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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-95-14/1-A
	Date:	24 March 2000
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

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

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

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The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of two appeals in relation to the written Judgement rendered by Trial Chamber I *bis* ("Trial Chamber") on 25 June 1999 in the case of *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T ("*Aleksovski* Judgement" or "Judgement").[1]

Having considered the written and oral submissions of both parties, the Appeals Chamber

HEREBY RENDERS ITS WRITTEN JUDGEMENT.

[1] "Judgement", *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T, Trial Chamber, 25 June 1999. (For a list of designations and abbreviations used in this Judgement, *see* Annex).

I. INTRODUCTION

A. Procedural Background

1. The indictment charged the accused, Zlatko Aleksovski, with three counts of crimes within the jurisdiction of the International Tribunal. Count 8 of the indictment charged the accused with a grave breach as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3) of the Statute of the International Tribunal ("Statute"). Count 9 of the indictment charged the accused with a grave breach as recognised by Articles 2(c) (willfully causing great suffering or serious injury to body or health), 7(1) and 7(3) of the Statute. Count 10 of the indictment charged the accused with a violation of the laws or customs of war (outrages upon personal dignity) as recognised by Articles 3, 7(1) and 7(3) of the Statute.

2. At his initial appearance before Trial Chamber I[2] on 29 April 1997, the accused pleaded not guilty to all counts. The Trial Chamber rendered its oral judgement on 7 May 1999, finding the accused guilty on Count 10 and not guilty on Counts 8 and 9. The Trial Chamber rendered its written judgement on 25 June 1999.

3. Both Zlatko Aleksovski ("Appellant" or "Defence") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the *Aleksovski* Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively).[3] Combined, these appeals are referred to as "the Appeals".

4. The Appeals Chamber heard oral argument on the Appeals on 9 February 2000. On the same day, the Appeals Chamber denied all of the Appellant's grounds of appeal, reserved its judgement on two of the Prosecution's grounds of appeal and allowed the

[2] The President of the International Tribunal re-assigned the case to Trial Chamber I *bis* on 20 Nov. 1997: "Order of the President", Case No.: IT-95-14/1-T, 20 Nov. 1997.
[3] In the present proceedings, Zlatko Aleksovski is both appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity, however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant", respectively will be employed throughout this Judgement.

Prosecution's appeal against sentence.[4] The Appellant was detained on remand pending the Appeals Chamber's written judgement.[5]

1. The Appeal

(a) Filings

5. A notice of appeal against the *Aleksovski* Judgement was filed on behalf of Zlatko Aleksovski on 17 May 1999.

6. Following an order for the variation of the time-limits for the filing of their respective briefs,[6] the Appellant filed his brief against the *Aleksovski* Judgement ("Appellant's Brief") on 24 September 1999.[7] The Prosecution responded to the Appellant's Brief ("Prosecution's Response") on 25 October 1999.[8] The Appellant filed his reply to the Prosecution's Response ("Appellant's Reply") on 10 November 1999.[9]

7. Following an order for the filing of additional submissions by both parties,[10] the Appellant filed his additional submissions on the doctrine of *stare decisis* and the defence of necessity ("Appellant's Additional Submissions") on 11 January 2000.[11] The Prosecution's additional submissions ("Prosecution's Additional Submissions") were filed on the same day.[12] The Appeals Chamber granted the Prosecution's request to file a reply to the

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[4] Transcript of hearing in *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, 9 Feb. 2000, p. 85 (T. 85). (Unless otherwise indicated, all transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.)

[5] "Order for Detention on Remand", Case No.: IT-95-14/1-A, 9 Feb. 2000; T. 85-86.

[6] "Scheduling Order", Case No.: IT-95-14/1-A, 30 July 1999.

[7] "Zlatko Aleksovski's Appellant's Brief in Opposition to the Condemnatory Part of the Judgement dated 25 June 1999", Case No.: IT-95-14/1-A, 24 Sept. 1999.

[8] "Respondent's Brief of the Prosecution", Case No.: IT-95-14/1-A, 25 Oct. 1999.

[9] "The Appellant's Brief in Reply to the Respondent's Brief of the Prosecution", Case No.: IT-95-14/1-A, 10 Nov. 1999.

[10] "Scheduling Order", Case No.: IT-95-14/1-A, 8 Dec. 1999.

[11] "The Appellant's Additional Submissions on Doctrine of *Stare Decisis* and Defence of "*Necessity*"", Case No.: IT-95-14/1-A, 11 Jan. 2000.

[12] "Prosecution Response to the Scheduling Order of 8 December 1999", Case No.: IT-95-14/1-A, 11 Jan. 2000.

Appellant's Additional Submissions.[13] The Prosecution responded on 31 January 2000.[14]

(b) Grounds of Appeal

8. The Appellant's grounds of appeal have not been listed explicitly in the Appellant's Brief. At the oral hearing on 9 February 2000, the Appeals Chamber asked the Appellant to indicate whether the Appeals Chamber had correctly interpreted the grounds of appeal.[15] The Appellant's grounds of appeal as so interpreted are as follows:

(i) Ground 1: The Trial Chamber failed to establish that the accused had a discriminatory intent, which it is submitted, is necessary to convict him for the offences under Article 3 of the Statute.[16]

(ii) Ground 2: The conduct found proven against the Appellant, in particular the violence against the detainees, was not sufficiently grave as to warrant a conviction under Article 3, and the Appellant's conduct may have been justified by necessity, which the Trial Chamber failed to consider.[17]

(iii) Ground 3: The Trial Chamber erred in relying on witness testimony that was inherently unreliable and did not meet the standard of proof beyond reasonable doubt.[18]

(iv) Ground 4: The Trial Chamber erred in its finding that the Appellant was in a position of superior responsibility under Article 7(3) of the Statute.[19]

2. The Cross-Appeal

9. The Prosecution filed a notice of appeal against the *Aleksovski* Judgement on 19 May 1999, and its brief against the Judgement ("Cross-Appellant's Brief") on 24 September

[13] "Scheduling Order", Case No.: IT-95-14/1-A, 24 Jan. 2000.
[14] "Prosecution Response to Zlatko Aleksovski's Additional Submissions in Relation to the Defence of 'Extreme Necessity'", Case No.: IT-95-14/1-A, 31 Jan. 2000 ("Prosecution's Further Additional Submissions").
[15] T. 2-4.
[16] T. 3; Appellant's Brief, paras. 1-6 and 10-11.
[17] T. 3; Appellant's Brief, paras. 3, 7 and 9.
[18] T. 3; Appellant's Brief, paras. 6 and 9.
[19] T. 3-4; Appellant's Brief, paras. 12-22.

1999.[20] The Appellant responded to the Cross-Appellant's Brief ("Appellant's Response") on 25 October 1999.[21] The Cross-Appellant filed its reply to the Appellant's Response ("Cross-Appellant's Reply") on 10 November 1999.[22]

10. The Prosecution's grounds of appeal are set out in the Cross-Appellant's Brief. The grounds of appeal are as follows:

(i) Ground 1: The Trial Chamber erred in deciding that Article 2 of the Statute was inapplicable because it had not been established that the Bosnian Muslims held at Kaonik prison between January 1993 and the end of May 1993 were protected persons within the meaning of Article 4 of Geneva Convention IV.[23]

(ii) Ground 2: The Trial Chamber erred in holding that the Defendant did not incur responsibility under Article 7(1) of the Statute for the mistreatment suffered by the detainees while outside Kaonik prison.[24]

(iii) Ground 3: The Trial Chamber erred when it sentenced Aleksovski to two and a half years' imprisonment.[25]

3. Relief Requested

(a) The Appeal against Judgement

11. The Appellant seeks the following relief in relation to his various grounds of appeal referred to above:

(i) The reversal of the finding of guilt under Count 10 for failure to establish the requisite *mens rea*.

(ii) The reversal of the finding of guilt under Count 10 for failure to establish the requisite *actus reus*.

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[20] "Prosecution's Appeal Brief", Case No.: IT-95-14/1-A, 24 Sept. 1999.
[21] "The Appellant's Brief in Reply to the Prosecution's Appeal Brief", Case No.: IT-95-14/1-A, 25 Oct. 1999.
[22] "Brief in Reply of the Prosecution", Case No.: IT-95-14/1-A, 10 Nov. 1999.
[23] Cross-Appellant's Brief, paras. 1.8 and 2.11.
[24] *Ibid.*, paras. 1.8 and 3.6.
[25] *Ibid.*, paras. 1.8 and 4.6.

(iii) The reversal of the finding of guilt under Count 10 for failure to correctly apply the standard of proof beyond reasonable doubt.

(iv) The reversal of the finding of guilt under Count 10 for failure to establish the responsibility of Zlatko Aleksovski as a commander.

(b) The Cross-Appeal

12. The Prosecution seeks the following relief in relation to its various grounds of appeal referred to above:

(i) The reversal of the finding of not guilty with respect to Count 8 and Count 9 and the substitution thereof with findings of guilt.[26]

(ii) The reversal of the finding in relation to Count 10 that the Appellant is not guilty of the mistreatment of prisoners outside Kaonik prison (other than their use as trench-diggers and human shields), and the substitution thereof with a finding of guilt. Further, should the Cross-Appellant's first ground of appeal succeed, the reversal of the findings with respect to this element of Counts 8 and 9, and the substitution thereof with findings of guilt on this element of each of the said counts.[27]

(iii) The revision of the sentence imposed to a sentence of not less than seven years.[28]

[26] Cross-Appellant's Brief, para. 2.78.
[27] *Ibid.*, para. 3.45.
[28] *Ibid.*, paras. 4.59-4.60.

II. FIRST GROUND OF APPEAL BY THE APPELLANT: LACK OF REQUISITE *MENS REA*

A. Submissions of the Parties

1. Appellant's Brief

13. The Appellant submits[29] that, as Article 3 of the Statute only deals with extremely grave crimes, the perpetrator of Article 3 offences is "evidently expected to manifest ... discriminatory conduct".[30] The Appellant construed the Trial Chamber's judgement as having accepted that a discriminatory intent is required under Article 3 of the Statute but says that the Trial Chamber failed to identify facts indicating the existence of this discriminatory intent.[31] The Appellant further contends generally that the perpetrator's motivation is a critical element of criminal liability under Article 3 and that a perpetrator must be "motivated by a contempt toward other person's dignity in racial, religious, social, sexual or other discriminatory sense".[32] The Appellant contends that the Trial Chamber, despite the Prosecutor's failure to prove the element of discriminatory intent, found that the Appellant's criminal liability was proved.[33] The Trial Chamber acted inconsistently in finding that certain of the Appellant's actions were not motivated by discrimination, but finding him guilty under Article 3, which implies the existence of discriminatory intent.[34]

14. The apparent confusion in these submissions was resolved during the oral hearing where the Appellant accepted the summary proposed by the Presiding Judge that this ground constituted an argument "that the Trial Chamber failed to establish that the accused had a discriminatory intent which you say is necessary to convict him for the offences under Article 3 of the Statute."[35]

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[29] *See* Appellant's Brief and submissions made orally to the Appeals Chamber in the hearing of 9 Feb. 2000.
[30] Appellant's Brief, paras. 2-3.
[31] *Ibid.*, paras. 6 and 10.
[32] *Ibid.*, para. 4.
[33] *Ibid.*, paras. 5 and 10.
[34] *Ibid.*, para. 11.
[35] T. 3.

2. Prosecution's Response

15. The Prosecution interpreted the Appellant's Brief as contending that the Trial Chamber made an error of fact, in which case he would need to establish that the Trial Chamber's findings on *mens rea* are unreasonable.[36] Although the Appellant expresses agreement with the Trial Chamber's findings on the elements of Article 3 of the Statute, the elements of *mens rea* cited in his Brief do not correspond with these findings.[37] The Appellant also seems to allege an error of law in that the Trial Chamber did not require proof of discriminatory intent on the Appellant's part.[38] The Trial Chamber's reference to discrimination does not mean it considered discrimination a requirement: it is merely evidence relevant to a determination of whether *mens rea* is established.[39] This evidence was mainly relied on in determining sentence.[40] Under international law, proof of discriminatory intent is not required for outrages upon personal dignity.[41] The *Furundžija* Judgement[42] at no point suggests that the relevant mental element requires proof of discriminatory intent.[43] The Prosecution contends that the Trial Chamber correctly held that the *mens rea* element of outrages upon personal dignity does not require proof of discriminatory intent.[44]

3. Appellant's Reply

16. The Appellant responds that the Prosecution has misinterpreted its arguments, perhaps due to their different legal backgrounds.[45] The Appellant contends that

[36] Prosecution's Response, para. 2.3.
[37] *Ibid.*, paras. 2.4-2.5.
[38] *Ibid.*, para. 2.6.
[39] *Ibid.*, paras. 2.11 and 2.18.
[40] *Ibid.*, para. 2.12.
[41] The Prosecution observes that the Appellant cited no authority to support the contrary assertion (*ibid.*, para. 2.14). The text of common Article 3 of the Geneva Conventions does not pronounce on the mental element of Article 3(1)(c). Discriminatory intent can be evidence of inhuman treatment, but is not essential (*ibid.*, para. 2.18). A requirement of discriminatory intent is not supported in the text of common Article 3 nor that of Additional Protocol I, Article 75(2)(b) and Protocol II, Article 4(2)(e) (*ibid.*, para. 2.19), nor in customary international law. In Article 4(e) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") and Article 8 (2)(c) (ii) of the Statute of the International Criminal Court ("ICC Statute"), there is no suggestion that discriminatory intent is required (*ibid.*, paras. 2.20-2.22).
[42] "Judgement", *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T, Trial Chamber, 10 Dec. 1998, para. 183 ("*Furundžija* Judgement").
[43] Prosecution's Response, para. 2.23.
[44] *Ibid.*, para. 2.24.
[45] Appellant's Reply, p. 5.

discriminatory intent is a necessary motive (which is not the same as *mens rea*), and that there was no proof that the Appellant had a discriminatory attitude. Under civil law, it is not sufficient to establish the elements of an alleged crime by proof merely that the perpetrator wishes to commit the crime, but one must establish that he is willing to accept the consequences of the *actus reus*. Such an approach is, the Appellant contends, found in Article 30 of the ICC Statute.[46]

B. Discussion

17. The Appeals Chamber does not accept the assertion of the Appellant that the Trial Chamber found that a discriminatory intent is a necessary element of crimes under Article 3 of the Statute. The Trial Chamber's references to an intention to discriminate, upon which the Appellant relies,[47] were made in the context of whether poor standards of detention were the result of conduct for which the Appellant could be held culpable or were the result of circumstances beyond the Appellant's control.

18. The Appeals Chamber understands the main passage relied on by the Appellant,[48] read in context, to mean that, in determining whether the *mens rea* of the offence of outrages against personal dignity under Article 3 is present, it is relevant to consider whether poor conditions of detention have been proved to be a result of the deliberate intention, negligence, failure to act or intentional discrimination of the person responsible for detention. The Trial Chamber was not saying that a discriminatory intent is an essential element of the crime of outrages against personal dignity or of Article 3 offences more generally. The Trial Chamber explicitly set out earlier in its judgement "the elements of the offence of outrages upon personal dignity within Article 3 of the Statute".[49] The Trial Chamber concluded that the *mens rea* of the offence is the "intent to humiliate or ridicule the victim" and did not refer to discrimination.[50] There is therefore no basis for the contention that the Trial Chamber found that a discriminatory intent was a necessary element of the offence of outrages upon personal dignity.

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[46] *Ibid.*
[47] *Aleksovski* Judgement, paras. 214, 215 and 218.
[48] *Ibid.*, para. 214.
[49] *Ibid.*, para. 55. *See also* para. 56.
[50] *Ibid.*, para. 56.

19. Counsel for the Appellant made the more general submission that an essential element of offences under Article 3 of the Statute is that the perpetrator is "motivated by a contempt towards other persons' dignity in racial, religious, social, sexual or other discriminatory sense".[51] However, he provided no authority to support this specific formulation or the existence generally of an international law requirement of discriminatory intent or "motive" for war crimes. The only apparent legal basis put forward for the submission is that, because of the extreme gravity of the crimes which fall within Article 3 of the Statute, not every assault on physical integrity and personal dignity is criminal and only proof of a discriminatory intent in committing those acts will establish that the acts are of adequate gravity.[52]

20. The Appellant's argument is unfounded. There is nothing in the undoubtedly grave nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that those offences are punishable only if they are committed with discriminatory intent. The general requirements which must be met for prosecution of offences under Article 3 have already been clearly identified by the Appeals Chamber in the *Tadić* Jurisdiction Decision,[53] and they do not include a requirement of proof of a discriminatory intent or motivation. The Appeals Chamber recognised there that the relevant violation of international humanitarian law must be "serious" in the sense that it "must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim".[54] This in no way imports a requirement that the violation must be committed with discriminatory intent.

21. International instruments provide no basis for asserting a requirement of a discriminatory intent for violations of the laws or customs of war as referred to by Article 3 of the Statute. The crimes punishable pursuant to Article 3 include all violations of international humanitarian law other than those designated as "grave breaches" of the Geneva Conventions falling under Article 2 of the Statute or crimes falling under Articles 4 or 5 of the Statute.[55] There is nothing in the provisions of the major instruments

[51] Appellant's Brief, para. 4.
[52] *Ibid.*, paras. 2-4.
[53] "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v Duško Tadić*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 Oct. 1995, ("*Tadić* Jurisdiction Decision"), para. 94.
[54] *Ibid.*
[55] *Ibid.*, para. 87.

encompassed by Article 3 of the Statute,[56] such as the 1907 Hague Convention IV and annexed Regulations[57] and the Geneva Conventions of 1949,[58] to suggest that violations must be accompanied by a discriminatory intent.

22. The specific offence of outrages upon personal dignity is found in common Article 3(1)(c) to the Geneva Conventions, Article 75(2)(b) of Additional Protocol I[59] and Article 4(2)(e) of Additional Protocol II.[60] Article 3(1)(c)[61] prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment". Nothing in the language or the purpose of this provision, or any of the Additional Protocols' provisions, indicates that the offence of an outrage upon personal dignity is committed only if a discriminatory intent is proved. The acts prohibited by subsection (1) of common Article 3 are prefaced by the words:

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

The reference in common Article 3(1)(c) to "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" does *not* qualify the overriding requirement of humane treatment of all persons taking no active part in hostilities, and in particular does not restrict the acts prohibited by that article to acts committed with a discriminatory motivation. This interpretation of the article is confirmed by the International Committee of the Red Cross commentaries to the Geneva Conventions. In relation to common Article 3, the Commentary to Geneva Convention IV[62] notes the wide

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[56] *Ibid.*, para. 89.
[57] The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations Respecting the Laws and Customs of War on Land.
[58] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.
[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977 ("Additional Protocol I").
[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977 ("Additional Protocol II").
[61] The provision on which the conviction in the present case was founded – *Aleksovski* Judgement, para. 228.
[62] Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, ICRC (1958) ("ICRC Commentary to Geneva Convention IV").

terms of Article 3 and makes it clear that the reference to "without adverse distinction" was intended not to limit Article 3 to treatment motivated by discrimination but to remove any possible basis for an argument that inhumane treatment of a particular class of persons may be justified:

> All the persons referred to in (1) without distinction are entitled to humane treatment. Criteria which might be employed as a basis for discrimination against one class of persons or another are enumerated in the provision, and their validity denied.[63]

The ICRC Commentary to Geneva Convention I regarding common Article 3 observes that the formula "without any adverse distinction founded on..." is cumbersome, but that "in view of past atrocities the authors felt it desirable to enter into detail in order to leave no possible loophole".[64]

23. There was also no basis for the Trial Chamber to conclude that customary international law imposes a requirement that violations of the laws or customs of war that may be prosecuted under Article 3 of the Statute require proof of a discriminatory intent. It has been recognised by the Appeals Chamber in the *Tadić* Judgement that, at customary law, crimes against humanity do not require proof of a discriminatory intent.[65] Such an intent must be proved only for those crimes for which it is an express requirement, that is the various types of persecution falling under Article 5(h) of the Statute.[66] There is no evidence of State practice which would indicate the development in customary international law of such a restriction on the requisite *mens rea* of violations of the laws or customs of war, nor of the specific offence of outrages upon personal dignity; certainly the Appellant did not adduce any. In the opinion of the Appeals Chamber, it is the specific discriminatory intent required for the international crimes of persecution and genocide which distinguishes them from other violations of the laws or customs of war.

24. More recent instruments which define the offence of outrages upon personal dignity, including Additional Protocols I and II (Articles 75(2)(b) and 4(2)(e), respectively) and the Statute of the ICTR (Article 4(e)) do not refer to discriminatory intent. Such a reference

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[63] *Ibid.* p. 40.
[64] Pictet (ed.), *ICRC Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC (1952), p. 55.
[65] "Judgement", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeals Chamber, 15 July 1999 ("*Tadić* Judgement"), paras. 288, 292; *see* generally paras. 287-292. *See also* "Judgement", *Prosecutor v. Kupreškić et al*, Case No.: IT-95-16-T, Trial Chamber, 14 Jan. 2000, para. 558 ("*Kupreškić* Judgement").
[66] *Tadić* Judgement, para. 305. A type of discriminatory intent is also an express element of the separate crime of genocide under Article 4 of the Statute.

might have been expected if there had been a contemporary view that customary law had developed to impose such a requirement.

25. Finally, there is no suggestion in any Tribunal jurisprudence that offences under Article 3 of its Statute require proof of a discriminatory intent. Where this offence has been considered previously, it was the broader concept of human dignity that was emphasised. In the *Furundžija* Judgement, where Trial Chamber II was required to consider the nature of the offence of rape as an outrage against personal dignity, it held:

> 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 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 humiliating and debasing the honour, the self-respect or the mental well-being of a person.[67]

That judgement makes no reference to a need to prove any discriminatory intent in establishing the offence of outrages upon personal dignity. It speaks of human dignity as being the important value protected by the offence, but does not find that this imposes a requirement of a *specific* state of mind, discriminatory or otherwise.

26. As noted by the Trial Chamber and emphasised in the ICRC commentaries to the Geneva Conventions, the prohibition of outrages upon personal dignity is a category of the broader proscription of inhuman treatment in common Article 3.[68] The offence of inhuman treatment, punishable under Article 2(b) of the Statute as a grave breach of the Geneva Conventions, was described in the *Čelebići* Judgement as constituting:

> ...an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[69]

That judgement also does not refer to discriminatory intention or motive.

27. In relation to the Trial Chamber's factual findings regarding *mens rea* in the present case, the Appeals Chamber is satisfied that the Trial Chamber found that the Appellant deliberately participated in or accepted the acts which gave rise to his liability under Articles

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[67] *Furundžija* Judgement, para. 188.
[68] *Aleksovski* Judgement para. 54; ICRC Commentary to Geneva Convention IV, p. 38.
[69] "Judgement", *Prosecutor v Delalić et al*, Case No.: IT-96-21-T, Trial Chamber, 16 Nov. 1998 ("*Čelebići* Judgement"), para. 543.

7(1) and 7(3) of the Statute for outrages upon personal dignity and was therefore guilty of these offences.[70] The Appeals Chamber should not, however, be understood as accepting the Trial Chamber's reasoning in relation to the mental element of the offence of outrages upon personal dignity, which is not always entirely clear, but is not the subject of this Appeal. In particular, the Appeals Chamber does not interpret the observation in the ICRC Commentary on the Additional Protocols, that the term "outrages upon personal dignity" refers to acts "aimed at humiliating and ridiculing" the victim,[71] as necessarily supporting a requirement of a *specific intent* on the part of a perpetrator to humiliate, ridicule or degrade the victims. The statement seems simply to describe the conduct which the provision seeks to prevent. The Trial Chamber's indication that the *mens rea* of the offence is the "intent to humiliate or ridicule" the victim[72] may therefore impose a requirement that the Prosecution was not obliged to prove and the Appeals Chamber does not, by rejecting this ground of appeal, endorse that particular conclusion.

C. Conclusion

28. For the above reasons, the Appeals Chamber finds that it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive. It was accordingly unnecessary for the Trial Chamber to find that the Appellant had a discriminatory intent in concluding that he was guilty of the offence of outrages upon personal dignity.[73] This ground of appeal fails.

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[70] *Aleksovski* Judgement, paras. 224, 229 and 237.

[71] Sandoz *et al.* (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) ("ICRC Commentary on the Additional Protocols"), para. 3047. This statement was referred to by the Trial Chamber at paras. 55 and 56. There is no specific reference in the ICRC Commentaries to the Geneva Conventions to the mental element required in relation to the offence of outrages upon personal dignity.

[72] Judgement, para. 56. The Trial Chamber also observed that an outrage against personal dignity is motivated "by contempt for the human dignity of another person" - para. 56. Although this is no doubt true, it does not make such a motivation an *element* of the offence to be proved beyond reasonable doubt.

[73] This does not mean that evidence that an accused who had responsibility for detention conditions discriminated between detainees in the conditions and facilities provided would be irrelevant. If, because of deliberate discrimination between detainees, poor conditions of detention affect only one group or class of detainees, while other detainees enjoy adequate detention conditions, this is evidence which could contribute to a finding that the *mens rea* of the offence of outrages upon personal dignity is satisfied.

III. SECOND GROUND OF APPEAL OF THE APPELLANT: THE SERIOUSNESS OF THE VIOLATION AND THE DEFENCE OF NECESSITY

29. The Appellant's second ground of appeal appears in effect to consist of two grounds of appeal, namely, that the conduct proved, in particular the violence against the detainees, was not sufficiently grave as to warrant a conviction under Article 3 of the Statute, and, that the Appellant's conduct may have been justified by necessity.[74] The Appeals Chamber will deal with each of these in turn.

A. Seriousness

1. Submissions of the Parties

(a) Appellant's Brief

30. The Appellant submits that "outrages upon personal dignity" as defined in Article 3 of the Statute only refers to particularly horrible acts.[75] He contends that the Trial Chamber itself raised the question as to whether the different forms of violence had been so grave as to constitute offences recognised by the Statute of the Tribunal.[76] In his view, the intensity of the violence against prisoners at the Kaonik prison was not sufficient to establish criminal liability and no evidence was offered in support.[77]

[74] T. 3.
[75] Appellant's Brief, para. 3.
[76] *Ibid.*, para. 7.
[77] *Ibid.*

(b) Prosecution's Response

31. The Prosecution submits that, to the extent that the Appellant claims that the Trial Chamber made a factual error in its assessment of the evidence of the requisite degree of suffering, his appeal should be dismissed for failure to demonstrate that the Trial Chamber's factual conclusions were unreasonable.[78] Furthermore, the explicit findings of the Trial Chamber refute the Appellant's claim that the *Aleksovski* Judgement failed to indicate the requisite degree of intensity.[79] These explicit findings are numerous.

32. The Appellant did not reply on this issue.

(c) Oral submissions of the Appellant

33. During the oral hearing of 9 February 2000, the Bench put three questions to the Appellant. The first question, to which the Appellant responded in the affirmative, was whether the conduct for which the accused was convicted was not a serious violation of international humanitarian law as provided in Article 1 of the Statute.[80] The second question was whether this is a point that can be raised at this stage of the proceedings, seeing that it is essentially a point relating to the jurisdiction of the Tribunal, the Appellant responded that "[w]e are not challenging the jurisdiction of the Tribunal".[81] It was the Appellant's position that, assuming that the conviction was correct, the conduct was indeed serious enough to constitute violations of international humanitarian law.[82]

34. When the Bench put the third question to the Appellant regarding the various acts of which he was convicted, he responded that such conduct was indeed a violation of humanitarian law, but his position was that this conduct had not been proven.[83] The Appellant also stated that:

[78] Prosecution's Response, paras. 2.35 and 2.36-2.38.
[79] *Ibid.*, paras. 2.35 and 2.38.
[80] T. 5.
[81] T. 5.
[82] T. 5-6.
[83] T. 6-7.

> We never claimed, nor gave any indication that such conduct, speaking in abstract terms, can be permissible and acceptable, on the contrary.[84]

2. Discussion

35. The Appellant's oral submission, set out above, seems to amount to an abandonment, perhaps only in part, of this ground of appeal. Further, in his written submission, the Appellant gave no reasons as to why these crimes were not serious – it was simply submitted that they were not. The Appeals Chamber will nevertheless consider whether the conduct on which the Trial Chamber convicted the Appellant was serious enough to constitute a violation of Article 3 of the Statute.

36. The Trial Chamber found beyond reasonable doubt that the Appellant was guilty of a number of acts falling under Article 3 of the Statute. These are as follows:

(a) Under Article 7(1) of the Statute, for aiding and abetting the physical and mental mistreatment of several detainees during body searches on 15 and 16 April 1993 in the Kaonik prison. The mistreatment included insults, searches accompanied by threats, sometimes of killing, thefts and assaults carried out in his presence.[85]

(b) Under Article 7(1) of the Statute, for ordering or instigating and aiding and abetting violence on Witnesses L and M. These witnesses were beaten regularly during their detention (sometimes four to six times a day, day and night), after the Appellant initially led the guards who beat them to their cell. The frequent beatings occasionally took place in the presence of the Appellant or otherwise near his office. In one instance, the Appellant ordered guards to continue beating them when they stopped. Witness M was at one point beaten with a "truncheon",[86] and in another instance, he fainted as a result of the beatings. In the words of the Trial Chamber, these witnesses were subjected to "recurring brutality".[87]

(c) Under Article 7(1) of the Statute, for aiding and abetting the mistreatment of detainees during their interrogation after the escape of a detainee.[88] One of the detainees,

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[84] T. 7.
[85] Judgement, paras. 87, 185-186, 190, 226 and 228.
[86] *Ibid.*, para. 196.
[87] *Ibid.*, para. 88.
[88] *Ibid.*, paras. 89, 205, 209-210 and 228.

Witness H, the brother of the fugitive, was interrogated in the Appellant's office before he was taken back to his cell where he was beaten by three guards. Following the beating, the Appellant, escorted by the same three guards, came to Witness H's cell, asked the witness the same questions concerning the circumstances of his brother's escape, and left the cell when the witness failed to answer them. The three guards resumed the beating once the Appellant left the cell.[89] Another detainee, Witness E, was beaten with a truncheon; on another occasion, his nose was broken when a guard punched him while the Appellant nodded as a sign to continue the beating.[90] The Trial Chamber saw this as an isolated, but nevertheless "serious" incident.[91]

(d) Under Article 7(1) of the Statute, for aiding and abetting psychological abuse, such as nocturnal visits by soldiers demanding money and beating detainees, and the nocturnal playing of songs and screams of people being beaten over a loudspeaker.[92] The Trial Chamber found that this "clearly constituted serious psychological abuse of the detainees".[93]

(e) Under Article 7(1) of the Statute, for aiding and abetting the use of detainees as human shields in the villages of Skradno and Strane and for trench-digging in dangerous conditions.[94] In the case of the latter, the Appellant did not order his guards to deny entrance to HVO soldiers coming to get detainees for trench-digging purposes and he sometimes participated in the selection of detainees.[95]

(f) Under Article 7(3) of the Statute, as prison warden, for the crimes committed by guards inside the Kaonik prison.[96]

37. The Trial Chamber, in making the above findings, considered the context in which the psychological and physical violence occurred. The Trial Chamber held that it:

> ... categorically rejects the idea that the existence of such situations [the precariousness of the detainees' situation and the existence of an armed conflict] justifies recourse to force as described by the former Kaonik prison detainees. Furthermore, the Trial Chamber considers that the commission of violent offences against vulnerable, helpless persons or those placed in a situation of inferiority constitutes an aggravating circumstance which, in

[89] *Ibid.*, para. 209.
[90] *Ibid.*, para. 209.
[91] *Ibid.*, para. 210.
[92] *Ibid.*, paras. 187, 190, 203 and 226.
[93] *Ibid.*, para. 190.
[94] *Ibid.*, paras. 122, 125, 128-129 and 229.
[95] *Ibid.*, para. 129.
[96] *Ibid.*, paras. 104-106, 114, 117-118 and 228.

> this case, excludes the excuse which might derive from a situation of conflict which had itself led to unrest.[97]

The Trial Chamber also held that:

> In sum, the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace. The Trial Chamber considers that the existence of an armed conflict does not render it tolerable and that it constitutes a grave violation of the principles of international humanitarian law arising from the Geneva Conventions.[98]

The Appeals Chamber, having considered the various acts for which the Appellant was convicted, can find no reason whatsoever to doubt the seriousness of these crimes. Under any circumstances, the outrages upon personal dignity that the victims in this instance suffered would be serious. The victims were not merely inconvenienced or made uncomfortable – what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such.

3. Conclusion

38. This ground of appeal fails.

B. Defence of necessity

1. Submissions of the Parties

(a) Appellant's Brief

39. The Appellant submits that the Trial Chamber noted that inside the Kaonik prison not a single prisoner suffered any injury as a result of the armed conflict and that only a guard who protected the facility was injured, whilst outside Kaonik, many people suffered serious physical injury and even lost their lives due to the armed hostilities.[99] However, the

[97] *Ibid.*, para. 227.
[98] *Ibid.*, para. 228.
[99] Appellant's Brief, para.7.

Trial Chamber's failure to comment on the contradiction in form, degree and intensity of violence is a misapplication of law.[100]

40. The Appellant submits that the criminal law concept of extreme necessity had to be applied to the facts.[101] This concept excludes the perpetrator's unlawful actions since such actions are motivated by the intent to avoid a worse violation.[102]

(b) Prosecution's Response

41. The Prosecution submits that it should not be required to respond to paragraph 8 of the Appellant's Brief because of its incomprehensibility.[103] Had it been intended as a separate ground of appeal, it should be rejected for failing to indicate, in accordance with Article 25 of the Statute, the alleged errors of law or fact the Appellant wishes to invoke.[104] On the presumption that the Appellant wants to rely on extreme necessity, or duress,[105] the argument should be rejected since the Appellant does not identify where in the trial record or pre-trial proceedings this defence was raised, nor does it identify why the Trial Chamber was in error by rejecting it.[106] The Appellant is not entitled to raise such defences for the first time on Appeal.[107] The Trial Chamber also took account of the difficult circumstances of armed conflict in its assessment of the poor prison conditions and in determining sentence.[108]

42. The Prosecution further submits that the injuries and loss of life that occurred outside the prison are irrelevant to the Appellant's liability for the crimes with which he was charged.[109] The Trial Chamber found the prevailing conditions of armed conflict constituted "aggravating circumstances", and rejected the Appellant's arguments for a comparison

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[100] *Ibid.*
[101] *Ibid.*, para. 8.
[102] *Ibid.*
[103] Prosecution's Response, para. 2.34.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*, para. 2.61.
[107] *Ibid.*
[108] *Ibid.*, para. 2.62 (referring to Judgement, paras. 212, 213, 215, 216, 219, 221; paras. 235-36).
[109] *Ibid.*, para. 2.47.

between the violence inflicted on the detainees at the Kaonik prison with the casualties arising from the ongoing armed conflict.[110]

(c) Appellant's Reply

43. The Appellant submits that the concept of extreme necessity (*exceptio casu necessitatis*) is familiar to civil law.[111] In civil law procedure, the court is authorised to apply the concept on its own in accordance with the principle *iura novit curia.*[112] The parties only have to prove the facts and their legal claims or opinions do not bind the court.[113] In this regard, the applicable facts proved by the Defence are that: (a) an armed conflict existed outside Kaonik prison in the Busovača municipality; (b) there was a large number of civilian casualties in that armed conflict; (c) not one of the prisoners in Kaonik was wounded or killed apart from the prison guards; and (d) the Appellant did not participate in the decision-making regarding the imprisonment of Bosnian Muslims, as he was forced into a situation with no proper options.[114] These factual findings could be interpreted under the legal principle *exceptio casu necessitatis.*[115]

44. The Appellant further submits that extreme necessity is not the same as duress, since the former has a broader meaning and could be used to exclude the guilt, illegality or punishment of the perpetrator.[116] A provision similar to extreme necessity is found in Article 31(d) of the ICC Statute.[117] This concept, although absent from the Statute of the Tribunal, should be applied as a general principle of law from a national system, as provided for in Article 21(c) of the ICC Statute.[118]

[110] *Ibid.* (referring to Judgement, para. 227).
[111] Appellant's Reply, p. 6.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*, pp. 6-7.
[115] *Ibid.*, p. 7.
[116] *Ibid.*
[117] *Ibid.*, p. 8.
[118] *Ibid.*

(d) Appellant's Additional Submissions

45. The Appeals Chamber ordered the parties to file additional submissions on:

> (2) how the defence of "necessity" referred to in the Appeal of Zlatko Aleksovski was raised before the Trial Chamber and what evidence presented to the Trial Chamber relates to it.[119]

Only those arguments not raised in the Appellant's Brief and the Appellant's Reply will be mentioned here.

46. In the Appellant's Additional Submissions, it is pointed out that the Appellant did not emphasise this ground for excluding criminal responsibility at trial.[120] The reason is that this accords with the legal practice and rules of domestic legislation that is based on civil law where a court is bound only by the established facts of the case and is authorised and obliged to apply legal qualifications in line with the applicable law, in accordance with the Roman law maxims *da mihi facta, dabo tibi ius* and *iura novit curia*.[121]

47. At trial, the Appellant attempted to establish that by the time the Appellant became warden of Kaonik, he was faced with the *fait accompli* of interned civilians and a raging armed conflict in the region.[122] The Appellant attempted to protect the civilians from the greater harm outside the Kaonik facility by detaining them, proof of which was that none of the interned persons were killed or wounded.[123] On the basis of these facts, the Appellant submits that the defence of extreme necessity should have been applied.[124]

(e) Prosecution's Additional and Further Additional Submissions

48. The Prosecution made further submissions on the defence of necessity in the Prosecution's Additional Submissions and the Prosecution's Further Additional Submissions.

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[119] "Scheduling Order", Case No.: IT-95-14/1-A, 8 Dec. 1999.
[120] Appellant's Additional Submissions, para. 11.
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*

49. Apart from the submissions already made on this point, the Prosecution asserts that an electronic search of the transcripts of the proceedings before the Trial Chamber using the expression "extreme necessity" has yielded no result.[125] The final trial brief of the Appellant also makes no mention of the expression.[126] On the assumption that the Appellant actually refers to duress,[127] the search of the transcripts and final trial brief using "duress" has also yielded no results.[128] The Appellant never expressly raised the defence of "extreme necessity" or "duress" at trial.[129]

50. In response to the Appellant's factual assertions relating to the defence of necessity, the Prosecution's position is that: (a) the Appellant did not raise the defence at trial; (b) the facts as alleged by the Appellant on this issue were not accepted; (c) the same general facts were considered by the Trial Chamber in relation to the liability of the Appellant; (d) the evidence relied on was relevant to the Defence position at trial that the Appellant was not responsible for the unlawful detention of civilians; and (e) the Appellant's allegations refer to a basis of liability for which he was not found guilty.[130] In response to the Appellant's legal assertions, the Prosecution's position is: (a) the proposition that there is no obligation on an accused to raise a defence upon which it is relying, and that the obligation is upon the Trial Chamber to apply any possible defence, is not consistent with the practice of the Tribunal, is not directly applicable to the Tribunal and is not binding on the Tribunal; (b) even accepting the existence of this proposition in civil law systems, it is not uniformly accepted that the defence has no obligation to raise a defence available to him.[131] The Prosecution submits that the appeal should be dismissed because the facts relied upon do not raise the defence of necessity, and further, the facts invoked by the Appellant are related to allegations which are not before the Appeals Chamber.[132] Should the Prosecution's submission be accepted, consideration of the *iura novit curia* principle is moot.[133]

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[125] Prosecution's Additional Submissions, para. 11.
[126] *Ibid.*, para. 11.
[127] *Ibid.*, para. 12.
[128] *Ibid.*, para. 13.
[129] *Ibid.*, para. 14.
[130] Prosecution's Further Additional Submissions, para. 5.
[131] *Ibid.*, para. 6.
[132] *Ibid.*, para. 7.
[133] *Ibid.*

2. Discussion

51. The Appeals Chamber considers that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during the trial, and where so required under the Rules of Procedure and Evidence of the International Tribunal ("Rules"), before trial.[134] It follows that accused, generally, cannot raise a defence for the first time on appeal.[135] This general obligation to raise all possible defences during trial stems from the Rules – in particular Rules 65*ter* and 67 - as well as the obligation upon accused to plead to the charges against them.[136] It is also important that the Prosecution should be allowed the opportunity to cross-examine witnesses testifying in support of any defence put forward and to call rebuttal witnesses, if necessary. The Appeals Chamber may also have some difficulty in properly assessing a Trial Chamber's judgement where the Defence failed to raise a defence expressly, despite evidence having been led that may support such a defence. However, all of this is not to say that the right of accused to be presumed innocent is in any way impaired or that the Prosecution does not bear the burden of proving its cases. In this Appeal, the Appeals Chamber will nevertheless consider the defence of necessity, as pleaded.

52. Assuming for the moment that necessity constitutes a valid defence and that the Appellant is entitled to raise it, the Appeals Chamber is of the view that this ground of appeal is entirely misplaced. The reasons for this conclusion are as follows.

53. During the oral submissions, the Appellant, in answer to a question from the Bench, indicated that the defence of necessity is raised only in relation to the Appellant's treatment of the detainees, not the fact of detention.[137] Having regard to the Trial Chamber's Judgement, the Appellant was neither convicted for having detained anyone[138] nor for having been the warden of the Kaonik prison. He was convicted of the mistreatment

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[134] *See* Rule 67(A) and (B) of the Rules in relation to alibi and special defences. This Rule was in force at the time of the trial in this case. *Also see* Rule 65 *ter* (F) of the Rules, which came into force after the trial in this case and reads, in part: "...the pre-trial Judge shall order the defence ... to file a pre-trial brief addressing factual and legal issues, and including a written statement setting out: (i) in general terms, the nature of the accused's defence; (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and (iii) in the case of each such matter, the reason why the accused takes issue with it."

[135] *Tadić* Judgement, para. 55; *The Prosecutor v. Zlatko Aleksovski*, "Decision on Prosecutor's Appeal on Admissibility of Evidence", Case No.: IT-95-14/1-AR73, Appeals Chamber, 16 Feb. 2000, paras. 18-20.

[136] Rule 62 of the Rules ("Initial Appearance of Accused").

[137] T. 11-12.

[138] Judgement, para. 102.

detainees suffered directly or indirectly at his hands or the hands of others over whom he had superior responsibility.

54. What the Appellant is in effect submitting is that the *mistreatment* the detainees suffered – not the fact of detention, with which he was not charged – should have been interpreted by the Trial Chamber as somehow having been justified by the assertion that they would have suffered even more had they not been treated the way they were while in detention. The Appellant does not and cannot argue, in the present case, that he was faced with only two options, namely, mistreating the detainees or freeing them. The Appellant, faced with the actual choice of mistreating the detainees or not, was convicted for choosing the former. This was intimated from the Bench when during the oral hearings on 9 February 2000, the counsel for the Appellant was asked:

> ...you said the accused chose a lesser evil, presumably as against the greater evil, but wouldn't it be open to him to have chosen no evil at all? Wouldn't that have been an option to him?[139]

55. In light of the misplaced basis of this aspect of the Appellant's appeal, the Appeals Chamber considers it unnecessary to dwell on whether necessity constitutes a defence under international law, whether it is the same as the defence of duress or whether the principle *iura novit curia* should be applied in this case.

3. Conclusion

56. This ground of appeal fails.

[139] T. 12.

IV. THIRD GROUND OF APPEAL OF THE APPELLANT: FAILURE TO CORRECTLY APPLY THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

A. Submissions of the Parties

1. Appellant's Brief

57. The Appellant submits that the Prosecutor has not proved beyond reasonable doubt the *actus reus* element of outrages upon personal dignity under Article 3 of the Statute, and that, despite the absence of evidence in this regard, the Trial Chamber incorrectly convicted the Appellant on Count 10.[140] In particular, the Trial Chamber relied exclusively on the highly subjective testimony of witnesses, in the absence of objective medical documentation or a scientifically objective expert appraisal, to establish an objective element of the alleged crime, namely, that serious bodily harm or mental suffering occurred.[141] For example, the Trial Chamber rejected the testimony of Hamdo Dautović, despite the fact that this witness referred to the repeated occurrence of serious violence during the entire period of his stay at the Kaonik prison.[142] The Trial Chamber was therefore aware of the unreliability and subjectivity of such testimony but did not consider this when evaluating the testimony of other witnesses.[143] This disadvantaged the Appellant and violated the standard of proof "beyond reasonable doubt".[144]

2. Prosecution's Response

58. The Prosecution submits that the Appellant raised the issue of reliance on mere witness testimony in the absence of medical or other scientifically objective evidence at trial, but that the argument was rejected in the Judgement where it was held that "the cumulative testimony was consistent enough and the number of witnesses sufficient, to be

[140] Appellant's Brief, para. 5.
[141] *Ibid.*, paras. 6 and 9.
[142] *Ibid.*, para. 9.
[143] *Ibid.*
[144] *Ibid.*

satisfied beyond reasonable doubt that acts of violence were committed".[145] The Appellant gives no reason why this finding is legally flawed and should therefore be dismissed.[146]

59. In addition, during the trial the Appellant admitted that many of the facts alleged by the Prosecution and confirmed by the witnesses had indeed taken place (for example, forced trench digging in dangerous circumstances during which some prisoners were killed; mistreatment by HVO soldiers outside the prison).[147] In relation to these admissions, the Appellant either disputed the legal characterisation of those facts or disputed that the Appellant played any culpable role in their commission.[148] In light of these admissions, the Appellant's arguments are misplaced, at least with respect to the events whose veracity was not disputed.[149]

60. In relation to facts not admitted, the Trial Chamber's factual and legal findings on events and facts are unassailable.[150] Unless the Rules or general international law provides otherwise, Trial Chambers are free to admit various types of evidence to determine whether or not a particular fact has been established beyond reasonable doubt.[151] Even a single credible witness may suffice: law does not require corroboration.[152]

61. With reference to the suggestion that the Trial Chamber should have discarded the testimony of witnesses other than Hamdo Dautović because of their unreliability and subjectivity, the Prosecution submits that it is the task of the trial Judges to determine whether one or all witnesses are reliable, whether their testimony is credible and whether further corroboration of a particular fact is required.[153] The findings indicate that the Trial Chamber correctly discharged its duties relating to the weighing of evidence.[154]

[145] Prosecution's Response, paras. 2.49 and 2.50, with reference to Judgement, para. 223.
[146] *Ibid.*, para. 2.51.
[147] *Ibid.*, para. 2.52. "HVO" stands for the "Croatian Defence Council".
[148] *Ibid.*
[149] *Ibid.*, para. 2.53.
[150] *Ibid.*, para. 2.54.
[151] *Ibid.*, para. 2.55.
[152] *Ibid.*, para. 2.56.
[153] *Ibid.*, para. 2.58.
[154] *Ibid.*

B. Discussion

62. Neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. The only Rule directly relevant to the issue at hand is Rule 89. In particular, sub-Rule 89(C) states that a Chamber "may admit any relevant evidence which it deems to have probative value", and sub-Rule 89(D) states that a Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".

63. Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial. Whether a Trial Chamber will rely on single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case.[155] In a similar vein, it is for a Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal[156] or where the evaluation of the evidence is wholly erroneous.

64. The Appeals Chamber is of the view that the Appellant has failed to show that the Trial Chamber erred in its evaluation of the evidence. In the present case, the Trial Chamber's reliance on witness testimonies without medical reports or other scientific evidence as proof of the suffering experienced by witnesses, has not been shown to be either wrong as a matter of law, or unreasonable. Similarly, despite not having been presented with any specific reasons why the Trial Chamber should have rejected the testimony of more witnesses, the Appeals Chamber is satisfied that the Trial Chamber did not err in the exercise of its discretion when it evaluated the testimony of the various witnesses. The Trial Chamber accepted such testimony as sufficient and credible, as it was entitled to do. The Trial Chamber, therefore, applied the standard of proof beyond reasonable doubt, in relation to this ground of appeal, correctly.

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[155] *Tadić* Judgement, para. 65.
[156] *Ibid.*

C. Conclusion

65. This ground of appeal fails.

V. FOURTH GROUND OF APPEAL OF THE APPELLANT: THE TRIAL CHAMBER ERRED IN ITS APPLICATION OF ARTICLE 7(3) OF THE STATUTE TO THE FACTS IN THIS CASE

A. Submissions of the Parties

1. Appellant's Brief

66. Ground 4 of the Appellant's appeal alleges that the Trial Chamber erred in the application of Article 7(3) of the Statute. The Appellant accepts the interpretation of the Trial Chamber in respect of the constituent elements of criminal liability under Article 7(3).[157] But he does not accept the finding of the Trial Chamber that he had "factual authority over the guards".[158] In his view, for the application of Article 7(3), the existence of authority to effectively control by giving binding orders and to sanction in cases of disobedience, must be established.[159] In respect of the prison guards, who were HVO military police, the Appellant submits that he did not have such authority, as his role was purely administrative and representative.[160] Further, he submits that he was a civilian prison warden, having no authority analogous to that of a military superior over the guards in the prison,[161] and that he only had power to inform the superiors of the guards of unlawful treatment, as a general duty for civilians under the former Socialist Federal Republic of Yugoslavia Law on Criminal Procedure, but had no power to punish.[162] He asserts that, since he showed at the trial by exhibits that he reported various incidents involving the guards to the Military Police Command and the President of the Travnik Military Tribunal, he could not be held responsible for the incidents.[163]

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[157] Appellant's Brief, para. 22. The three elements identified by the Trial Chamber in paragraph 69 of the Judgement correspond to the findings of the *Čelebići* Judgement.
[158] Appellant's Brief, paras. 15-16.
[159] *Ibid.*, para. 16.
[160] *Ibid.*, para. 17.
[161] *Ibid.*, para. 20.
[162] *Ibid.*, paras. 21-22.
[163] *Ibid.*, para. 22.

2. Prosecution's Response

67. The Prosecution responds that the Appellant has failed to identify a legal error, as he is challenging the existence of a superior-subordinate relationship and arguing that *de facto* authority is not sufficient.[164] It submits that both matters were argued and adjudicated at trial, and that the Trial Chamber applied the law correctly to the evidence before it.

3. Appellant's Reply

68. The Appellant replies that he indeed challenges the existence of a superior-subordinate relationship, which is the first of three principles for command responsibility under Article 7(3). [165] He repeats that he was not formally appointed as prison warden by the authority that controlled the guards, i.e. the Ministry of Defence, but by the Ministry of Justice, and that he could not have *de jure* or *de facto* command over the guards. [166]

B. Discussion

69. Article 7(3) provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

70. In its Judgement, the Trial Chamber found that "the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police".[167] However, in its view, "anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the

[164] Prosecution's Response, paras. 3.6 and 3.7.
[165] Appellant's Reply, para. Ad.6.
[166] *Ibid.*
[167] Judgement, para. 103.

accused's ability to give them orders and to punish them in the event of violations".[168] It went on to find that the Appellant had effective authority over the guards, as shown by his issuing orders to them and the availability to him of the means to report to superiors the situation in the prison, including incidents of mistreatment of prisoners.[169] The Trial Chamber found, however, that the Appellant failed to report to the superior authority the offences committed by the guards and HVO soldiers within the prison, and that he even joined in certain incidents of assault.[170]

71. The Appeals Chamber, on the basis of the submissions of the parties and the findings of the Trial Chamber, reaches the following conclusions regarding this ground of appeal.

72. The Appeals Chamber notes that the Appellant has agreed with the Trial Chamber in respect of the constituent elements of liability under Article 7(3).[171] Three elements have been identified by the Trial Chamber: 1) the existence of a superior-subordinate relationship; 2) the fact that the superior "knew or had reason to know that a crime was about to be committed or had been committed"; and 3) his obligation to take all the necessary and reasonable measures to prevent or to punish the perpetrators.[172]

73. The Appellant claims to appeal against the way in which the Trial Chamber applied the law to his case, but this ground of appeal in essence questions the inferences drawn from facts found by the Trial Chamber regarding his authority within the Kaonik prison. The Appeals Chamber therefore considers this ground to be factual in nature.

74. The Appellant disputes two facts found by the Trial Chamber. The first fact is that he had authority over the prison guards who were HVO military police, as demonstrated by his powers to issue orders to them, his generally elevated status within the Kaonik prison, and his right to report to the Military Police command and the Travnik Military Tribunal within whose jurisdiction the prison was placed. The second fact is that he failed to report the offences by his subordinates to either of the superior authorities. Both facts

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[168] *Ibid.*
[169] *Ibid.*, paras. 104 and 117.
[170] *Ibid.*, para. 117.
[171] The Trial Chamber referred expressly to the Appellant's acceptance of the elements at first instance: *ibid.*, para. 71.
[172] *Ibid.*, para. 69.

were found to be proved by the Trial Chamber after examining evidence and arguments specific to them. Like the Trial Chamber, the Appellant also construes the authority of a superior to mean that he has the power to order and to enforce his orders in certain ways.[173] The Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence, it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber.[174] In this appeal, the Appellant has failed to convince this Chamber that unreasonable conclusions were drawn by the Trial Chamber in respect of the two facts.

75. The legal aspect of this ground of appeal consists of a single issue as to whether the Appellant was a commander of the guards, who were military police, for the purposes of Article 7(3) of the Statute.

76. Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision. In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden,[175] whereas the Trial Chamber finds that he was the superior to the guards by reason of his powers over them.[176] The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior,[177] if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus

[173] Appellant's Brief, para. 16.
[174] *Tadić* Judgement, para. 64.
[175] Appellant's Brief, para. 22.
[176] Judgement, paras. 101-106.
[177] The Appellant relies in this regard on the 1998 ICC Statute in particular: Appellant's Brief, para. 17. Article 28 of the Statute clearly envisages responsibility for both military and civilian superiors.

its finding that the Appellant was a superior within the meaning of Article 7(3).[178]

C. Conclusion

77. The Appeals Chamber therefore finds that the fourth ground of appeal of the Appellant must fail for lack of merit, for the following reasons: a) the facts disputed by the Appellant have all been argued and adjudicated at the trial, with no good cause having been shown on appeal to justify a re-examination of the factual findings of the Trial Chamber; and b) the Appellant does not challenge the Trial Chamber's interpretation of the elements of command responsibility, the application of which by the Trial Chamber has not been shown to be unreasonable.

[178] *Ibid.*, para. 106.

VI. FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: INTERNATIONALITY AND "PROTECTED PERSONS"

A. Submissions of the Parties

1. Cross-Appellant's Brief

78. The Prosecution argues that the majority of the Trial Chamber[179] applied the wrong legal test to determine whether, for the purposes of Article 2 of the Statute, the armed conflict in the present case was international in nature.[180] With regard to the question whether the acts of the HVO could be imputed to the Government of Croatia, the correct test under international law is the "overall control" test, as set forth in the *Tadić* Judgement; that Judgement does not require evidence of specific orders or directions in respect of individual operations.[181] The Prosecution further contends that the factual findings of the Trial Chamber below satisfy the requirements of the "overall control" test,[182] and therefore, that the only reasonable conclusion is that the armed forces of the Bosnian Croats, the HVO, were acting under the overall control of Croatia.[183]

79. The Prosecution also contends that the majority of the Trial Chamber erred in applying a strict nationality requirement to determine whether the victims were protected persons within the meaning of Article 4 of Geneva Convention IV.[184] In its view, if the Appeals Chamber finds that the Bosnian Croat captors acted as *de facto* organs of Croatia, it follows that the Bosnian Muslim detainees had a different nationality from the detaining power.[185] The Prosecution notes that in the *Tadić* Judgement it was held that the primary purpose of Article 4 of Geneva Convention IV is to ensure the safeguards afforded by the

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[179] "Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement", Case No.: IT-95-14/1-T, 25 June 1999 ("Majority Opinion").
[180] Cross-Appellant's Brief, paras. 2.11, 2.17-2.29.
[181] *Ibid.*, paras. 2.13-2.16.
[182] *Ibid.*, para. 2.32. Croatia exercised political influence and control over the Bosnian Croats (*ibid.*, paras 2.33-2.35); Croatia sent troops to Bosnia and Herzegovina ("BH") to serve Croatian interests (*ibid.*, paras. 2.36-2.38); Croatia exercised military control over the HVO (*ibid.*, paras. 2.39-2.49). In this regard the majority of the Trial Chamber failed to consider six documents showing the presence of HV in BH and their support for the HVO (*ibid.*, para. 2.47).
[183] *Ibid.*, para. 2.50.
[184] *Ibid.*, paras. 2.56 and 2.58.
[185] *Ibid.*, para. 2.57.

Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control of the State in whose hands they find themselves.[186] The Prosecution further notes that both the Appeals Chamber in *Tadić*, and the Trial Chamber in *Čelebići* held that ethnicity, rather than nationality, may be a more appropriate gauge of national allegiance in the context of modern armed conflicts.[187]

80. The Prosecution argues, therefore, that both requirements for the application of Article 2 of the Statute are met, and further that the criminal liability of the Appellant under Counts 8 and 9 (grave breaches) can be established on the basis of the record below, since these charges arise out of the same factual allegations as Count 10, on which the Appellant was convicted.[188]

2. Appellant's Response

81. The Appellant requests that the Appeals Chamber reject this ground of appeal.[189] The Appellant contends that in the present case, the evidence showed without any doubt that the Appellant and the alleged victims were citizens of BH.[190] The *Čelebići* Judgement is inapplicable because in the present case the Bosnian Croats did not secede, like the Bosnian Serbs, but rather, they voluntarily joined the Bosnian Muslims in forming BH and actively supported the creation and preservation of that entity.[191] The Appellant argues that the attitude of the Prosecution towards Article 4 of Geneva Convention IV, that the Article should not be interpreted on formal bonds and purely legal relations, is inapplicable. Article 4 of the Geneva Conventions must therefore be strictly applied, in accordance with the principle of legality or *nullem crimen sine lege*.[192]

82. With regard to the argument that the conflict was international in nature, the Appellant contends that there are four reasons why this should be rejected, namely: (a) any Croatian intervention took place in 1992 and was against the Serbian forces, not in the first

[186] *Ibid.*, para. 2.59, with reference to the *Tadić* Judgement, para. 168.
[187] *Ibid.*, para. 2.60.
[188] *Ibid.*, paras. 2.66-2.69.
[189] Appellant's Response, p. 22.
[190] *Ibid.*, p. 5.
[191] *Ibid.*
[192] *Ibid.*, pp. 5, 6 and 13.

half of 1993 against Bosnian Muslims;[193] (b) Croatia did not control the Bosnian Croat military forces in Central Bosnia;[194] (c) Croatia did not intervene militarily in Central Bosnia where the alleged violations took place and did not control the HVO military forces;[195] and (d) the conflict must be deemed internal to avoid unequal application of Article 2 as between Bosnian Croats and Bosnian Muslims.[196] The Appellant further argues that the International Court of Justice's ("ICJ") decision in the *Nicaragua* case[197] can be distinguished from the present case,[198] and that it set forth a stricter test for imputing acts to a State in relation to civil, not criminal liability, than that of the "overall control" test.[199] He further argues that, as these are criminal proceedings, the applicable test should be even more stringent.[200] In his view, if there was intervention by Croatia during the critical period (although, he argues, there is no evidence to support this), it was justified and should not be held to internationalise the conflict.[201] He asserts that there was no state of war between Croatia and Bosnia and Herzegovina,[202] that under Article 4(2) of Geneva Convention IV, Croatia and BH were co-belligerents, that they had normal diplomatic relations, and that, therefore, the victims were not protected persons.[203]

83. The Appellant also contends that the Trial Chamber did not err in omitting to apply the "overall control" test established in the *Tadić* Judgement, as the *Tadić* Judgement dealt with completely different factual and legal circumstances and was delivered after the Trial Chamber rendered judgement in this case.[204]

3. Cross-Appellant's Reply

84. The Prosecution argues in reply that the *Tadić* Judgement establishes a precedent which should not be departed from unless the Appeals Chamber concludes that it was

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[193] *Ibid.*, pp. 7-8.
[194] *Ibid.*, p. 7.
[195] *Ibid.*
[196] *Ibid.* pp. 7 and 20.
[197] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgement, ICJ Reports (1986) ("*Nicaragua*"), p. 14.
[198] *Ibid.*, pp. 9-11.
[199] *Ibid.*, pp. 8-9.
[200] *Ibid.*, p. 9.
[201] *Ibid.*, pp.10, 11 and 21.
[202] *Ibid.*, pp. 13-15 and 19.
[203] *Ibid.*, pp. 13-15.
[204] *Ibid.*, p. 21.

clearly erroneous.[205] The Appellant's arguments regarding a lack of evidence of Croatia's intervention and justifications for it are refuted.[206] The Prosecution furthermore argues that the Appeals Chamber's findings in *Tadić* as to protected person status should be followed. The Prosecution contends that such an approach would not be inconsistent with principles of international criminal law, such as the principle of *nullum crimen sine lege*.[207]

4. Prosecution's Additional Submissions

85. The Appeals Chamber ordered the parties to file additional submissions on "[...] the doctrine of *stare decisis*, its applicability, if at all, to proceedings before the International Tribunal and in particular to this case [...]".[208]

86. The Prosecution submits that the doctrine, as such, exists in common law systems and is not a general principle of law.[209] The Prosecution argues that the term "precedent" is preferable to "*stare decisis*".[210] The use of precedents is common to courts in both common and civil law systems.[211] The Prosecution refers to its Cross-Appellant's Reply where its submissions are set out on the applicability of the *Tadić* Judgement as to (a) the proper test to determine the existence of an international armed conflict and (b) the interpretation of the nationality requirement for civilians under Geneva Convention IV to be considered protected persons.[212]

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[205] Cross-Appellant's Reply, paras. 1.5-1.18.
[206] The Prosecution refutes the following: (1) the Appellant's claim that the Prosecution relies on an "intervention theory" (*ibid.*, paras. 2.3-2.5); (2) the Appellant's claim that the conflict must be deemed internal to avoid unequal application of Article 2 of the Statute (*ibid.*, paras. 2.7-2.10); (3) the Appellant's claim that there was no evidence that Croatia was at war with BH (*ibid.*, paras. 2.11-2.44); (4) the Appellant's claim that the "effective control" test should be applied instead of the "overall control" test (*ibid.*, paras. 2.46-2.60).
[207] *Ibid.*, paras. 2.67-2.88.
[208] Scheduling Order, Case No.: IT-95-14/1-A, 8 Dec. 1999.
[209] Prosecution's Additional Submissions, para. 4.
[210] *Ibid.*
[211] *Ibid.*, para. 4.
[212] *Ibid.*, paras. 5-7.

5. Appellant's Additional Submissions

87. In the Appellant's Additional Submissions on the doctrine of *stare decisis*, he asserts that the application of the doctrine relates to the issue of the sources of law, rather than differences between civil and common law systems.[213] He submits that only international humanitarian law which is beyond any doubt part of customary law can be applied by the International Tribunal, and points to the Report of the Secretary-General, which makes no mention of precedent as a source of law.[214] The Appellant asserts that the judgements of the ICJ are only valid for the case under consideration, and that its Statute does not refer to precedents as a source of law.[215] Reference is also made to Article 21 of the ICC Statute, which prioritises the legal sources to which recourse may be had, and according to which the ICC may only apply principles and rules of law as interpreted in its previous decisions as a last resort.[216] The ICC Statute further explicitly prohibits the use of analogy in defining a crime.[217] The Appellant asserts that precedent represents an individual legal norm that resolves a particular case and is valid only for that case.[218] He notes that, while in some common law systems judgements are used as sources of law, in that the legal principle applied in a particular case is deemed compulsory for all future cases thereby becoming a general legal norm, neither the courts of the former Yugoslavia nor its successor States apply a system of precedents, as it runs counter to the principle of legality.[219]

88. The Appellant contends that, in a functional sense, judicial practice may only be applied as something akin to a legal source where the facts are identical or very similar.[220] The Appellant submits that, while the doctrine of *stare decisis* should not be excluded, it should only be applied on a restrictive basis, and that, as a prerequisite to applying a precedent, the similarity of the facts of the case must be established.[221] The Appellant asserts that the armed conflict between Serbian and Muslim ethnic groups in Bosnia and Herzegovina was basically different from that between the Croatian and Muslim ethnic

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[213] Appellant's Additional Submissions, paras. 3-8.
[214] *Ibid.*, paras. 4-5.
[215] *Ibid.*, para. 6.
[216] *Ibid.*, para. 7.
[217] *Ibid.*
[218] *Ibid.*, para. 8.
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*, para. 9.

groups.[222] All the other armed conflicts from 1992 to 1994 in Bosnia and Herzegovina were not identical or even similar by their general or internal features.[223] Since the facts of the present case are basically different from that of *Tadić*, the Appellant asserts that the doctrine of *stare decisis* is not applicable in the present case.[224]

B. Discussion

89. The arguments advanced by the parties in this appeal raise directly the question whether decisions of the Appeals Chamber are binding on itself, and also indirectly, whether its decisions are binding on Trial Chambers and whether decisions of Trial Chambers are binding on each other.

90. The Prosecution contends that some of the arguments advanced by the Appellant can only be upheld if the Chamber does not follow its previous decisions, since those arguments are, in the Prosecution's submission, plainly inconsistent with those decisions.

91. The Appeals Chamber will now consider these questions.

1. Whether the Appeals Chamber is bound to follow its previous decisions

92. Traditionally common law jurisdictions have recognised the principle of *stare decisis*, or binding precedent, by which courts are bound by their previous decisions. However, in 1966, the House of Lords (the United Kingdom's highest court) decided that, while it would continue to treat previous decisions as "normally binding," it would "depart from a previous decision when it appears right to do so."[225] The trend which emerges from an examination of common law jurisdictions is that their highest courts will normally consider themselves bound by their previous decisions, but reserve the right to depart from them in certain circumstances. The House of Lords puts the matter this way:

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[222] *Ibid.*, para. 10.
[223] *Ibid.*
[224] *Ibid.*
[225] The practice statement was read by Lord Gardiner LC, on behalf of himself and the Lords of Appeal in Ordinary, before judgements were delivered on 26 July 1966. *See* Cross and Harris, *Precedent in English Law* (1991), p.104, n. 27.

> Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ... [D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. *It requires much more than doubts as to the correctness of such opinion to justify departing from it.*[226]

The High Court of Australia (Australia's highest court) has similarly observed:

> No justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the court. A justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. *It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the court.*[227]

The United States Supreme Court (the highest court of the United States of America) has said:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit ... [W]e recognise that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.[228]

In the same way that other common-law legal systems have limited the strict application of the doctrine of *stare decisis*, the United States Supreme Court does not view it as an "inexorable command."[229] Indeed, the Court recently delineated the following circumstances in which it would depart from a precedent:

(i) where a rule of law has proved unworkable in practice;

(ii) where related principles of law have so far developed as to have left the old rule "no more than a remnant of abandoned doctrine"; and

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[226] *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, [1977] 3 All ER 996, 999 (emphasis added).
[227] *Queensland v. Commonwealth* (1977) 16 ALR 487 at 497 (emphasis added).
[228] *Planned Parenthood of Southeastern Pennsylvannia et al. v. Casey*, 505 U.S. 833, 854 (1992).
[229] *Ibid.*

(iii) where facts, or the perception thereof, have changed so as "to have robbed the old rule of significant justification or application."[230]

93. Although, in general, civil law jurisdictions do not recognise the principle of *stare decisis* or binding precedent, as a matter of practice, their highest courts will generally follow their previous decisions. For example, one commentator has said of the French legal system:

> Despite the absence of a formal doctrine of *stare decisis*, there is a strong tendency on the part of the French courts, like those of other countries, to follow precedents, especially those of the higher courts ... The Cour de Cassation can, of course, always overrule its own prior decisions. *But it is equally certain that it will not do so without weighty reasons* ... The attitude of the lower courts toward decisions of the Cour de Cassation is in substance quite similar to that of lower courts in common law jurisdictions towards decisions of superior courts.[231]

94. Similarly, in the Italian legal system, "even though the decisions of the [Supreme Court of Cassation] are not 'binding' in theory, few judges would knowingly adopt a different interpretation ... [T]he fact is that courts do not act very differently toward reported decisions... in Italy than they do in the United States."[232]

95. While the doctrine of precedent does not operate formally in the European Court of Human Rights system, "as a matter of general practice and practical necessity, the Commission regards the Court's binding judgments as the final authority on the interpretation of the Convention."[233] In the *Cossey Case*,[234] the Court noted that, although not strictly bound, it would normally follow its previous decisions and would only depart from them if there were "cogent reasons" for doing so:

> It is true that ... the Court is not bound by its previous judgments ... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. *Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so.* Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.[235]

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[230] *Ibid.*
[231] David and De Vries, *The French Legal System* (1958), p. 113 (emphasis added).
[232] Cappelletti, Merryman and Perillo, *The Italian Legal System: An Introduction* (1967), p.271.
[233] Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998), p. 43.
[234] European Court of Human Rights, Cossey Judgement of 27 September 1990, Series A, vol. 184.
[235] *Ibid.*, para. 35 (emphasis added).

96. Despite the non-operation of the principle of *stare decisis* in relation to the International Court of Justice, its previous decisions are accorded considerable weight. This may be due to their perceived status as authoritative expressions of the law. As Judge Zoričić stated in his Dissenting Opinion in the *Peace Treaties* case, while "it is quite true that no international court is bound by precedents ... there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value."[236] This is confirmed by Judge Mohamed Shahabuddeen, who offers the view that "there is an acceptable sense in which, subject to a power to depart, decisions of the Court may be regarded as authoritative."[237]

97. The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals. Judge Shahabuddeen observes:

> The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection... The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.[238]

The Appeals Chamber also acknowledges that that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated.

98. References to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter. Ultimately, that question must be answered by an examination of the Tribunal's Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties.[239]

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[236] *Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports 1950, p. 65, at p. 104, Judge Zoričić, Dissenting Opinion.
[237] Shahabuddeen, *Precedent in the World Court* (1996), p. 239.
[238] *Ibid.*, pp. 131-2.
[239] Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969.

99. There is no provision in the Statute of the Tribunal that deals expressly with the question of the binding force of decisions of the Appeals Chamber. The absence of such a provision, however, does not mean that the Statute is of no assistance in this matter. Article 25 of the Statute provides as follows:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
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> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

100. The importance of the right of appeal is emphasised in the Report of the Secretary-General as follows:

> The Secretary General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.[240]

The significance of this right is highlighted by the fact that there was no such right in the Nuremberg and Tokyo trials.[241]

101. The fundamental purpose of the Tribunal is the prosecution of persons responsible for serious violations of international humanitarian law.[242] The Appeals Chamber considers that this purpose is best served by an approach which, while recognising the need for certainty, stability and predictability in criminal law, also recognises that there may be instances in which the strict, absolute application of that principle may lead to injustice.

102. The principle of the continuity of judicial decisions must be balanced by a residual principle that ensures that justice is done in all cases. Judge Tanaka in his Separate Opinion

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[240] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993, S/25704 ("Report of the Secretary-General"), para. 116.
[241] *See* Article 17 of the Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946 and Article 26 of the Charter of the International Military Tribunal at Nuremberg, Germany, 8 August 1945.
[242] *See* Article 1 of the Statute.

in the *Barcelona Traction (Preliminary Objections)* case[243] addressed the need for this balance between certainty and justice:

> I am well aware that some consideration should be given to the existence of precedents in regard to a case which the Court is called upon to decide. Respect for precedents and maintenance of the continuity of jurisprudence are without the slightest doubt highly desirable from the viewpoint of the certainty of law which is equally required in international law and in municipal law. *The same kind of cases must be decided in the same way and possibly by the same reasoning.* This limitation is inherent in the judicial activities as distinct from purely academic activities.
>
> On the other hand, the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents and should not be too preoccupied with the authority of its past decisions. The formal authority of the Court's decision must not be maintained to the detriment of its substantive authority. Therefore, it is quite inevitable that, from the point of view of the conclusion or reasoning, the minority in one case should become the majority in another case of the same kind within a comparatively short space of time.[244]

103. Rosenne also speaks of the relative character of the requirement of consistency of jurisprudence:

> Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions, but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *Temple of Preah Vihear* and the *Barcelona Traction* cases towards the 1959 decision in the Aerial Incident case are illustrative of this process, and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work).[245]

104. The right of appeal is a component of the fair trial requirement[246] set out in Article 14 of the ICCPR, and Article 21(4) of the Statute. The right to a fair trial is, of course, a requirement of customary international law.[247]

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[243] *Barcelona Traction, Light and Power Company, Limited,* Preliminary Objections, Judgement, ICJ Reports 1964, p. 6, at p. 65, Judge Tanaka, Separate Opinion.
[244] *Ibid.*, p. 65 (emphasis added).
[245] Rosenne, *The Law and Practice of the International Court* (1985), p. 613.
[246] Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993) comments that the bundle of rights which constitute the right to a fair trial are those set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") (*ibid.*, Article 14, para. 19).
[247] *See* Article 6 of the 1949 European Convention on Human Rights, Article 8 of the 1969 American Convention on Human Rights and Article 7 of the 1981 African Charter on Human and People's Rights.

105. An aspect of the fair trial requirement is the right of an accused to have like cases treated alike, so that in general, the same cases will be treated in the same way and decided as Judge Tanaka said, "possibly by the same reasoning."[248]

106. The right to a fair trial requires and ensures the correction of errors made at trial. At the hearing of an appeal, the principle of fairness is the ultimate corrective of errors of law and fact, but it is also a continuing requirement in any appeal in which a previous decision of an appellate body is being considered.

107. The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.

108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[249]

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.

110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.

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[248] *See* footnote 243, Judge Tanaka's Separate Opinion.
[249] *Black's Law Dictionary* (7th ed., 1999).

111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.

2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers

112. Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated:

> ... it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.[250]

113. The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final;

(ii) the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and

[250] Zweigert and Kotz, *An Introduction to Comparative Law* (1998), p. 263.

(iii) the right of appeal is, as the Chamber has stated before,[251] a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers, as though the Security Council had established not a single, but four, tribunals. This would be inconsistent with the intention of the Security Council, which, from a plain reading of the Statute and the Report of the Secretary-General, envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.

3. Whether the Decisions of the Trial Chambers are Binding on Each Other

114. The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.

115. The Appeals Chamber will now turn to consider the question raised by the Prosecution's first ground of appeal.

4. The Ground of Appeal

116. The Prosecution's first ground of appeal is that the Trial Chamber erred in deciding that Article 2 of the Statute was inapplicable because it had not been established that the

[251] *See* para. 104, *supra*.

Bosnian Muslims held at the Kaonik prison compound between January and the end of May 1993 were protected persons within the meaning of Article 4 of Geneva Convention IV.[252]

117. This ground of appeal raises two substantial issues, both relating to the criteria for the applicability of Article 2 of the Statute. The first issue is the test for determining the internationality of an armed conflict and the second is the test for determining the status of the victims as protected persons under Article 4 of Geneva Convention IV.

118. The Prosecution contends that the Trial Chamber applied the wrong criteria for determining these issues, and that, had the correct tests been applied, the accused would have been convicted. Consequently, it seeks a reversal of the verdict of acquittal on Counts 8 and 9 of the Indictment.

119. The Appeals Chamber will address (a) the criteria for determining the international character of the armed conflict, (b) the criteria for determining whether the Bosnian Muslim victims were protected persons under Article 4 of Geneva Convention IV, and (c) the question of the reversal of the acquittal on Counts 8 and 9.

(a) The Criteria for Determining the International Character of the Armed Conflict

120. It is the contention of the Prosecution that the correct criterion for determining the nature of an armed conflict is the "overall control" test, enunciated by this Chamber in the *Tadić* Judgement. The Prosecution argues that, had that test been applied, the Trial Chamber would have concluded that the acts of the HVO, were attributable to Croatia. Instead, the Trial Chamber "incorrectly decided that the Prosecution needed to demonstrate that Croatia had given a specific mandate or specific instructions to the Bosnian Croats with respect to the conflict in the Lašva Valley area."[253] Specifically, the Prosecution argues that the Trial Chamber "did not adopt an appropriate framework when it set out to examine whether certain Bosnian Croat individuals and organisations, who, while not being official agents of the Croatian Government, received from the latter 'some power or assignment to perform acts on its behalf such that they become *de facto* agents'".[254] This test, the

[252] Cross-Appellant's Brief, para. 2.4.
[253] *Ibid.*, para. 2.17.
[254] *Ibid.*, para. 2.18.

Prosecution says, is in effect, a "special instructions" test, as distinct from the "overall control" test.

121. The examination of this ground of appeal as argued by the Prosecution requires that the following issues be considered:

(i) What is the applicable law on this issue?

(ii) If the "overall control" test is the applicable law, did the Trial Chamber fail to apply it?

(i) What is the applicable law on this issue?

122. The Prosecution contends that the applicable criterion for determining the internationality of the conflict is the "overall control" test, as set out by the Appeals Chamber in the *Tadić* Judgement. The following paragraph from the *Tadić* Judgement is cited by the Prosecution in support of that contention:

> As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opština Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.[255]

The Prosecution submits that the Appeals Chamber should not depart from its previous decision in *Tadić* unless it decides that decision was clearly erroneous and cannot stand.[256]

123. The Defence, on the other hand, makes a general case against the application by the Tribunal of the doctrine of *stare decisis*, but concludes that, if it is to be applied, it "can be only exceptionally applied in the procedure before ICC [*sic*] and only after all priority legal sources have failed to direct to the decision with respect to the specific factual and legal

[255] *Tadić* Judgement, para. 156.
[256] Cross-Appellant's Reply, para. 1.18.

question."[257] In particular, the Defence stresses that if the doctrine of *stare decisis* is to be applied by the Tribunal, it can only be applied in circumstances where the factual situations are the same or substantially similar.[258] The Defence contends that in the instant case, since "the armed conflict between Serbian and Muslim ethnicities in the territory of Bosnia and Herzegovina was basically different from the armed conflict between the Croatian and Muslim ethnicities",[259] the principle is inapplicable here. The Defence further argues that the doctrine of *stare decisis* or binding precedent is inconsistent with the principle of legality, or *nullem crimen sine lege*.[260]

124. The Appeals Chamber will now address the arguments advanced by the Defence.

125. The argument that the principle of *stare decisis* is only to be applied in circumstances where the facts are the same, is unmeritorious. As explained earlier in this Judgement,[261] what is followed in relation to a previous decision is the legal principle that it establishes, and the obligation to follow it only arises where, on the facts, the question settled by that principle is the same as the question that is raised by the facts of the subsequent case. Thus, it is irrelevant that the *Tadić* Judgement dealt with an armed conflict between the Serbian and Muslim groups in Bosnia and Herzegovina, while the present case dealt with an armed conflict between the Croatian and Muslim groups. What is important is whether, in the subsequent case, the legal principle enunciated in the *Tadić* Judgement as to "overall control" may be applied in relation to the conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina. In the *Tadić* Judgement, that legal principle was derived from a factual situation in which there was a question of the level of control by a State (the Federal Republic of Yugoslavia (Serbia and Montenegro)) or entity (the Yugoslav Peoples's Army, "JNA") over a military group (the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska, "VRS") that was involved in an armed conflict that was *prima facie* internal. The same question arises from the facts of the instant case, that is, the level of control by a State or entity (Croatia or the Army of the

[257] Appellant's Additional Submissions, para. 7.
[258] *Ibid.*, para. 8.
[259] Appellant's Additional Submissions, para. 10.
[260] *Ibid.*, paras. 7 and 8.
[261] *See* para. 110, *supra*.

Republic of Croatia, "HV") over a military group (the HVO) that was engaged in an armed conflict that was *prima facie* internal. It is, therefore, perfectly proper in the instant case to recall and rely upon the legal principle enunciated in the *Tadić* Judgement.

126. The Defence argument on the principle of legality or *nullum crimen sine lege*, is based on a misunderstanding of that principle. The Appeals Chamber understands the Defence to be saying that reliance cannot be placed on a previous decision as a statement of the law, since that decision would necessarily have been made after the commission of the crimes, and for that reason would not meet the requirements of the principle of legality. There is nothing in that principle that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases in appropriate circumstances. The principle of legality is reflected in Article 15 of the ICCPR.[262] What this principle requires is that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission. In the instant case, the acts in respect of which the accused was indicted, all constituted crimes under international law at the time of their commission. Inhuman treatment and wilfully causing grave suffering or serious injury to body or health under Article 2 of the Statute were violations of the grave breaches provisions of the Geneva Conventions, and outrages against personal dignity under Article 3 of the Statute constituted a violation of the laws or customs of war, at the time of the commission of the crimes.

127. There is, therefore, no breach of the principle of *nullum crimen sine lege*. That principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.

128. The Appeals Chamber now turns to a consideration of the *Tadić* Judgement in order to determine whether it should be followed, applying the principle set out in paragraph 107, *supra*, that a previous decision of the Chamber should be followed unless there are cogent reasons in the interests of justice for departing from it.

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[262] Article 15 of the ICCPR states in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

129. The *Tadić* Judgement was concerned, *inter alia,* with the legal criteria for determining the circumstances in which the acts of a military group could be attributed to a State, such that the group could be treated as a *de facto* organ of that State, thereby internationalising a prima facie internal armed conflict in which it is involved.

130. The Trial Chamber in *Tadić* applied the "effective control" test enunciated by the ICJ *Nicaragua*, and interpreted it as requiring evidence of specific instructions.[263] The Appeals Chamber in *Tadić* advanced two grounds on which the "effective control" test was not persuasive and should not be followed.

131. Broadly, the first basis identified by the Appeals Chamber in *Tadić* for not following the effective control test in the *Nicaragua* case in the case of "individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels,"[264] is that, "normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group."[265]

132. Consequently, in the view of the Appeals Chamber in *Tadić,* once it is established that the group is under the "overall control" of a State, the responsibility of the State is engaged for the group's activities, irrespective of whether specific instructions were given by the State to members of the group.

133. The second ground on which the *Tadić* Appeals Chamber found the *Nicaragua* test unpersuasive is that it was at variance with judicial and state practice. The *Tadić* Judgement cites a number of cases from claims tribunals, national, regional and international courts, in which acts of groups were attributed to particular countries without any inquiry being made as to whether specific instructions had been issued by that country to members of the group.[266]

134. Applying the principle enunciated in paragraph 107 of this Judgement, the Appeals Chamber will follow its decision in the *Tadić* Judgement, since, after careful analysis, it is unable to find any cogent reason to depart from it. Certainly the Appeals Chamber is unable

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[263] *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Opinion and Judgment, 7 May 1997.
[264] *Tadić* Judgement, para. 120.
[265] *Ibid.*
[266] *Ibid.*, paras. 124–131.

to say that it was arrived at on the basis of the application of a wrong legal principle or arrived at *per incuriam*. The "overall control" test, set out in the *Tadić* Judgement is the applicable law.

135. The Appellant argues that the *Tadić* Judgement should not be relied on by this Chamber because it had not yet been delivered when the *Aleksovski* Judgement was rendered.[267] This argument is based on a misconception. The Appeals Chamber wishes to clarify that when it interprets Article 2 of the Statute, it is merely identifying what the proper interpretation of that provision has always been, even though not previously expressed that way.

136. The Appeals Chamber will now proceed to an examination of the *Aleksovski* Judgement, in order to ascertain what test was applied.

(ii) If the "overall control" test is the applicable law, did the Trial Chamber fail to apply it?

137. In the *Aleksovski* case, the question was whether the HVO forces, while not being official agents of the Croatian government, could be said to be acting as *de facto* agents of the Croatian State. In seeking to answer this question, the Majority Opinion made the following reference to the decision of the Appeals Chamber in the *Tadić* Jurisdiction Decision:

> The Appeals Chamber in the *Tadić Interlocutory Decision* did not specify the requisite degree of intervention by a foreign State in the territory of another State to internationalise an armed conflict. However, it did provide some guidance on the matter by indicating that the clashes between the Government of Bosnia and Herzegovina and the Bosnian Serb forces should be considered as internal, unless a "direct involvement" of the JNA could be proved, in which case the conflict should be considered to be an international one.[268]

Further indication of the majority's reasoning is garnered from the following paragraph:

> A State can act in international law directly through governmental authorities and officials, or indirectly through individuals or organisations who, while not being official

[267] Appellant's Response, paras. 5 and 10. The *Tadić* Judgement was delivered on 15 July 1999, approximately three weeks after the Judgement in *Aleksovski* had been issued, on 25 June 1999.
[268] Majority Opinion, para. 8,

> agents of the government, receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents.[269]

138. The phrase "receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents," does, in the opinion of the Appeals Chamber, indicate that the position of the majority was that some kind of instruction was required in order for the requisite relationship between the Bosnian Croats and the Croatian State to be established. This is what the Prosecution refers to as the "specific instructions" test.

139. The Majority Opinion then referred to the ICJ decision in *Nicaragua* in this way:

> According to the International Court of Justice ("the ICJ"), where the relationship of a rebel force to a foreign State is one of such dependence on the one side and control on the other that it would be appropriate to equate the rebel force, for legal purposes, with an organ of that State, or as acting on behalf of that State, then in such a case the conflict can be seen to be an international one, even if it is *prima facie* internal and there is no direct involvement of the armed forces of the State.[270]

It made further reference to the reliance placed by the majority Judgement of Judge Stephen and Judge Vohrah in the *Tadić* case (first instance), "on the high standard expounded by the ICJ in the *Nicaragua* case in the sense that the international responsibility of a State can arise only if control is exercised ("directed and enforced") with respect to specific military or paramilitary operations."[271]

140. In dealing with the relationship between the HV and HVO forces, the majority commented on a particular aspect of the evidence of the expert witness:

> The expert witness presented an order from the HVO (not the HV) – this distinction is very important – to their soldiers to remove the HV insignias (November – December 1992) because of potential problems to Croatia. While there is a document dated May 1993 which allowed the transfer/promotion of soldiers from the HVO to the HV, this does not in itself prove the dependency of the HVO on the HV.[272]

141. The Appeals Chamber makes two observations about this paragraph. First, the fact that the Majority Opinion goes out of its way to mention that the order came from the HVO, and not the HV, and that the distinction was very important, highlights the weight the Trial

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[269] *Ibid.*, para. 9.
[270] Majority Opinion, para. 11 (footnotes omitted).
[271] *Ibid.*, para. 12 (footnotes omitted).
[272] *Ibid.*, para. 23 (footnotes omitted).

Chamber attached to an order or instruction of the controlling State as a prerequisite for the attribution of acts of members of a military group to a State. Secondly, to the extent that the Majority Opinion uses dependency as a criterion, it is not consistent with the decision in the *Tadić* Judgement.

142. Significantly, the Majority Opinion concludes by finding that "the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina."[273]

143. The Appeals Chamber finds that, notwithstanding the express reference to "overall control", the *Aleksovski* Judgement did not in fact apply the test of overall control. Instead, the passages cited show that the majority gave prominence to the need for specific instructions or orders as a prerequisite for attributing the acts of the HVO to the State of Croatia, a showing that is not required under the test of overall control.

144. The test set forth in the *Tadić* Judgement of "overall control" and what is required to meet it constitutes a different standard from the "specific instructions" test employed by the majority in *Aleksovski*, or the reference to "direct involvement" in the *Tadić* Jurisdiction Decision.

145. The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*,[274] and the "specific instructions" test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests.

146. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental

[273] *Ibid.*, para. 27 (footnotes omitted).
[274] *See* in this regard, the reference to the "higher standard" of *Nicaragua* in the Majority Opinion, para. 12.

purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible."[275]

(b) The Criteria for Determining Whether the Bosnian Muslim Victims were Protected Persons under Article 4 of Geneva Convention IV

147. The Prosecution contends that the Trial Chamber erred in finding that the status of protected persons was not established because the Bosnian Muslim victims were of the same nationality, that of Bosnia and Herzegovina, as their captors. [276]

148. Article 4 of Geneva Convention IV, applicable here, defines protected persons as:

> those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals.

149. Essentially, the Defence contends that the conflict was an internal one, between the Bosnian Croats and the Bosnian Muslims, who were both of Bosnian and Herzegovinian nationality, and, therefore, that the Bosnian Muslim victims were of the same nationality as their captors.

150. The Prosecution submits that, if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable.

151. The Appeals Chamber agrees with this submission. However, the Appeals Chamber also confirms the finding in the *Tadić* Judgement that, in certain circumstances, Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.

152. In the *Tadić* Judgement, the Appeals Chamber, after considering the nationality

[275] *Tadić* Judgement, para. 168.
[276] Cross-Appellant's Brief, para. 2.56.

criterion in Article 4, concluded that "not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[277] This formulation relies on a teleological approach to the interpretation of Article 4 of Geneva Convention IV, and correctly identifies as the object of that Convention, "the protection of civilians to the maximum extent possible."[278] In the words of the *Tadić* Judgement, the primary purpose of Article 4:

> is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[279]

The Appeals Chamber considers that this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts.

(c) The Prosecution's application to reverse the acquittal on Counts 8 and 9

153. Although the Appeals Chamber finds that the Trial Chamber applied the wrong test for determining the applicability of Article 2, for the following reasons, it declines to reverse the verdict of acquittal on Counts 8 and 9:

(i) in relation to this ground of appeal, the substantive issues for determination are questions of law rather than fact, and the Chamber considers it important for the development of the Tribunal's jurisprudence that those issues be resolved, and it has made that determination in relation to the criteria for assessing the international character of an armed conflict and the status of a victim as a protected person;

(ii) the Chamber's conclusions as to those criteria necessarily mean that the Trial

[277] *Tadić* Judgement, para. 166.
[278] *Ibid.*, para. 168.
[279] *Ibid.*

Chamber applied the wrong tests and therefore, that its findings of fact were made on an erroneous basis;

(iii) the Chamber does not favour remitting the case to the Trial Chamber for re-examination, nor will it make its own determination of the facts, as neither course would serve a useful purpose. The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.

C. Conclusion

154. This ground of appeal succeeds to the extent that the Appeals Chamber finds that the Trial Chamber applied the wrong test for determining the nature of the armed conflict and the status of protected persons within the meaning of Article 2 of the Statute. However, the Appeals Chamber declines to reverse the acquittals on Counts 8 and 9.

VII. SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: RESPONSIBILITY FOR THE MISTREATMENT OF PRISONERS OUTSIDE THE PRISON

A. Submissions of the Parties

1. Cross-Appellant's Brief

155. The Prosecution complains that the Trial Chamber failed to deal with part of its case in support of Count 10 (outrages on personal dignity amounting to a violation of the laws or customs of war). The count was based upon the assertion in the indictment that Bosnian Muslim civilians, who were detained in the Kaonik prison under the command of the Appellant, were subjected to physical and psychological harm, forced labour (digging trenches) and working in hazardous circumstances (being used as human shields).[280]

156. The Prosecution case was that (a) the outrages on personal dignity constituted by physical and psychological harm ("mistreatment") took place not only inside the compound but also outside it, where the prisoners worked under the control of HVO soldiers, and (b) those outrages on personal dignity constituted by forced labour and the use of the prisoners as human shields took place only outside the compound.

157. The Trial Chamber found that the Appellant was responsible as a superior pursuant to Article 7(3) of the Statute for the mistreatment of prisoners within the compound.[281] It also found that he was individually responsible pursuant to Article 7(1) of the Statute for the forced labour and the use of the prisoners as human shields outside the prison, in that he aided and abetted in the acts of the HVO soldiers there.[282] The basis upon which he was found to have aided and abetted in those acts was that he was aware of the use to which the prisoners were being put by the HVO soldiers, he was present sometimes when the prisoners were selected for that purpose and practically always when the prisoners returned to make sure that they were all there, and (having responsibility for the welfare of the prisoners) he

[280] Indictment, para. 31.
[281] Judgement, para. 228.
[282] *Ibid.*, para. 229.

failed to take measures open to him to stop them from going out to work in dangerous circumstances.[283] On the other hand, the Trial Chamber found that it had not been proved that the Appellant "participated directly" in the mistreatment of the prisoners by the HVO soldiers outside the prison, saying that it had not been claimed by the Prosecution, so that he was not individually responsible for that mistreatment.[284]

158. The Prosecution says that, although it did not produce evidence that the Appellant had personally inflicted the mistreatment upon the prisoners outside the prison, it had pleaded an individual responsibility pursuant to Article 7(1) of the Statute which included an allegation that the Appellant had aided and abetted in unlawful treatment of the Bosnian Muslim detainees, in terms which included their treatment outside the prison.[285] The Prosecution says that the Trial Chamber had acknowledged that this was the Prosecution case in its Judgement.[286]

159. Finally, the Prosecution says that the factual findings made by the Trial Chamber in relation to the Appellant's responsibility for aiding and abetting the forced labour and the use of the prisoners as human shields outside the prison,[287] together with other factual findings that the Appellant was aware of the mistreatment of those prisoners outside the prison,[288] must inevitably have led to a finding that the Appellant was individually

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[283] *Ibid.*, paras. 125 and 128-129.
[284] *Ibid.*, para. 130.
[285] Indictment, para. 37, which was in the following terms: "... individually, and in concert with others, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful treatment of Bosnian Muslim detainees in the Lašva Valley area of the Republic of Bosnia and Herzegovina and, or in the alternative, knew, or had reason to know, that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
[286] Cross-Appellant's Brief, para. 3.14. Reliance is placed upon para. 40 of the Judgement, which stated: "The allegations of inhuman treatment ... are based not only on the detention conditions in Kaonik compound ... but also on the treatment meted out to the detainees at trench-digging locations (forced labour, mistreatment, inadequate food) and the fact that they were used as human shields. In support of her charge of wilfully causing great suffering or serious injury to body or health under Article 2(c) of the Statute, the Prosecutor relies not only on mistreatment inside the Kaonik compound but also on suffering and injury to body or health resulting from mistreatment or hazardous circumstances in which prisoners were forced to dig trenches. In respect of outrages against personal dignity as recognised by Common Article 3 of the Geneva Conventions, the Prosecutor invokes unlawful detention ... forced trench-digging, use of detainees as human shields and, more generally, refers to the elements of breaches under Article 2 of the Statute. The facts submitted by the Prosecutor in support of the three charges therefore relate to events taking place both inside and outside the Kaonik compound."
[287] Judgement, para. 128.
[288] *See* para. 168, *infra*.

responsible for that mistreatment in that he aided and abetted the acts of the HVO soldiers there.[289]

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

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[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadić* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

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[294] *Furundžija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.
[296] *Ibid.*, para. 245.
[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundžija*, and of the Appeals Chamber in *Tadić*.
[298] *Tadić* Judgement, para. 229.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

164. The Trial Chamber in the present case relied upon the *Furundžija* Judgement, amongst other decisions at first instance within the Tribunal (the *Tadić* Judgement of the Appeals Chamber was given after the Trial Chamber had given its judgement).[299] The Trial Chamber expressed itself in various ways, but identified what it saw to be the two essential elements which had to be established in order to demonstrate liability for the acts of others, in these terms:

> The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that lend encouragement or support" constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had [a] "substantial effect" on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate". If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.[300]

The absence of any reference to an awareness by the aider and abettor of the essential elements of the crime committed by the principal (including his relevant *mens rea*) detracts from that passage as a reasonably accurate statement of the law, but that flaw did not disadvantage the Appellant in the circumstances of this case, where the relevant state of mind on the part of the HVO soldiers was obvious from the nature of the injuries seen by him.

165. The Prosecution must, of course, establish the acts of the principal or principals for

[299] *Aleksovski* Judgement, para. 60.
[300] *Ibid*, para. 61. The citations of authority have been omitted.

which it seeks to make the aider and abettor responsible. Considerable evidence was given by prisoners of mistreatment when digging trenches. Witness B gave evidence that, when he was digging trenches at Kula, he was beaten by HVO soldiers. A particular soldier threatened him with a rifle and scratched a bayonet across his neck and nose, leaving a visible mark. After digging all night, Witness B and the other detainees were taken back to the Kaonik prison where he and two other prisoners were taken for a medical examination because of the extent of the injuries they had received.[301] Witness B described his injuries as including knife wounds, a "broken up" nose, and two broken ribs.[302] Witness H gave evidence, unchallenged in cross-examination, that he had been hit by a soldier with a rifle butt while out digging trenches.[303] Witness L gave evidence, also unchallenged in cross-examination, that he saw prisoners being beaten by HVO soldiers when they were digging trenches in Strane,[304] and that he was beaten when digging trenches in Carica by a member of the HVO who also came to the Kaonik prison afterwards to mistreat him and other prisoners.[305]

166. Witness M gave evidence that he had been taken out for trench digging in Strane when he was already injured from being beaten in the camp. While out trench-digging, a soldier whipped him with a rope, hit and kicked him; he was then beaten and kicked by other HVO soldiers. He was unable to open his mouth because it was so swollen from being whipped with the rope.[306] At some point after being taken out for trench-digging, Witness M asked to see a doctor and was taken by the Appellant to a local clinic with two other detainees who had been beaten. The Appellant was present when he saw the doctor and, when Witness M told the doctor that he was suffering pains from the digging, the Appellant said: "Tell the truth. Tell her that there was a dance down there." Witness M then told the doctor that he had been beaten. Some days later, Witness M was taken out again for trench digging in Polom.[307] This account was not contradicted in cross-

[301] Trial Chamber Transcript (English), pp. 580-588.
[302] *Ibid.*, pp. 599-602.
[303] *Ibid.*, pp. 923-924.
[304] *Ibid.*, p. 1392.
[305] *Ibid.*, pp. 1396-1397.
[306] *Ibid.*, pp. 1445-1449.
[307] *Ibid.*, pp. 1457-1461.

examination, and the fact that the Appellant accompanied Witness M for the visit to the doctor was expressly confirmed.[308]

167. The Defence at the trial did not dispute that some of the prisoners were mistreated by the HVO soldiers while digging trenches.[309] The Prosecution submitted that, because the evidence already described was uncontradicted, the Trial Chamber had "by inference" accepted it as correct.[310] The Appeals Chamber, however, is not satisfied that such an inference should be drawn. The Trial Chamber apparently held the view that the Prosecution case did not include a charge that the Appellant was liable as having aided and abetted the HVO soldiers in mistreating the prisoners outside the compound.[311] On that view, it did not need to make any findings in relation to that evidence. It would not therefore be safe to infer that the Trial Chamber formed any particular view of that evidence beyond what was said expressly in relation to it. The Appeals Chamber now turns to what the Trial Chamber said.

168. The Trial Chamber made the following finding when considering the state of the Appellant's knowledge that the prisoners were being used unlawfully by the HVO soldiers to dig trenches:

> All this went to show that the accused knew not only that detainees were being sent off to dig trenches, but also that this practice was unlawful. Further, the detainees were very often used for this purpose and the accused, as he was usually present when the prisoners returned, could not have been unaware of the extremely difficult conditions and the repeated abuse prisoners were subjected to at the trench site the marks of which were clearly visible on them. [312]

And again:

> The evidence relating to ... the state in which some of the detainees returned from digging trenches, goes to establish that the accused was perfectly aware of the traumas suffered by the detainees.[313]

The Trial Chamber did not find, and the evidence does not appear to suggest, that the Appellant was aware of any psychological harm caused to the prisoners as a result solely of being mistreated when outside the prison.

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[308] *Ibid.*, p. 1494.
[309] Judgement, para. 33.
[310] T. 55-56.
[311] Judgement, para. 130. *See* para. 157, *supra*.
[312] Judgement, para. 128.
[313] *Ibid*, para. 224.

169. Necessarily implicit in the findings which were made is the conclusion that the Appellant was aware that the prisoners were being mistreated by the HVO soldiers on a recurring basis over a period of time (without specifying the precise nature of that mistreatment), yet with that awareness he continued to participate in sending the prisoners out to work under those soldiers and (having responsibility for the welfare of the prisoners) he failed to take measures open to him to stop them from going out to work in such conditions.[314] The Prosecution says that, if that was regarded by the Trial Chamber as sufficient to find the Appellant liable for aiding and abetting in the forced labour and the use of prisoners as human shields outside the prison,[315] he should inevitably have been found liable also for aiding and abetting in the mistreatment of the prisoners whilst engaged in that forced labour.[316]

170. The Trial Chamber appears to have rejected such a finding upon two bases. First, in the context of discussing individual (not superior) responsibility, it said:

> He cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes. [317]

The original French version of the Judgement also refers to Article 7(1) of the Statute. The context precludes any explanation that this was a typographical error for Article 7(3) of the Statute. The statement is clearly wrong. Secondly, after finding that the Appellant was responsible under Article 7(1) for having aided and abetted in the use of prisoners as human shields and for trench digging, the Trial Chamber said:

> It was not proved, however, that the accused participated directly in the mistreatment meted out to the prisoners there. Nor was such mistreatment claimed by the Prosecutor. The accused cannot therefore incur responsibility under Article 7(1) for the mistreatment suffered by the detainees outside the Kaonik compound. [318]

There is some latent ambiguity in that statement. As previously stated, the Prosecution did not seek to make out a case of individual responsibility based upon the direct or personal participation by the Appellant in the mistreatment of the prisoners by the HVO soldiers. But Article 7(1) deals not only with individual responsibility by way of direct or personal

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[314] *See* Judgement, paras. 125 and 128-129. Also *see* para. 157, *supra.*
[315] Judgement, para. 229.
[316] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[317] Judgement, para. 129.
[318] *Ibid*, para. 130.

participation in the criminal act but also with individual participation by way of aiding and abetting in the criminal acts of others.

171. The Trial Chamber appears to have thought that the Prosecution had restricted its case against the Appellant as having aided and abetted in the crimes committed by the HVO soldiers to using the prisoners as human shields and for trench digging only. The Appeals Chamber is satisfied that the Prosecution did charge the Appellant with individual responsibility by way of aiding and abetting for the mistreatment of the prisoners by the HVO soldiers, and that the Trial Chamber was in error if the second passage quoted in the last paragraph was intended to assert that no such claim had been made.[319] The passage of the Judgement upon which the Prosecution relies as demonstrating an acknowledgement by the Trial Chamber that such a claim had been made,[320] if read carefully, does appear to do so although this may well not have been the intention. Whatever may have been intended, it is clear that the Trial Chamber should have proceeded to make findings in relation to the individual responsibility of the Appellant for aiding and abetting the mistreatment of the prisoners by the HVO soldiers.

C. Conclusion

172. The Appeals Chamber accepts that the only finding which could reasonably have been made by the Trial Chamber, in the light of its other findings, is that the Appellant was individually responsible for the mistreatment by the HVO soldiers outside the prison by way of having aided and abetted in it. Any finding to the contrary would have been unreasonable in those circumstances. The Appeals Chamber accordingly makes that finding.

173. That finding does not alter the verdict of guilty entered by the Trial Chamber on Count 10, but the additional finding is, strictly, a matter to be taken into account when, as already announced, the Appeals Chamber comes to impose a revised sentence upon Count 10. In view of the limited finding possible, however, the Appeals Chamber does not

[319] The practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged: "Decision on Preliminary Motion on Form of Amended Indictment", *Prosecutor v. Krnojelac*, Case No.: IT-97-25-PT, Trial Chamber, 11 Feb. 2000, paras. 59-60.
[320] Judgement, para. 40, quoted in footnote 286, *supra*.

believe that the additional finding of itself warrants any heavier sentence than would have been imposed without it.

VIII. THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: ERROR IN SENTENCING

A. Background

174. The Appellant is aged 40, is married and has two young children. He is a university graduate and worked in the Zenica prison service before the conflict. Between January and May 1993, which was the relevant period in this case, he was commander of Kaonik prison.

175. The Trial Chamber found the Appellant responsible for the following crimes, committed while he was commander of the Kaonik prison:

(i) The mistreatment of the detainees

(a) aiding and abetting mistreatment of detainees during the body searches on 15 and 16 April 1993 by his being present during such mistreatment (which included insults, threats, thefts and assaults) and not objecting to it;[321]

(b) ordering, instigating and aiding and abetting violence on Witnesses L and M, who were beaten regularly during their detention (sometimes four to six times a day), occasionally in the presence of Zlatko Aleksovski or otherwise near his office, both day and night; ordering the guards to continue beating them when they stopped; as a result of the beatings Witness M fainted and afterwards had traces of blood in his urine and at the time of trial he was still suffering from back and chest pains;[322]

(c) aiding and abetting the mistreatment of detainees during their interrogation after the escape of a detainee;[323]

(d) aiding and abetting psychological terror, such as the playing of screams over the loudspeaker at night;[324]

(e) aiding and abetting the use of detainees as human shields and trench digging, in that

(i) he took part in designating detainees for trench digging and made sure that they returned;

[321] Judgement, paras. 87, and 185-186.
[322] *Ibid.*, paras. 88 and 196.
[323] *Ibid.*, paras. 89, 205, and 209-210. The Trial Chamber, however, treated this as "an isolated case which does not demonstrate a systematic resolve to mistreat the prisoners": *ibid.*, para. 120.
[324] *Ibid.*, paras. 187 and 203.

(ii) he did not prevent HVO soldiers coming to get detainees and participated in picking out detainees;

(iii) he was present when detainees were taken to serve as human shields and thus manifested his approval of the practice.[325]

176. In its conclusions the Trial Chamber held that the violence inflicted upon detainees constituted an outrage upon personal dignity, in particular degrading or humiliating treatment within common Article 3 of the Geneva Conventions as a violation of the laws or customs of war for which the Appellant was responsible under Articles 7(1) and 7(3) of the Statute.[326] The Trial Chamber also held that the use of detainees as human shields and for trench digging constituted an outrage upon personal dignity for which the appellant must be held guilty under Article 7(1).[327] The Trial Chamber said of these offences that "the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace", and that "the commission of violent offences against vulnerable, helpless persons or those placed in a situation of inferiority constitutes an aggravating circumstance [...]".[328]

177. The Trial Chamber also found that the Appellant, as the commander of the prison, was responsible as a superior under Article 7(3) for the acts of violence committed by the guards inside the prison[329] since he knew that such crimes were committed but took no steps to prevent them.[330]

178. In determining sentence, the Trial Chamber took into consideration that the accused had not demonstrated the "repeated malice" alleged by the Prosecution and noted that many of the events took place during the peak of the relevant conflict.[331] The Trial Chamber also took into consideration the fact that the accused had no previous convictions, that his direct participation in the commission of acts of violence was relatively limited and that he had a secondary role in the totality of crimes alleged in the common indictment.[332] His guilt

[325] *Ibid.*, paras. 122, 125, and 128-129.
[326] *Ibid.*, para. 228.
[327] *Ibid.*, para. 229.
[328] *Ibid.*, paras. 227-228.
[329] *Ibid.*, paras. 104 and 114.
[330] *Ibid.*, paras. 104-106, 114 and 117-118.
[331] *Ibid.*, para. 235.
[332] *Ibid.*, para. 236. The common indictment from which the counts against the Appellant were severed involved charges against (among others) a senior political official and the commander of the local operative zone.

rested in his knowing participation in, or acceptance of, violence contrary to international humanitarian law committed in a broader frame.[333] On the other hand, he made efforts to improve conditions in the compound and to secure medical services for detainees.[334] The Trial Chamber referred to Articles 41(1) and 142 of the former Socialist Federal Republic of Yugoslavia ("SFRY") Penal Code, but took the view that the more important factor to bear in mind was "the gravity of the criminal acts of which the accused had been found guilty and in the context of his individual circumstances".[335] The Trial Chamber said that it was strongly of the view that in order to implement the Tribunal's mandate it is crucial to establish a gradation of sentences, depending on the magnitude of crimes committed and the extent of the liability of the accused.[336] The Trial Chamber sentenced the Appellant to two and a half years of imprisonment. That sentence was pronounced on 7 May 1999 and given that the accused was entitled to credit for a longer period of time than that of the sentence imposed, the Trial Chamber ordered his immediate release.[337] The accused by that date had spent two years, ten months and twenty-nine days in custody.

B. Submissions of the Parties

179. The Prosecution submits that the Trial Chamber erred in imposing the sentence which it did on the Appellant.[338] The Prosecution advances several grounds for this submission which may be summarised as follows:

(a) The sentence of two and a half years' imprisonment was 'manifestly disproportionate' to the crimes committed and, accordingly, outside the limits of a fairly exercised discretion.[339]

(b) Such a sentence defeats one of the main purposes of the Tribunal, namely to deter future violations of international humanitarian law. Such a purpose is defeated if the

[333] *Ibid.*, para. 237.
[334] *Ibid.*, para. 238.
[335] *Ibid.*, para. 242.
[336] *Ibid.*, para. 243.
[337] *Ibid.*, para. 245.
[338] Cross-Appellant's Brief, para. 1.8.
[339] *Ibid.*, para. 4.6.

sentence imposed is lower than those typically imposed by national courts for similar conduct.[340]

(c) The Trial Chamber did not have sufficient regard to the gravity of the Appellant's conduct: his crimes were not trivial and would be regarded as serious in most legal systems.[341]

(d) The Trial Chamber should have considered the Appellant's superior responsibility as an aggravating circumstance and should have considered his conduct at least as grave as that of the individual perpetrators.[342]

(e) The Trial Chamber erred in treating factors as mitigating which could, in fact, be regarded as aggravating.[343]

The Prosecutor further submits that in these circumstances the Appeals Chamber should revise the sentence and impose a sentence of no less than seven years' imprisonment.[344]

180. In response the Appellant submits that the Trial Chamber should have acquitted him altogether.[345]

C. Oral Hearing

181. On 9 February 2000, after hearing the oral submissions of the parties, the Appeals Chamber dismissed the Appellant's appeal against conviction and allowed the Prosecution

[340] *Ibid.*, paras. 4.16-4.20.
[341] *Ibid.*, paras. 4.20-4.37.
[342] *Ibid.*, paras. 4.39-4.41.
[343] According to the Prosecution, the following factors could not reasonably have been regarded by the Trial Chamber as justifying a significant reduction in the sentence that would otherwise be warranted by the inherent gravity of the Appellant's conduct: (1) that the crimes were committed during two distinct periods and that they occurred at the peak of the conflict (*ibid.*, para. 4.48); (2) the good character of the accused (*ibid.*, para. 4.49); (3) the motive of the accused in taking up his post (*ibid.*, para. 4.50); (4) the accused's knowledge of the broader frame (*ibid.*, para. 4.51); (5) his efforts to improve conditions (*ibid.*, para. 4.52); and (6) his family life (*ibid.*, para. 4.54).
[344] *Ibid.*, para. 4.59.
[345] Appellant's Response, para. 16.

appeal against sentence.[346] Following this decision, the Appellant was remanded in custody.[347] The Appeals Chamber gives its reasons and its revised sentence below.

D. Discussion

182. The nub of the Prosecutor's appeal is to be found in the third ground as summarised above, namely the weight to be given to the gravity of the Appellant's conduct. Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence. The practice of the International Tribunal provides no exception. The Statute provides that in imposing sentence the Trial Chambers should take into account such factors as the gravity of the offence.[348] This has been followed by Trial Chambers. Thus, in the *Čelebići* Judgement, the Trial Chamber said that "[t]he most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[349] In the *Kupreškić* Judgement, the Trial Chamber stated that "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".[350] The Appeals Chamber endorses these statements.

183. The Appeals Chamber accepts the Prosecution argument in this connection and holds that the Trial Chamber erred in not having sufficient regard to the gravity of the conduct of the Appellant. His offences were not trivial. As warden of a prison he took part in violence against the inmates. The Trial Chamber recognised the seriousness of these offences but stated that his participation was relatively limited. In fact, his superior responsibility as a warden seriously aggravated the Appellant's offences. Instead of preventing it, he involved himself in violence against those whom he should have been protecting, and allowed them to be subjected to psychological terror. He also failed to punish those responsible. Most seriously, the Appellant, by participating in the selection of detainees to be used as human

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[346] T. 85.
[347] "Order for Detention on Remand", IT-95-14/1-A, 9 Feb. 2000.
[348] Article 24(2) of the Statute.
[349] *Čelebići* Judgement, para. 1225.
[350] *Kupreškić* Judgement, para. 852.

shields and for trench digging, as he must have known, was putting at risk the lives of those entrusted to his custody. Thus, the instant case is one of a prison warden who personally participated in physical violence against detainees when, by virtue of his rank, he should have taken steps to prevent or punish it. The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.

184. The Trial Chamber was right to emphasise the need to establish a gradation of sentencing. For instance, the Appeals Chamber in a recent decision said that, while the conduct of the accused in that case was "incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low".[351] While, therefore, this Appellant may have had a secondary role, compared with the alleged roles of others against whom charges have been brought, he was nonetheless the commander of the prison and as such the authority who could have prevented crimes in the prison and certainly should not have involved himself in them. An appropriate sentence should reflect these factors. There are no other mitigating circumstances in this case.

185. The Prosecution submits that a manifestly disproportionate sentence defeats a purpose of sentencing for international crimes, namely to deter others from committing similar crimes. While the Appeals Chamber accepts the general importance of deterrence as a consideration in sentencing for international crimes, it concurs with the statement in *Prosecutor v. Tadić* that "this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal".[352] An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal Tribunal

[351] "Judgement in Sentencing Appeals", *Prosecutor v. Tadić*, Case No.: IT-94-1-A and IT-94-1-A*bis*, Appeals Chamber, 26 Jan. 2000, para. 56.
[352] *Ibid.*, para. 48.

for Rwanda.[353] Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question[354] and show "that the international community was not ready to tolerate serious violations of international humanitarian law and human rights".[355]

186. The Appeals Chamber is thus satisfied that the Trial Chamber was in error in sentencing the Appellant to two and a half years' imprisonment. The question then arises whether the Appeals Chamber should review the sentence. Appellate review of sentencing is available in the major legal systems but it is usually exercised sparingly. For example, in the United Kingdom the Attorney-General will appeal against a sentence if it appears "unduly lenient".[356] The Court of Appeal has stated that a sentence is unduly lenient where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.[357] Similarly the New South Wales Court of Criminal Appeal in Australia has stated that "an appellate court will only interfere if it is demonstrated that the sentencing judge fell into material error of fact or law. Such error may appear in the reasons given by the sentencing judge, or the sentence itself may be manifestly excessive or inadequate, and thus disclose error".[358] In civil legal systems such as Germany and Italy the relevant Criminal Codes set out what factors a judge must take into consideration in imposing a sentence.[359] The appellate courts may interfere with the discretion of the lower court if its considerations went outside these factors or if it breached a prescribed minimum or maximum limit on sentence.

187. The Appeals Chamber has followed this general practice. Thus in *Prosecutor v. Tadić*, the Appeals Chamber held that it should not intervene in the exercise of the Trial

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[353] "Sentencing Judgement", *Prosecutor v. Erdemović*, Case No.: IT-96-22-T, 24 Dec. 1996, para. 64; "Judgement", *Prosecutor v. Delalić et al.*, Case No.: IT-96-21-T, 16 Nov. 1998, para. 1234; "Judgement", *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, 10 Dec. 1998, para. 288; "Judgement and Sentence", *Prosecutor v. Kambanda*, Case No.: ICTR 97-23-S, 4 Sept. 1998, para. 28; "Sentence", *Prosecutor v. Akayesu*, Case No.: ICTR-96-4-S, 2 Oct. 1998, para. 19; Sentence, *Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, 5 Feb. 1999, para. 20; "Judgement and Sentence", *Prosecutor v. Rutaganda*, Case No.: ICTR-96-3-T, 6 Dec. 1999, para. 456; "Judgement and Sentence", *Prosecutor v. Musema*, Case No.: ICTR-96-13-T, 27 Jan. 2000, para. 986.

[354] "Sentencing Judgement", *Prosecutor v. Erdemović*, 24 Dec. 1996, paras. 64-65.

[355] "Judgement", *Prosecutor v. Kambanda*, 4 Sept.1998, para. 28.

[356] Criminal Justice Act 1998 s.36.

[357] *Attorney-General's Reference* (No. 4 of 1989) [1990] 1 WLR 41; 90 Cr. App. Rep. 366; [1990] Crim LR 438.

[358] *Regina v. Ronald Trafford Allpass*, (1993) 72 A. Crim R. 561 at 562.

[359] Italian Criminal Code, Art. 133; German Criminal Code (StGB) s. 46.

Chamber's discretion with regard to sentence unless there is a "discernible error".[360] In applying that test to the instant case the Appeals Chamber finds that there was a discernible error in the Trial Chamber's exercise of discretion in imposing sentence. That error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute. The sentence imposed by the Trial Chamber was manifestly inadequate.

188. In this connection the Appeals Chamber also points out that Article 142 of the SFRY Criminal Code imposed a minimum term of imprisonment of not less than five years for "crimes against humanity and international law" such as "killing, torture, inhumane treatment of the civilian population, causing great suffering or serious injury to body and health ... use of measures of intimidation and terror and the unlawful taking to concentration camps and other unlawful confinement".[361]

189. The Appeals Chamber has now upheld the Prosecution's second ground of appeal and found that the Appellant aided and abetted the mistreatment by HVO soldiers of detainees outside the prison compound. This additional finding makes no difference to a revised sentence, as the Appeals Chamber has already held that the additional finding does not of itself warrant any heavier sentence than would have been imposed without it.[362]

190. In imposing a revised sentence the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress,[363] and also that he has been

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[360] "Judgement in Sentencing Appeals", *Prosecutor v. Tadić*, Case No.: IT-94-1-A and IT-94-1-A*bis*, 26 Jan. 2000, para. 22.

[361] In 1985 *Zdravko Kostić* was found guilty by the District Court of Sabac of war crimes against the civilian population, proscribed under Art. 142 of the SFRY Criminal Code, for his participation in beating up a civilian and molesting the victim's family. He was sentenced to five years imprisonment with his youth as the single mitigating factor, a sentence upheld by the Supreme Court of Serbia on appeal: District Court of Sabac, K-32/85, 2 Oct. 1985. The Appeals Chamber also notes the case of *Willy Zühlke*, a German prison warden who was convicted by the Netherlands Special Court of the beating of Jewish and other prisoners as a war crime and crimes against humanity in 1948. The Court took account of the fact that the accused had allowed himself to be carried along with "the criminal stream of German terrorism" rather than acting with intent on his own initiative and also found that the ill-treatment was not of a very serious nature. Willy Zühlke was sentenced to seven years of imprisonment. Judgement of the *Bijzonder Gerechtshof Amsterdam*, 3 Aug. 1948 (referred to in Judgement of *Bijzondere Raad van Cassatie*, 6 Dec. 1948, *Nederlandse Jurisprudentie*, 1949 No. 85): English translation in UN War Crimes Commission, *Law Reports of Trials of War Criminal*, Vol. XIV, p.139.

[362] *See* para. 173, *supra*.

[363] In common law this double exposure to sentencing is referred to as "double jeopardy" which is applicable to all the different stages of the criminal justice process: prosecution, conviction and punishment: *Pearce v. R.*,

detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.

E. Conclusion

191. For these reasons the Appeals Chamber has decided to impose on Zlatko Aleksovski a sentence of seven years' imprisonment. Zlatko Aleksovski is entitled to credit for the time he has spent in detention, which amounts to three years and 12 days.

(1998) 156 ALR 684. *See* also *Att-Gen.'s Ref. (No. 15 of 1991) (R. v. King)*, CA 13 CR. App R (S) 622, [1992] Crim L R 454; *Att-Gen. Ref. (No. 2 of 1997) (Neville Anthony Hoffman)* [1998] 1 Cr. App R (S) 27, [1997] Crim LR 611; *Att-Gen.'s Ref. (No. 40 of 1996) (R. v. Robinson)* [1997] 1 Cr. App. R (S) 357, [1997] Crim LR 69.

IX. DISPOSITION

192. For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**,

(1) DENIES the Appellant's first ground of appeal against Judgement;

(2) DENIES the Appellant's second ground of appeal against Judgement;

(3) DENIES the Appellant's third ground of appeal against Judgement;

(4) DENIES the Appellant's fourth ground of appeal against Judgement;

(5) ALLOWS IN PART the Prosecution's first ground of appeal against Judgement, but DECLINES to reverse the acquittals on Counts 8 and 9;

(6) ALLOWS the Prosecution's second ground of appeal against Judgement;

(7) ALLOWS the Prosecution's third ground of appeal against sentence, and REVISES the sentence the Appellant received at trial to seven years' imprisonment as of today, subject to deduction therefrom of three years and 12 days for the time served in detention;

(8) DIRECTS that the imprisonment be served in a State to be designated by the International Tribunal in accordance with Article 27 of the Statute and Rule 103 of the Rules.

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

Judge Richard May
Presiding

Dated this twenty-fourth day of March 2000
At The Hague,
The Netherlands.

Judge Hunt appends a Declaration to this Judgement.

[SEAL OF THE TRIBUNAL]

X. DECLARATION OF JUDGE DAVID HUNT

1. I agree with the disposition of these appeals as stated in the Judgement of the Appeals Chamber, and I am content to join in the reasons given therein for all but one of the issues determined during the course of the appeals. The exception is the issue of judicial precedent within the Tribunal. So important is that issue, which is being determined for the first time in the Appeals Chamber, that I prefer to state my own reasons for the conclusion which has been expressed in the Judgement. I should emphasise that the differences between us lie in emphasis rather than in substance.

2. Previous judicial decisions do not, in general, play an important part in international law. They rate no higher than the teaching of highly qualified publicists, as subsidiary means for determining what the international law is upon any issue.[1] Not even the International Court of Justice regards itself as bound by its previous decisions.

3. This Tribunal is unique even in the sphere of international law.[2] This is so in many ways. It is the only international court which has its own appellate structure,[3] so that issues arise not only in relation to the attitude which the Appeals Chamber should take towards its own previous decisions but also in relation to the attitude which the Trial Chambers should take towards the decisions of the Appeals Chamber and of the other Trial Chambers. Only the first of those issues arise for determination in the present appeal.

4. Another way in which the Tribunal is unique in the sphere of international law is that it is presently the only international criminal court, and, as such, it is necessarily subject to many of the same concerns that arise in relation to the criminal courts in domestic jurisdictions. There has always been recognised a special need for certainty in the criminal law. There is, however, a tension existing between that special need and another special

[1]Statute of the International Court of Justice, Article 38.1(d). Article 38 is generally regarded as a complete statement of the sources of international law. See also *Prosecutor v Kupreškić*, Case No.: IT-95-16-T, Judgement, 14 Jan. 2000, para 540.
[2]I equate the International Criminal Tribunal for Rwanda with this Tribunal for this purpose.
[3]The Rwanda Tribunal has its own appellate structure, but the members of this Tribunal's Appeals Chamber are members also of the Rwanda Tribunal's Appeals Chamber.

need in the criminal law, the need for flexibility where adherence to a previous decision will create injustice. Both of these special needs apply equally to international criminal law as well.

5. A third matter of importance to consider in relation to the Tribunal is that, unlike in domestic systems, there is no legislative body readily able to fine-tune its Statute when a decision of the Appeals Chamber is subsequently seen to have produced an injustice. It is quite unrealistic to expect the Security Council of the United Nations to perform that task.

6. Finally, the Tribunal's Statute is not a self-contained code of the nature adopted in the civil law systems, and (as in the common law systems) it requires constant interpretation for its continuing application.

7. In all these circumstances, how then is the Appeals Chamber to respond to the tension between the special needs of certainty and flexibility? In my respectful view, the answer to that question is not to be found in the practices of other international courts (which are necessarily not criminal courts) or in the doctrine of judicial precedent in the domestic courts where the situation in which those courts operate is quite different to that in which this Tribunal operates.

8. The need for certainty in the criminal law means that the Appeals Chamber should never disregard a previous decision simply because the members of the Appeals Chamber at that particular time do not personally agree with it. The Appeals Chamber should depart from its previous decisions only with caution. It is unwise to attempt an exhaustive tabulation of specific instances when it would be appropriate to do so. The appropriate test, in my view, is that a departure from a previous decision is justified only when the interests of justice require it. Some examples may be given which illustrate the application of that test. It would be appropriate to reconsider a previous decision where that decision has led to an injustice, or would lead to an injustice if its principle is applied in a subsequent case, or where a subsequent decision of the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction has demonstrated an error of reasoning in the previous decision, or where, in the light of subsequent events, the previous decision can be seen to have been plainly wrong, or where the previous decision

was given *per incuriam.*

9. I therefore agree with the Judgement where it says that the normal rule is that the Appeals Chamber follows its previous decisions and that a departure from them is the exception. The reference to a previous decision means the *ratio decidendi* of that decision, the precise principle upon which the decision depended. The *ratio decidendi* cannot be distinguished merely because the facts to which it is to be applied are different.

10. Although it is not necessary for the purposes of this appeal (and thus is not part of the *ratio decidendi* of the Judgement), I agree with the Judgement, largely for the reasons given, that a Trial Chamber is bound by the decisions of the Appeals Chamber directly in point, although it should be permitted at the same time to express a reasoned disagreement with that decision for the later consideration of the Appeals Chamber itself.

11. I also agree with the Judgement that a Trial Chamber is not bound by the decision of another Trial Chamber, although I believe that it should have respect for that decision and consider carefully whether it is appropriate to depart from it.

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

Dated this 24th day of March 2000,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt

ANNEX

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
Aleksovski Judgement/Judgement	"Judgement", *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T, Trial Chamber, 25 June 1999
Appellant	Zlatko Aleksovski
Appellant's Additional Submissions	The Appellant's Additional Submissions on Doctrine of *Stare Decisis* and Defence of *"Necessity"*, Case No.: IT-95-14/1-A, 11 January 2000
Appellant's Brief	Zlatko Aleksovski's Appellant's Brief in Opposition to the Condemnatory Part of the Judgement dated 25 June 1999, Case No.: IT-95-14/1-A, 24 September 1999
Appellant's Reply	The Appellant's Brief in Reply to the Respondent's Brief of the Prosecution, Case No.: IT-95-14/1-A, 10 November 1999
Appellant's Response	The Appellant's Brief in Reply to the Prosecution's Appeal Brief, Case No.: IT-95-14/1-A, 25 October 1999
BH	Bosnia and Herzegovina
Čelebići Judgement	"Judgement", *Prosecutor v. Zejnil Delalić et al.*, Case No.: IT-96-21-T, Trial Chamber, 16 November 1998
Cross-Appellant	Prosecutor
Cross-Appellant's Brief	Prosecution's Appeal Brief, Case No.: IT-95-14/1-A, 24 September 1999

Cross-Appellant's Reply	Brief in Reply of the Prosecution, Case No.: IT-95-14/1-A, 10 November 1999
Defence	Zlatko Aleksovski
Furundžija Judgement	"Judgement", *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T, Trial Chamber, 10 December 1998
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
HV	Army of the Republic of Croatia
HVO	Croatian Defence Council
ICC Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc. A/CONF. 183/9
ICCPR	International Covenant on Civil and Political Rights, 1966
ICJ	International Court of Justice
ICRC Commentary to Geneva Convention IV	Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958
ICRC Commentary on the Additional Protocols	Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
International Tribunal/ Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in

	the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav People's Army
Kupreškić Judgement	"Judgement", *Prosecutor v. Kupreškić et al*, Case No.: IT-95-16-T, Trial Chamber, 14 January 2000
Majority Opinion	"Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement", Case No.: IT-95-14/1-T, 25 June 1999
Nicaragua	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, ICJ Reports (1986), p. 14
Prosecution	Prosecutor
Prosecution's Response	Respondent's Brief of the Prosecution, Case No.: IT-95-14/1-A, 25 October 1999
Prosecution's Additional Submissions	Prosecution Response to the Scheduling Order of 8 December 1999, Case No.: IT-95-14/1-A, 11 January 2000
Prosecution's Further Additional Submissions	Prosecution Response to Zlatko Aleksovski's Additional Submissions in Relation to the Defence of "Extreme Necessity", Case No.: IT-95-14/1-A, 31 January 2000
Rules	Rules of Procedure and Evidence of the International Tribunal
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993
SFRY	The Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
T.	Transcript of hearing in *The Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, which was held on 9 February 2000. All transcript page numbers referred to in the course of this Judgement are from the unofficial,

	uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tadić Judgement	"Judgement", *Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeals Chamber, 15 July 1999
Tadić Jurisdiction Decision	"Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v Duško Tadić*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995
Trial Chamber	Trial Chamber I *bis*
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republica Srpska