis.[20] In the meantime, the HVO were arming themselves.[21] In March 1992, a crisis staff was formed in Vitez in response to the

[17] T. 94.
[18] T. 97.
[19] T. 97-98.
[20] T. 95.
[21] T. 102-103.

problems generated by the conflicts in Croatia and other parts of Bosnia and Herzegovina; it had an equal ethnic composition.[22] In a meeting of the crisis staff held in late April, a member of the HVO said that the Moslems in Vitez had to place themselves under the command of the Croatian Community of Herzeg-Bosna as they had no chance of staying in Vitez; however, this statement was not taken "seriously" and co-operation continued.[23]

53. The first incident of violence occurred on 20 May 1992 when a young Moslem was killed by an HVO guard.[24] This incident was followed by the take-over by the HVO of the local town hall, the police station and the Territorial Defence building on 18 June 1992, over which the flags of Herzeg-Bosna and Croatia were raised.[25] At a subsequent meeting of the Vitez crisis staff, the HVO members demanded that the Moslems place themselves under their command.[26] The Moslems however considered the actions of the HVO to be an illegal coup and refused to become part of the new government.[27] After this, the HVO took control over the town of Vitez.[28] Harassment of Moslems became frequent[29] and the Moslem community established a co-ordination board for the protection of Moslems.[30] In November of 1992, armed conflict erupted between the HVO and ABiH in Novi Travnik; there were simultaneous incidents of violence in Vitez.[31] Inter-ethnic tension in Vitez continued to rise as the HVO blockaded the town.[32] During this time, killings and other violence became increasingly frequent and Dr. Muhamed Mujezinović regularly treated the wounded, most of whom were Moslem civilians.[33] On 15 January 1993, the Moslems of Vitez converted their Council for the Defence of Moslems into a war presidency which commanded the ABiH and

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[22] T. 98-100.
[23] T. 102-103.
[24] T. 103-104.
[25] T. 105.
[26] T. 106.
[27] T. 107.
[28] T. 107.
[29] T. 108.
[30] T. 109.
[31] T. 110.
[32] T. 119.
[33] T. 112.

Dr. Mujezinović became the President.[34] For a brief period, a joint commission was established to relieve the tension in the area. However, the HVO continued to push for the disarmament of the AbiH.[35] Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmići.[36]

54. Witness A and Witness C testified that the fighting in Vitez started on 16 April 1993 between 5 a.m. and 6 a.m. with a loud detonation.[37] Mr. Sulejman Kavazović, a member of the Territorial Defence of Bosnia and Herzegovina, testified that after the explosion he saw a lot of HVO soldiers in full combat equipment running toward the part of the city controlled by the Territorial Defence of Bosnia and Herzegovina.[38] Witness A and Witness C gave evidence that Moslem apartments were searched by the HVO[39] and that prominent Moslems were temporarily detained at the Workers University.[40] From that day on, large numbers of the local Moslem population were reduced to living in basements and terrorised by HVO soldiers; Moslems were, on a daily basis, forced from their homes and taken away.[41]

55. Witness B testified about the HVO attack on Ahmići. On 16 April 1993, she woke up to the sound of shooting and explosions.[42] A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother.[43] Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent.[44] She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[45]

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[34] T. 116.
[35] T. 121-122.
[36] T. 122 and T. 125.
[37] T. 275-276 and T. 381.
[38] T. 516.
[39] T. 277 and T. 382.
[40] T. 279 and T. 385.
[41] T. 277-286 and T. 382-390.
[42] T. 246.
[43] T. 249 and 251.
[44] T. 249-250.
[45] T. 253-255.

56. Witness D also testified to the outbreak of the armed conflict on 16 April 1993.[46] He was an HVO soldier who was arrested and held by the ABiH for about 10 days.[47] Subsequently, he was arrested and held by the Jokers for a month.[48] On his release, he continued serving as an active HVO soldier until he was wounded in the leg after six weeks.[49]

57. Mr. Sulejman Kavazović gave evidence that he was forced to dig trenches on the front-line between the HVO and the Territorial Defence at "the river, at the Špilja locality," and on another occasion at Kratine.[50] He testified that the conflict continued into May 1993 and that he served as an officer in the ABiH until he was wounded on 25 May 1993. Mr. Kavazović received notification of the cessation of hostilities in January 1995.[51]

B. The Defence Case

58. The Defence has not conceded that a state of armed conflict existed at the relevant time, but called no evidence to counter the submissions of the Prosecution. In his closing remarks, Defence counsel submitted that the Prosecution evidence did not demonstrate that there was an armed conflict in terms of front-lines and military objectives, but only that there was an attack by the HVO on civilians.[52]

C. Factual Findings

59. It was not disputed that the test to be applied in determining the existence of an armed conflict is that set out by the Appeals Chamber of the International Tribunal in the *Tadić Jurisdiction Decision*, which states:

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[46] T. 321.
[47] T. 323-324.
[48] T. 325-326 and T. 353.
[49] T. 353.
[50] T. 517-519; Prosecution Exhibit P4.
[51] T. 523.
[52] Defence Closing Statement, T. 674.

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[53]

Applying that test, the Trial Chamber finds, on the clear evidence in this case, that at the material time, being mid-May 1993, a state of armed conflict existed between the HVO and the ABiH.

60. Considering the above finding, the Trial Chamber must now determine whether a nexus exists between the alleged criminal conduct of the accused and the armed conflict.

[53] Case No. IT-94-1-AR72, para.70.

IV. THE LINK BETWEEN THE ARMED CONFLICT AND THE ALLEGED FACTS

A. The Prosecution Case

61. The Prosecution submitted that the accused participated in the armed conflict as a local commander of the Jokers.[54] It is in this capacity that he is alleged to have interrogated Witness A, a civilian, about her fighting-age sons and relations between Moslems and HVO personnel.[55]

62. Several Prosecution witnesses identified the accused as a commander of the Jokers: Dr. Muhamed Mujezinović,[56] Witness D,[57] Witness A,[58] and Mr. Sulejman Kavazović.[59] Witness B also testified that during the attack on Ahmići, the accused was wearing a Jokers patch on his sleeve.[60]

63. Witness A testified that during her interrogation, she was accused of co-operating with HVO soldiers, in particular Witness D, with whom she was confronted by the accused. He asked her if she knew a man called Petrović or another man from Busovaća[61] and accused her of having a code-name 'Brasno'.[62] The accused also demanded to know whether her children were in the army and he threatened personally to kill them.[63] Witness D testified that he was beaten and interrogated by members of the Jokers, including the accused, about his arrest by the ABiH and whether he had told them anything about the Jokers.[64]

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[54] Prosecution's Closing Statement, T. 646.
[55] Prosecution's Closing Rebuttal Statement, T. 708.
[56] T. 144-145 and T. 234-234.
[57] T. 372.
[58] T. 402.
[59] T. 529.
[60] T. 253.
[61] T. 403.
[62] T. 406.
[63] T. 406-409.
[64] T. 326-328.

B. The Defence Case

64. Although the Defence did not contest that the accused was a member of the Jokers, its case is that he was not present during the sexual assaults on Witness A, and that he did not interrogate her.[65] Moreover, the Defence argues that there was no armed conflict to which the accused could be linked.

C. Factual Findings

65. The Trial Chamber accepts the evidence of Witness A about the nature of her interrogation by the accused. She was a civilian in the hands of the Jokers being questioned by the accused, who was a commander of that unit. He was an active combatant and participated in expelling Moslems from their homes. He also participated in arrests such as those of Witnesses D and E. The Trial Chamber holds that these circumstances are sufficient to link the alleged offences committed by the accused to the armed conflict.

[65] T. 689, T. 691 and T. 720.

V. THE EVENTS AT THE BUNGALOW AND THE HOLIDAY COTTAGE IN NADIOCI

A. Introduction

66. The Prosecution case against the accused turns on the evidence of Witness A, and to a lesser extent, Witness D. Both witnesses have testified as to what happened to them in mid-May 1993, at the Bungalow and the Holiday Cottage, in Nadioci, Central Bosnia. The precise dates involved are a matter of dispute between the parties. The Trial Chamber has been assured that these two vital witnesses have had no contact with each other or knowledge of the whereabouts of the other since then.

67. In response, the case of the Defence is that Witness A is mistaken. Due to the traumatic events that she endured and lapse of time, her memory regarding the events at issue is flawed. Suggestions are alleged to have been made to her during vulnerable stages of her physical and psychological recovery, therefore rendering her memory unreliable. This, it is argued, is demonstrated by inconsistencies in the statements, which she gave in 1993, 1995, 1997 and before the Trial Chamber in oral testimony. The Defence further contends that Witness A's testimony is directly contradicted by that of Witness D, thereby making it unreliable. Witness E was called to challenge certain assertions made by Witness D. The evidence of expert witness Dr. Loftus, who did not examine any of the witnesses, but testified in these proceedings, was submitted to demonstrate the weakness of memory, in particular where shock is involved.

68. The Defence does not deny that the accused was in the Holiday Cottage. There has been no denial that Witness A did in fact suffer the atrocities she claims were committed against her; the defence is simply that Witness A's recollection of the events is inaccurate and that the accused was not present when she was being assaulted.

69. Before examining the evidence pertaining to the events in question, it is necessary for the Trial Chamber to establish the factual background and circumstances which led to Witness A and Witness D being together at the Holiday Cottage in May 1993.

B. Background and Circumstances

1. Witness A

70. The following testimony of Witness A was undisputed. In May 1993, she was a married woman of Bosnian Moslem origin.

71. Fighting between the HVO and the ABiH broke out in Vitez on 16 April 1993 and, through a series of events, Witness A came to be separated from her husband. She spoke of how, in spite of public warnings not to help Moslems, the man she later came to know as Witness D transferred her two sons to a safer building when she and others were taken to the headquarters of the HVO. At a later stage, she and some friends of the family arranged to have her sons sent to Travnik. Witness A, upon cross-examination, denied that her children were in the AbiH,[66] and that her husband had any involvement in the military.[67]

72. Witness A testified how she came to live in the family apartment in Vitez with one Vlatko Maleš, a childhood friend of her children; he was of Croatian origin and had a military affiliation to the HVO. Having promised to protect the mother of his friends in their absence, he moved into the apartment with Witness A. On a day in May, which she said was the 15 May 1993,[68] several soldiers from an elite unit of the HVO came to her apartment. They were dressed in black uniforms, which had the characteristic insignia of the Jokers, known to be a special task unit of the HVO with a "terrifying" reputation.[69] Witness A was not molested at this time, but was ordered to go with them. In her testimony, she recalled that it was approximately 10.30 in the morning.[70] She recounted being taken in a sports car to the Bungalow, which had been turned into the headquarters of the Jokers in 1991.

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[66] T. 432.
[67] T. 432.
[68] T. 438 and T. 461.
[69] T. 441.
[70] T. 442.

2. Witness D

73. Witness D was a member of the HVO, and much of his testimony was undisputed. Following the outbreak of hostilities in Vitez, he was assigned guard duties around the area of the HVO Headquarters, which included several residential buildings. One of these buildings housed the apartment of Witness A. As one of the guards of the apartment block, Witness D, on several occasions during the four to five days that he was stationed there, transferred the children of Witness A to a safer building and back again.[71] On or around 8 May 1993, he was captured by the ABiH, and detained for several days, along with two other individuals,[72] one of whom was Witness E. During this time, he was interrogated about the HVO in the Vitez region; his videotaped interrogation was shown to the Trial Chamber as Defence Exhibit D9.

74. Defence Exhibit D10, a document issued by the Joint Committee for the Release of Detainees, dated 16 May 1993, demonstrates that Witness D was released in a prisoner-of-war exchange on 16 May 1993. He was then interrogated by the HVO in Busovača and eventually released.[73] His evidence that, upon release, he walked back home was challenged by the testimony of Witness E, who testified that he and Witness D were given a lift back by car.[74] Witness D claims that the accused, a soldier identified hereafter as 'Accused B' and another person picked him up by car as he was walking back home.[75] He was told that they had been looking for him and he was then driven to the Bungalow in Nadioci.

75. At the Bungalow, he told the Trial Chamber, he was held in detention and interrogated. The Defence did not challenge this witness's assertion that the accused questioned him about the circumstances of his arrest by the ABiH and what he had revealed to them, and that the accused also hit the witness. In the course of his detention at the Bungalow, Witness D was subjected to serious physical assaults by Accused B, for what he estimates to be three days, before his encounter with Witness A. The Defence

[71] T. 323 and T. 451.
[72] T. 358.
[73] T. 368; Defence Exhibit D8, p. 2.
[74] T. 554.
[75] T. 325; Defence Exhibit D8, p. 3.

also did not challenge Witness D's allegation that the accused was present for parts of the serious assaults on him.[76] Witness E saw this witness on what appears to have been his first day at the Bungalow, before he showed visible signs of physical assault.[77] Although Witness D does not mention seeing Witness E at the Bungalow at any time, the latter confirmed that he later witnessed some of the severe physical attacks which Accused B inflicted upon Witness D. Both witnesses spoke of a style of beating, which involved hitting the toes and the top of the foot close to the anklebone with a baton.[78] Witness E also testified that he saw Accused B hit Witness D on the head and elsewhere on his body.[79] He also corroborates Witness D's testimony that the accused was present for some of the beatings Witness D suffered.[80]

C. Events in the Large Room

76. It is uncontested that on arriving at the Bungalow, Witness A was led away along a path to the Holiday Cottage, which appeared to form part of the Bungalow complex. She recalls having seen a large number of armed soldiers, dressed in the characteristic Jokers uniform, around the Bungalow, which was known to be their headquarters. Witness A was taken to a large room in the Holiday Cottage, which appears to have been the living quarters of the soldiers. She was told to sit and eat a piece of bread with paté to give her "strength".[81] She was surrounded by soldiers dressed in Jokers uniforms who spoke in expectant tones about the arrival of the 'Boss'. There were about forty of them in the room.

77. Witness A then heard someone say, "Furundžija has arrived",[82] and a young man entered the room holding some papers.[83] Witness A drew the conclusion that this man

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[76] Caveat as above.
[77] T. 558-559.
[78] T. 329-330, T. 561 and T. 585; Defence Exhibit D8, p. 4.
[79] T. 560.
[80] T. 560.
[81] T. 399.
[82] T. 399.
[83] T. 401.

was the 'Boss' who had been expected by the soldiers, and that his name was Furundžija.[84]

78. The man whom Witness A identified as Furundžija, the 'Boss', she described as being a "rather thin young man, rather strong jaw or teeth. Height, well, medium for a man, a metre 75, one metre 80. I cannot tell you exactly"; he had "chestnut to black hair", which was "cut short and combed up".[85] Like the other soldiers, he was wearing a black Jokers uniform, but with the sleeves rolled up.[86] In her 1995 statement, she described him as "tall, maybe the height of [. . .] who tells me she is about 172 centimetres tall. He was thin, small featured and had short blond hair."[87] In cross-examination, the witness denied having told Prosecution investigators that this man had blond hair. She reiterated that the man definitely had dark brown hair and was around 175 to 180 centimetres tall.[88] When questioned by the Presiding Judge, the witness was able to identify the accused in court. Since the events in question, she had only seen him momentarily on a BBC television newscast after he had been arrested by SFOR troops. She recalled thinking that he looked as if he had put on weight.[89]

79. The Trial Chamber notes that the Medical Report of the accused's examination on arrival at the United Nations Detention Unit, admitted as Defence Exhibit D16, specifies his height as 1.83 metres and his weight as 82 kilograms. There are no notes of any distinguishing features. Defence counsel drew attention to these inconsistencies in the description of the accused, which, it submitted, demonstrated that the accused had not been present as alleged.

80. Witness A recalled that in the large room, the accused read the allegations against her and started to question her about her alleged co-operation with the ABiH[90] and about an individual named Petrović.[91] Defence Counsel pointed out that this was inconsistent

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[84] T. 401-402 and T. 456; Defence Exhibit D13, p. 6; Prosecution Exhibit P3, p. 23.
[85] T. 403.
[86] T. 403.
[87] Defence Exhibit D13, p. 6.
[88] T. 446.
[89] T. 437.
[90] T. 403.
[91] T. 401-402; Prosecution Exhibit P3, pp. 24-25.

with her 1995 witness statement in which she stated that the soldiers asked her about Petrović. The answers she gave the accused were apparently unsatisfactory and she was suddenly grabbed by the hair from behind and a knife was held to her throat. A man said, "If you don't know them, do you know me?".[92] This man, Accused B, forced her to undress and to remove her glasses.[93] Witness A, under cross-examination, was adamant that Furundžija was in the room before Accused B entered.[94]

81. The witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused. This evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecution.[95] At no stage of the proceedings did the Prosecution seek to modify the Amended Indictment to charge the accused with participation in these assaults. Further to an oral motion by the Defence on 12 June 1998, the Trial Chamber issued a Decision confirming that it would only consider as relevant Witness A's evidence in so far as it relates to paragraphs 25 and 26 as pleaded in the Indictment against the accused. Further clarification was sought by the Prosecution on 15 June 1998 and this was provided by the Trial Chamber orally and in writing on 15 June 1998. Therefore, the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment.

82. The accused continued to interrogate Witness A, who was forced to remain naked in front of approximately 40 soldiers. Accused B drew a knife over the body and thigh of Witness A, threatening, *inter alia*, to cut out her private parts if she did not co-operate.[96] As this was happening, it is alleged that the accused continued to interrogate her about her children, her alleged visits to the Moslem part of Vitez and why certain Croats had helped her when she was Moslem.[97] The witness testified that the accused also issued threats against her children.[98] She spoke of a direct relationship between his

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[92] T. 403; Defence Exhibit D13, p. 6; Prosecution Exhibit P3, p. 23.
[93] T. 403 and T. 405; Defence Exhibit D13, p. 6.
[94] T. 454-456.
[95] Confidential Prosecution's Reply to Trial Chamber's Order, 1 May 1998.
[96] T. 406; Defence Exhibit D13, p. 6.
[97] T. 406-407; Prosecution Exhibit P3, p. 25; Defence Exhibit D13, p. 6.
[98] T. 408-409.

dissatisfaction with her answers and the assaults inflicted upon her by Accused B.[99] She stated: "it was one at the same time the interrogation and the ill-treatment and the abuse".[100]

83. At one stage during the interrogation, Witness A testified that the accused became annoyed with her responses and left the large room, threatening to force her to confess by confronting her with another person who later turned out to be Witness D.[101] The Defence has not disputed that the accused left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B, accompanied by questioning. After being subjected to multiple rapes, sexual assaults and physical abuse by Accused B, she was given a small blanket and taken to another room, the 'pantry', still in a state of nudity.

D. Events in the Pantry

84. While Witness A was being taken to the pantry, Witness D was being brought out from the Bungalow for a confrontation with her. Witness D said that Accused B took him out and the accused met them downstairs in the Bungalow.[102] Witness A testified that the accused, another soldier described as Dugi and Accused B, took her out of the large room and that Accused B was with her throughout.[103]

85. The Defence has pointed to inconsistencies in the order in which the two victims entered the room as an indication that Witness A's memory is unreliable. Her testimony to the Trial Chamber on the order of entry is ambiguous[104] but in 1997, she clearly stated that Witness D was already in the room when she entered.[105] On the other hand, her 1995 Witness Statement is also clear: she entered the room first, and then Witness D entered.[106] Witness D says he entered the room and saw a woman he recognised as Witness A, naked

[99] T. 416.
[100] T. 455.
[101] T. 409-410.
[102] T. 343; Defence Exhibit D8, p. 5.
[103] T. 410-411; Defence Exhibit 13, p. 7.
[104] T. 411.
[105] Prosecution Exhibit P3, p. 26.
[106] Defence Exhibit D13, P. 7.

but partially covered by a small blanket, leaning against the wall.[107] She was in tears and sobbing.[108] He also recalls that as he entered the room, the accused was there.[109] Witness A, on her part, recognised Witness D, and described her shock at seeing him: he had a swollen head, bruises on his face, was trembling and appeared to be in a grave condition.[110] The Trial Chamber recalls Witness E's testimony that Witness D was hit on the head and was badly beaten by Accused B in the Bungalow.

86. Witness A testified that the accused interrogated both of them.[111] They were accused of working for the AbiH.[112] Both witnesses then described how Witness D was beaten by Accused B. Witness A described how Accused B hit Witness D on the toes of the feet.[113] This was consistent with the description given by Witness E and Witness D of the style of beatings inflicted by Accused B on Witness D in the Bungalow.[114] Witness A said that the accused was in the doorway.[115] According to Witness D, the door was kept open and there was an audience of Jokers, both inside the room and outside.[116] He recalls that the accused was with the soldiers outside the room; he believed that they could see what was going on in the pantry.[117]

87. The attacks then moved on to Witness A: Accused B had warned Dugi, another soldier, not to hit her as he had "other methods" for women,[118] methods which he then put to use. Accused B hit Witness A[119] and forced her to perform oral sex on him. He raped her vaginally and anally, and made her lick his penis clean.[120] Witness D was forced to watch these assaults and he testified that the accused was one of the soldiers outside the room.[121] It appears to the Trial Chamber that the accused would have had to

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[107] T. 345; Defence Exhibit D8, p. 5.
[108] T. 346.
[109] Defence Exhibit D8, p. 6.
[110] T. 413; Defence Exhibit D13, p. 7; Prosecution Exhibit P3, p. 26.
[111] T. 412; Defence Exhibit D13, p. 7.
[112] Defence Exhibit D13, p. 7.
[113] T. 413; Defence Exhibit D13, p. 7.
[114] T. 347, T. 561 and T. 585; Defence Exhibit D8, p. 4.
[115] T. 414.
[116] T. 348; Defence Exhibit D8, pp. 5-6.
[117] T. 348.
[118] T. 413; Prosecution Exhibit P3, p. 26; Defence Exhibit D13, p. 7.
[119] Defence Exhibit D13, p. 7; Defence Exhibit 8, p. 6.
[120] T. 415 and T. 350; Defence Exhibit D13, p. 6; Defence Exhibit D8, p. 6.
[121] T. 351; Defence Exhibit D8, p. 6.

be in the vicinity of the door in order for Witness D to have seen him amidst the group of soldiers. Witness A categorically stated, in response to cross- examination, that the accused was present in the room: "Yes, he was in the room. He watched me and [Witness D] and [Accused B]. He was inside the room [...] and we were all together inside"[122] and said that "Furundžija was the person who interrogated and confronted me".[123] In Prosecution Exhibit P3, she stated that the accused was there all the time, "because he was the one who was confronting me with [Witness D]".[124] In 1995, she stated that the accused "was in the pantry questioning us as we were being beaten. He was there as [Accused B] forced me to have oral and vaginal sex with him. He did nothing to stop the beatings or the rapes".[125] Witness D testified that when he was taken out of the pantry, he saw the accused outside the doorway.[126]

88. Witness A continued to be sexually assaulted by Accused B until she collapsed in a state of exhaustion. This is demonstrated by the testimony of Witness A, and also by the evidence of Witness D, who having been returned to the Bungalow, heard a woman screaming from the direction of the Holiday Cottage and the name of Furundžija being called out. Later, a man whom Witness A recognised as Dragan Botić eventually took her upstairs to another room in the cottage.

89. The further abuses visited upon Witness A, who remained in the custody of the Jokers for several weeks, are not the subject matter of the charges against the accused. Witness A continued to be detained until she was released in a prisoner exchange on 15 August 1993. Whilst in captivity, she was repeatedly raped, sexually assaulted and subjected to other cruel, inhuman and degrading treatment. As a result, she experienced severe physical and mental suffering.

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[122] T. 415.
[123] T. 480.
[124] Prosecution Exhibit P3, p. 27.
[125] Defence Exhibit D13, p. 7.
[126] T. 352 ("He remained there [in the Holiday Cottage]"); Defence Exhibit D8, p. 6.

E. The Re-opening of the Proceedings

1. Background and Reasons for Re-Opening the Proceedings

90. On 29 June 1998, after the proceedings and closing submissions had been concluded, the Prosecution disclosed for the first time to the Defence a document entitled "Certificate of Psychological Treatment" from Medica, a Womens' Therapy Center in Zenica, dated 11 July 1995.[127] This document related to Witness A and stated that she had contacted Medica on 24 December 1993 in connection with the psychological trauma she had been suffering since she was abused in the Bungalow. Defence Exhibit D37 stated that she had been receiving treatment in the counselling center and that the symptoms of Post-Traumatic Stress Disorder, hereafter "PTSD", had been relieved. The Prosecution also disclosed a statement dated 16 September 1995 from an unidentified witness who stated that she had first seen Witness A on 24 December 1993 at Medica and last saw the witness on 11 July 1995.[128]

91. Thereupon the Defence filed a motion requesting the Trial Chamber to strike out the testimony of Witness A because the late disclosure of the said documents prejudiced the Defence and that such prejudice permeated the strategy of the whole Defence case. Alternatively, it was requested that in the event of a conviction, a new trial be ordered. The Prosecution responded, after which the Trial Chamber heard oral submissions by both parties.

92. In the Decision of 16 July 1998 the Trial Chamber ruled that the interests of justice required a re-opening of the proceedings as the only available means to remedy the prejudice suffered by the Defence. The Prosecution disclosed the Medica documents to the Defence only after the close of the trial. These documents referred to medical and psychological treatment that Witness A was alleged to have received at Medica. In the circumstances of this case, the late-disclosed material was considered to be relevant to the issue of credibility of Witness A's testimony. The prejudice suffered directly stemmed from the fact that the Defence was unable to fully cross-examine relevant Prosecution

[127] Exhibit D37.

witnesses and to call evidence to deal with the issues raised by the Medica documents. This right is encapsulated in Article 21(4)(e) of the Statute, which reads: "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: [. . .]; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him [. . .]." In the event, the Trial Chamber ordered the re-opening of the proceedings. It permitted the recalling of Prosecution witnesses for cross-examination, but solely on any "medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993".[129] The Trial Chamber also permitted the Defence to call evidence on these issues and the Prosecution to call evidence in rebuttal.

93. The Trial Chamber further considered the rights of the accused and Witness A. In the circumstances of the case, the Trial Chamber was of the view that the protection of Witness A could only be allowed to affect the public nature of the trial, not its fairness. This view is supported by Article 20(4) of the Statute. The Statutory provisions of Articles 20(1), 21(2) and in particular the guarantees that an accused is entitled to according to Article 21(4), mandate the Trial Chamber to ensure that the accused receives a fair trial. These Articles read as follows: Article 20(4) provides that "[t]he hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."; Article 20(1) reads that "[t]he 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."; and Article 21(2) reads that "[i]n the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute". In addition, Article 21(3) of the Statute, which reads, "[t]he accused shall be presumed innocent until proved guilty according to the provisions of the present Statute", upholds the presumption of innocence of the accused. The Trial Chamber therefore has to allow the accused to explore every

[128] Exhibit D38.
[129] Decision, 16 July 1998.

possible defence within the provisions of the Statute. Cognisant of its duty to search for the truth and applying the 'interests of justice' test inherent in its powers, the Trial Chamber decided to re-open the proceedings to allow the Defence to remedy the prejudice suffered.

94. On 14 September 1998, in response to a *subpoena duces tecum*, Medica produced a report, Defence Exhibit D24, on the treatment of Witness A. The report states that on the basis of supportive and therapeutic work with the patient and information on what had occurred, it was possible to conclude that the patient was exhibiting symptoms of PTSD. An attached report compiled by a psychologist dated 24 December 1993 states that Witness A could not sleep without therapy and was afraid to fall asleep, thought of herself as unimportant, had an uncontrolled recollection of events and allowed herself to cry, and suppressed thoughts of the rapes. On 11 July 1995 she is recorded as occasionally coming to talk, taking a tranquilliser called Apaurin, and suffering from insomnia and weeping fits.

95. The case re-opened on 9 November 1998 and the Trial Chamber heard evidence for four days until 12 November 1998. Witness A and Dr. Mujezinović were recalled for cross-examination, each side called two expert witnesses and both sides made submissions. What follows is a summary of the evidence relating to the central issue, namely whether the reliability of the evidence of Witness A has or may have been affected by any psychological disorder from which she may have suffered as a result of her ordeal. It is thus necessary to consider whether she was suffering from PTSD, and, if so, whether it has or may have affected her memory.

2. Summary of the Relevant Evidence

96. Dr. Mujezinović said that he saw Witness A in the autumn of 1993. She was frightened and said that she wanted to kill herself; she could not sleep, had nightmares and thought people were accusing her and staring. He referred her to Dr. Racic-Sabic, an associate of Medica who worked in the neuro-psychiatric department in Zenica. The latter subsequently told him that Witness A would need a long period of psychiatric treatment as she was seriously traumatised.

97. Witness A gave a different account. She agreed that she had met Dr. Mujezinović in 1993 and had a conversation. Although she was physically exhausted and had difficulty sleeping, she did not seek psychiatric help. She was not referred to Dr. Racic-Sabic and had no contact with that doctor. Medica had approached her and she had not asked for psychological assistance. She did not agree with the Medica Report and the diagnosis of PTSD. However, she had taken tranquillisers. She maintained that she accurately remembered the events which form the subject of this case.

98. Explanations for the discrepancies between the evidence of Dr. Mujezinović and Witness A are to be found in the evidence of two experts. The Defence called Dr. Charles Morgan, Associate Professor of Psychiatry at Yale University School of Medicine and Associate Director of the PTSD Program at the National Centre for PTSD. He said that Witness A's denials that she had PTSD or treatment, were consistent with findings in studies of PTSD, for example, Dr. Carol North found in her study that subjects deny having symptoms of PTSD.[130]

99. Dr. Craig Rath, an experienced clinical and forensic psychologist from California, called by the Prosecution, said that the discrepancy is to be explained because while Medica believed that Witness A was starting psychotherapy, she herself did not see it in that light. This is because a typical approach in psychiatric treatment is to ask broad questions. The witness was demonstrating symptoms into which she had little insight. Medica approached her in a general manner in order to ventilate her feelings. Witness A then felt a little better and left what Medica saw as the therapy situation but without having built a therapeutic alliance with a therapist, although her "ventilation" had been therapeutic. Dr. Rath said that this would account for the discrepancy in the evidence. Medica viewed her as being treated, but there is no evidence that typical therapeutic techniques were ever applied and there is an issue whether she engaged in psychotherapy.[131] The difference in the accounts between the witness and Medica can be explained in these terms; the witness felt as if she had an informal talk with them whereas according to Medica this was part of her treatment.

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[130] T. 996-997.
[131] T. 1252-1254.

100. The Trial Chamber accepts the evidence of Dr. Rath on this subject and finds that Witness A is mistaken in saying that she was not referred for treatment.

101. The Trial Chamber accepts the diagnosis that it is likely that Witness A had PTSD. This is based on the certificate from Medica and the evidence of Dr. Morgan, an expert in PTSD, who said that his reading of the documents suggested that Witness A was suffering from chronic PTSD. Dr. Daniel Brown, Assistant Clinical Professor in Psychology, Harvard Medical School, called by the Prosecution, agreed although pointing out that it is not clear whether Witness A had met all the criteria for PTSD.[132]

102. The Defence case was that because Witness A was suffering from PTSD and may have been treated for it, Witness A's memory was likely to have been affected and contaminated. This case was based on the evidence of Dr. Morgan to the effect that high levels of stress hormones can damage the area of the brain called the hippocampus, responsible for memory. Studies showed that the hippocampus in people with PTSD had been damaged and people suffering from PTSD performed more poorly in memory tests than people without PTSD. Studies which the witness had conducted with people suffering from PTSD showed a greater inconsistency in their accounts than people without PTSD.[133] Dr. Morgan used charts to demonstrate what he viewed as the inconsistencies in Witness A's accounts. Dr. Morgan said when giving evidence in rejoinder that he would not consider a single course of information from the reported memory of one individual suffering from PTSD to be scientifically reliable and that he would want independent corroborating evidence.[134]

103. The Defence also called Dr. Jeffrey Younggren, an experienced clinical and forensic psychologist from California and a Fellow of the American Psychological Association who has treated many PTSD victims. He said that his reading indicated that the trauma can have an effect on memory: the more trauma, the worse the memory. He referred to a report entitled "Medica's Psycho Team",[135] which stated that Medica had no knowledge about trauma and how to deal with it and lacked experience and theoretical

[132] T. 1163.
[133] T. 976-980.
[134] T. 1312.

knowledge. The witness said that this state of affairs could lead to contamination of memory, that group therapy can then fill in the blanks and lead to false beliefs. If Witness A participated in "dream and imagined journeys",[136] it could contribute to false beliefs.[137] The witness also said that he was concerned about the mixed mission of Medica in saying that "their goal is to deal with war criminals".[138] This goal may be incompatible with the recovery and treatment of trauma patients.[139]

104. For the Prosecution, Dr. Brown said that there was a link between PTSD and inconsistency but it did not mean that the trauma caused inconsistency. The evidence about accuracy in recollection of normal, meaningful, personal events shows that the more meaningful the experience, the greater the accuracy of retention. It also shows that inconsistency does not necessarily mean inaccuracy.[140] Dr. Brown said that it was not known if Witness A had hippocampal damage.[141] Dr. Rath pointed out that there was no evidence that Witness A had engaged in group or "dream" psychotherapy or that a therapist had contaminated her memory.

105. The Prosecution argued in its closing remarks that any arguments that Witness A's credibility was diminished due to therapeutic interference with her memory or because of biological damage to her brain were based on pure speculation. PTSD does not render a person's memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies. The actions of the accused as interrogator and "boss" were core to this experience and the evidence of Witness D corroborated this core. The Prosecution concluded by stating it had proved the guilt of the accused beyond reasonable doubt.

106. The Defence argued in its closing remarks that as part of the standard of proof beyond reasonable doubt, doubts in this case should be resolved in favour of the accused.

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[135] Exhibit D22, p. 2.
[136] Exhibit D22, p. 3.
[137] T. 886-892.
[138] Report on the Medica Women's Therapy Centre, Exhibit D25, p. 5.
[139] T. 894-895.
[140] T. 1124, T. 1128 and T. 1136.
[141] T. 1161-1163.

According to the Defence, the diagnosis of PTSD presents an explanation for the inconsistencies in Witness A's various statements and further discrepancies between her evidence and that of other witnesses and documentary evidence. In conclusion the Defence argued that these inconsistencies should not be dismissed but that they indicated a failure on the part of the Prosecution to meet the burden of proof in this case.

3. The *Amicus Curiae* Briefs

107. The Trial Chamber granted the applications seeking leave to file two *amicus curiae* briefs. Timely assistance in this manner is generally appreciated. Unfortunately, both the briefs dealt at great length with issues pertaining to the re-opening of the instant proceedings. By the time the two briefs were received, the re-opening of the proceedings had already been decided having commenced on 9 November 1998. Nevertheless, from the discussion on the re-opening proceedings above it should be clear that it was not the fact that Witness A received any medical and psychological counselling that automatically led the Trial Chamber to re-open the proceedings. Rather, the proceedings had to be re-opened in light of the late disclosure of the Medica material and the Trial Chamber's duty to uphold the fairness and presumption of innocence, as discussed above.

4. Findings

108. Having seen and heard all the witnesses and considered the evidence, the Trial Chamber has come to the following conclusions: the Trial Chamber finds that Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had. Indeed the Trial Chamber accepts the evidence of Dr. Rath that such treatment that she may have had was of a purely preliminary nature. The Trial Chamber also considered that the aim in therapy is not fact-finding.

109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.

F. Inconsistencies in the Testimony of Witness A

110. Following the findings above, the Trial Chamber has to examine the inconsistencies in the testimony of Witness A in order to determine whether they are sufficient to render the material aspects of the evidence of Witness A unreliable. In doing so the Trial Chamber recalls the testimony of Dr. Morgan to the effect that tests carried out to determine the consistency and accuracy of answers given by subjects in memory studies have no bearing on the truthfulness of a witness in court proceedings in that there is no model in the world that can directly measure what anyone knows in their mind. Further, Dr. Morgan added that, "I know of no way of measuring what people actually remember."[142] Much of the Defence challenge to the reliability of Witness A centred around statements allegedly made by her to sources not associated with the International Tribunal.

111. The witness denied that Defence Exhibit D11b, a hand-written statement, was in her handwriting or had been signed by her. Therefore, this exhibit and the typed versions,[143] which appear as statements dated 11 September 1996 from the State Commission for Gathering Facts on War Crimes at the Territory of the Republic of Bosnia and Herzegovina, are unreliable.

112. Witness A also denies having given evidence in legal proceedings brought against Dario Kordić and others. She recalls having a conversation about her experiences, but denies having given a formal statement in the course of legal proceedings. The document filed as Defence Exhibit D12, Witness Interview on 21 December 1993 by the Investigating Judge of the Zenica High Court in the Criminal Case of Dario Kordić *et al*, has relevant identifications blacked out, including that of the signature of the witness.

[142] T. 1042.
[143] Defence Exhibits D11 and D11a (English translation).

Witness A did not recognise this document. In the circumstances, this exhibit and its English translation, Defence Exhibit D12a, cannot be relied upon. As a consequence, challenges to the reliability of the testimony of Witness A which have been made on the basis of these documents are not accepted by the Trial Chamber.

113. The Trial Chamber finds that, despite her inconsistencies on the finer details which the Defence has validly pointed out, Witness A is a reliable witness. The evidence of expert witness Dr. Loftus, and cross-examination of Witness A, have not cast doubts on the reliability of her testimony. There is no evidence to substantiate the allegation made in the Defence closing statement that persons such as Enes Surković made suggestions on the sequence of events and identities of those involved in abusing Witness A and that these people influenced her recollection of events. The Trial Chamber is of the view that survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses. The Trial Chamber therefore attaches no particular significance to the inconsistencies in the order in which Witnesses A and D say they entered the pantry.

114. The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundžija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has been sufficiently identified by Witness A.

115. With respect to inconsistencies as to dates, the Trial Chamber observes that the dates referred to in oral testimony were put to Witness A by Defence Counsel; she

herself admitted to being poor with dates and did not volunteer the information on the exact dates of the assaults. The Trial Chamber is more concerned with the events that occurred rather than the exact date on which they happened.

116. Witness A dealt with cross-examination in an honest and confident way and countered challenges to her memory of events by indicating that she was testifying to the best of her recollection, that the evidence she gave was the way she, as the person who endured these events, saw them happen. She told the Trial Chamber that "in those moments, one does not analyse too much",[144] an observation confirmed by the views of expert witness Dr. Loftus.[145] The witness's manner in court was convincing and although her testimony, in accordance with Rule 96 of the Rules[146], requires no corroboration, the Trial Chamber notes that the evidence of Witness D does confirm the evidence of Witness A in this regard. The Trial Chamber also notes that cross-examination of Witness D did not touch upon his detention at the Bungalow or the Holiday Cottage. Witness E, a witness for the Defence, testified that he found Witness D at the Bungalow and saw him being beaten by Accused B and that the accused was present during some of the assaults. When Witness E left the Bungalow, Witness D stayed behind, being eventually confronted with Witness A.

G. The Evidence of Witness D and Witness E

117. Witnesses A and D described in detail the treatment they received at the hands of the accused and Accused B in a convincing manner. The style of beatings described by Witness D in the Bungalow was consistent with that described by Witness E who, although aged sixteen at the material time, appeared confident of his recollection. Witness D, as a member of the HVO who was suspected by the accused and Accused B of having betrayed them to the ABiH, knew the Jokers well. Notwithstanding his detention and punishment at their hands, he returned to active duty with the HVO upon his release. Both Witness D and Witness E clearly described the roles played by the

[144] T. 440.
[145] T. 593-628.
[146] Rule 96 partly reads: "In cases of sexual assault (i) no corroboration of the victim's testimony shall be required [. . .]."

accused and Accused B at the Bungalow. There was nothing material to cast doubt on their testimony.

118. With respect to the dates involved, Witness D consistently said that he could not remember exact dates.[147] He readily accepted the date shown on Defence Exhibit D10 as being the date of his release by the ABiH and identified his signature on the exhibit. He appeared not to have known Witness E beforehand as he was not sure about the name of "this person"[148] although he recalled having been released together with a "younger man" and another "older man".

119. The Trial Chamber attaches no particular significance to the question whether Witness D walked home alone, or whether he was driven back together with Witness E after their release on 16 May 1993. It is sufficient that Witness D was arrested and taken to the Bungalow earlier than Witness E.

H. Factual Findings

120. Having considered the evidence, the Trial Chamber is satisfied beyond reasonable doubt that the following findings may be made.

1. The Arrest

121. On or about 16 May 1993, Witness D was arrested and taken to the Bungalow by the accused and Accused B. He was interrogated and assaulted by both of them. Accused B in particular, beat him with his fists and on the feet and toes with a baton, in the presence of Witness E, and most of the time in the presence of the accused who was coming and going.

122. On or about 18 or 19 May 1993, Witness A was arrested and taken from her apartment in Vitez by several members of an elite unit of soldiers attached to the HVO and known as the Jokers. She was driven by car to the Bungalow, the headquarters of the

[147] T. 323.
[148] T. 359.

Jokers. Soldiers and several commanders of different units were based at the Bungalow, among whom were the accused, Accused B, Vlado Santić and others.[149]

123. On arrival at the Bungalow, Witness A was taken to a nearby house, the Holiday Cottage, which formed part of the Bungalow complex. She entered a room described as the large room, which was where the Jokers lodged. She was told to sit down and was offered bread and paté to eat. Around her, the soldiers, dressed in Jokers uniforms, awaited the arrival of the man referred to as 'the Boss', who was going to deal with her. Witness A then heard someone announce the arrival of 'Furundžija', and the man she has identified to the satisfaction of the Trial Chamber as being Anto Furundžija, the accused, entered the room holding some papers in his hands.

2. In the Large Room

124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.

125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.

126. Witness A was subjected to severe physical and mental suffering and public humiliation.

[149] T. 527-529; Defence Exhibit D14.

3. In the Pantry

127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.

128. Accused B beat Witness D and repeatedly raped Witness A. The accused was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

VI. THE LAW

A. Article 3 of the Statute (Violations of the Laws or Customs of War)

131. Article 3 of the Statute of the International Tribunal provides as follows:

> 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.

132. As interpreted by the Appeals Chamber in the *Tadić Jurisdiction Decision*,[150] Article 3 has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.

133. It follows that the list of offences contained in Article 3 is merely illustrative; according to the interpretation propounded by the Appeals Chamber, and as is clear from the text of Article 3, this provision also covers serious violations of international rules of humanitarian law not included in that list. In short, more than the other substantive provisions of the Statute, Article 3 constitutes an 'umbrella rule'. While the other provisions envisage classes of offences they indicate in terms, Article 3 makes an open-ended reference to all international rules of humanitarian law: pursuant to Article 3

serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the Statute, if the requisite conditions are met.

B. Torture in International Law

1. International Humanitarian Law

134. Torture in times of armed conflict is specifically prohibited by international treaty law, in particular by the Geneva Conventions of 1949[151] and the two Additional Protocols of 1977.[152]

135. Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the *Tadić Jurisdiction Decision*,[153] these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them. *In casu*, Bosnia and Herzegovina ratified the Geneva Conventions of 1949 and both Additional Protocols of 1977 on 31 December 1992. Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, were applicable as minimum fundamental guarantees of treaty law in the territory of Bosnia and Herzegovina at the time relevant to the Indictment. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to observe the most important provisions of the Geneva Conventions, including those prohibiting torture.[154] Thus undoubtedly the

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[150] Case No. IT-94-1-AR72, paras. 86-94.

[151] *See* common Art. 3; Arts. 12 and 50 of Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949; Arts. 12 and 51 of Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949; Arts. 13, 14 and 130 of Geneva Convention III Relative to the Treatment of Prisoners of War, 12 Aug. 1949; Arts. 27, 32 and 147 of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, hereafter "Geneva Convention IV".

[152] Art. 75 of Geneva Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Victims of International Armed Conflicts (Protocol I), 8 June 1977, hereafter "Additional Protocol I"; and Art. 4 of Geneva Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[153] Case No. IT-94-1-AR72, para.143.

[154] On 22 May 1992, at the invitation of the International Committee of the Red Cross, hereafter "ICRC", the parties to the conflict in Bosnia and Herzegovina signed an Agreement. The parties undertook to apply common Art. 3 of the Geneva Conventions, and "to bring into force" a number of other provisions of the Geneva Conventions including Art. 27, as well as various provisions of Additional Protocol I including Art. 77. This Agreement was signed by the representatives of the President of the Republic,

provisions concerning torture applied *qua* treaty law in the territory of Bosnia and Herzegovina as between the parties to the conflict.

136. The Trial Chamber also notes that torture was prohibited as a war crime under article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia, hereafter "SFRY", and that the same violation has been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992.[155]

137. The Trial Chamber does not need to determine whether the Geneva Conventions and the Additional Protocols passed into customary law in their entirety, as was recently held by the Constitutional Court of Colombia,[156] or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code[157] and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907,[158] read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention.[159] Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, hereafter "London Agreement", but it was one of the acts expressly classified as a crime against

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Mr. Izetbegović, the President of the Serbian Democratic Party, Mr. Karadžić and the President of the Croatian Democratic Community, Mr Brkič. Another Agreement was signed by the same parties on 23 May 1992.

[155] *Tadic Jurisdiction Decision*, para 135; and *Prosecutor v. Zejnil Delalić et al.*, Judgement, Case No. IT-96-21-T, 16 Nov. 1998, para. 1212, hereafter "*Delalić*".

[156] *See* [Case name unknown], Judgement, C-574/92, unpublished, Section V, B2c, 28 Oct. 1992, and; Judgement, C-225/95, unpublished, Section VD, 18 May 1995.

[157] "Francis Lieber, Instructions for the Government of Armies of the United States (1863)", reprinted in Schindler and Toman (eds.), *The Laws of Armed Conflicts* (1988), p. 10.

[158] 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907, hereafter "Hague Convention IV", and the Regulations attached to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.

[159] Preamble to Hague Convention IV. The so-called 'Martens clause' reads: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience".

humanity under article II(1)(c) of Allied Control Council Law No. 10,[160] hereafter "Control Council Law No.10". As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.

138. That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the *Nicaragua case* it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.[161]

139. It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and – if the requisite conditions are met - *qua* treaty law, the content of the prohibition being the same.

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[160] Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, Journal Officiel du Commandement en Chef Français en Allemagne, No. 12 of 11 Jan. 1946.

[161] *See* Judgement, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. U.S.A.)*, (Merits), 1986 I.C.J. Reports 14, 27 June 1986, pp. 113-114, para. 218.

140. The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts. As the International Military Tribunal at Nuremberg put it in general terms: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[162] Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter "ICTR" are indisputably declaratory of customary international law.

141. It should be stressed that in international humanitarian law, depending upon the specific circumstances of each case, torture may be prosecuted as a category of such broad international crimes as serious violations of humanitarian law, grave breaches of the Geneva Conventions, crimes against humanity or genocide.

142. Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.

2. International Human Rights Law

143. The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on

[162] *See Trials of the Major War Criminals Before the International Military Tribunal*, hereafter "IMT",

human rights: these rules ban torture both in armed conflict and in time of peace.[163] In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible.[164]

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or *jus cogens*. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[165]

145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish

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Vol. I, p. 223.

[163] These provisions are contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; the United Nations Covenant on Civil and Political Rights of 1966, hereafter "ICCPR"; the Inter-American Convention on Human Rights of 1969; the African Charter on Human and Peoples' Rights of 1981; the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, hereafter "Torture Convention"; and the Inter-American Convention to Prevent and Punish Torture of 1985, hereafter "Inter-American Convention".

[164] Reference can be made to such mechanisms as the United Nations Special Rapporteur on Torture, hereafter "Special Rapporteur"; the European Committee against Torture, set up under the European Convention for the Prevention of Torture of 1987; and the United Nations Committee against Torture, set up under the Torture Convention.

[165] *See* Art. 3 of the Torture Convention; Art. 13(4) of the Inter-American Convention Human Rights Committee, General Comment on Art. 7, para. 9, *Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994); *Soering v. United Kingdom*, Judgement of 7 July 1989, Eur. Ct. H.R., *Series A*, No.161, para. 91, hereafter "Soering"; *Cruz Varas and others v. Sweden*, Judgement of 20 March 1991, Eur. Ct. H.R., *Series A*, No. 201, paras. 69-79; *Chahal v. United Kingdom*, Judgement of 5 Nov. 1996, Eur. Ct. H.R., *Series A*, No. 22.

offenders.[166] Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.

146. The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.

3. Main Features of the Prohibition Against Torture in International Law

147. There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Peña-Irala*, "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind".[167] This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The Prohibition Even Covers Potential Breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the

[166] Torture Convention, Art. 5.
[167] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980).

European Court of Human Rights in *Soering*,[168] international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied.[169] By contrast, in the case of torture, the mere fact of keeping in force or passing legislation

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[168] The Court stated: "It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him, if implemented, be contrary to Article 3 [prohibiting torture and inhuman or degrading treatment] by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article." (para. 90).

[169] *See Mariposa Development Company and Others*, Decision, U.S.-Panama General Claims Commission, 27 June 1933, *U.N. Reports of International Arbitral Awards*, Vol. VI, pp. 340- 341; *German Settlers in Upper Silesia,* Advisory Opinion of 10 Sept. 1923, PCIJ, *Series B,* No. 6, pp. 19-20, 35-38; the arbitral award of 1922 in the *Affaire de l'impôt sur les benefices de guerre*, in *U.N. Reports of International Arbitral Awards*, Vol. I, pp. 302-305.

contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

(b) The Prohibition Imposes Obligations *Erga Omnes*

151. Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of *Jus Cogens*

153. While the *erga omnes* nature just mentioned appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.[170] The most conspicuous consequence

[170] *See also* the General Comment No. 24 on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to

of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*,[171] and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.[172] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects

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declarations under Article 41 of the Covenant", issued on 4 Nov. 1994 by the United Nations Human Rights Committee, para. 10 ("the prohibition of torture has the status of a peremptory norm"). In 1986, the United Nations Special Rapporteur, P. Kooijmans, in his report to the Commission on Human Rights, took a similar view (E/CN. 4/1986/15, p. 1, para 3). That the international proscription of torture has turned into *jus cogens* has been among others held by U.S. courts in *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992) Cert. Denied, *Republic of Argentina v. De Blake*, 507 U.S. 1017,123L. Ed. 2d 444, 113 S. Ct. 1812 (1993); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929, 949 (D.C. Cir. 1988); *Xuncax et al. v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996); and *In re Estate of Ferdinand E. Marcos*, 978 F. 2d 493 (9th Cir. 1992) Cert. Denied, *Marcos Manto v. Thajane*, 508 U.S. 972, 125L. Ed. 2d 661, 113 S. Ct. 2960 (1993).

[171] Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969.

[172] As for amnesty laws, it bears mentioning that in 1994 the United Nations Human Rights Committee, in its General Comment No. 20 on Art. 7 of the ICCPR stated the following: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." (*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994)).

discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[173]

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann*, and echoed by a USA court in *Demjanjuk*, "it is the universal character of the

[173] IMT, Vol. 1, p. 223.

crimes in question [*i.e.* international crimes] which vests in every State the authority to try and punish those who participated in their commission".[174]

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

4. Torture Under Article 3 of the Statute

158. Torture is not specifically prohibited under Article 3 of the Statute. As noted in paragraph 133 of this Judgement, Article 3 constitutes an 'umbrella rule', which makes an open-ended reference to all international rules of humanitarian law. In its "Decision On The Defendant's Motion To Dismiss Counts 13 and 14 of The Indictment (Lack Of Subject Matter Jurisdiction)" issued on 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction over alleged violations of Article 3 of the Statute.

5. The Definition of Torture

159. International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1(1) of the 1984 Torture Convention whereby:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

[174] *See Attorney-General of the Government of Israel v. Adolf Eichmann 36 I.L.R. 298*; *In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp.544, 558 (N.D. Ohio 1985). *See also Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1198, 89 L. Ed. 2d 312 (1986), for a discussion of the universality principle as applied to the commission of war crimes.

> capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

160. This definition was regarded by Trial Chamber I of ICTR, in *Prosecutor v. Jean-Paul Akayesu*, hereafter *"Akayesu"*, as *sic et simpliciter* applying to any rule of international law on torture, including the relevant provisions of the ICTR Statute.[175] However, attention should be drawn to the fact that article 1 of the Convention explicitly provides that the definition contained therein is "for the purposes of this Convention". It thus seems to limit the purport and contents of that definition to the Convention solely. An extra-conventional effect may however be produced to the extent that the definition at issue codifies, or contributes to developing or crystallising customary international law. Trial Chamber II of the International Tribunal has rightly noted in *Delalić* that indeed the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has hence concluded that that definition "thus reflects a consensus which the Trial Chamber considers to be representative of customary international law".[176] This Trial Chamber shares such conclusion, although on legal grounds that it shall briefly set out. First of all, there is no gainsaying that the definition laid down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, *inter alia*, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration".[177] It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter-American

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[175] Judgment, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 593.
[176] Case No. IT-96-21-T, para. 459.
[177] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly resolution 3452 (XXX) of 9 Dec. 1975. Art. 1(2) describes torture as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Convention.[178] Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights[179] and the Human Rights Committee.[180]

161. The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

162. The Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition

(ii) this act or omission must be intentional;

(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;

(iv) it must be linked to an armed conflict;

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[178] Arts. 2 and 3.

[179] The European Court of Human Rights found that torture is deliberate inhuman treatment causing very serious and cruel suffering (*Ireland v. United Kingdom*, Eur. Ct. H.R., *Series A*, No. 25, para. 167). The level of pain and suffering was said to be the distinguishing factor between torture and cruel, inhuman or degrading treatment: "[T]he Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering". In the *Greek Case*, the Commission held that torture has a purpose, such as the obtaining of information or confessions or the infliction of punishment and it is generally an aggravated form of inhuman treatment (*Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 12, p. 186).

[180] The Human Rights Committee, in its General Comment on Art. 7 of the ICCPR, indicated that the distinction between prohibited forms of mistreatment depends on the kind, purpose and severity of the particular treatment. (*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev. 1 at 30 (1994)).

(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity".[181] The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.

163. As evidenced by international case law, the reports of the United Nations Human Rights Committee[182] and the United Nations Committee Against Torture, those of the Special Rapporteur,[183] and the public statements of the European Committee for the Prevention of Torture,[184] this vicious and ignominious practice can take on various forms. International case law,[185] and the reports of the United Nations Special Rapporteur[186] evince a momentum towards addressing, through legal process, the use of rape in the

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[181] *See e.g.* Art. 3 (1)(c) common to the Geneva Conventions, Art. 75 (2)(b) of Additional Protocol I and Art. 4 (2)(e) of Additional Protocol II.

[182] Human Rights Committee, General Comment No. 20 on Art. 7 of the ICCPR, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,* U.N. Doc. HRI\GEN\1\Rev. 3, at 31-33 (1997).

[183] The Special Rapporteur to examine questions relevant to torture was appointed by the Commission on Human Rights in its resolution 1985/33. In pursuance of this resolution, the Special Rapporteur submitted annual reports to the Commission, which are contained in documents E/CN. 4/Sub. 2/1985/6, E/CN. 4/1986/15, E/CN. 4/1987/13, E/CN. 4/1988/17 and Add. 1, E/CN. 4/1989/15, E/CN. 4/1990/17 and Add. 1, E/CN. 4/1991/17, E/CN. 4/1992/17 and Add. 1 and E/CN. 4/1993/26.

[184] *See* the Public Statement on Turkey adopted on 15 Dec. 1992 (CPT/inf (93)1) as well as the Public Statement adopted on 6 Dec. 1996 (CPT/Inf (96) 34).

[185] *See e.g. Aksoy v. Turkey*, Judgment of 18 Dec. 1996, Eur. Ct. H.R., *Reports of Judgments and Decisions* 1996-VI; *Aydin v. Turkey*, Judgment of 25 Sept. 1997, Eur. Ct. of H.R., *Reports of Judgments and Decisions,* 1997-VI, paras. 62-88, hereafter "Aydin"; *Fernando and Raquel Mejia v. Peru* (Decision of 1 March 1996), Report No. 5/96, case no 10.970, in *Annual Report of the Inter-American Commission on Human Rights* 1995 OEA/Ser.L/V/II.91, pp. 182-188, hereafter "Meijia".

[186] *See e.g.* Report of 1986 (Special Rapporteur P. Kooijmans, E/CN.4/1986/15, pp. 29-30) and the Report of 1995 (Special Rapporteur N. Rodley, E/CN.4/1995/34, pp. 8-10).

course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture, as demonstrated by the finding of the European Court of Human Rights in *Aydin*[187] and the Inter-American Court of Human Rights in *Meijia*.[188]

164. Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture; this will be covered in the following section of the Judgement.

C. Rape and Other Serious Sexual Assaults in International Law

1. International Humanitarian Law

165. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949,[189] Additional Protocol I of 1977[190] and Additional Protocol II of 1977.[191] Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties.[192]

166. At least common article 3 to the Geneva Conventions of 1949, which implicitly refers to rape, and article 4 of Additional Protocol II, which explicitly mentions rape, apply *qua* treaty law in the case in hand because Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols on 31 December 1992. Furthermore,

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[187] Paras. 83-84.
[188] At pp. 182-188.
[189] Art. 27 of Geneva Convention IV.
[190] Art. 76(1).
[191] Art. 4(2)(e).
[192] *See* common Art. 3, which prohibits "outrages upon personal dignity, and in particular, humiliating and degrading treatment"; Art. 147 of Geneva Convention IV; Art. 85(4)(c) of Additional Protocol I; and Arts. 4(1) and 4(2)(a) of Additional Protocol II. In an *aide-memoire* of 3 Dec. 1992 and in its recommendations to the Conference on the Establishment of an International Criminal Court in Rome, July 1998, the ICRC has confirmed that the act of "wilfully causing great suffering or serious injury to body or health", categorised as a grave breach in each of the four Geneva Conventions, does include the crime of rape.

as stated in paragraph 135 above, on 22 May 1992, the parties to the conflict undertook to observe the most important provisions of the Geneva Conventions and to grant the protections afforded therein.

167. In addition, the Trial Chamber notes that rape and inhuman treatment were prohibited as war crimes by article 142 of the Penal Code of the SFRY and that Bosnia and Herzegovina, as a former Republic of that federal State, continues to apply an analogous provision.

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code[193] and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults.[194] The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in *Yamashita*,[195] along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law

[193] "Francis Lieber, Instructions for the Government of Armies of the United States (1863)", reprinted in Schindler and Toman (eds.), *The Laws of Armed Conflicts* (1988), p. 10.
[194] *See* Roeling and Ruter (eds.), *The Tokyo Judgement: The International Military Tribunal for the Far East* (1977), vol. I, p. 385.
[195] In this case, there was found to be command responsibility for rape, and this was punished as a war crime. In its decision of 7 Dec. 1945 the Commission held: "It is absurd [. . .] to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them". (Text reprinted in Friedman (ed.), *The Law of War* (1972), vol. II, p. 1597).

prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

2. International Human Rights Law

170. No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in all of the relevant international treaties.[196] The right to physical integrity is a fundamental one, and is undeniably part of customary international law.

171. In certain circumstances, however, rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture, as stated above in paragraph 163.

3. Rape Under the Statute

172. The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave

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[196] Art. 7 of the ICCPR prohibits cruel, inhuman or degrading treatment, and complaints alleging State failure to prevent or punish rape and serious sexual assaults have been brought to the Human Rights Committee under this provision. In the case of *Cyprus v.Turkey, 4 EHRR 482 (1982),* the European Commission of Human Rights found that Turkey had violated its obligation to prevent and punish inhuman or degrading treatment under Art. 3 as a result of the rapes committed by Turkish troops against Cypriot women. In the *Aydin* case, the European Court found that rape of a detainee by an official of the State "must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence" (para. 83). Under the African Charter on Human and Peoples' Rights, rape and other serious sexual assaults are caught by Art. 4 as violations of the right to respect for the integrity of the person, and also under Art. 5 which prohibits all forms of cruel, inhuman and degrading treatment. The Inter-American Convention on Human Rights enshrines the right to humane treatment in Art. 5, under which "[e]very person has the right to have his physical, mental and moral integrity respected" and "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

breach of the Geneva Conventions, a violation of the laws or customs of war[197] or an act of genocide,[198] if the requisite elements are met, and may be prosecuted accordingly.

173. The all-embracing nature of Article 3 of the Statute has already been discussed in paragraph 133 of this Judgement. In its "Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject-Matter Jurisdiction)" of 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers outrages upon personal dignity including rape.

4. The Definition of Rape

174. The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression".[199] This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.[200]

175. No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and "any form of indecent assault" on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, *inter alia*, confirmed by Article 5 of the International Tribunal's Statute, which explicitly provides for the prosecution of rape while it implicitly covers

[197] Art. 3 of the Statute.
[198] Art. 4 of the Statute.
[199] Prosecution's Pre-trial Brief, p. 15.

other less grave forms of serious sexual assault through Article 5(i) as "other inhuman acts".[201]

176. Trial Chamber I of the ICTR has held in *Akayesu* that to formulate a definition of rape in international law one should start from the assumption that "the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts".[202] According to that Trial Chamber, in international law it is more useful to focus "on the conceptual framework of State sanctioned violence".[203] It then went on to state the following:

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[204]

This definition has been upheld by Trial Chamber II *quater* of the International Tribunal in *Delalić*.[205]

177. This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based

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[200] *Ibid.*, p. 15.
[201] The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. The expression at issue undoubtedly embraces such acts as serious sexual assaults short of rape proper (rape is specifically covered by Art. 27 of Geneva Convention IV and Art. 75 of Additional Protocol I, and mentioned in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993) S/25704, para. 48, hereafter "Report of the Secretary-General"), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights and covered by the provisions of humanitarian law just mentioned as well as the Report of the Secretary-General), or the enforced disappearance of persons (prohibited by the General Assembly resolution 47/133 of 18 Dec. 1992 and the Inter-American Convention on Human Rights of 1969).
[202] Case No. ICTR-96-4-T, para. 597.
[203] *Ibid.*
[204] *Ibid.*, paras. 597-598.

on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings",[206] account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

179. The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a

[205] Case No. IT-96-21-T, para. 479.
[206] Para. 5, Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Dražen Erdemović*, Judgement, Case No. IT-96-22-A, 7 Oct. 1997.

woman,[207] others provide that rape can be committed against a victim of either sex.[208] The laws of several jurisdictions state that the *actus reus* of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ.[209] There are also jurisdictions which interpret the *actus reus* of rape broadly.[210] The provisions of civil law jurisdictions often use wording open for interpretation by the courts.[211] Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim:[212] force is given a broad interpretation and includes rendering the victim helpless.[213] Some jurisdictions indicate that the force or intimidation can be directed at a third person.[214] Aggravating factors commonly include causing the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.

181. It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be

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[207] *See* Section 361 (2) of the Chilean Code; Art. 236 of the Chinese Penal Code (Revised) 1997; Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code; Art. 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code.

[208] *See* Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-23; Art. 519 of the Italian Penal Code (as of 1978); Art. 119 of the Argentinian Penal Code.

[209] *See* Section 375 of the Pakistani Penal Code 1995; Art. 375 of the Indian Penal Code; The Law of South Africa, W.A. Joubert 1996 at p. 257-8: "The actus reus of the crime consists in the penetration of the female by the male's sexual organ (*R. v. M.* 1961 2 SA 60 (O) 63). The slightest penetration is sufficient."(*R. v. Curtis* 1926 CPD 385 389); Section 117 of the Ugandan Penal Code: "[t]here must be "carnal knowledge." This means sexual intercourse. Sexual intercourse in turn means penetration of the man's penis into the woman's vagina".

[210] For a broad definition of sexual intercourse, *see* the Criminal Code of New South Wales s. 61 H (1). *See also* the U.S. Proposal to the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (19 June 1998 A/CONF.183/C.1/L/10).

[211] *See e.g.* the Dutch Penal Code stating in Art. 242: "A person who by an act of violence or another act or by threat of violence or threat of another act compels a person to submit to acts comprising or including sexual penetration of the body is guilty of rape and liable to a term of imprisonment of not more than twelve years or a fine of the fifth category." *See also* Art. 201 of the Austrian Penal Code (StGB); French Code Penal Arts. 222-23.

[212] *See e.g.* in England and Wales the Sexual Offences Act 1956 to 1992.

[213] *See* Art. 180 of the Dutch Penal Code; Art. 180 of the SFRY Penal Code.

[214] The Penal Code of Bosnia and Herzegovina (1988) Ch. XI states that "[w]hoever coerces a female person with whom he is not married to, into sexual intercourse by force or threat to endanger her life or body or that of someone close to her will be sentenced to between one to ten years in prison".

the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.

182. A major discrepancy may, however, be discerned in the criminalisation of forced oral penetration: some States treat it as sexual assault, while it is categorised as rape in other States. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an

accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex – and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules – then he is not adversely affected by the categorisation of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.

185. Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.

186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

5. Individual Criminal Responsibility

187. It follows from Article 7(1) of the Statute that not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.

188. There has been some variation in the Prosecution's allegations concerning responsibility for direct perpetration. In the "Prosecutor's Reply Re: Article 7(1) of the Statute of the International Tribunal" filed on 31 March 1998, the Prosecution claimed that it would not be trying the accused for committing rape as the direct perpetrator.[215] However, in the opening statement the following assertion was made: "We say that by conducting an interrogation under the circumstances described by Witness A, by transferring the victim to another room, by bringing in the other person for the confrontation, and remaining while further beating and sexual abuse occurred, marks (sic) the accused as a direct perpetrator committing the crimes of torture and outrages upon personal dignity, including rape".[216]

189. The Trial Chamber finds that as the Prosecution has relied on Article 7(1) without specification and left the Trial Chamber the discretion to allocate criminal responsibility, it is empowered and obliged, if satisfied beyond reasonable doubt that the accused has committed the crimes alleged against him, to convict the accused under the appropriate head of criminal responsibility within the limits of the Amended Indictment.

D. Aiding and Abetting

1. Introduction

190. The accused is charged with torture and outrages upon personal dignity, including rape. For the purposes of the present case however, it is necessary to define "aiding and abetting" as used in Article 7(1) of the Statute.

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[215] Prosecutor's Reply Re: Art. 7(1) of the Statute of the International Tribunal, 31 March 1998, p. 2: "The charges against the accused do not portray him as the actual perpetrator of the rape. The Prosecution will not be attempting to show, under Art. 7(1) that the accused "committed" the rape".
[216] Prosecution Opening Statement, T. 70.

191. Since no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility. In particular, it must establish both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the *actus reus* of aiding and abetting, and also the relevant *mens rea* required to accompany this action for responsibility to ensue.

2. Actus Reus

192. With regard to the *actus reus*, the Trial Chamber must examine whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral support. The Trial Chamber must also examine the proximity required between the assistance provided and the commission of the criminal act. In particular, it will have to consider whether the actions of the aider and abettor need to have a causal effect, so that without his contribution the offence would not be committed, or whether the acts of the aider and abettor need simply facilitate the commission of the offence in some way.

(a) International Case Law

(i) Introduction

193. Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials: the London Agreement,[217] the Charter of the International Military Tribunal for the Far East, establishing the Tokyo Tribunal,[218] and Control Council Law No. 10. It therefore becomes necessary to examine the case law.

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[217] Secondary liability was provided for in proceedings at the IMT at Nuremberg in Art. 6 of the Charter annexed to the London Agreement: "Leaders, organisers, 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". The IMT limited its consideration of liability in respect of the common plan or conspiracy to the charge of waging aggressive war and did not apply it with respect to the charges of war crimes and crimes against humanity. As such, the IMT Judgement provides little assistance on the issue of complicity.

[218] Art. 5 of the Charter of the IMT for the Far East contained a provision identical to that of the Nuremberg Tribunal.

194. For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.

195. First of all, there are the cases stemming from US military commissions or, in territory occupied by US forces, by courts and tribunals set up by the military government. While the military commissions operated under different directives within each theatre of US military operations, each applied a provision identical to that of the London Agreement with relation to complicity. In occupied territories, the courts and tribunals operated under the terms of Control Council Law No. 10.

196. The Trial Chamber will also rely on case law from the British military courts for the trials of war criminals, whose jurisdiction was based on the Royal Warrant of 14 June 1945,[219] which provided that the rules of procedure to be applied were those of domestic military courts, unless otherwise specified. In fact, unless otherwise provided,[220] the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration. The British cases deal with forms of complicity analogous to that alleged in the present case. The term used to describe those liable as accomplices (in killing) is that they were "concerned in the killing".

197. Cases heard under Control Council Law No. 10, either by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone are also material to the Trial Chamber's analysis.

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[219] The text of the Royal Warrant of 14 June 1945 and the Regulations for the Trial of War Criminals appended thereto is reproduced in Telford Taylor, *Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council No. 10* (1949), p. 254 ff.

[220] *See* in particular the Judge Advocate's summary of the law, *Trial of Franz Schonfeld and Nine Others*, Essen, 11-26 June 1946, Vol. XI, Law Reports, p. 69f, hereafter "Schonfeld".

198. Finally, the International Tribunal has on a previous occasion examined the question of complicity under its Statute, namely in the Opinion and Judgement of 7 May 1997 in the case of *Prosecutor v. Duško Tadić*,[221] hereafter "*Tadić Judgement*".

(ii) Nature of Assistance

199. The Trial Chamber will first examine the nature of the assistance required to establish *actus reus*. The cases which follow indicate that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.

200. In the British case of *Schonfeld*,[222] four of the ten accused were found guilty of being "concerned in the killing of" three Allied airmen, who had been found hiding in the home of a member of the Dutch resistance. All four claimed that their purpose in visiting the scene had been the investigation and arrest of the Allied airmen. One admitted to shooting the three airmen but claimed it was in self-defence; he was found guilty and sentenced to death. The roles of the three others were less direct. One drove a car to the scene and was the first to enter the house. Another had obtained the original information, searched a different house for the airmen earlier and claimed to have stood guard at the back entrance to the house along with the fourth convicted person. All except one denied having fired any shots themselves.

201. The court did not make clear the grounds on which it found these three to have been "concerned in the killing".[223] However, the Advocate General, citing the position in English law, outlined the role of an accessory who is not present at the scene but procures, counsels, commands or abets another to commit the offence, and that of an aider and abettor, either of which could have formed the basis of the court's decision. In doing so he gave an example of how an individual may participate without giving tangible assistance:

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[221] Case No. IT-94-1-T, paras. 688-692.
[222] At p. 64.
[223] The prosecutor referred to Regulation 8 (ii) of the Royal Warrant concerning units or groups of men discussed above, and this may have been taken into consideration by the court. In his reference to English substantive law on complicity, the Advocate General included the doctrine of "common design", whereby

> if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.[224]

202. Again, in giving "additional confidence to his companions" the defendant facilitates the commission of the crime, and it is this which constitutes the *actus reus* of the offence.

203. In the British case of *Rohde*[225] six persons were found guilty of being "concerned in the killing" of four British women prisoners in German hands. The women were executed by lethal injection and their bodies disposed of in the prison camp crematorium. In defining the term "concerned in the killing", the Judge Advocate explained that actual presence at the crime scene was not necessary to be "concerned in the killing". He gave the example of a lookout, who would be "concerned in the killing" by providing a service to the commission of the crime in the knowledge that the crime was going to be committed.[226]

204. In the case of one of the accused, assistance *ex post facto* was found to be sufficient for criminal responsibility. As this was not the position under English law, the

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if a group sets out to commit a crime, all are equally guilty of the act committed by one of them in the pursuance of that criminal goal whether or not they *materially* contribute to the execution of the crime.

[224] *Schonfeld*, p. 70. A similar passage is to be found in another British case, the *Trial of Werner Rohde and Eight Others*, British Military Court, Wuppertal, 29th May-1st June 1946, Vol. V, Law Reports, p. 56.

[225] *Ibid.*, p. 54.

[226] However, two defendants appear to have been convicted without proof of knowledge. *See also* the *Almelo Trial, Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24-26 Nov. 1945, Vol. I, Law Reports, p. 35, in which four German soldiers were charged with committing a war crime in that they participated in the execution of a British prisoner of war and a Dutch civilian. One ordered the execution and one fired the shots. The other two acted as lookouts, waiting near the car and preventing people from coming near while the shooting took place. All four were found guilty. *See also* the *Stalag Luft III* case (*Trial of Max Wielen and 17 Others*, British Military Court, Hamburg, 1 July-3 Sept. 1947, Vol. XI, Law Reports, p. 31). Two defendants, Denkmann and Struve, were convicted for having acted as drivers in the execution of British prisoners of war. The Judge Advocate, stating English law on the matter, said: "If people are all present, aiding and abetting one another to carry out a crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary" (pp. 43-44, p. 17 of the Official Transcript, Public Record Office, London).

inference is warranted that the court applied a different law to these international crimes.[227] The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge that they will be warned of impending discovery in the lookout scenario, reassures the killers and facilitates their commission of the crime in some significant way.

205. Guidance can also be derived from the following cases, which were heard under the terms of Control Council Law No. 10.[228] In the *Synagogue* case, decided by the German Supreme Court in the British Occupied Zone, one of the accused was found guilty of a crime against humanity (the devastation of a synagogue)[229] although he had not physically taken part in it, nor planned or ordered it. His intermittent presence on the crime-scene, combined with his status as an "*alter Kämpfer*" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him.

206. The accused was convicted at first instance of a crime against humanity under the provision on co-perpetration of a crime ("*Mittäterschaft*") of the then German penal code (Art. 47 *Strafgesetzbuch*). The conviction was confirmed on appeal. The appellate decision noted that the accused was a militant Nazi. The court went on to find that he knew of the plan at least two hours before the commission of the crime.

207. It may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

208. The *Synagogue* case may be contrasted with the *Pig-cart parade* case, also from the German Supreme Court in the British Occupied Zone. The accused, P had attended,

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[227] In English law, the law relating to accessories after the fact has generally been a separate statutory offence of "assisting an offender" rather than a form of aiding and abetting (*see* section 4(1) of the Criminal Law Act 1967).

[228] The judgements referred to in the following are to be found in *Entscheidungen des Obersten Gerichtshofs für die Britische Zone. Entscheidungen in Strafsachen, Vol. I (1949).* Several contain the proposition that in judging crimes against humanity under Control Council Law No. 10, no recourse may be had to German law on aiding and abetting, although others do apply German principles.

[229] *Strafsenat. Urteil vom 10. August 1948 gegen K. und A.* StS 18/48 (*Entscheidungen,* Vol. I, pp. 53 and 56).

as a spectator in civilian dress, a SA (*Stürmabteilung*) "parade" in which two political opponents of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown . . . His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.[230]

P was found not guilty. He may have lacked the necessary *mens rea*. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.

209. It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. Jean-Paul Akayesu was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, *by virtue of his authority*, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place: [. . .]".[231] Furthermore, it can be inferred from this finding that assistance need not be tangible. In addition, assistance need not

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[230] *Strafsenat. Urteil vom 10. August 1948 gegen L. u. a.* StS 37/48 (*Entscheidungen*, Vol. I, pp. 229 and 234).
[231] Case No. ICTR-96-4-T, para. 692, emphasis added.

constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

210. Mention should also be made of several cases which enable us to distinguish aiding and abetting from the case of co-perpetration involving a group of persons pursuing a common design to commit crimes.

211. The *Dachau Concentration Camp* case was held before a US Tribunal under Control Council Law No. 10.[232] All the accused held some position in the hierarchy running the Dachau concentration camp. While allegations of direct participation in instances of ill-treatment were made against certain accused, and allegations of command responsibility against others, the real basis of the charges was that all the accused had "acted in pursuance of a common design" to kill and mistreat prisoners, and hence to commit war crimes.

212. The organised and official nature of the system by which war crimes were perpetrated in this case adds a specific element to the "complicity" of the accused. The report of the case by the United Nations War Crimes Commission isolates three elements necessary to establish guilt in each case. The first was the existence of a system to ill-treat the prisoners and commit the various crimes alleged; the second was the accused's knowledge of the nature of this system; and the third was that the accused "encouraged, aided and abetted or participated" in enforcing the system. Once the existence of the system had been established, a given accused was potentially liable for his participation in this system. The roles of the accused ranged from camp commanders to guards and prisoner functionaries and all were found guilty, with the difference in the levels of participation reflected in the sentences. It would seem that the holding of any role in the administration of the camps was sufficient to constitute encouraging, aiding and abetting or participating in the enforcement of the system.

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[232] *The Dachau Concentration Camp Trial, Trial of Martin Gottfried Weiss and Thirty-Nine Others*, General Military Government Court of the United States Zone, Germany, 15 Nov.-13 Dec. 1945, Vol. XVI, Law Reports, p. 5. The Prosecution did refer to principles of American criminal law on the subject of complicity (pp. 12-13).

213. The prosecution in the *Dachau Concentration Camp* case, did not base its case on the direct participation of the accused in the crime. Regardless of whether the accused themselves had beaten or murdered the concentration camp inmates, the assistance they afforded to those who did, or the system, formed the basis of their guilt. The level of assistance required was low: any participation in the enterprise was sufficient, although as the accused were all members of staff of the camps, their contribution to the commission of the crimes was tangible - the carrying out of their respective duties - so that none were convicted on the basis of having lent moral support or encouragement alone.

214. The same approach underlies the judgement of the German courts in the *Auschwitz Concentration Camp*[233] trial. In summarising with approval the findings of the court of first instance in the case of the accused Höcker, the German Supreme Court stated:

> The assize court found that the accused's deeds had been proved on the basis of the fact that the accused was adjutant to the camp commander, and that participation at the arrival of the detainees were part of the adjutant's duties, as well as on the basis of the testimony of the witnesses Wal. and Pa., who witnessed such participation.[234]

215. In the same case the court remarked how the accused Mulka, by means of his presence on the ramp at the moment of arrival of the detainees "psychologically strengthened the SS-men"[235] in charge of separating the Jews destined for labour from those destined for the gas chambers. However, account was taken of the accused's role as adjutant to the camp commander, of his administrative duties related to the preparation of the mass killings, and of the specific characteristics of concentration camp trials outlined above.

216. This distinction between participation in a common criminal plan or enterprise, on the one hand, and aiding and abetting a crime, on the other, is also supported by the

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[233] Massenvernichtungsverbrechen und NS-Gewaltverbrechen in Lagern; Kriegsverbrechen. KZ Auschwitz, 1941-1945, reported in *Justiz und NS-Verbrechen,* 1979, vol. XXI, pp. 361-887.
[234] *Ibid.*, p. 858 (unofficial translation).

Rome Statute for an International Criminal Court,[236] hereafter "Rome Statute", adopted on 17 July 1998 by the Rome Diplomatic Conferences. Article 25 of the Rome Statute distinguishes between, on the one hand, a person who "contributes to the commission or attempted commission of [...] a crime by a group of persons acting with a common purpose" where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime",[237] from, on the other hand, a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[238] Thus, two separate categories of liability for criminal participation appear to have crystallised in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.

(iii) Effect of Assistance on the Act of the Principal

217. Back to aiding and abetting, in the *Einsatzgruppen* case,[239] heard by a US Military Tribunal sitting at Nuremberg, all of the accused except for one (Graf) were officers charged with war crimes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held that the acts of the accomplices had to have a substantial effect on those of the principals to constitute the *actus reus* of the war crimes and crimes against humanity charged. This conclusion is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. Klingelhoefer held a variety of positions, the least important of which was that of interpreter. The court said that even if this were his only function,

> it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive

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[235] *Schutzstaffel der Nationalsozialistische Deutsche Arbeiterpartei*, hereafter "SS"', p. 446 (unofficial translation).
[236] On the legal status of this Statute, see para. 227 below.
[237] Art. 25(3)(d).
[238] Art. 25(3)(c).
[239] *Trial of Otto Ohlendorf and Others (Einsatzgruppen)*, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. IV.

> of his organisation he was aware that the people listed would be executed when found.[240]

218. Fendler served in one of the *Kommandos* of the *Einsatzgruppen* for a period of seven months. The prosecution case against him was not that he himself conducted an execution but rather "that he was part of an organisation committed to an extermination programme".[241] The Court noted that:

> The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was "too summary". But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the *Kommando*, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.[242]

Both of these defendants were found guilty.

219. The cases of Ruehl and Graf provide a contrast which helps delineate the *actus reus* of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations of which they were a part. Ruehl's position, however, was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation".[243] He was found not guilty.

220. Graf was a non-commissioned officer. The court held that:

> Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment.[244]

221. It is clear, then, that knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case

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[240] *Ibid.* p. 569.
[241] *Ibid.* p. 571.
[242] *Ibid.* p. 572.
[243] *Ibid.* p. 581.
[244] *Ibid.* p. 585.

and that the defendants' acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to ensue. This might be because their failure to protest made some difference to the course of events, or, in the case of Klingelhoefer, that his transmission of the lists of names led directly to the execution of the members of those lists.

222. In the British case of *Zyklon B*,[245] the three accused were charged with supplying poison gas used for the extermination of allied nationals interned in concentration camps, in the knowledge that the gas was to be so used. The owner and second-in-command of the firm were found guilty; Drosihn, the firm's first gassing technician, was acquitted. The Judge Advocate set out the issue of Drosihn's complicity as turning on,

> whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty.[246]

223. This clearly requires that the act of the accomplice has at least a substantial effect on the principal act – the use of the gas to murder internees at Auschwitz - in order to constitute the *actus reus*. The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction.

224. In *S. et al.*,[247] hereafter "*Hechingen Deportation*", heard by a German court in the French occupied zone, five accused were charged with complicity in the mass deportation of Jews in 1941 and 1942 as a crime against humanity under Control Council Law

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[245] *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93.
[246] *Ibid.* p. 102.
[247] LG Hechingen, 28.6.1947, Kls 23/47 and OLG Tübingen, 20.1.1948, Ss 54/47 (decision on appeal), reported in *Justiz und NS-Verbrechen*, case 022, vol. I, pp. 469 ff.

No. 10.[248] The accused, S, was the local administrative authority responsible for organising the execution of Gestapo orders. He had complied with a Gestapo decree concerning the deportations. The court of first instance found S guilty of aiding and abetting the Gestapo in its criminal activity. His objection that his conduct in no way contributed to the crimes, because others would have taken his place if he had refused to comply with the Gestapo decree, was dismissed. The court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another.[249]

225. The Court of First Instance convicted also three other accused, Ho., K and B, female low-level government employees, who had been ordered to search Jewish women for valuables and jewellery before deportation[250] (their conviction was later quashed by the appeals court on the basis of different legal findings concerning the *mens rea* for aiding and abetting).[251]

226. Finally, in the *Tadić Judgement*, Trial Chamber II of the International Tribunal held that there was a basis in customary international law for holding an individual criminally responsible in respect of the various types of participation falling short of primary involvement, listed in Article 7(1) of the Statute.[252] The Trial Chamber examined a number of the post-Second World War trials and found that there was a requirement both that the conduct of the accused contribute to the commission of the illegal act, and that his participation directly and substantially effect the commission of the offence. When applying these criteria in the section on legal findings, the Trial

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[248] Regarding the law applicable to complicity, the court of first instance held that Control Council Law No. 10 is not only authoritative, it is the exclusive legal basis for the punishment of the conduct defined as a crime by that law. The provisions of the first (general) part of the German Criminal Code are not immediately applicable to crimes falling under Control Council Law No. 10: whenever Control Council Law No. 10 is applied, the rules of the general part have either to be found in Control Council Law No. 10 (*e.g.* rules concerning aiding and abetting (Art. II 2(c)) and the rules concerning mitigating circumstances (Art II 3)), or, in the event there should not be any express rules in Control Council Law No. 10, they have to be supplemented from the object and purpose of the statute and taking into consideration generally recognised principles of criminal law (*e.g.* in relation to the so-called duress).

[249] *Ibid.*, p. 484.

[250] "It is irrelevant that if a single accused or all of them had refused to co-operate, the search would have been carried out by the other accused or by somebody else." (*ibid.*, p. 490, unofficial translation).

[251] *Ibid.*, p. 498.

[252] Case No. IT-94-1-T, para. 669.

Chamber held that the accused "intentionally assisted directly and substantially in the common purpose of the group" to commit the offence. [253]

(b) International Instruments

227. The two international instruments useful for these purposes are the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission, and the Rome Statute. Neither instrument is legally binding internationally. The Draft Code was adopted in 1996 by the United Nations International Law Commission, a body consisting of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly. The Draft Code was taken into account by the General Assembly: in its resolution 51 (160) of 30 January 1997 it expressed its "appreciation" for the completion of the Draft Code and among other things drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the Draft Code to their work.[254] In the light of the above the Trial Chamber considers that the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world. As for the Rome Statute, at present it is still a non-binding international treaty (it has not yet entered into force). It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998.[255] In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing

[253] *Ibid.*, paras. 730 and 738.
[254] *See* operative para. 2 of the resolution.
[255] The significance of the Rome Statute has also been acknowledged by the Sixth Committee of the United Nations in a resolution entitled "Establishment of an international criminal court", dated 18 Nov. 1998 (A/C. 6/53/L. 9/Rev. 1), in which it "note[s] that a significant number of States have signed the Rome Statute"; "acknowledges the historic significance of the adoption of the Rome Statute", and; "calls upon

or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.

228. The Code of Crimes against the Peace and Security of Mankind deals with aiding and abetting in article 2(3)(d), which would impose criminal responsibility upon an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission".[256]

229. In the absence of specification, it appears that assistance can be either physical or in the form of moral support. Encouragement given to the perpetrators may be punishable, even if the abettor did not take any tangible action, provided it "directly and substantially" assists in the commission of a crime. This proposition is also supported by a passage from the International Law Commission's Commentary concerning *ex post facto* assistance:

> The Commission concluded that complicity could include aiding, abetting or assisting *ex post facto*, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.[257]

230. This conclusion implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime. From this perspective, willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator.[258]

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all States to consider signing and ratifying the Rome Statute, and encourages efforts aimed at promoting awareness of the results of the Conference and of the provisions of the Rome Statute".

[256] *Report of the I.L.C.*, on the work of its forty-eighth session, G.A. Supp. No. 10 (A/51/10) 1996, p. 18.

[257] *Ibid.*, p. 24.

[258] *See* the *Rohde* case.

231. The International Law Commission's Commentary also states that "participation of an accomplice must entail assistance which *facilitates* the commission of a crime *in some significant way*".[259] The word "facilitates" suggests that it is not necessary for the conduct of the aider and abettor to cause the commission of the crime; it need not be a *conditio sine qua non* of the crime. The "directly and substantially" requirement in article 2, and the word "significant" used in the International Law Commission Commentary, however, clearly exclude any marginal participation. Article 25(3), in particular paragraphs (c) and (d), of the Rome Statute deals with aiding and abetting:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> [. . .]
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii)Be made in the knowledge of the intention of the group to commit the crime;
>
> [. . .].

This wording is less restrictive than the Draft Code, which limits aiding and abetting to assistance which "facilitate[s] in some significant way", or "directly and substantially" assists, the perpetrator. Article 25 of the Rome Statute, like the Draft Code, also clearly contemplates assistance in either physical form or in the form of moral support. Indeed, the word "abet" includes mere exhortation or encouragement.

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[259] *Report of the I.L.C.*, p. 24 (emphasis added).

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal. The suggestion made in the *Einsatzgruppen* and *Zyklon B* cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the *Einsatzgruppen* case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

3. Mens Rea

(a) International Case Law

236. With regard to *mens rea*, the Trial Chamber must determine whether it is necessary for the accomplice to share the *mens rea* of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute *mens rea* in aiding and abetting the crime. The case law indicates that the latter will suffice.

237. For example in the *Einsatzgruppen* case,[260] knowledge, rather than intent, was held to be the requisite mental element.

238. The same position was taken in *Zyklon B* where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

239. Two of the not guilty verdicts in *Schonfeld* also provide an indication of the *mens rea* necessary to amount to being "concerned in the killing". Both concerned drivers who claimed to have followed instructions without knowing the purpose of the mission, and were therefore found not guilty. Despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.

240. In the *Hechingen Deportation* case, the court of first instance considered the *mens rea* required for aiding and abetting and concluded that this mental element encompassed both the knowledge of the crime being committed by the principals and the awareness of supporting, by aiding and abetting, the criminal conduct of the principals.[261] As

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[260] This is reflected in passages quoted from the *Einsatzgruppen* case in relation to Klingelhoefer and Fendler, pp. 568-573.

[261] "As far as the *mens rea* is concerned, whether the accused's conduct is punishable or not depends on whether he intentionally acted as an aider and abettor. The aider and abettor's intent (*Gehilfenvorsatz*) requires in the first place, that he knew the conduct he was supporting by his participation; he must have been aware that the action requested of him by the Gestapo served a persecution on racial grounds. As a

mentioned above, the subsequent acquittal of the accused Ho., K., and B. on appeal was based on a different legal standard concerning the *mens rea* of those accused, requiring the aider and abettor to have acted out of the same cast of mind as the principal.[262]

241. Finally, in the *Tadić Judgment* it was found that the test of *mens rea* which emerged from the post-Second World War trials is "awareness of the act of participation coupled with a conscious decision to participate".[263] The requirement adopted by the Trial Chamber was that the mental element for aiding and abetting consists of a knowing participation in the commission of an offence.[264]

(b) International Instruments

242. Article 2(3)(d) of the International Law Commission's Draft Code on Crimes and Offences Against Mankind, provides that the *mens rea* required is that the assistance be given "knowingly". The Commentary adds:

> Thus, an individual who provides some assistance to another individual without knowing that this assistance will facilitate the commission of a

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result of the trial proceedings and of the evidence, the court finds that the accused had this awareness (*Bewußtsein*), on the basis of the wording and of the contents of the Gestapo decrees he received, although he has credibly asserted that he did not reckon with the possibility that the deported Jews would be killed [. . .]. The abettor's intent secondly requires that he knew that by means of his participation he supported the principal criminal conduct. On the basis of the evidence produced in trial this court finds that the accused had this awareness. The accused's reasoning that, if he had refused to execute the measures requested by the Gestapo himself, somebody else would have implemented those measures, does not exclude this awareness; on the contrary, it proves its existence [. . .]. The abettor's intent, however, does not require that the accused himself acted for racist motives or, generally, out of an inhuman cast of mind. Nor is it necessary that the accused was aware of the illegality (*Rechtswidrigkeit*) of his conduct, as CCL No. 10 [Control Council Law. No. 10] provides for the punishment of persecution on racial grounds whether they violate the domestic law of the country on whose territory it is committed or not [. . .]". (pp. 484-485, unofficial translation).

[262] The relevant part of the judgement reads as follows: "Under Article II, 2(a) to (c), Control Council Law No. 10 treats all thinkable forms of perpetration and of complicity as equal. It does not distinguish between being a perpetrator and being an accomplice [as opposed to German law]. The aider and abettor of a crime against humanity 'is deemed to have committed a crime against humanity without regard to the capacity in which he acted'. As a consequence of this complete equality between perpetrator and aider and abettor, *the aider and abettor has to have acted out of the same cast of mind as the principal, i.e. out of an inhuman cast of mind, or, in the case of persecutions, motivated by a political, racist or religious ideology*. The court of first instance correctly assumed that the statute [Control Council Law No. 10] had to be construed without recourse to exterior sources." (*ibid.*, p. 498, unofficial translation, emphasis added).

[263] Case No. IT-94-1-T, para. 674.

[264] *Ibid.*, para. 692.

crime would not be held accountable under the present sub-paragraph.[265]

243. Therefore, it is not necessary for an aider and abettor to meet all the requirements of *mens rea* for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.

244. Reference should also be made to article 30 of the Rome Statute, which provides that, "[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and *knowledge*".[266]

(c) Conclusions

245. The above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably

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[265] *Report of the I.L.C.*, p. 24.

[266] Emphasis added. Art. 30, reads:
"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

have known that the purpose of the trip was an unlawful execution, he would be acquitted.

246. Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

247. Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of *mens rea* in customary international law. This is the standard adopted by this Tribunal in the *Tadić Judgement*, although sometimes somewhat misleadingly expressed as "intent".[267]

248. One exception to this requirement of knowledge is the *Rohde* case, which appears to require no *mens rea* at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the *Hechingen Deportation* case, which required that the accomplice share the *mens rea* of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.

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3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

[267] Case No. IT-94-1-T, paras. 675-677.

E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, 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). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that

torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.[268]

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically

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[268] *See also* the *Eichmann* case: "[. . .] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer", p. 323, and *Akayesu*, Case No. ICTR-96-4-T, para. 541. *See also* the *Pinochet* Judgement of the House of Lords, 25 Nov. 1998, *per* Lord Steyn: "It is apparently conceded that if [General Pinochet] personally tortured victims the position would be different. This distinction flies in the face of an elementary principle of law, shared by all civilised legal systems, that there is no distinction between the man who strikes, and a man who orders another to strike".

participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described *supra*, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co-perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

VII. LEGAL FINDINGS

A. Relevant Criteria

1. Applicability of Article 3 of the Statute

258. It is well established that for international humanitarian law to apply there must first be an armed conflict. The Trial Chamber has found that there was an armed conflict between the HVO and the ABiH at the material time. For the purposes of Article 3 of the Statute, the nature of this armed conflict is irrelevant. The Appeals Chamber in the *Tadić Jurisdiction Decision* held that it does not matter whether the serious violation occurred in the context of an international or internal armed conflict, provided the following requirements are met:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
>
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
>
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[269]

259. The Trial Chamber has found that the International Tribunal has jurisdiction over torture and outrages upon personal dignity including rape under Article 3 of its Statute. There is therefore temporal, territorial and subject matter jurisdiction and the Trial Chamber is properly seised of this matter.

2. The Elements of Torture

260. These have been identified by the Trial Chamber in paragraph 162 of this Judgement.

3. The Elements of Rape

261. These have been identified by the Trial Chamber in paragraph 185 of this Judgement.

B. Status of Those Involved

262. The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the Lašva Valley area, including the attack on the village of Ahmići, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described. Accused B was a commander in one of the units of the HVO. Witness A was a Moslem civilian and non-combatant who was arrested and detained by the Jokers. Witness D, a Croatian, was a combatant with the HVO but was arrested by the Jokers and detained on suspicion of having betrayed them to the ABiH who had captured him for a period of time. Witness E, a Croatian, was a non-combatant who had been arrested by the ABiH after straying into their territory and was detained by the Jokers for questioning upon his release.

C. The Amended Indictment

263. The Amended Indictment against the accused charges him with two counts, Count 13 and Count 14. The citation of events in the paragraphs in the Amended Indictment culminate in paragraphs 25 and 26 respectively supporting the charges in the counts. They read as follows:

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[269] Case No. IT-94-1-AR72, para. 94.

25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDŽIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDŽIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.

26. Then Witness A and Victim B,[270] a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDŽIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDŽIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

1. Count 13: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR (torture) recognised by Article 3 of the Statute

264. Count 13 is based on what happened in the large room and in the pantry of the Holiday Cottage. The Trial Chamber is satisfied that the accused was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.

265. The intention of the accused, as well as Accused B, was to obtain information which they believed would benefit the HVO. They therefore questioned Witness A about the activities of members of Witness A's family and certain other named individuals, her relationship with certain HVO soldiers and details of her alleged involvement with the ABiH.

266. The Trial Chamber has found that the accused was also present in the pantry where the second phase of the interrogation of Witness A occurred. Witness D was taken there for a confrontation with Witness A to make her confess as 'promised' by the accused in the large room. Both Witness A and Witness D were interrogated by the accused and hit on the feet with a baton by Accused B in the course of this questioning. Accused B again assaulted Witness A who was still naked, before an audience of soldiers. He raped her by the mouth, vagina and anus and forced her to lick his penis clean. The accused continued to interrogate Witness A in the same manner as he had done earlier in the large room. As the interrogation intensified, so did the sexual assaults and the rape.

267. The intention of the accused, as detailed above, was to obtain information from Witness A by causing her severe physical and mental suffering. In relation to Witness D, the accused intended to extract information about his alleged betrayal of the HVO to the ABiH and his assistance to Witness A and her children.

(i) The Trial Chamber finds that in relation to Witness A, the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co-perpetrator by virtue of his interrogation of her as an integral part of the torture. The Trial Chamber finds that the accused tortured Witness A.

(ii) In relation to Witness D, paragraph 26 of the Amended Indictment alleges that having been badly beaten in the Bungalow, he was then taken with Witness A to another room. While the accused continued to interrogate Witness A and Witness D, Accused B beat them both on the feet with a baton. Witness D was then forced to watch Accused B's sexual attacks on Witness A, which have already been described. The physical attacks upon Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering.

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[270] Referred to in this Judgement as Witness D.

268. On the evidence on record, the Trial Chamber finds that the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co-perpetrator of torture, he is individually responsible for torture. The Trial Chamber is satisfied that the Prosecution has proved the case against the accused beyond reasonable doubt.

269. The Trial Chamber therefore finds the accused, as a co-perpetrator, guilty of a Violation of the Laws or Customs of War (torture) on Count 13.

2. Count 14: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon personal dignity including rape) recognised by Article 3 of the Statute

270. The rapes committed by Accused B on Witness A were not disputed in any of the details described by the victim and Witness D. What was contested was the presence of the accused, and, to some extent, whether he played any part in their commission. The Trial Chamber has found that Witness A was subjected to rape and serious sexual assaults by Accused B in the course of the interrogation by the accused.

271. The elements of rape, as discussed in paragraph 185 of this Judgement, were met when Accused B penetrated Witness A's mouth, vagina and anus with his penis. Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that any form of captivity vitiates consent. Under Rule 96 of the Rules, it is clear that no corroboration of the evidence of Witness A is required. The Trial Chamber notes that in any case, the evidence of Witness D does confirm the evidence of Witness A in this regard.

272. The Trial Chamber is satisfied that all the elements of rape were met. Again, the rapes and sexual assaults were committed publicly; members of the Jokers were watching and milling around the open door of the pantry. They laughed at what was going on. The Trial Chamber finds that Witness A suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity.

273. The position of the accused has already been discussed. He did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co-perpetrator. The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.

274. On the evidence on record, the Trial Chamber is satisfied that the Prosecution has proved its case against the accused beyond reasonable doubt. In accordance with Article 7(1) and the findings of the Trial Chamber that the *actus reus* of aiding and abetting consists of assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and that the *mens rea* required is the knowledge that these acts assist the commission of the offence, the Trial Chamber holds that the presence of the accused and his continued interrogation aided and abetted the crimes committed by Accused B. He is individually responsible for outrages upon personal dignity including rape, a violation of the laws or customs of war under Article 3 of the Statute.

275. The Trial Chamber therefore finds the accused, for aiding and abetting, guilty of a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) on Count 14.

VIII. SENTENCING

A. Introduction

276. The accused, Anto Furundžija, has been found guilty on Count 13, a Violation of the Laws or Customs of War (torture), and Count 14, a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) both under Article 3 of the Statute. It is pursuant to these findings of guilt that the Trial Chamber will proceed to sentence him.

B. Sentencing Guidelines

277. In determining the appropriate sentence for the accused in this case, the Tribunal is guided by its Statute and Rules. The Statute provides as follows:

> Article 23
> Judgement
>
> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> [...]
>
> Article 24
> 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 the former Yugoslavia.
>
> 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.
>
> [...]

278. The Trial Chamber has also duly considered Rules 100[271] and 101 of the Rules.[272]

C. Submissions of the Parties

279. Both parties made submissions regarding sentence in open session on 22 June 1998. The Prosecution submitted, in relation to the tortures, that "this goes to the heavier end of gravity for an offence of torture."[273] With regard to the outrages upon personal dignity, the Prosecution called the instances of rape in this case "probably the most severe form of outrage upon personal dignity, and the physical, personal, and sexual integrity of the victim."[274] Other aggravating circumstances mentioned by the Prosecution include the presence of other soldiers during the perpetration of the alleged crimes. According to the Prosecution, there are no mitigating circumstances in this case and it recommends that the accused be sentenced according to the sentencing practice of the former Yugoslavia, without giving any specific recommendation for the length of sentence.

280. The Defence called Dragan Štrbac, an employee of the Sector for Civilian Defence in the Federal Ministry of Defence in Sarajevo, who had known the accused as a

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[271] Rule 100 reads:

"(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to sub-Rule 102(B)."

[272] Rule 101 reads:

"(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2 of the Statute, as well as such factors as:
(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

[273] Closing Statement, T. 641.

[274] Closing Statement, T. 641.

neighbour in Dubravica since birth.[275] He testified that the accused is married and has a daughter of approximately three years old.[276] He was living with his mother and family in Vitez before his arrest.[277] To his knowledge, the accused was never previously arrested for a crime. Although he was a member of the Territorial Defence and later the HVO,[278] he was never a nationalist.[279] Instead, the witness described him as "well-liked by his peers, communicative, vivacious", and "honest and fair."[280] Apart from this evidence, the Defence made no further submissions on sentencing.

D. Aggravating Circumstances

281. As for the first count, the accused's role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while both were being tortured by Accused B. In such situations, the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering. Torture is one of the most serious offences known to international criminal law and any sentence imposed must take this into account.

282. In relation to the second count, the Trial Chamber bears in mind that the accused did not himself perpetrate acts of rape, but aided and abetted in the rapes and serious sexual assaults inflicted on Witness A. The circumstances of these attacks were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity. The accused, far from preventing these crimes, played a prominent part in their commission.

283. In conclusion, the Trial Chamber holds that this case presents particularly vicious instances of torture and rape. The Trial Chamber further considers the accused's active role as a commander of the Jokers to be an aggravating factor. Finally, the Trial

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[275] T. 630.
[276] T. 632.
[277] T. 634.
[278] T. 636.
[279] T. 634.
[280] T. 635.

Chamber considers the fact that Witness A was a civilian detainee and at the complete mercy of her captors to be a further aggravating circumstance.

E. Mitigating Circumstances

284. The Trial Chamber bears in mind the age of the accused. He was born on 8 July 1969 and is currently 29 years of age. At the time of the commission of the offences in May of 1993, he was 23 years of age. The Trial Chamber has also taken into consideration the evidence given by the witness Dragan Štrbac, including the fact that the accused has no previous convictions and is the father of a young child. However, this may be said of many accused persons and cannot be given any significant weight in a case of this gravity.

F. The General Practice in the Courts of the Former Yugoslavia

285. Sub-Rule 101(B)(iii) requires the Trial Chamber to consider the general practice regarding prison sentences in the courts of the former Yugoslavia. Article 41(1) of the SFRY Penal Code set out the various factors to be taken into account in determining sentence:

> The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator.

For this purpose, the Trial Chamber also takes note of Chapter XVI of the 1990 SFRY Penal Code, entitled "Criminal Offences Against Humanity and International Law". Article 142 of that Code lists a number of criminal acts:

> Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack against the civilian population

> [. . .] or killings, tortures, or inhuman treatment of the civilian population [. . .] compulsion to prostitution or rape [. . .] shall be punished by no less than five years in prison or by death penalty.[281]

As was held in the case of *Prosecutor v. Duško Tadić,* hereafter *"Tadić Sentencing Judgement"*:

> [. . .] the offences of which he has been convicted under Article 3 of the Statute, under Common Article 3 - itself an extension in those Conventions to armed conflicts not of an international character of the fundamental provisions of the grave breaches regime - are generally very similar to those covered by Article 142 of the SFRY Penal Code [. . .].[282]

286. The Trial Chamber must itself interpret the SFRY Penal Code as the parties have not presented it with decisions of the courts of the former Yugoslavia dealing with similar situations. It is clear that article 142 allows for the imposition of severe penalties for war crimes, namely "at least five years in prison" or the death penalty. The Trial Chamber notes that by virtue of Article 24 of its Statute, the maximum penalty the International Tribunal may impose is that of life imprisonment, and never the death penalty.[283]

G. Sentencing Policy of the Chamber

287. Apart from the factors mentioned above, the Trial Chamber bears in mind the severe physical pain and great emotional trauma that Witness A has had to suffer as a consequence of these depraved acts committed against her. It also notes the severe pain and suffering caused to Witness D.

288. It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but

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[281] Note that an amendment to the law (published in the Official Gazette of the FRY no. 37 of 16 July 1993 p. 817) stipulated that the most serious criminal offences could be punishable by up to 20 years imprisonment (and no longer the death penalty).
[282] Case No. IT-94-1-T, 14 July 1997, para. 8.
[283] The SFRY Penal Code provided that a prison term of 20 years (not life) may be imposed instead of a death sentence.

also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.

289. In another case before the International Tribunal, it was remarked that

> the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.[284]

Although this case does not deal with crimes against humanity, the Trial Chamber finds that this reasoning can also apply to war crimes and other serious violations of international humanitarian law.

290. The Trial Chamber is further guided in its determination of sentence by the principle proclaimed as early as in 1764 by Cesare Beccaria: "punishment should not be harsh, but must be inevitable."[285] It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.

291. Finally, none of the above should be taken to detract from the Trial Chamber's support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case.

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[284] Sentencing Judgement, *Prosecutor v. Dražen Erdemović*, Case No, IT-96-22-T, 29 Nov. 1996, para. 65.
[285] As he put it, "one of the greatest brakes on crime is not the cruelty of the punishment but its infallibility, and, consequently, the vigilance of judges.". Beccaria, "Dei delitti e delle pene (Crimes and Punishment)", 1766 ed., para. XXVII, Venturi (ed.), 1965 p. 59.

H. The Sentence to be Imposed for a Multiple Conviction

292. The question remains, as to how a double conviction reflects on sentencing. The Trial Chamber has found the accused guilty of the two counts with which he has been charged. Pursuant to sub-Rule 101(C) of the Tribunal's Rules, the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

293. In pronouncing on this matter, the Trial Chamber is under a duty to apply the provisions of the Statute, in particular Article 24(1). Pursuant to article 48 of the former SFRY Penal Code, which is still applied in Bosnia and Herzegovina,[286] if the accused has committed several criminal offences by one act or several offences by several acts, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments.[287]

294. As was held by the Trial Chamber in the *Tadić Sentencing Judgement*, "(t)he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person".[288] This Trial Chamber notes that in numerous legal systems the penalty inflicted in case of multiple conviction for offences committed by one act, or by several acts which may be considered to form the same transaction, is limited to the punishment provided for the most serious offence.[289]

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[286] The Republic of Croatia enacted its own Penal Code in 1997.

[287] The text of Art. 48 partly reads: "(1) If the perpetrator by one deed has committed several criminal offences or by several deeds has committed several criminal offences none of which has yet been adjudicated, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment in the following way; 1) If capital punishment has been inflicted by the court for one of the concurring criminal offences, it shall pronounce that punishment only; [. . .] 3) If the punishments of imprisonment were assessed by the court for the concurring criminal offences, it shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments, or exceed 15 years of imprisonment".

[288] Case No. IT-94-1-T, para. 9.

[289] An example of this approach is found in Arts. 55 and 56 of the Dutch Penal Code.

295. In the present case, Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture for the purpose of aggravating the sentence imposed under Count 13. On the other hand, in assessing the sentence imposed under Count 14, the Trial Chamber has considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore, the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture.

296. In the light of the above observations, the Trial Chamber is inclined to follow the practice of the Tribunal in the *Tadić* and *Delalić* cases.[290]

[290] *See Delalić*, Case No. IT-96-21-T, para. 1286.

IX. DISPOSITION

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the TRIAL CHAMBER finds, and imposes sentence, as follows:

With respect to the accused, ANTO FURUNDŽIJA:

Count 13: GUILTY of a Violation of the Laws or Customs of War (torture).

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundžija to 10 years' imprisonment.

Count 14: GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity, including rape).

For outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundžija to 8 years' imprisonment.

The foregoing sentences are to be served concurrently, *inter se*.

A. Credit for Time Served

Pursuant to sub-Rule 101(D) of the Rules, a convicted person is entitled to credit "for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal." Anto Furundžija was detained by the authorities in Bosnia and Herzegovina on 18 December 1997, pursuant to a Warrant of Arrest and Order for Surrender issued by Judge Lal Chand Vohrah on 8 December 1995.[291] On 18 December 1997, Anto Furundžija was transferred to the United Nations Detention Center in The Hague, where he has remained in detention throughout the trial. Accordingly, 11 months and 22 days shall be deducted from the sentence today imposed

[291] Case No. IT-95-17-I, 8 Dec. 1995.

on Anto Furundžija, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Anto Furundžija's sentence, subject to the above mentioned deduction, shall begin to run from today.

B. Enforcement of Sentences

Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Anto Furundžija shall serve his sentence in a State designated by the President of the International Tribunal. The transfer of Anto Furundžija 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 Furundžija, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the final appeal by the Appeals Chamber. Until such time as his transfer is effected, Anto Furundžija shall remain in the custody of the International Tribunal, in accordance with Rule 102.

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

Florence Ndepele Mwachande Mumba
Presiding

Richard May

Antonio Cassese

Dated this tenth day of December 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]

ANNEX A- Amended Indictment

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case: IT-95-17/1-PT

Before: **Judge Florence Ndepele Mwachande Mumba, Presiding**
Judge Antonio Cassese
Judge Richard May

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Date Filed: **2 June 1998**

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

ANTO FURUNDŽIJA

AMENDED INDICTMENT

Louise Arbour, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Tribunal Statute) alleges that:

1. On 6 March 1992, the Republic of Bosnia-Herzegovina ("BiH") declared its independence.

2. From at least 3 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside the Republic of Bosnia-Herzegovina.

3. From at least January 1993 through at least mid-July 1993, the HZ-BZ armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an

armed conflict with the armed forces of the government of the Republic of Bosnia-Herzegovina.

4. From the outset of hostilities in January 1993, the HVO attacked villages chiefly inhabited by Bosnian Muslims in the Lašva River Valley region in Central Bosnia-Herzegovina. These attacks resulted in the death and wounding of numerous civilians.

5. In addition, other civilians were detained, transported from their places of residence, forced to perform manual labour, were tortured, subjected to sexual assaults, and other physical and mental abuse. Hundreds of Bosnian Muslim civilians were arrested by the HVO and taken to the locations such as the Vitez Cinema Complex and the Vitez Veterinary Station which were being used as detention facilities.

6. While imprisoned, numerous Bosnian Muslim prisoners were brought to the front lines where HVO soldiers forced them to dig protective trenches to protect HVO soldiers from being shot by BiH snipers. On several occasions Bosnian Muslim prisoners were killed and wounded while digging these protective trenches.

7. One of the locations relevant to this indictment where Bosnian Muslim prisoners were forced to dig trenches was at Kratine, a small hamlet in the Vitez municipality.

THE ACCUSED

8. [REDACTED]

9. ANTO FURUNDŽIJA was born in Travnik on 8 July 1969, and currently resides in Dubravica, Vitez. During the war, he was a commander of the JOKERS working out of their headquarters (the "Bungalow") in Nadioci near Vitez.

10. [REDACTED]

11. [REDACTED]

GENERAL ALLEGATIONS

12. At all times relevant to this indictment, a state of international armed conflict and partial occupation existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

13. All acts or omissions set forth herein as grave breaches of the Geneva Conventions of 1949 (grave breaches) and recognised by Article 2 of the Statute of the Tribunal occurred during that armed conflict and partial occupation.

14. At all times relevant to this indictment, the victims referred to in the charges contained herein were persons protected by the Geneva Conventions of 1949.

15. At all times relevant to this indictment, the accused were required to abide by all laws or customs governing the conduct of war.

16. Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.

17. The general allegations contained herein are incorporated into each of the charges set forth below.

THE CHARGES

COUNTS 1 - 2
(UNLAWFUL CONFINEMENT OF CIVILIANS)

18. [REDACTED]

COUNTS 3 - 4
(INHUMANE AND CRUEL TREATMENT)

19. [REDACTED]

COUNTS 5 - 8
(TORTURE AND MURDER)

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

COUNTS 9 - 11
(TORTURE/RAPE)

23. [REDACTED]

24. [REDACTED]

COUNTS 12 - 14
(TORTURE/RAPE)

25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDŽIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDŽIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.

26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDŽIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witnesses A to have oral and vaginal sexual intercourse with him. FURUNDŽIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

By the foregoing acts and omissions, [REDACTED] Anto FURUNDŽIJA committed the following crimes:

COUNT 12: (WITHDRAWN WITH THE CONSENT OF THE TRIAL CHAMBER).

COUNT 13: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (torture) recognised by Article 3 of the Tribunal Statute.

COUNT 14: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon personal dignity including rape) recognized by Article 3 of the Tribunal Statute.

COUNTS 15 - 17
(TORTURE/RAPE)

27. [REDACTED]

COUNTS 18 - 21
(TORTURE/RAPE, UNLAWFUL CONFINEMENT)

28. [REDACTED]

29. [REDACTED]

COUNT 22 - 25
(TORTURE/RAPE, UNLAWFUL CONFINEMENT)

30. [REDACTED]

2 June 1998

The Hague
The Netherlands

Graham T. Blewitt
Deputy Prosecutor