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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-17/1-A

Date: 21 July 2000

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Patrick Lipton Robinson
Judge Fausto Pocar

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

Judgement of: **21 July 2000**

PROSECUTOR

v.

ANTO FURUNDŽIJA

JUDGEMENT

Counsel for the Prosecutor:

Mr. UpawansaYapa
Mr. Christopher Staker
Mr. Norman Farrell

Counsel for the Accused:

Mr. Luka S. Misetić
Mr. Sheldon Davidson

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I. INTRODUCTION

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 ("the International Tribunal" or "the ICTY") is seized of an appeal filed by Anto Furundžija ("the Appellant") against the Judgement rendered by Trial Chamber II of the International Tribunal on 10 December 1998.

The Trial Chamber held the Appellant individually responsible for his participation in the crimes charged in the Amended Indictment pursuant to Article 7(1) of the Statute of the International Tribunal ("the Statute"). The Trial Chamber also found that under Article 3 of the Statute, the Appellant was guilty as a co-perpetrator of torture as a violation of the laws or customs of war and for aiding and abetting outrages upon personal dignity, including rape, as a violation of the laws or customs of war.[1]

Having considered the written and oral submissions of the Appellant and the Prosecutor ("the Prosecutor" or "the Respondent"), the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998 ("the Judgement").

A. Procedural background

1. In the original indictment, confirmed by Judge Gabrielle Kirk McDonald on 10 November 1995 ("the Indictment"), the Appellant was charged with three counts comprising Count 12, alleging a grave breach of the Geneva Conventions of 1949 under Article 2(b) of the Statute relating to torture and inhumane treatment, Count 13, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to torture, and Count 14, alleging a violation of the laws or customs of war under Article 3 of the Statute relating to outrages upon personal dignity including rape.

2. The Appellant was arrested on 18 December 1997. At his initial appearance on 19 December 1997, he pleaded not guilty to all counts of the Indictment and was remanded in detention pending trial.

3. On 13 March 1998, the Trial Chamber issued an Order granting the Prosecutor leave to withdraw Count 12 of the Indictment and denying the Defence's motion to dismiss all counts against the Accused based on defects in the form of the Indictment.

4. Following submissions by the Prosecutor on 1 May 1998 of statements and transcripts of witnesses, and on 4 May 1998 of legal material relating to the alleged criminal conduct of the Appellant, the Trial Chamber found on 13 May 1998 that sufficient material had been provided to the Defence to enable it to prepare its case.[2]

5. On 22 May 1998, the Prosecutor filed a pre-trial brief. On 29 May 1998, the Trial Chamber directed the Prosecutor to redact and amend portions of the Indictment. An amended version of the Indictment was filed on 2 June 1998 ("the Amended Indictment"). It contained two charges: Count 13 alleging torture and Count 14 alleging outrages upon personal dignity including rape. Both counts were charged as violations of the laws or customs of war under Article 3 of the Statute.

6. The trial of the Appellant commenced on 8 June 1998. The Appellant filed a motion on 12 June 1998, seeking to exclude the portion of Witness A's testimony that related to the Appellant's presence during the sexual assaults alleged to have been perpetrated by a co-accused, hereafter Accused B, upon Witness A, on the ground that it did not fall within the scope of the Amended

[2] On 6 April 1998, the Appellant filed "Defendant's Motion for Leave to File Instanter His Motion to Dismiss Counts 13 & 14 of the Indictment Based on Defects in the Form of the Indictment (Vagueness), Lack of Subject Matter Jurisdiction, and Failure to Establish a Prima Facie Case", arguing that the Prosecutor had failed to submit facts supporting a theory of liability under Article 7(1) that the Appellant directly and substantially facilitated the rape of Witness A. On 29 April 1998, the Trial Chamber issued a Decision denying the Appellant's Motion and a further decision ordering the Prosecutor to file a supplementary document specifying the factual and legal bases upon which the Prosecutor would rely at trial.

Indictment. In a Decision issued later on the same day, the Trial Chamber held that it would "only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused."[3]

7. By confidential decision dated 15 June 1998, the Trial Chamber responded to the Prosecutor's request for clarification of its decision of 12 June 1998 regarding Witness A's testimony and ruled as inadmissible "all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B] in the presence of [the Appellant] in the 'large room' apart from the evidence of sexual assault alleged in paragraph 25 of the Indictment."[4]

8. The parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date. On 29 June 1998, after the close of the hearings, the Prosecutor disclosed to the Appellant a redacted certificate of psychological treatment dated 11 July 1995 and a witness statement dated 16 September 1995 from a psychologist from Medica Women's Therapy Centre ("Medica") in Zenica, Bosnia and Herzegovina, concerning Witness A and the treatment she had received at Medica.

9. On 10 July 1998, the Appellant filed a motion to strike the testimony of Witness A or, in the event of a conviction, requested a new trial. The Trial Chamber issued its written Decision on the matter on 16 July 1998, finding that there had been serious misconduct on the part of the Prosecutor in breach of Rule 68 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") causing prejudice to the Appellant. As a consequence, the Trial Chamber ordered that the proceedings be re-opened but limited strictly to the cross-examination of Prosecution witnesses and the recalling of any defence witnesses or new evidence only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993 ("the re-opened proceedings"). The Trial Chamber further ordered the Prosecutor to disclose any other connected documents.

10. On 23 July 1998, the Appellant filed a request for leave to appeal the Trial Chamber's Decision of 16 July 1998. By its Decision of 24 August 1998, a bench of the Appeals Chamber unanimously denied the application, finding that the requirements under sub-Rule 73(B) for interlocutory appeals had not been met.[5]

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[3] The specific charges against the Accused were based on the factual allegations contained in paragraphs 25 and 26 of the Amended Indictment.

[4] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998 ("Confidential Decision"), p. 2.

[5] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-AR73, Decision on Defendant's Request for Leave to Appeal Trial Chamber II's Order of 16 July 1998, 24 Aug. 1998.

11. Subsequently, the Defence sought leave to introduce the evidence of two witnesses into the re-opened proceedings by way of deposition. By its confidential ex parte Order dated 27 August 1998, the Trial Chamber denied the Defence request to take the deposition of a certain individual, referred to as Witness F for the purposes of this appeal, reasoning that his evidence did not fall within the scope of the re-opened proceedings, as circumscribed by the Trial Chamber's Decision of 16 July 1998. In this regard the Trial Chamber noted that, according to its Decision of 16 July 1998, the Appellant may call new evidence only to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. Thereafter, on 13 October 1998, the Trial Chamber issued a confidential Decision denying the Defence leave to call Mr. Enes Šurković as a witness in the re-opened proceedings on the same grounds.[6]

12. On 9 November 1998, the proceedings were re-opened. The Appellant called four witnesses, including two expert witnesses, while the Prosecutor called two expert witnesses. On 9 and 11 November 1998, the Trial Chamber received two applications to file *amicus curiae* briefs, both of which were granted. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments.

13. On 10 December 1998, Trial Chamber II rendered its Judgement ("the Judgement"), finding the Appellant guilty on Count 13, as a co-perpetrator of torture as a violation of the laws or customs of war, and guilty on Count 14, as an aider and abettor of outrages upon personal dignity, including rape, as a violation of the laws or customs of war. The Trial Chamber sentenced the Appellant to ten years' imprisonment for the conviction under Count 13 and eight years' imprisonment for the conviction under Count 14. Consistent with the Trial Chamber's disposition, the Appellant is serving the sentences concurrently, *inter se*.

1. The Appeal

(a) Notice of Appeal

14. The Appellant filed the "Defendant's Notice of Appeal Pursuant to Rule 108" on 22 December 1998.

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[6] *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Decision on Proposed Calling of Mr. Enes Šurković as Witness, 13 Oct. 1998.

(b) Post-Trial Application

15. The Appellant filed on 3 February 1999 the "Defendant's Post-Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial". By this motion, the Appellant sought an order from the Bureau disqualifying Judge Mumba, vacating the Judgement and ordering a new trial before a differently constituted Trial Chamber. On 5 March 1999, the Appeals Chamber issued an order suspending the briefing schedule in the appeal on the merits pending the decision by the Bureau. On 11 March 1999, the Bureau issued its Decision on the Post-Trial Application, dismissing the application on the ground that the determination as to the fairness of the trial was not within the competence of the Bureau.[7]

(c) Filing of Briefs

16. On 24 March 1999, following the Bureau's decision, the Appeals Chamber issued a decision resuming the briefing schedule and ordered the parties to file their briefs as follows: the Appellant's Brief by 21 May 1999, the Respondent's Brief by 21 June 1999 and the Appellant's Reply by 6 July 1999. Following a request by the Appellant, the filing deadline for the Appellant's Brief was extended until 25 June 1999, with subsequent changes in the filing dates for the Response and Reply. On 25 June 1999, the Appellant filed the "Defendant's Appellate Brief".

17. The Appellant filed on 25 June 1999 the "Defendant's Motion to Supplement the Record on Appeal" requesting that the Registrar certify the Post-Trial Application and the exhibits attached thereto as part of the Record on Appeal. The Prosecutor filed a response on 20 July 1999, opposing the motion on the ground that the Post-Trial Application contained new evidence not submitted by the Appellant at trial. In this regard, the Prosecutor contended that the Appellant must satisfy the requirements under the relevant Rules pertaining to additional evidence before the Post-Trial Application could be submitted on appeal.

18. The Appellant filed on 23 July 1999, as a confidential document, its "Reply Memorandum in Support of Defendant's Motion to Supplement Record on Appeal" requesting that the Motion to Disqualify Presiding Judge Mumba and the Affidavit of Witness F be added to the record on appeal. On 2 August 1999, the Appellant filed a non-confidential version of the "Defendant's Appellate Brief".

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[7] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar. 1999.

19. On 2 September 1999, the Appeals Chamber issued its "Order on Defendant's Motion to Supplement Record on Appeal". By this Order, the Appeals Chamber granted the Appellant's motion to amend the Appellate Brief, but considered that Rule 109(A) of the Rules did not allow for the record on appeal to be supplemented as requested, and that Rules 115 and 119 of the Rules were not applicable to the material sought to be admitted, as the Appellant's ground of appeal related to the partiality of a Judge at trial and not to the guilt or innocence of the Appellant.

20. On 14 September 1999, the Appellant filed the "Defendant's Amended Appellate Brief" and on 30 September 1999 the Prosecutor filed the "Respondent's Brief of the Prosecution". On 14 October 1999, the Appeals Chamber issued, at the request of the Appellant, an order granting an extension of time for the filing of the Appellant's Reply. On 8 November 1999, the Appellant filed the "Defendant's Reply Brief". All three briefs were filed as confidential documents.

21. On 28 February 2000, the President of the International Tribunal assigned Judge Fausto Pocar to the Appeals Chamber to replace Judge Wang Tieya, who had withdrawn from the bench under Rule 16 of the Rules.[8]

22. The hearing of the appeal was held on 2 March 2000 and judgement was reserved to a later date.[9]

23. Subsequently, on 8 March 2000, the Appellant filed a motion entitled "Conviction of Anto Furundžija based upon alleged Torture of Witness D is void as being (1) Outside the Scope of the Jurisdiction of the ICTY and (2) Based upon an Alleged Crime not charged in the Indictment." The motion was rejected by the Appeals Chamber on 5 May 2000 as it was filed out of time.

24. Upon the request of the Appeals Chamber, the Appellant filed public versions of his amended appellate brief and reply brief on 23 June 2000 ("the Appellant's Amended Brief" and "the Appellant's Reply" respectively). [10] The Prosecutor filed a public version of her response brief on 28 June 2000 ("the Prosecutor's Response").[11]

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[8] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Order of the President Assigning a Judge to the Appeals Chamber, 7 Mar. 2000 (the original French version was filed on 28 Feb. 2000).

[9] Transcript of hearing on appeal in *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-A, 2 March 2000 (hereafter pages from the transcript are referred to as "T (2 March 2000)"; all transcript page numbers referred to in the course of this Appeals 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).

[10] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief [Public Version], 23 June 2000; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appellant's Reply [Public Version], 23 June 2000.

[11] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution Dated 30 Sept. 1999, 28 June 2000.

B. Grounds of Appeal

25. The Appellant submits the following grounds of appeal against the Judgement of 10 December 1998:

Ground (1): That the Appellant was denied the right to a fair trial in violation of the Statute;

Ground (2): That the evidence was insufficient to convict him on either count;

Ground (3): That the Defence was prejudiced by the Trial Chamber's improper reliance on evidence of acts that were not charged in the indictment and which the Prosecutor never identified prior to the trial as part of the charges against the Appellant;

Ground (4): That presiding Judge Mumba should have been disqualified; and

Ground (5): That the sentence imposed upon him was excessive.[12]

C. Relief Requested

26. By his appeal, the Appellant seeks the following relief:

(i) That the Appellant be acquitted or, in the alternative, that his convictions be reversed[13] or that he be granted a new trial.[14]

(ii) That, in the alternative, if the Appeals Chamber affirms the conviction imposed by the Trial Chamber, the Appeals Chamber reduce the sentence to a term that does not exceed six years, including time served since the date of his original incarceration (18 December 1997).[15]

[12] Appellant's Amended Brief, pp. 1-3 and T. 9 - 10 (2 March 2000).
[13] Appellant's Amended Brief, p. 158.
[14] *Ibid.*, and T. 190 (2 March 2000).
[15] Appellant's Amended Brief, p. 158.

II. STANDARD OF REVIEW ON APPEAL

A. Submissions of the Parties

1. The Appellant

27. The Appellant submits that the standard of review in the Appeals Chamber "necessarily takes into account the standard of proof in the Trial Chamber."[16] The Appellant further submits that "[i]f a reasonable person could have reasonable doubt about his guilt, the conviction must be reversed."[17]

28. The Appellant argues that to satisfy the test of proof beyond reasonable doubt, "[t]he evidence must be so overwhelming that it excludes every fair or rational hypothesis except that of guilt."[18] He contends that he "appeals on the basis that the Trial Chamber was unreasonable in concluding that the only fair or rational hypothesis that could be derived from the evidence is that Mr. Furundžija is guilty."[19] He concludes that the Appeals Chamber must acquit him because the evidence may be read to support a fair or rational inference of innocence.[20]

2. The Respondent

29. The Respondent submits that the appealing party bears the burden of establishing an error within the terms of Article 25(1) of the Statute.[21] The Respondent further contends that the appropriate standard of review on appeal depends on the classification of the alleged error as one of fact or law.[22]

30. The Respondent submits that two categories of error fall within Article 25(1)(a) of the Statute, which provides for an appeal from "an error on a question of law invalidating the decision". The first relates to an error in the substantive law applied by the Trial Chamber and the second to an error in the exercise of the Trial Chamber's discretion.[23] Where the error alleged is one of substantive law, the Respondent says that the nature of the burden on the appealing party is that of persuasion rather than proof.[24] Where the appeal is based on an error in the exercise of the Trial

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[16] Appellant's Reply, p.3.
[17] *Ibid.*, p. 5.
[18] T. 11 (2 March 2000).
[19] T. 12 (2 March 2000).
[20] T. 167 (2 March 2000).
[21] Prosecutor's Response, para. 2.2.
[22] *Ibid.*, para. 2.6.
[23] *Ibid.*, para. 2.7.
[24] *Ibid.*, para. 2.9.

Chamber's discretion, the Respondent contends that the Appeals Chamber should review the impugned decision under an abuse of discretion standard.[25] The Respondent submits that "absent a showing that the Trial Chamber abused its discretion, the Appeals Chamber should not substitute its own view for that of the Trial Chamber."[26]

31. As regards the standard of review under Article 25(1)(b) of the Statute, which provides for an appeal on the basis of "an error of fact which has occasioned a miscarriage of justice," the Respondent identifies two types of error which may be the subject of an appeal under this provision. The first is an error based on the submission of additional evidence that was not available at trial, and the second is an error in the factual conclusions the Trial Chamber reached based upon the evidence submitted at trial.[27]

32. The Respondent contends that the standard of review on appeal proposed by the Appellant is erroneous, and that the Appeals Chamber should not disturb the Trial Chamber's findings of fact, unless no reasonable person could have so concluded on the evidence presented.[28] The Respondent finds equally mistaken the Appellant's proposed standards as regards the burden placed on the Appellant.[29]

33. The Respondent further submits that in order to appeal a decision under Article 25(1), a party has to object at trial in a timely and proper manner to an error of the Trial Chamber or to a Trial Chamber's abuse of discretion, or the issue of waiver must be considered.[30]

B. Discussion

34. Article 25 of the Statute sets forth the circumstances in which a party may appeal from a final decision of the Trial Chamber. A party invoking a specific ground of appeal must establish an error within the scope of this provision, which provides:

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

[25] *Ibid.*, para. 2.10.
[26] *Ibid.*
[27] *Ibid.*, para. 2.8.
[28] T. 108 – 109 (2 March 2000).
[29] T. 111 – 112 (2 March 2000).
[30] Prosecutor's Response, para. 2.11.

35. Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.

36. Furthermore, this Chamber is only empowered to reverse or revise a decision of the Trial Chamber on the basis of Article 25(1)(a) when there is an error of law that invalidates that decision. It is not any error of law that leads to a reversal or revision of the Trial Chamber's decision; rather, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid.

37. As to an allegation that there was an error of fact, this Chamber agrees with the following principle set forth by the Appeals Chamber for the International Criminal Tribunal for Rwanda ("the ICTR")[31] in *Serushago*:

> Under the Statute and the Rules of the Tribunal, a Trial Chamber is required as a matter of law to take account of mitigating circumstances. But the question of whether a Trial Chamber gave due weight to any mitigating circumstance is a question of fact. In putting forward this question as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice.[32]

Similarly, under Article 25(1)(b) of the ICTY Statute, it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has led to a miscarriage of justice. A miscarriage of justice is defined in *Black's Law Dictionary* as "a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[33] This Chamber adopts the following approach taken by the Appeals Chamber in the *Tadić* case[34] in dealing with challenges to factual findings by Trial Chambers:

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[31] 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 Neighbouring States between 1 January and 31 December 1994 ("the ICTR").

[32] *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, para. 22.

[33] Black's Law Dictionary (7th ed., St. Paul, Minn. 1999).

[34] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 ("the *Tadić* Appeals Judgement").

> [t]he task of hearing, assessing and weighing the evidence presented at trial is left to the judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[35]

The position taken by this Chamber in the *Tadić* Appeals Judgement has been reaffirmed in the *Aleksovski* Appeals Judgement.[36] The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.

38. The Appeals Chamber now turns to consider the Appellant's submissions in relation to the appropriate standard of review where the sufficiency of the evidence in support of a conviction is challenged on appeal. The Appellant submits that the *Tadić* Appeals Judgement demonstrates that, in evaluating the sufficiency of the evidence in support of a conviction, the Appeals Chamber must determine whether the standard of proof beyond reasonable doubt was correctly applied by the Trial Chamber.[37] The Appellant further invites the Appeals Chamber to: 1) conduct an independent assessment of the evidence, both as to its sufficiency and its quality; and 2) inquire whether a reasonable trier of fact could have found that an inference or hypothesis consistent with innocence of the offence charged was open on the evidence.[38] The Appellant further contends that, as to the application of the standard of proof beyond reasonable doubt, the Appeals Chamber must find that guilt was not merely a reasonable conclusion based on the evidence, but rather the only "fair and rational hypothesis which may be derived from the evidence".[39]

39. The Appellant's reliance on the *Tadić* Appeals Judgement is misplaced. In *Tadić,* the Appeals Chamber held that the Trial Chamber had erred in law in its application of the legal standard of proof beyond reasonable doubt to its factual findings in respect of certain charges in the indictment. The application of the correct legal standard did not support the inferences which the Trial Chamber had drawn from the facts. On a true interpretation, the *Tadić* Appeals Chamber did not disturb the finding of facts by the Trial Chamber.

40. The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This

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[35] *Tadić* Appeals Judgement, para. 64.
[36] *Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("the *Aleksovski* Appeals Judgement"), para. 63.
[37] Appellant's Reply, p. 4.
[38] *Ibid.*, p. 8.
[39] *Ibid.* (citing *Tadić* Appeals Judgement, para. 174).

Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice.

III. FIRST GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

41. As a first ground of appeal against the Judgement, the Appellant argues that he was denied the right to a fair trial under Article 21 of the Statute. As a consequence, the Appeals Chamber should acquit him on Counts 13 and 14 of the Amended Indictment. In support of this ground, the Appellant submits the following arguments: (a) he did not receive fair notice of the charges to be proven against him; (b) the Trial Chamber failed to provide a reasoned opinion in respect of the conflicting testimony of Witness A and Witness D; and (c) he was denied the right under Article 21(4) of the Statute to call witnesses during the re-opened proceedings.[40]

(a) Lack of fair notice of the charges to be proven against the Appellant

42. As a first aspect of this ground of appeal, the Appellant submits that the Trial Chamber erred by failing to ensure that he received fair notice of the charges to be proven against him, as required by Articles 20 and 21 of the Statute.

43. The Appellant argues that his convictions rested upon a sequence of events which were not described in any document filed by the Prosecutor prior to trial and that the case of the Prosecutor leading to the findings of the Trial Chamber, which in turn resulted in his convictions, was not presented to him until trial.[41] He submits that the Prosecutor's case at trial proved to be inconsistent with that reflected in the Indictment and Amended Indictment and the pre-trial pleadings.[42]

44. More specifically, the Appellant contends that the documents submitted by the Prosecutor prior to trial, on which the Appellant relied for trial preparation, including the Indictment and the 1995 Statement by Witness A, do not contain any allegations of complicity in rapes or sexual assaults committed in the large room ("the Large Room") either in his presence or after his departure.[43] According to the Appellant, the Amended Indictment does not contain allegations of a conspiracy between him and Accused B, nor does it contain allegations of concert of action and forced nudity, since any rapes and sexual assaults committed in the Large Room are alleged to have taken place before the Appellant's arrival in that room.[44] The Appellant contends that, in reliance

[40] Appellant's Amended Brief, pp. 49-50, 75 and T. 9 - 10 (2 March 2000).
[41] Appellant's Amended Brief, pp. 56-57.
[42] *Ibid.*, pp. 56-60 and T. 9 (2 March 2000).
[43] Appellant's Amended Brief, pp. 59-63.
[44] T. 30 (2 March 2000).

on the Prosecutor's pre-trial submissions and the Indictment, he prepared for trial in the reasonable belief that the Prosecutor would attempt to prove that he arrived in the Large Room after the sexual assaults on Witness A by Accused B had taken place.[45] The Appellant submits that the testimony of Witness A at trial was inconsistent with the events alleged in the Amended Indictment and all pre-trial pleadings, in that Witness A testified at trial that the Appellant 1) began questioning Witness A prior to Accused B's arrival in the Large Room, 2) was present at the time of Accused B's rape of Witness A in the Large Room, 3) questioned Witness A in the "Large Room" while Accused B was raping her and otherwise sexually assaulting her, and 4) left Witness A with Accused B in the Large Room where Accused B continued to rape and sexually assault her.[46]

45. The Appellant contends that he alerted the Trial Chamber to the serious prejudice he suffered as a result of the misleading pleadings and that the Trial Chamber responded by issuing a decision, dated 12 June 1998, stating that it would consider the evidence of Witness A only "insofar as it relates to Paragraphs 25 and 26 as pleaded in the Indictment."[47] A subsequent motion for clarification submitted by the Prosecutor led to an additional confidential decision, dated 15 June 1998, specifying that "[t]he Trial Chamber rules inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the 'Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."[48] The Appellant submits that, in reliance on the decisions of the Trial Chamber, he did not undertake the necessary measures to obtain additional witnesses who could testify to his absence from the Large Room while Witness A was being sexually assaulted.[49] He further contends that the Amended Indictment did not allege that he left Witness A to be sexually assaulted by Accused B.[50]

46. In sum, the Appellant submits that the trial proved to be unfair when the Trial Chamber made findings concerning rapes and sexual assaults perpetrated by Accused B on Witness A in the Large Room on the basis of evidence which it had previously declared inadmissible, and convicted the Appellant based on those findings.

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[45] Appellant's Amended Brief, p. 57 and T. 36 - 7 (2 March 2000).
[46] Appellant's Amended Brief, pp. 59-60.
[47] *Ibid.*, p. 63 (citing *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Decision, 12 June 1998, p. 2).
[48] Appellant's Amended Brief p. 64 (citing Confidential Decision, 15 June 1998, p. 2) and T. 47 (2 March 2000).
[49] Appellant's Amended Brief, p. 64 and T. 49 (2 March 2000).
[50] T. 54 (2 March 2000).

(b) The Trial Chamber failed to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

47. In respect of the second aspect of this ground of appeal, the Appellant submits that he did not receive a fair trial as a result of the Trial Chamber's failure to provide a reasoned opinion to explain its evaluation of the conflicting evidence of Witness A and Witness D on a determinative issue. The Appellant contends that the Trial Chamber failed to reconcile the conflicting testimony as to whether the Appellant conducted an interrogation in the pantry ("the Pantry") and whether he was even present in that room. He argues that the absence of reasoning in the Judgement on this decisive point constitutes an error of law and violates his right to a fair trial under Articles 21 and 23(2) of the Statute as well as under Article 6(1) of the European Convention on Human Rights.[51]

48. While recognising that the Trial Chamber need not address every discrepancy in the evidence, the Appellant contends that discrepancies on issues that may be determinative of guilt or innocence must be addressed in a reasoned manner.[52] The Appellant cites the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights to support the contention that "the Trial Chamber was under an obligation to address well-founded submissions on determinative issues."[53]

(c) Denial of the right to call Witnesses F and Enes Šurković upon the reopening of the proceedings

49. As a third aspect of this ground of appeal, the Appellant contends that the Trial Chamber denied his right under Article 21(4) of the Statute to obtain the attendance and examination of Witness F and Enes Šurković during the re-opened proceedings, as part of his general right to a fair trial.[54]

50. The Appellant submits that the Trial Chamber failed to remedy the prejudice suffered by him as a consequence of the Prosecutor's inexcusable misconduct with regard to the belated disclosure of the Medica documents, since the relief chosen by the Trial Chamber failed to place him in the position he would have been in had the Prosecutor disclosed the Medica documents prior to trial.[55] According to the Appellant, the scope of the re-opened proceedings was so restrictive that he could not pursue relevant defences and, consequently, did not receive a fair trial. The Appellant

[51] European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ("the European Convention on Human Rights").
[52] T. 76 (2 March 2000).
[53] T. 79 (2 March 2000); Appellant's Amended Brief, pp. 65-72, and in particular pp. 70-71 where the jurisprudence of the European Court of Human Rights is discussed.
[54] Appellant's Amended Brief, pp. 74-75.
[55] *Ibid.*, p. 73.

argues that, by limiting the issues at the re-opened proceedings to the psychiatric and psychological treatment received by Witness A, he was prevented from introducing relevant evidence contained in the Medica documents, such as Witness A's mental and emotional condition during the material period in 1993, the relevance of which was unknown to the Defence prior to the disclosure of the Medica documents.[56] Furthermore, according to the Appellant, the limited scope of the re-opened proceedings prevented him from introducing evidence regarding the credibility of Witness A's trial testimony in respect of her emotional condition during the relevant period of 1993.[57]

51. The Appellant further contends that the Trial Chamber erred in denying him the right to call Witness F on the ground that his testimony would fall outside the scope of the re-opened proceedings. The Appellant submits that the testimony of Witness F was within the ambit of the re-opened proceedings, since, among other things, Witness F was purportedly the first person to take Witness A for medical treatment after the events in question.[58] Furthermore, the Appellant submits that it was only in the course of the investigation arising out of the disclosure of the Medica documents that he learnt that Witness F had relevant information.[59]

52. In respect of Enes Šurković, the Appellant argues that his proposed testimony would bear directly on the issue of Witness A's credibility and, in particular, Witness A's repudiation of a 1993 statement which Enes Šurković prepared based on a conversation he had with Witness A in December 1993.[60]

2. The Respondent

53. The Prosecutor rejects the Appellant's complaints regarding the alleged errors committed by the Trial Chamber, as set out in the first ground of appeal, and requests that this ground be dismissed.

(a) Appellant received fair notice in respect of the charges to be proven against him

54. In addressing the first aspect of this ground of appeal, the Prosecutor submits that there was ample notice of the conduct alleged in paragraphs 25 and 26 of the Amended Indictment which the Appellant faced at trial,[61] and that, in any event, the issue of lack of fair notice as to conduct in the Large Room which was not reflected in the Amended Indictment was resolved by the Trial Chamber's Decision of 12 June 1998, granting the Appellant's request to exclude certain

[56] *Ibid.*, pp. 72-73 and Appellant's Reply, p. 24.
[57] Appellant's Amended Brief, p.73.
[58] T. 82 (2 March 2000).
[59] Appellant's Reply, pp. 22-24.
[60] *Ibid.*, pp. 23-24.

evidence.[62] The Prosecutor further submits that there are no findings in the Judgement which support the Appellant's argument that the Trial Chamber based its conviction on evidence which it had previously held to be inadmissible.[63]

(b) Alleged failure of the Trial Chamber to provide a reasoned opinion in relation to the conflict between the testimony of Witness A and that of Witness D

55. The Prosecutor submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of the Trial Chamber to give a reasoned opinion on this particular issue. The Prosecutor further submits that the Trial Chamber was under no obligation to provide reasons for its findings with respect to an issue that was never squarely raised by either party.[64] The Prosecutor contends that the Trial Chamber's findings (or lack thereof) with respect to the alleged inconsistencies in the evidence of Witness A and Witness D concerning the Appellant's presence in the Pantry do not amount to a violation of the Appellant's right to a reasoned opinion pursuant to Article 23 of the Statute.[65] The Prosecutor says that, upon a review of the Judgement in its totality, the Trial Chamber provided a "reasoned opinion in writing", as required by Article 23 of the Statute.[66] The Prosecutor distinguishes the circumstances of the instant case from those in the case law on which the Appellant relies.[67]

(c) Alleged denial of the right to call Witnesses F and Enes Šurković upon the reopening of the proceedings

56. The Prosecutor rejects the Appellant's contention that the scope of the re-opened proceedings was too limited and submits that the new matter which arose as a result of the belated disclosure of the Medica documents was correctly circumscribed by the Trial Chamber in its decision to reopen the proceedings.[68] The Prosecutor contends that the issue of medical, psychiatric or psychological treatment or counselling received by Witness A was the focus of the re-opened proceedings, and not the mental health or psychological state of Witness A generally.[69] According to the Prosecutor, the Appellant was aware that any evidence relating to the mental health or

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[61] Prosecutor's Response, paras. 3.26-3.34.
[62] *Ibid.*, para. 3.22 and T. 118 (2 March 2000).
[63] Prosecutor's Response, paras. 3.39-3.43.
[64] T. 139 - 140 (2 March 2000).
[65] Prosecutor's Response, paras. 3.51–3.55.
[66] *Ibid.*, paras. 3.54-3.55.
[67] *Ibid.*, paras. 3.75-3.77.
[68] *Ibid.*, paras. 3.78, 3.83 – 3.87. See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Decision, 16 July 1998.
[69] Prosecutor's Response, paras. 3.82-3.83.

psychological state of Witness A generally would have been material to his case since his defence had been conducted on the basis that Witness A's memory was flawed. Consequently, the Prosecutor submits, the Appellant was under an obligation to exercise due diligence in respect of the production of such evidence during the trial.[70]

57. With regard to the proposed testimony of Witness F, the Prosecutor submits that this testimony would not have been relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness A after 1993. The Prosecutor, therefore, argues that the Trial Chamber's decision to deny the Appellant leave to introduce the testimony of Witness F was in accordance with the limits set by the Trial Chamber's decision defining the scope of the re-opened proceedings. The Prosecutor further contends that the alleged relevance of Witness F's proposed testimony could have been ascertained through the exercise of due diligence before the Medica documents were disclosed.[71]

58. The Prosecutor contends that the same conclusions apply in respect of the proposed testimony of Enes Šurković.[72]

B. Discussion

(a) First aspect of the first ground of appeal

59. With regard to the first aspect of the first ground of appeal, the Appellant submits that his trial was unfair since he did not receive fair notice of the charges to be proven against him. In particular, he complains that the Trial Chamber erred by including certain findings in the Judgement relating to acts which fall outside the scope of the Amended Indictment.

60. The Appeals Chamber notes that the Indictment was filed and remains under seal. On 2 June 1998, however, the Prosecutor filed an Amended Indictment, which set forth, by way of a redacted version of the Indictment, only those allegations underlying three counts against the Appellant.[73] The only difference between the Indictment and the Amended Indictment is that in the former the introductory words "shortly after the events described in paragraphs 21 and 22" appear in paragraph 25. The Appellant did not raise any objections in respect of the Amended Indictment as filed on 2 June 1998, and his trial proceeded on the basis of the charges as set forth therein. Any complaint raised by the Appellant as to whether he received fair notice of the charges to be proven

[70] *Ibid.*, paras. 3.82-3.90.
[71] *Ibid.*, paras. 3.80-3.83.
[72] *Ibid.*, and paras. 3.87-3.89.
[73] With the filing of the Amended Indictment the count based on Article 2 of the Statute, together with any associated allegations, was also withdrawn.

against him must be assessed in light of the allegations contained in the Amended Indictment. Accordingly, the charges set forth in the Indictment against the Appellant and the other co-accused, including Accused B, are not relevant to the determination of this ground of appeal.

61. Article 18(4) of the Statute and Rule 47(C) of the Rules require that an indictment contain a concise statement of the facts of the case and of the crime with which the suspect is charged. That requirement does not include an obligation to state in the indictment the evidence on which the Prosecution has relied. Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defence adequate time to respond to the additional allegations, or by excluding the challenged evidence.

62. The Amended Indictment alleges in relevant part:

> On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow") [the Appellant] the local commander of the Jokers, [Accused B] and another soldier interrogated Witness A. While being questioned by [the Appellant], [Accused B] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.[74]

63. The Appellant submits that the Trial Chamber erred in finding that his questioning of Witness A in the Large Room commenced prior to Accused B's entry, as this sequence of events is not consistent with that set forth in the Amended Indictment. While it is stated in the Judgement that "Witness A, under cross-examination was adamant that [the Appellant] was in the [Large Room] before Accused B entered",[75] this is merely a narrative account of the evidence given by Witness A and does not form part of the Trial Chamber's factual findings. The Appeals Chamber, therefore, is unable to find any merit in the Appellant's submission.

64. The Appellant further submits that the Trial Chamber erred in finding that rapes and sexual assaults were committed in his presence in the Large Room, on the basis of evidence which it had previously declared inadmissible, and in convicting him on that basis. The objection was founded on the fact that the Amended Indictment did not include an allegation that the Appellant was present in the Large Room, while rapes and sexual assaults were perpetrated there. The Appeals Chamber observes that the Trial Chamber upheld this objection insofar as it ruled "inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by [Accused B] in the

[74] Amended Indictment, para. 25.
[75] Judgement, para. 80.

presence of the [Appellant] in the 'Large Room' apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]".[76]

65. The Appellant however raises the additional question whether the Trial Chamber failed to adhere to the terms of its own decision by including factual findings in the Judgement concerning rapes and sexual assaults committed in the Appellant's presence in the Large Room and convicting the Appellant on that basis. These factual findings are set out in the following paragraphs of the Judgement relating to events in the Large Room:

> 124. Witness A was interrogated by the [Appellant]. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the [Appellant]. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the [Appellant] and the abuse by Accused B were parallel to each other.
>
> 125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.
>
> 126. Witness A was subjected to severe physical and mental suffering and public humiliation.

66. The Appeals Chamber would observe that paragraph 125 refers to rapes and sexual assaults perpetrated by Accused B after the Appellant's departure from the Large Room. The Trial Chamber did not make any factual findings that rapes and sexual assaults were committed in the Appellant's presence in the Large Room, nor was the Appellant convicted on that basis.[77]

67. The Appellant further submits that the Trial Chamber's finding that the Appellant left Witness A in the Large Room to be raped and sexually assaulted by Accused B was impermissible as falling outside the scope of the Amended Indictment.[78] In this context, the Appeals Chamber notes the following. Although the Amended Indictment against the Appellant does not contain any allegations to that effect, at trial Witness A gave evidence that the Appellant left her in the Large Room where she was raped and sexually assaulted by Accused B. In its Judgement, the Trial Chamber states that the Defence "has not disputed that the [Appellant] left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B."[79] The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[80] But while finding so as part of the narrative, the Trial Chamber did not say that the Appellant, in leaving

[76] Confidential Decision, p.2. See also Judgement, paras. 18 and 81.
[77] Judgement, paras. 264 – 269.
[78] Appellant's Reply, p. 39.
[79] Judgement, para. 83.
[80] *Ibid.*, para. 125.

Witness A in the custody of Accused B, did so with the intent that Accused B should perform those acts on Witness A. The performance of such acts by Accused B did not influence the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the Trial Chamber's legal findings in support of the Appellant's conviction for torture under Count 13 which contain no reference to rapes and sexual assaults in the Large Room:

> The Trial Chamber is satisfied that the Appellant was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[81]

There is no reference in this paragraph or in any of the other paragraphs relating to these legal findings to the evidence of Witness A being "left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[82]

(b) Second aspect of the first ground of appeal

68. The Appellant submits that he was denied a fair trial under Article 21(2) and Article 23(2) of the Statute, since the Trial Chamber failed to provide a reasoned opinion as to the manner in which it resolved the conflict between the testimony of Witness A and that of Witness D on the question whether the Appellant conducted an interrogation in the Pantry. The Appellant specifically objects to the Trial Chamber's conclusion that "the evidence of Witness D does confirm the evidence of Witness A in this regard."[83]

69. The right of an accused under Article 23 of the Statute to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute. The case-law that has developed under the European Convention on Human Rights establishes that a reasoned opinion is a component of the fair hearing requirement, but that "the extent to which this duty . . . applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case."[84] The European Court of Human Rights has held that a "tribunal' is not obliged to give a detailed answer to every argument.[85]

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[81] *Ibid.*, para. 264.
[82] *Ibid.*, para. 125.
[83] *Ibid.*, para. 116.
[84] See *Case of Ruiz Torija v. Spain,* Judgment of 9 December 1994, Publication of the European Court of Human Rights ("Eur. Ct. H. R."), Series A, vol. 303, para. 29.
[85] *Case of Van de Hurk v. The Netherlands,* Judgment of 19 April 1994, Eur. Ct. H. R., Series A, vol. 288, para. 61.

70. From a reading of the Judgement, the Appeals Chamber considers that the Trial Chamber dealt satisfactorily with the evidence of Witnesses A and D. Paragraphs 84 - 89 of the Judgement are devoted to events in the Pantry. In these paragraphs, the Trial Chamber considered the evidence of both Witnesses A and D in respect of the events in the Pantry and, on this basis, arrived at its factual findings which are set out in paragraphs 127 - 130.

71. Moreover, the Appeals Chamber is not convinced that there was any necessary conflict in the evidence of the two witnesses. Indeed, Witness D's evidence could be read to support Witness A's testimony that the Appellant was present in the Pantry, as Witness D testified that he entered the Pantry with the Appellant and that later, while he was being beaten by Accused B, the Appellant was standing by the doorway to the Pantry.[86]

72. As to the Appellant's objection to the Trial Chamber's statement that "the evidence of Witness D does confirm the evidence of Witness A in this regard,"[87] the Appeals Chamber notes that this conclusion does not relate to the issue whether the Appellant interrogated anyone in the Pantry or whether he was present in that room. The statement was made in the context of the Trial Chamber's review of certain inconsistencies in Witness A's testimony and did not refer to the question whether the Appellant conducted any interrogation in the Pantry. The Appellant's objection is therefore unfounded.

73. Based on the foregoing analysis, the Appeals Chamber finds that the evidence is not conflicting on the question whether the Appellant conducted an interrogation in the Pantry or whether he was present in that room during the physical assaults perpetrated by Accused B upon Witnesses A and D. In view of this, the Appeals Chamber is unable to conclude that the Trial Chamber erred in the manner alleged by the Appellant.

(c) Third aspect of the first ground of appeal

74. In respect of the third aspect of the first ground, the Appellant contends that, by preventing him from introducing the testimony of Witness F and Enes Šurković when the proceedings were re-opened, the Trial Chamber violated his right, under Article 21(4) of the Statute, to examine, and obtain the attendance of, relevant witnesses on his behalf.

75. Article 21(4)(e) of the Statute grants an accused the right "to obtain the attendance and examination of witnesses on his behalf". This right is, for obvious reasons, subject to certain

[86] Judgement, paras. 85 and 87.
[87] *Ibid.*, para. 116.

conditions, including a requirement that the evidence should be called at the proper time.[88] In this regard, the Appeals Chamber observes that the Appellant was obliged, under the applicable rules, to present all available evidence at trial. However, it should be noted that the proceedings were re-opened due to the exceptional circumstance of the Prosecutor's late disclosure of material which, in the view of the Trial Chamber, "clearly had the potential to affect the '*credibility of prosecution evidence*'".[89] The question arises whether the Trial Chamber was correct to limit the Appellant's right to call new evidence in the re-opened proceedings to "any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993,"[90] and to deny him the right to call Witness F and Enes Šurković on the ground that their proposed testimony fell outside the scope of the re-opened proceedings.

76. As to the first issue, namely, whether the scope of the re-opened proceedings was too restrictive, the Appeals Chamber notes that the material belatedly disclosed by the Prosecutor was a witness statement dated 16 September 1995 from a psychologist at the Medica Women's Therapy Centre, concerning the treatment Witness A had received at the Centre. The Trial Chamber determined that the sole issue arising out of the disclosure of the material was the medical, psychological or psychiatric treatment or counselling received by Witness A, and not the more general question of the mental health and psychological state of Witness A. The Appeals Chamber sees no basis for interfering with this assessment. Furthermore, the Appeals Chamber considers that the relevance of Witness A's mental health could not have been unknown to the Appellant prior to the Prosecutor's disclosure of the material, especially in the light of the mistreatment that Witness A had endured and the circumstance that the Appellant's defence was premised on the fact that Witness A's memory was flawed and that she was therefore not a reliable witness. This conclusion is supported by the fact that, at trial the Appellant called an expert witness, Dr. Elisabeth Loftus, to testify on the effects of shock and trauma on memory. In accordance with the general rule that evidence should be called at the proper time, the Appellant was obliged to call all evidence which, in his estimation, had a bearing on the more general subject of Witness A's mental condition and her lack of reliability during the trial.

77. The second issue concerns the Trial Chamber's denial of the Appellant's alleged right to call Witness F and Enes Šurković on the ground that their proposed evidence fell outside the scope of the re-opened proceedings. The Appeals Chamber finds no merit in the Appellant's submission that the evidence was incorrectly excluded. The proposed evidence was clearly not relevant to the

[88] Rule 85 of the Rules provides that evidence at trial shall be presented in a certain sequence unless otherwise directed by the Trial Chamber in the interests of justice.
[89] *Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Decision, 16 July 1998, para. 17 (original emphasis).
[90] *Ibid.*, p. 8.

question of medical, psychological or psychiatric treatment or counselling received by Witness A, which was the subject of the re-opened proceedings. Outside of these matters, the introduction of the evidence at that stage could not be justified.

78. The Appeals Chamber accordingly finds that the Trial Chamber did not err when it decided to deny the Appellant the right to call Witness F and Enes Šurković on the ground that the proposed testimony fell outside the scope of the re-opened proceedings.

79. For the foregoing reasons, this ground must fail.

IV. SECOND GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

80. As the second ground of appeal, the Appellant submits that the Prosecutor failed to prove beyond reasonable doubt: (a) that he committed torture; and (b) that he committed outrages upon personal dignity including rape.

(a) The evidence was insufficient to convict Anto Furundžija of the crime of torture (Count 13 of the Amended Indictment)

81. The Appellant alleges that the Trial Chamber established his liability for the crime of torture on the basis of its finding that he interrogated Witness A in the Pantry, but that the evidence does not prove this beyond reasonable doubt.[91] He claims that Witness D testified that the only interrogator in the Pantry was Accused B, and that the "very, very credible" testimony of the "truthful" Witness D, as described by the Prosecutor during the trial, precludes a finding that the Appellant conducted any interrogation in the Pantry.[92]

82. The Appellant further contends that Witness A's identification of him in court is unreliable.[93] He refers to the case of *Prosecutor v. Duško Tadić* where the Trial Chamber addressed the need to identify the accused independently of in-court identification.[94] He submits that in the Judgement, the Trial Chamber never addressed the possibility that Witness A's memory of him could have been displaced or altered, when she saw his image on a BBC television report, or that her in-court identification of him was merely an identification of the man she had seen on television rather than a description of the person she had seen in the Large Room or the Pantry.[95]

83. The Appellant further submits that the acts charged in the Amended Indictment would not constitute torture, even if proven. The Appellant alleges that the Prosecutor failed to prove that, by the acts and omissions charged in the Amended Indictment, he intentionally inflicted "severe pain or suffering, whether physical or mental", aimed at "obtaining information or a confession, or at

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[91] Appellant's Amended Brief, p. 78.
[92] *Ibid.*
[93] *Ibid.*, pp. 78-80.
[94] *Ibid.*, p. 80 (citing *Prosecutor v. Duško Tadić*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 546).
[95] *Ibid.*, pp. 82-83.

punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person."[96]

84. The Appellant contends that, to establish his liability as co-perpetrator of the crime of torture under the Trial Chamber's definition of the necessary elements of that crime, proof by the Prosecutor that he questioned Witness A is insufficient. He submits that a direct connection must be proven between his questioning and the infliction by Accused B of severe pain and suffering upon Witness A, whether physical or mental,[97] but that there has been no such proof.[98]

85. The Appellant further submits that Witness A's testimony of the events was unreliable, as she suffered from post-traumatic stress disorder ("PTSD"), and that the inconsistencies in her testimony do not justify the Trial Chamber's finding that "inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses".[99]

(b) The evidence was insufficient to convict Anto Furundžija of the crime of outrages upon personal dignity, including rape

86. The Appellant submits that the Trial Chamber cited no authority for the proposition that his presence alone could support a conviction for aiding and abetting.[100] He contends that the acts charged against him in paragraph 26 of the Amended Indictment do not constitute aiding and abetting, and that the cases upon which the Trial Chamber relied to support the conviction for aiding and abetting are distinguishable from the instant case. The Appellant distinguishes the circumstances in the *Dachau Concentration Camp* case and submits that the conduct of the accused in that case, which the court found to constitute "acting in pursuance of a common design to violate the laws and usages of war", did not occur in the present case.[101] Referring to the case of *Rohde*, he argues that there is no evidence that he was a link in the chain of events that led to the rape of Witness A.[102] He also refers to the decision in the *Stalag Luft III* case, and submits that there is no proof that his acts contributed directly to the rape or that the rape would not have happened in this manner had he not aided it willingly.[103] Relying on the *Schonfeld* case, the Appellant submits that he cannot be convicted of aiding and abetting merely because he did not endeavour to prevent the rape of Witness A.[104] He argues that, unlike in the *Schonfeld* case, there was no allegation in this

[96] Judgement, para. 162.
[97] Appellant's Amended Brief, p. 84.
[98] *Ibid.*, pp. 86-91.
[99] *Ibid.*, pp. 91-94 (referring to the Judgement, para. 113).
[100] *Ibid.*, pp. 95-96.
[101] *Ibid.*, p. 98.
[102] *Ibid.*, p. 99.
[103] *Ibid.*, pp. 99-100.
[104] *Ibid.*, p. 100.

case that his mere presence in or outside the Pantry "was calculated to give additional confidence" to Accused B.[105] He also submits that his case is to be contrasted with the *Almelo Trial* and the *Trial of Otto Sandrock and Three Others*, since there was no allegation or evidence that he knew that there was a common purpose behind the rape of Witness A or that he had gone to the Pantry for the very purpose of having Witness A raped.[106]

2. The Respondent

(a) The evidence was sufficient to convict the Appellant of torture

87. As regards the Appellant's argument that Witness D testified that the only interrogator in the Pantry was Accused B, the Respondent submits that there is no inconsistency between the testimony of Witnesses A and D as to whether Witness D was interrogated in the Pantry and that there is no failure on the part of the Trial Chamber to give a reasoned opinion on this particular issue.[107]

88. With respect to the Appellant's argument concerning his in-court identification by Witness A, the Prosecutor submits that a proper identification of the Appellant did not depend only on Witness A's evidence, but that Witness D's evidence, among others, was highly relevant, and that the totality of the evidence more than sufficiently identified the Appellant.[108]

89. As regards the Appellant's contention that the acts charged against him in the Amended Indictment, even if proven, do not constitute torture, the Prosecutor interprets that contention to include such issues as the insufficiency of the Amended Indictment, an error of law by the Trial Chamber in determining the elements of torture, the insufficiency of the evidence, and the lack of showing of a previous conspiracy or of evidence in support of a finding of action in concert.[109] The Prosecutor submits that the elements of torture committed in an armed conflict, as stated by the Trial Chamber in the Judgement, reflect a correct interpretation of the law.[110] It is submitted that there was sufficient and relevant evidence for the Trial Chamber to draw the factual conclusions to establish beyond reasonable doubt the elements of the offence of torture in this case.[111] The Prosecutor submits that neither the Statute and the Rules nor the jurisprudence of the International Tribunal require that each and every element of an offence be alleged in an indictment, and that, by failing to raise the insufficiency of the Amended Indictment at the pre-trial stage, the Appellant

[105] *Ibid.*
[106] *Ibid.*, p. 101.
[107] Prosecutor's Response, paras. 3.44-3.55. See *supra*, para. 55.
[108] Prosecutor's Response, para. 4.9.
[109] *Ibid.*, para. 4.17.
[110] *Ibid.*, para. 4.2.
[111] *Ibid.*, paras. 4.4-4.5.

effectively waived this argument.[112] Any challenge by the Appellant to the Trial Chamber's formulation of the elements of torture would constitute an error of law that requires *de novo* review. However, the Prosecutor considers that the determination by the Trial Chamber that the evidence proved the Appellant's guilt of torture beyond reasonable doubt should not be disturbed, as there is a reasonable basis for it.[113]

90. As to the question whether the Amended Indictment contained sufficient allegations of concerted action between Accused B and the Appellant, the Prosecutor submits that the Amended Indictment alleged that the Appellant was liable under Article 7(1) of the Statute, and that the *Tadić* Appeals Judgement establishes that liability for action in concert is contained within Article 7(1) of the Statute.[114] With respect to the need to demonstrate a conspiracy or a pre-existing plan, the Prosecutor argues that this is unnecessary, as the *Tadić* Appeals Judgement finds that individual criminal responsibility does not require a pre-existing plan between the parties.[115] The Prosecutor contends that the evidence provided a reasonable basis for the finding of co-perpetration, consistent with the *Tadić* Appeals Judgement,[116] and, in her view, established that the Appellant acted "in unison" with Accused B, performing different parts of the torture process.[117] The Prosecutor submits that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and must be assessed in its entirety.[118] It is her view that the Appellant has failed to demonstrate that the Trial Chamber's finding that the Appellant and Accused B acted in concert was unreasonable,[119] and that there is no requirement that there be proof of a pre-existing plan or design in order to find the accused criminally liable as a co-perpetrator; common design may be inferred from the circumstances of the case.[120]

91. The Prosecutor notes that Witness A testified that there was a relationship between the questions and the assaults,[121] and that the evidence demonstrated that the Appellant was seeking information from Witness A. Even assuming that the main purpose of the Appellant was to obtain information, in contrast with the purpose of Accused B, which was to humiliate and degrade

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[112] *Ibid.*, paras. 4.18-4.20.
[113] *Ibid.*, paras. 4.22-4.27.
[114] *Ibid.*, para. 4.28 (citing the *Tadić* Appeals Judgement, paras. 189-193).
[115] *Ibid.*, paras. 4.30-4.31 (citing the *Tadić* Appeals Judgement, para. 227).
[116] *Ibid.*, paras. 4.32-4.36 (citing the *Tadić* Appeals Judgement, paras. 190-206, 220).
[117] *Ibid.*, paras. 4.34-4.35.
[118] *Ibid.*, para. 4.36.
[119] *Ibid.*, para. 4.37.
[120] *Ibid.*, para. 4.37.
[121] *Ibid.*, paras. 4.38-4.39.

Witness A, that main purpose would not alter the individual criminal responsibility of the Appellant as co-perpetrator of torture.[122]

92. Contrary to the Appellant's argument that the Trial Chamber erred in finding Witness A to be reliable, the Prosecutor is of the view that the Trial Chamber had ample opportunity to assess all the submissions made on this issue and its determination should be given due weight.[123]

(b) The evidence was sufficient to convict the Appellant of the crime of outrages upon personal dignity including rape

93. It is the Prosecutor's view that the substance of the Appellant's arguments relates to the mode of participation, i.e., aiding and abetting, upon which the Appellant was found guilty of outrages upon personal dignity.

94. The Prosecutor addresses the three bases supporting the Appellant's arguments. First, as regards the Appellant's submission that the Prosecutor failed to prove beyond reasonable doubt that the Appellant conducted any interrogation in the Pantry, based on Witness D's testimony, the Prosecutor argues that the Trial Chamber's findings were reasonable and that Witness D's testimony corroborated Witness A's testimony as to the presence of the Appellant in the Pantry.[124] Secondly, concerning the Appellant's submission that Witness A's identification of the Appellant in court was unreliable, the Prosecutor contends that the totality of the evidence confirms the identity of the Appellant as the perpetrator of the crimes of which he now stands accused.[125] Thirdly, the Prosecutor submits that the Appellant's argument that the acts described in paragraph 26 of the Amended Indictment do not constitute aiding and abetting is based on the Appellant's misunderstanding of the case law cited in the Judgement. In support, the Prosecutor refers to the case law of the International Tribunal which establishes that a "knowing presence" that has a direct and substantial effect on the commission of the illegal act is sufficient "to base a finding of participation and assign the criminal culpability that accompanies it."[126]

95. Regarding the Appellant's argument that the allegations in paragraph 26 of the Amended Indictment did not meet the requirements for aiding and abetting reflected in the cases cited by the Trial Chamber, the Prosecutor submits that what is relevant to the appeal is not the allegations contained in the charging instrument, but the legal and factual findings contained in the

[122] *Ibid.*, para. 4.44.
[123] *Ibid.*, paras. 4.50-4.54.
[124] *Ibid.*, para. 3.61.
[125] *Ibid.*, para. 4.9.
[126] *Ibid.*, paras. 4.59-4.60 (citing *Prosecutor v. Duško Tadić,* Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, paras. 689-692; *Prosecutor v. Delalić et al.,* Case No. IT-96-21-T, Judgement, 16 Nov. 1998 ("the *Čelebići* Judgement"), paras. 327-328).

Judgement.[127] Overall, the Prosecutor submits that the Appellant must demonstrate that the findings of the Trial Chamber are inconsistent with existing international customary law and with other decisions of this Tribunal and consequently cannot constitute the basis for determining individual criminal responsibility.[128]

3. Appellant in Reply

96. The Appellant submits that the evidence is insufficient to support the Trial Chamber's finding of his guilt beyond reasonable doubt.[129] He argues that there is no direct evidence of concerted action and that the inference could be drawn that there was no concert of action between him and Accused B.[130] He also argues that, given the unreliability of Witness A's testimony, there is no evidence that he did anything to Witness A or that he shared any criminal purpose with Accused B.[131] He contends that the testimony of Witness D raises a reasonable doubt as to the reliability of Witness A's testimony.[132]

97. The Appellant also claims that there is reasonable doubt as to whether he was present at the time the offences were committed, whether his presence was "approving" and further, whether his authority could have assisted in the commission of the offence. He argues that the Prosecutor failed to prove beyond reasonable doubt that he gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that the Appellant knew that his acts assisted Accused B in the commission of the rape.[133]

B. Discussion

98. At the outset, this Chamber identifies the constituent bases of this ground of appeal as follows. First, there is the alleged failure of the Trial Chamber to address fully Witness D's testimony in relation to its findings of events in the Pantry. That testimony, according to the Appellant, shows that he did not conduct an interrogation while Accused B beat Witnesses A and D and sexually assaulted Witness A. Secondly, the courtroom identification of the Appellant by Witness A was not reliable, in view of her previously stated impression of him. Thirdly, the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of

[127] *Ibid.*, para. 4.72.
[128] *Ibid.*, paras. 4.74-4.75.
[129] Appellant's Reply, pp. 24-26.
[130] *Ibid.*, p. 25.
[131] *Ibid.*, p. 26.
[132] *Ibid.*, pp. 26-27.
[133] *Ibid.*, pp. 26-38.

torture. Fourthly, the Prosecutor did not prove beyond reasonable doubt that the Appellant was a co-perpetrator of the crime of torture. Fifthly, Witness A's testimony is not reliable as it was given in a state of post-traumatic stress disorder. Lastly, the mere presence of the Appellant at the scene of the acts charged in paragraph 26 of the Amended Indictment did not constitute aiding or abetting.

99. These elements will be dealt with separately. Before embarking on an analysis of the issues raised by this ground, the Chamber reiterates its conclusions set out above: an appellant who argues an error of fact must establish that the Trial Chamber's findings "could not reasonably have been accepted by any reasonable person",[134] and that the error was a decisive factor in the outcome. An appellant who argues an error of law must also show that the error invalidated the decision.

1. Witness D's Testimony

100. The Trial Chamber found that both Witnesses A and D were interrogated in the Pantry.[135] The Appellant submits that, contrary to the testimony of Witness A, Witness D's testimony showed that the Appellant did not interrogate anyone in the Pantry, and that the Appellant was not present when Witness D was in the Pantry with Witness A and Accused B. The Prosecutor argues that the Trial Chamber relied on the evidence given by Witness D as to the presence of the Appellant in the Pantry,[136] and that Witness D's evidence showed that the events in the Large Room and in the Pantry were part of a single process, whereby the Appellant sought information from both Witness A and Witness D. The Appellant brought in the latter to confront Witness A in the Pantry, having failed to obtain satisfactory answers from her in the Large Room.[137] According to Witness A's testimony, Witness D was questioned by the Appellant in the Pantry.

101. The evidence relied upon by the Trial Chamber in the Judgement reveals the following. Witness A gave evidence that the Appellant was standing in the doorway to the Pantry or in that room during the attacks on Witness D and the subsequent sexual assaults on Witness A,[138] and further testified that she and Witness D were interrogated by the Appellant in the Pantry.[139] Witness D testified that, when he entered the Pantry, the Appellant was there, and that the Appellant remained in the vicinity of the doorway to the Pantry.[140] Witness D's evidence thus supports the testimony of Witness A that the Appellant was present in the Pantry or at least in the doorway to

[134] *Tadić* Appeals Judgement, para. 64.
[135] Judgement, para. 127.
[136] Prosecutor's Response, para. 3.59.
[137] *Ibid.*, para. 3.61.
[138] Judgement, para. 87.
[139] *Ibid.*, paras. 86-87.
[140] *Ibid.*

that room. It is Witness D's testimony that he did not recall if anything was said while he was being beaten in the Pantry that the Appellant argues gives rise to reasonable doubt as to whether the Appellant conducted an interrogation in the Pantry. However, given that this testimony of Witness D relates solely to the question whether he was interrogated by the Appellant while he was being beaten by Accused B, Witness D's testimony is not dispositive on the question whether the Appellant interrogated Witness A in the Pantry at any time during her confinement in that room. Moreover, Witness D was only in the Pantry for part of the period of Witness A's confinement in that room, and consequently his testimony does not cover events in the Pantry before his entry, or after his departure. Witness D did testify that upon leaving the Pantry he heard the screams of Witness A and a soldier's voice calling out the name of Furundžija.[141] The Appeals Chamber takes the view that it was not unreasonable for the Trial Chamber to conclude, based upon a consideration of the testimony of both Witnesses A and D, that the Appellant interrogated Witness A in the Pantry.

102. For these reasons, this element of the ground must fail.

2. Courtroom Identification

103. The Appellant argues that Witness A's description of the Appellant contained in her 1995 statement differed in significant respects from her in-court description and identification of the Appellant. He further submits that Witness A's in-court identification of the Appellant is the only evidence that the Appellant was present in the Large Room and that the Trial Chamber should have found an independent basis for identifying the Appellant. Further, he recalls that the Prosecutor never asked Witness A to identify him in court, but only asked whether the voice of the person who questioned her in the Pantry was the same as the voice of the person who questioned her in the Large Room.[142] The Prosecutor submits that Witness A's identification of the Appellant as the individual who interrogated her in the Large Room is supported by the uncontested evidence of Witness D.[143]

104. The Trial Chamber made the following finding in relation to the identification of the Appellant by Witness A:

> The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also

[141] *Ibid.*, para. 88.
[142] Appellant's Amended Brief, p.79.
[143] Prosecutor's Response, paras. 4.8-4.9 and 4.16.

> significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundžija, the Boss. The inconsistencies in her identification testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has been sufficiently identified by Witness A.[144]

105. The Judgement shows that, in reaching this conclusion, the Trial Chamber carefully considered the significance of the differences in Witness A's 1995 description of the Appellant's appearance and his actual appearance.[145] The Trial Chamber appears to have accepted Witness A's explanation on this point. The Trial Chamber was further persuaded by Witness A's recognition of the Appellant when she saw him briefly on a BBC television news broadcast. In this regard, the Trial Chamber cited Witness A's testimony that, when she saw the Appellant on television, she recalled thinking that he had put on weight.[146]

106. Moreover, Witness A's in-court identification is not the sole evidence identifying the Appellant as present in the Large Room; there is other evidence to confirm this. This includes the testimony of Witness A of the arrival of the commander of the Joker unit, addressed by his subordinates as "the Boss" or "Furundžija", in the Large Room where she was interrogated by him immediately after his arrival.[147] Witness A further testified that the Appellant had been irritated by her not giving satisfactory answers to his questions there, and that he had gone to set up the confrontation in the Pantry with another person who later turned out to be Witness D.[148] Both Witness A and Witness D identified the Appellant as being present in the doorway to the Pantry during the events that subsequently unfolded in that room as charged in the Amended Indictment.[149] The Appeals Chamber notes that the Appellant has not addressed any of these arguments in his reply to the Prosecutor's Response.

107. In sum, the Appeals Chamber can find no fault with the Trial Chamber's treatment of the courtroom identification of the Appellant, and notes that, in any event, there was other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant.

108. For these reasons, this element of the ground must fail.

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[144] Judgement, para. 114.
[145] *Ibid.*, para. 78.
[146] *Ibid.*
[147] *Ibid.*, para. 77.
[148] *Ibid.*, para. 83.
[149] *Ibid.*, para. 86.

3. Whether the Acts Charged in the Amended Indictment Constitute Torture

109. The Appellant argues that the Prosecutor failed to prove that the acts charged in the Amended Indictment constituted the crime of torture. He submits that the Trial Chamber failed to consider whether the acts of Accused B in the Large Room, for which the Appellant was subsequently convicted as a co-perpetrator, were serious enough to amount to torture.[150] The Prosecutor submits that the findings of the Trial Chamber that torture was committed should not be disturbed on appeal, considering that there was a reasonable factual basis for them.[151]

110. Those arguments raised by the Appellant under this heading which relate to the Appellant's conviction as a co-perpetrator of torture will be dealt with in relation to the next element of this ground.

111. The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention",[152] and takes the view that the definition given in Article 1 reflects customary international law.[153] The Appellant does not dispute this finding by the Trial Chamber. The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:

> (i) . . . the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
>
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.[154]

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[150] Appellant's Amended Brief, pp. 84-86.
[151] Prosecutor's Response, paras. 4.23-4.25.
[152] Judgement, para. 161. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984 and entered into force on 26 June 1987.
[153] Article 1 of the Torture Convention defines torture in the following terms: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[154] Judgement, para. 162.

Under this definition, in order to constitute torture, the accused's act or omission must give rise to "severe pain or suffering, whether physical or mental."

112. In respect of the events in the Large Room, the Trial Chamber said:

> The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[155]

113. The Trial Chamber based this conclusion upon its findings that Witness A was interrogated in the Large Room in a state of nudity, and that, "[a]s she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused."[156] It is difficult to ignore the intimidating and humiliating aspects of that scene and their devastating impact on the physical and mental state of Witness A. The act of Accused B rubbing his knife against Witness A's inner thighs and threatening to put his knife inside her vagina was carried out parallel to the interrogation of Witness A by the Appellant. The entire scene was marked by the Appellant's showing of his annoyance with Witness A and the laughter and stares of the on-looking soldiers.

114. The Appeals Chamber finds this element of the ground to be unmeritorious. It also finds it inconceivable that it could ever be argued that the acts charged in paragraph 25 of the Amended Indictment, namely, the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, once proven, are not serious enough to amount to torture. This element of the second ground of appeal must fail.

4. Co-perpetration

115. The Appellant submits that in order to sustain his conviction as a co-perpetrator of torture, it must be proved that there was a "direct connection" between the Appellant's questioning and the infliction on Witness A of severe pain or suffering, whether physical or mental.[157] He also submits that "[w]hat is missing in this case is any allegation *or* proof that Mr. Furundžija participated in any crime, *i.e.*, intentionally acted *in concert with* Accused B in questioning Witness A", and that there was no such allegation contained in the Amended Indictment, nor was proof offered at the trial in this regard.[158] He comments on the evidence of Witness A thus:

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[155] *Ibid.*, para. 264.
[156] *Ibid.*
[157] Appellant's Amended Brief, p.84.
[158] *Ibid.*, p.85.

> Witness A's testimony shows only that Accused B's actions took place during Mr. Furundžija's alleged interrogation of Witness A; it does not show that Mr. Furundžija planned, agreed, or intended that Witness A would be touched or threatened in any way in the course of his questioning. There is no evidence that Mr. Furundžija invited or encouraged Accused B's actions or threats, or that he endorsed them in any way.[159]

116. The Appellant was charged under Article 7(1) of the Statute which, in the Prosecutor's submission, clearly covers liability for action in concert and does not require that a pre-existing "conspiracy", "agreement" or "plan" between the offenders be proved beyond reasonable doubt,[160] in order for the Trial Chamber to find the Appellant to be a co-perpetrator of torture.

117. The Appeals Chamber notes that the Appellant did not challenge the Trial Chamber's use of the definition of co-perpetrator found in Article 25 of the Rome Statute.[161] Article 25 of the Rome Statute states in relevant part:

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

118. The Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other".[162] It further stated that, to distinguish a co-perpetrator from an aider or abettor, "it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person)".[163] It then concluded that, to be convicted as a co-perpetrator, the accused "must participate in an integral part of the torture and partake of the purpose behind the torture, that is the

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[159] *Ibid.*, p.89.
[160] Prosecutor's Response, para. 4.31.
[161] Judgement, para. 216 (referring to the Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF.183/9 ("the Rome Statute")).
[162] *Ibid.*
[163] *Ibid.*, para. 252 (original emphasis).

intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person".[164]

119. This Chamber, in a previous judgement, identified the legal elements of co-perpetration. It is sufficient to recall the Chamber's conclusion in that Judgement in relation to the need to demonstrate a pre-existing design:

> There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. [165]

120. There is no dispute that the Appellant sought certain information from Witness A in the events relevant to this case. There is also no dispute that the various physical attacks in the Large Room and in the Pantry were not committed by the Appellant, but by Accused B. According to the Trial Chamber's factual findings,[166] the Appellant was present both in the Large Room and the Pantry interrogating Witness A while the offences charged in the Amended Indictment took place. The Appeals Chamber agrees with the Prosecutor's submission that the events in this case should not be artificially divided between the Large Room and the Pantry, as the process was a continuum and should be assessed in its entirety. Once the abuses started and continued successively in two rooms, the interrogation did not cease. There was no need for evidence proving the existence of a prior agreement between the Appellant and Accused B to divide the interrogation into the questioning by the Appellant and physical abuse by Accused B. The way the events in this case developed precludes any reasonable doubt that the Appellant and Accused B knew what they were doing to Witness A and for what purpose they were treating her in that manner; that they had a common purpose may be readily inferred from all the circumstances, including (1) the interrogation of Witness A by the Appellant in both the Large Room while she was in a state of nudity, and the Pantry where she was sexually assaulted in the Appellant's presence; and (2) the acts of sexual assault committed by Accused B on Witness A in both rooms, as charged in the Amended Indictment. Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.

121. For these reasons, this element of the ground must fail.

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[164] *Ibid.*, para. 257.
[165] *Tadić* Appeals Judgement, para. 227.
[166] Judgement, paras. 124-130.

5. Post-Traumatic Stress Disorder (PTSD)

122. This issue was the subject of the re-opened proceedings at which several experts testified. The weight of the expert testimony, PTSD's impact upon memory, and the effect of treatment of PTSD on memory, were fully argued before the Trial Chamber which, having examined the inconsistencies in Witness A's evidence, held that:

> 108. ...Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had....
>
> 109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.[167]

123. Under the standard established in the *Tadić* Appeals Judgement, the Appeals Chamber will only disturb a finding of fact by the Trial Chamber where "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person. . .".[168] In the re-opened proceedings, numerous experts gave evidence on the potential effects of PTSD on memory. The Trial Chamber was best placed to assess this evidence and to draw its own conclusions.[169] The Appeals Chamber can find no reason to disturb these findings and accordingly this element must fail.

6. Presence of the Appellant and Aiding and Abetting

124. The Appellant raises three points in connection with his conviction for aiding and abetting outrages upon personal dignity including rape. First, the Prosecutor failed to prove that the Appellant interrogated anyone in the Pantry. The Trial Chamber failed to cite any authority to support the proposition that presence alone would implicate the Appellant as an aider and abettor.[170] Secondly, the allegations in paragraph 26 of the Amended Indictment do not meet the requirements for aiding and abetting set forth in the cases cited by the Trial Chamber.[171] Thirdly, the Prosecutor did not prove beyond reasonable doubt that the Appellant gave Accused B assistance, encouragement, or moral support that had a substantial effect on the perpetration of the rape or that

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[167] Judgement, paras. 108-109.
[168] *Tadić* Appeals Judgement, para. 64.
[169] Judgement, paras. 96-109.
[170] Appellant's Amended Brief, pp. 95-97.
[171] *Ibid.*, pp. 97-101.

he knew that his acts assisted Accused B in the commission of the rape.[172] The reasons are that the Appellant never interrogated anyone in the Pantry, that Witness D's evidence conflicts with that of Witness A, and that mere presence would not constitute aiding and abetting.

125. The Prosecutor replies that the case law of the International Tribunal establishes that "knowing presence" that has a substantial effect on the commission of an offence is sufficient for a finding of participation and attendant liability.[173] Further, as to the second point of the Appellant, the Prosecutor considers that the Appellant failed to identify and discuss any legal finding of the Trial Chamber in the Judgement.[174] The cases were cited by the Trial Chamber in its inquiry into whether there were relevant rules of customary law on this point.[175] As to the third point, the Prosecutor refers to its various replies in relation to the reasons given by the Appellant.

126. The Trial Chamber found that the Appellant's "presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him".[176] As the Trial Chamber found that the Appellant was not only present in the Pantry, but that he acted and continued to interrogate Witness A therein, it is not necessary to consider the issue of whether mere or knowing presence constitutes aiding and abetting.[177] Although the Appellant disputed Witness A's testimony in this regard, the Trial Chamber was in the best position to assess the demeanour of the witness and the weight to be attached to that testimony. This Chamber can find no reason to disturb this finding.

127. For the reasons given, this element of the second ground of appeal must fail and thus the second ground of appeal fails as a whole.

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[172] *Ibid.*, p. 102.
[173] Prosecutor's Response, para. 4.60.
[174] *Ibid.*, para. 4.63.
[175] *Ibid.*, para. 4.73.
[176] Judgement, para. 273.
[177] *Ibid.*, para. 266.

V. THIRD GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

128. The Appellant argues that the Defence was prejudiced by the Trial Chamber's admission of, and reliance on, evidence of acts not charged in the Indictment and which the Prosecutor never identified prior to trial as part of the charges against the Appellant.

(a) Evidence concerning other acts in the Large Room and the Pantry

129. The Appellant submits that, despite having ruled in its Decision of 12 June 1998 and the Confidential Decision of 15 June 1998 that it would only consider Witness A's testimony as relating to paragraphs 25 and 26 of the Amended Indictment, the Trial Chamber made factual and legal findings relating to facts not alleged in the Amended Indictment, which led to his conviction for torture. These include findings that the Appellant (i) interrogated Witness A while she was in a state of forced nudity, (ii) threatened in the course of his interrogation to kill Witness A's sons, and (iii) abandoned Witness A in the Large Room to further assaults by Accused B.[178]

(b) Evidence of alleged acts committed by the Appellant which are unrelated to Witness A

130. The Appellant refers to specific paragraphs in the Judgement to support the proposition that the Trial Chamber allowed the Prosecutor to introduce evidence concerning events which are unrelated to the acts with which the Appellant is charged. In this regard, the Appellant points in particular to the events which occurred in the village of Ahmići on 16 April 1993. He also contests the alleged finding by the Trial Chamber of his guilt of persecution, a crime with which he was not charged.[179]

(c) Violation of Rule 50 by the Prosecutor and the Trial Chamber: Evidence of acts not charged in the Amended Indictment

131. Rule 50 of the Rules sets forth the procedure for amending indictments. The Appellant contends that by attempting to amend the Amended Indictment through proof at trial, the Prosecutor violated Rule 50, and that, by admitting the evidence and finding him guilty of a crime without

[178] Appellant's Amended Brief, pp. 103-104.
[179] *Ibid.*, pp. 104-105.

giving him notice of charges relating to the village of Ahmići, the Trial Chamber violated Rule 50.[180]

2. The Respondent

132. The Respondent submits that under this ground of appeal, the Appellant must demonstrate that the Trial Chamber erred in concluding that the evidence was within the scope of the Amended Indictment and that such evidence was relied upon by the Trial Chamber to convict the Appellant.[181]

(a) Evidence concerning other acts in the Large Room and the Pantry

133. The Respondent submits that, neither before nor during trial did the Appellant seek to exclude the evidence which he claims to be at variance with the Amended Indictment. The Respondent contends that the issue is being raised for the first time on appeal.[182]

134. The Respondent submits that, although the Trial Chamber includes sexual assaults by Accused B in the Large Room in the factual findings, these assaults are not mentioned in the legal findings.[183] Overall, the Respondent submits that (i) the factual findings were not at variance with the Amended Indictment, (ii) even if they were at variance, this would be permissible in light of their minor nature, and (iii) even if the Trial Chamber erred in finding facts allegedly outside the scope of the Amended Indictment, there has been no showing that this would invalidate the decision.[184]

135. As regards acts not charged in the Amended Indictment, the Respondent submits that Article 18(4) of the Statute and Rule 47 of the Rules prescribe that an indictment should identify the suspect's name and particulars and provide a concise statement of the facts and of the crime with which the suspect is charged.[185] The Respondent indicates that the case law of the International Tribunal demonstrates that an indictment must contain information that permits an accused adequately to prepare his defence. The Respondent notes that, in two recent decisions, a distinction has been drawn between the material facts underpinning the charges and the evidence that goes to prove those facts.[186]

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[180] *Ibid.*, pp. 105-106.
[181] Prosecutor's Response, para. 5.11.
[182] *Ibid.*, para. 5.8.
[183] *Ibid.*, para. 5.9.
[184] *Ibid.*, para. 5.10.
[185] *Ibid.*, para. 5.14.
[186] *Ibid.*, para. 5.17 (citing *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 Feb. 1999, para. 12; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-PT,

136. As regards the evidence challenged by the Appellant as being at variance with the Amended Indictment, which concerns the manner in which the interrogation alleged in the Amended Indictment was carried out, the Respondent submits that it constitutes evidence which "relates to Paragraphs 25 and 26 as pleaded in the Indictment against the Accused" and is therefore admissible pursuant to the Trial Chamber's own order.[187]

137. With respect to the evidence that the Appellant threatened to kill Witness A's sons during the course of the interrogation, the Respondent submits that there is no indication that the Trial Chamber relied upon this evidence in convicting the Appellant.[188] The Respondent further submits that the evidence relating to the assaults against Witness A by Accused B after the Appellant's departure from the Large Room relates to the ongoing acts which occurred during the course of the interrogation and was not relied upon in convicting the accused.[189]

138. The Respondent alleges that, even if the evidence were at variance with the Amended Indictment, such variance would be permissible, as it did not alter the scope of the charges against the Appellant, nor did it affect his right to be notified of the charges against him (the Appellant received sufficient notification of the precise nature of the charges in the pre-trial documents disclosed).[190] The Respondent concludes that the Appellant's failure to seek to have the evidence excluded constitutes a waiver of the issue on appeal.[191]

(b) Evidence of alleged acts by Appellant unrelated to Witness A

139. As regards the Appellant's argument that he was found guilty of the crime of persecution, the Respondent submits that the Appellant was not found guilty of persecution, but that the evidence was properly admitted to prove the existence of an armed conflict and the nexus of the Appellant to that armed conflict.[192]

(c) Allowing evidence not charged in the Indictment violates Rule 50

140. With respect to the Appellant's argument that the Respondent violated Rule 50 of the Rules by attempting to further amend the Amended Indictment through evidence submitted at trial, the Respondent reiterates that the evidence was not at variance with the Amended Indictment, that even

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Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999; and also *Prosecutor v. Tadić*, Case No. IT-94-1-PT, Decision on the Defence Motion on the Form of the Indictment, 14 Nov.1995, paras. 6-8).

[187] *Ibid.*, para. 5.21.
[188] *Ibid.*, para. 5.24.
[189] *Ibid.*, paras. 5.25-5.26.
[190] *Ibid.*, para. 5.30.
[191] *Ibid.*, para. 5.31.
[192] *Ibid.*, paras. 5.32-5.38.

if the evidence were at variance, that variance would be permissible, and that the evidence submitted was directly relevant to the charges.[193]

3. Appellant in Reply

141. The Appellant rejects the Respondent's interpretation of this ground of appeal. The Appellant indicates that his argument is that he was misled and that the Amended Indictment failed to provide sufficient notice of the proof that would be offered at trial. Instead, the Appellant submits, he was tried and convicted on the basis of acts which either fell outside the scope of the Amended Indictment or were ordered by the Trial Chamber to be excluded pursuant to its Decisions dated 12 June 1998 and 15 June 1998.[194] The Appellant argues that the Trial Chamber's findings of facts as contained in paragraphs 120-130 of the Judgement "relate to acts that are outside the scope of [Amended Indictment]" and should have been excluded.[195]

142. The Appellant submits that "[a]n Indictment defines and circumscribes the elements of the crimes for which a defendant can be convicted. The Trial Chamber cannot convict a defendant of crimes not charged in the Indictment or crimes committed by means of acts not set forth in the Indictment."[196]

143. As regards the crime of torture specifically, the Appellant submits that he was found guilty of torture on the basis of a particular course of conduct not charged in the Amended Indictment or committed by means of acts not set forth in the Amended Indictment.[197]

B. Discussion

144. The Appellant submits that, notwithstanding the assurance given by the Trial Chamber, the latter made factual findings inconsistent with the Amended Indictment and its decisions of 12 and 15 June 1998. In this regard, the Appellant refers specifically to the factual findings listed in paragraphs 124 -130 of the Judgement, which are as follows:

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[193] *Ibid.*, paras. 5.39-5.40.
[194] Appellant's Reply, pp. 39-40.
[195] *Ibid.*, p. 40.
[196] *Ibid.*, p. 41.
[197] *Ibid.*, p. 44.

In the Large Room:

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

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

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

In the Pantry:

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

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

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

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

145. The Appellant argues that in convicting him of torture, the Trial Chamber relied on evidence to make findings as to material facts not alleged in the Amended Indictment. Article 18 of the Statute provides in relevant part:

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

146. Moreover, Rule 47 of the Rules provides *inter alia* that:

> (C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

147. Under both the Statute and the Rules, as discussed in paragraph 61 above, there is no requirement that the actual evidence on which the Prosecutor relies has to be included in the indictment. Where, in the course of the trial, evidence is introduced which, in the view of the accused, does not fall within the scope of the indictment, or is within the scope but in relation to

which there is no corresponding material fact in the indictment, the defence may challenge the admission of the evidence or request an adjournment.

1. Evidence Concerning Other Acts in the Large Room and the Pantry

148. Trial Chambers have been consistently mindful of the primary function of the International Tribunal, which is to ensure that justice is done and that the accused receives a fair trial. It is, no doubt, in light of this preoccupation that in evaluating the testimony of Witness A, the Trial Chamber limited its consideration to that part of the testimony relating to the Amended Indictment. This exercise by the Trial Chamber is indicative of its sensitivity to any prejudice to the fairness of the trial that could result from Witness A's testimony. Consistent with this concern, the Trial Chamber acknowledged that "[t]he witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused", and that the relevant "evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecutor."[198] The Trial Chamber also remarked that during the proceedings the Prosecutor did not seek to modify the Amended Indictment to charge the Accused with participation in the rapes and sexual abuse.

149. It is on the basis of the aforementioned grounds that the Trial Chamber decided that "the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment."[199]

150. The factual allegations contained in paragraphs 25 and 26 of the Amended Indictment and pertaining to Counts 13 and 14 are as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDŽIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDŽIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDŽIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDŽIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.

[198] Judgement, para. 81 (citing the Confidential Prosecutor's Reply to Trial Chamber's Order, 1 May 1998, filed in this case).
[199] *Ibid.*

151. In its written decision of 12 June 1998, the Trial Chamber allowed the oral motion by the Defence and held that "in the circumstances, the Trial Chamber will only consider as relevant Witness A's evidence in so far as it relates to Paragraphs 25 and 26 as pleaded in the Indictment against the accused." In the written Confidential Decision issued on 15 June 1998, addressing the "Prosecutor's Request for Clarification of Trial Chamber's Decision Regarding Witness A's Testimony", the Trial Chamber "rules as inadmissible all evidence relating to rape and sexual assault perpetrated on [Witness A] by the individual identified as [Accused B] in the presence of the accused in the large room apart from the evidence of sexual assault alleged in paragraph 25 of the [Amended Indictment]."

(a) The interrogation of Witness A by the Appellant while she was in a state of forced nudity

152. In relation to the interrogation of Witness A while she was in a state of forced nudity, the Trial Chamber found that "[Witness A] was forced by Accused B to undress and remain naked before a substantial number of soldiers", and that "Witness A was left by the accused in the custody of Accused B."[200] Although the fact of Witness A's nudity appears in the Judgement under the section entitled "Legal Findings"[201] and was obviously a factor in arriving at the decision to convict, it was nonetheless permissible for the Trial Chamber to take account of it, since it fell within the scope of the acts alleged in the Amended Indictment.

153. In this context, the Appeals Chamber considers as correct the distinction made in *Krnojelac*[202] between the material facts underpinning the charges and the evidence that goes to prove those material facts. In terms of Article 18 of the Statute and Rule 47, the indictment need only contain those material facts and need not set out the evidence that is to be adduced in support of them. In the instant case, the Appeals Chamber can find nothing wrong in the Trial Chamber's admission of this evidence which supports the charge of torture, even though it was not specified in the Amended Indictment. It would obviously be unworkable for an indictment to contain all the evidence that the Prosecutor proposes to introduce at the trial.

(b) Alleged threats in the course of the Appellant's interrogation to kill Witness A's sons

154. In relation to this aspect of the third ground of appeal, the Trial Chamber accepted the evidence of Witness A about the nature of her interrogation by the Appellant.[203] This finding was

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[200] *Ibid.*, paras. 124-125.
[201] *Ibid.*, para. 264.
[202] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb. 1999, para. 12. See also *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 Apr. 1999, para. 14.
[203] Judgement, para. 65.

made in the context of the Trial Chamber's discussion of the link between the armed conflict and the Appellant, and did not form part of the legal findings underlying the Appellant's convictions.

(c) Witness A abandoned in the Large Room to further assaults by Accused B

155. The Trial Chamber found that "Witness A was left by the [Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her".[204] In this respect, the Appeals Chamber recalls paragraph 67 of this Judgement and reiterates that the finding was not one that influenced the Trial Chamber in coming to a decision to convict the Appellant. This is borne out by a review of the legal findings in Chapter 7 of the Judgement, and in particular paragraphs 264 – 269 relating to Count 13 (torture), which show that the Trial Chamber did not rely upon this evidence in convicting the Appellant. In paragraph 264, the Trial Chamber found that the Appellant

> was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.[205]

156. There is no reference in paragraph 264, or in any of the other paragraphs relating to these legal findings, to the evidence of Witness A being "left by [the Appellant] in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her."[206]

2. Evidence of alleged acts by the Appellant unrelated to Witness A

157. The Appellant submits the following findings by the Trial Chamber as evidence of acts unrelated to Witness A and upon which the Trial Chamber relied in convicting him:[207]

> The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmići. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians.[208]

> Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmići.[209]

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[204] *Ibid.*, para. 125.
[205] *Ibid.*, para. 264.
[206] *Ibid.*, para. 125.
[207] Appellant's Amended Brief, pp.104-105.
[208] Cf. Judgement, para. 51.
[209] Cf. *Ibid.*, para. 53.

> Witness B testified about the HVO attack on Ahmići. On 16 April 1993, she woke up to the sound of shooting and explosions. A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother. Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent. She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[210]
>
> Witness B also testified that during the attack on Ahmići, the accused was wearing a Jokers patch on his sleeve.[211]

158. The above paragraphs are not findings made by the Trial Chamber; rather they are the Trial Chamber's recitation of the factual allegations submitted by the Prosecutor. It is not of little consequence that these paragraphs of the Judgement are preceded by the heading: "The Prosecution Case".

159. The Appellant further submits that the Trial Chamber held that he "was an active combatant and participated in expelling Moslems from their homes."[212] This section in the Judgement comprises the factual findings of the Trial Chamber for purposes of the requirement under Article 3 of the Statute that the violations of the laws or customs of war occur during an armed conflict; thus the heading "The Link Between the Armed Conflict and the Alleged Facts".

160. Finally, the Appellant refers to the following legal findings of the Trial Chamber in support of his proposition that "the Trial Chamber found that Mr. Furundžija was guilty of the crime of persecution":[213]

> The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the Lašva Valley area, including the attack on the village of Ahmići, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described.[214]

161. The Appeals Chamber finds no support in the Judgement for the Appellant's contention that the Trial Chamber found him guilty of the crime of persecution.

3. Alleged violation of Rule 50 of the Rules

162. The Appeals Chamber finds wholly unmeritorious the argument that the Prosecutor violated Rule 50 by further amending the Amended Indictment through proof at trial. As discussed above, under Article 18 of the Statute and Rule 47 of the Rules, an indictment need only plead the material

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[210] Cf. *Ibid.*, para. 55.
[211] Cf. *Ibid.*, para. 62
[212] *Ibid.*, para. 65.
[213] Appellant's Amended Brief, p. 105.
[214] Judgement, para. 262.

acts underlying the charges and need not set out the evidence that is to be adduced in support of them.[215] The evidence admitted at trial did not alter the charges in the Amended Indictment.

163. Thus, this ground of appeal fails.

[215] Supra, para. 153.

VI. FOURTH GROUND OF APPEAL

164. The issue which has been raised as the fourth ground of appeal is that of recusal, namely, whether or not Judge Mumba, the Presiding Judge in the Appellant's trial was impartial or gave the appearance of bias. The allegations turn on her former involvement with the United Nations Commission on the Status of Women ("the UNCSW"). It is the nature of her involvement with this organisation and its implications on the Appellant's trial which have led the Appellant to assert that she should have been disqualified pursuant to Rule 15 of the Rules.

165. The Appeals Chamber finds it useful to set out initially the factual basis for the allegations made by the Appellant.

166. Judge Mumba has served as a Judge of the International Tribunal since her election on 20 May 1997. For a period of time prior to her election, she was a representative of the Zambian Government on the UNCSW.[216] At no stage was she a member of the UNCSW whilst at the same time serving as a Judge with the International Tribunal. The UNCSW is an organisation whose primary function is to act for social change which promotes and protects the human rights of women.[217] One of its concerns during Judge Mumba's membership of it was the war in the former Yugoslavia and specifically the allegations of mass and systematic rape. This concern was exhibited by its resolutions which condemned these practices and urged the International Tribunal to give them priority by prosecuting those allegedly responsible.[218]

167. The UNCSW was involved in the preparations for the UN Fourth World Conference on Women held in Beijing, China, 4-15 September 1995, and specifically participated in the drafting of the "Platform for Action," a document identifying twelve "critical areas of concern" in the area of women's rights and which contained a five-year action plan for the future, the aim being to achieve gender equality by the year 2000. Three of the critical areas of concern were particularly relevant to issues in the former Yugoslavia.[219] There was an Expert Group Meeting following the Beijing conference, whose purpose was to work towards achieving certain of the goals drawn from the

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[216] The Appellant states that Judge Mumba's term with the UNCSW was from 1992-1995 and this is not disputed by the Prosecutor (Appellant's Amended Brief, p. 122 and Prosecutor's Response, para. 6.28).

[217] Established by the United Nations Economic and Social Council ("ECOSOC") Resolution 11 (II) on 21 June 1946, Section 1 provides that "[t]he functions of the Commission shall be to prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, social and educational fields. The Commission shall also make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights." The Commission was subsequently enlarged by ECOSOC Resolutions 1987/22, 1987/23, and 1989/45.

[218] Both the Appellant and Respondent refer to several of these resolutions including, ECOSOC Resolution 38/9, ECOSOC Resolution 37/3 and ECOSOC Resolution 39/4.

[219] Critical Area D (Violence against Women), Critical Area E (Women and armed conflict) and Critical Area I (Human Rights of Women). United Nations Economic and Social Council, Commission on the Status of Women; *Report of the Commission on the Status of Women on its Fortieth Session,* U.N. Doc. E/199/27 (1996).

Beijing Conference and set out in the Platform for Action, including the reaffirmation of rape as a war crime, by the end of 1998. Three authors of one of the *amicus curiae* briefs later filed in the instant case[220] and one of the Prosecutors in the instant case, Patricia Viseur-Sellers ("the Prosecution lawyer"), attended this meeting.[221] This Expert Group proposed a definition of rape under international law.[222]

168. The Appeals Chamber notes that it is not so much that the parties dispute the factual basis of the Appellant's allegations, but rather that they differ in their interpretation of it and the relevance of it to the ground of appeal. For example, the parties do not dispute that Judge Mumba was involved in the UNCSW in the past, but they do dispute the nature of her involvement and the exact role which she played. The parties do not dispute that the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs may also have been involved in either the activities of the UNCSW on some level or the Expert Group Meeting, but they do dispute the extent of the contact they may have had with Judge Mumba and its impact on, or relevance to, the Appellant's trial.

A. Submissions of the Parties

1. The Appellant

169. The Appellant submits that because of Judge Mumba's personal interest in, and association with the UNCSW, the ongoing agenda or campaign of the Platform for Action, the three authors of one of the *amicus curiae* briefs, and the Prosecution lawyer, she should have been disqualified under Rule 15 of the Rules.[223] He argues that the test which should be applied by the Appeals Chamber in ascertaining if disqualification is appropriate is whether "a reasonable member of the public, knowing all of the facts [would] come to the conclusion that Judge Mumba has *or had* any associations, which *might* affect her impartiality."[224] Based on this test, he submits that Judge Mumba should have been disqualified as an appearance was created that she had sat in judgement

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[220] By orders of 10 and 11 November 1998, the Trial Chamber granted leave for two *amicus curiae* briefs to be filed, pursuant to Rule 74 of the Rules, which provides that, "[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to appear before it and make submissions on any issue specified by the Chamber." (Judgement, paras. 35 and 107).
[221] Prosecutor's Response, para. 6.29.
[222] United Nations Division for the Advancement of Women, *Report of the Expert Group Meeting, Toronto, Canada (9 – 12 November 1997)*, EGM/GBP/1997/Report.
[223] Appellant's Amended Brief, p. 121 and Appellant's Reply, pp. 46-47. Rule 15(A) provides: "A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case."
[224] Appellant's Reply, p. 46.

in a case that could advance and in fact did advance a legal and political agenda which she helped to create whilst a member of the UNCSW.[225]

170. The Appellant alleges that Judge Mumba continued to promote the goals and interests of the UNCSW and Platform for Action after her membership concluded, and contends that this was reflected directly in his trial. He does not allege that Judge Mumba was actually biased.[226] Rather, the issue was whether a reasonable person could have an apprehension as to her impartiality.[227] In this regard, he argues that a tribunal should not only be unbiased but should avoid the appearance of bias.[228] Hence the submission that there could be no other conclusion based on the above test than that Judge Mumba has or had associations which might affect her impartiality.[229]

2. The Respondent

171. The Respondent submits that the Appellant has failed to establish the existence of either a personal interest by Judge Mumba in the instant case, or the existence of an association or working relationship between Judge Mumba, the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer, such that she should have been disqualified. In addition, the Appellant has submitted no evidence to support an allegation that Judge Mumba exhibited actual bias or partiality.[230] The Prosecutor contends that the standard for a finding of bias should be high and that Judges should not be disqualified purely on the basis of their personal beliefs or legal expertise.[231] In the view of the Prosecutor, the Appellant has failed to meet the "reasonable apprehension" of bias standard.[232] The prior involvement of a Judge in a United Nations body such as the UNCSW cannot give rise to any reasonable apprehension that the Judge has an agenda which would cause him or her to be biased against an accused appearing before him or her. [233]

[225] *Ibid.*, p. 48 and Appellant's Amended Brief, p. 121.
[226] Appellant's Reply, p. 48.
[227] *Ibid.*, p. 49.
[228] Appellant's Amended Brief, p. 136.
[229] *Ibid.*, p.138.
[230] Prosecutor's Response, para. 6.33.
[231] *Ibid.*, paras. 6.50-6.54.
[232] *Ibid.*, para. 6.55.
[233] *Ibid.*, paras. 6.54–6.55.

B. Discussion

172. Before proceeding to consider this matter further, the Appeals Chamber makes two observations.

173. First, the Appellant states that he first discovered Judge Mumba's associations and personal interest in the case after judgement was rendered, and for this reason, only then raised the matter before the Bureau.[234] Although the Appeals Chamber has decided to consider this matter further, given its general importance,[235] it would point out that information was available to the Appellant at trial level, which should have enabled him to discover Judge Mumba's past activities and involvement with the UNCSW. The Appeals Chamber notes, in this context, public documentation issued by the International Tribunal, including, for example, its published yearbooks which contain sections devoted to biographies of the Judges elected to serve at the International Tribunal.[236] In addition, Public Information Service of the Tribunal, which is responsible for ensuring public awareness of the International Tribunal's activities, regularly publishes Bulletins and releases information on the International Tribunal's web-site. Both the Yearbook and the Public Information Service of the Tribunal provide official information to the public regarding such issues as the election of new Judges to the International Tribunal and details of a Judge's legal background. The information was freely available for the Appellant to discover.

174. The Appeals Chamber considers that it would not be unduly burdensome for the Appellant to find out the qualifications of the Presiding Judge of his trial. He could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On this basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss this ground of appeal.

175. These observations however, should not be construed as relieving an individual Judge of his or her duty to withdraw from a particular case if he or she believes that his or her impartiality is in question. This is in fact what Rule 15(A) of the Rules calls for when it says that the Judge shall in any such circumstance withdraw. The Appeals Chamber finds that Judge Mumba had no such duty for the reason that she had no potentially disqualifying personal interest or associations.

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[234] Appellant's Amended Brief, p. 121. The Appellant raised the matter before the Bureau by filing on 3 February 1999 the "Defendant's Post Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial."
[235] *Tadić* Appeals Judgment, paras. 247 and 281.
[236] *E.g.*, Yearbook of the International Tribunal (1997) stated that Judge Mumba was a member of the UNCSW from 1992-1995 (pp. 26-27).

176. The second observation is concerned with the additional material annexed to the Appellant's Amended Brief. It is to be recalled that, in an order dated 2 September 1999, the Appeals Chamber granted leave to the Appellant to amend his Appellate Brief, although not specifically admitting the material referred to in the "Defendant's Motion to Supplement Record on Appeal".[237] The Appeals Chamber confirms that, by granting leave to file an amended Appellate Brief, it granted leave to file the annexed documents, which the Appeals Chamber will take into account in considering the Appellant's submissions.

1. Statutory Requirement of Impartiality

177. The fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial. Article 13(1) of the Statute reflects this, by expressly providing that Judges of the International Tribunal "shall be persons of high moral character, *impartiality* and integrity".[238] This fundamental human right is similarly reflected in Article 21 of the Statute, dealing generally with the rights of the accused and the right to a fair trial.[239] As a result, the Appeals Chamber need look no further than Article 13(1) of the Statute for the source of that requirement.

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[237] Filed on 28 June 1999.

[238] (Emphasis added). Article 13(1) provides: "The Judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law." See also Arts. 2 and 11 of Statute of the International Tribunal for the Law of the Sea (Annex VI of United Nations Convention on the Law of the Sea of 10 December 1982); Art. 19 of Statute of the Inter-American Court of Human Rights (adopted by Resolution 448 by the General Assembly of the Organisation of American States at its ninth regular session held in La Paz, Bolivia, October 1979); Arts. 36(3)(a), 40 and 41 of the Rome Statute.

[239] Under Article 21(2) of the Statute, the accused is entitled to "a fair and public hearing" in the determination of the charges against him. Paragraph 106 of the Report of the Secretary General provides that "[i]t is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights." (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808(1993)). Article 14(1) of the ICCPR provides in relevant part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognised in other major human rights treaties. The Universal Declaration of Human Rights provides in Art. 10 that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him". Art. 6(1) of the European Convention on Human Rights protects the right to a fair trial and provides *inter alia* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Art. 8(1) of the American Convention provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law". Art. 7(1)(d) of the African Charter on Human and Peoples' Rights provides that every person shall have the right to have his case tried "within a reasonable time by an impartial court or tribunal."

178. However, it is still the task of the Appeals Chamber to determine how this requirement of impartiality should be interpreted and applied to the circumstances of this case. In doing so, the Appeals Chamber notes that, although the issue of impartiality of a Judge has arisen in several cases to date, before both the Bureau and a Presiding Judge of a Trial Chamber,[240] this is the first time that the Appeals Chamber has been seized of the matter.

2. Interpretation of the Statutory Requirement for Impartiality

179. Interpretation of the fundamental human right of an accused person to be tried by an impartial tribunal is carried out by considering situations in which it is alleged that a Judge is not or cannot be impartial and therefore should be disqualified from sitting on a particular case. A two-pronged approach appears to have developed. Although interpretation on a national or regional level is not uniform, as a general rule, courts will find that a Judge "might not bring an impartial and unprejudiced mind"[241] to a case if there is proof of actual bias or of an appearance of bias.

180. The Appellant acknowledges that he "makes no claim that Judge Mumba was actually biased".[242] The Appeals Chamber will proceed on this basis.

181. The European Convention on Human Rights has generated a large amount of jurisprudence on the interpretation of Article 6 of that Convention which provides, *inter alia,* that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." In the view of the European Court of Human Rights:

> Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6§1 (art.6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given Judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.[243]

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[240] In each case, application has been made under Rule 15(B) of the Rules and considered by either the Presiding Judge of the Chamber in question who confers with the Judge in question, or if necessary, the matter is determined by the Bureau. See for example, *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, Decision of the Bureau on Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 1 Oct. 1999; *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, Decision of the Bureau on Motion on Judicial Independence, 4 Sept. 1998; *Prosecutor v. Dario Kordić et al.,* Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998; *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Talić* Decision").

[241] *Talić* Decision, para. 15.

[242] Appellant's Reply, p. 48.

[243] *Piersack v. Belgium,* Judgment of 21 September 1982, Eur. Ct. H. R., Series A, No. 53 ("*Piersack*"), para. 30. This test has been confirmed and applied in *De Cubber v. Belgium*, Judgment of 26 October 1984, Eur. Ct. H. R., Series A, No.86 ("*De Cubber*"), para. 24; *Hauschildt v. Denmark,* Judgment of 24 May 1989, Eur. Ct. H. R., Series A, No. 154 ("*Hauschildt*"), para. 46; *Bulut v. Austria,* Judgment of 22 February 1996 Eur. Ct. H. R, Series A, No.5 ("*Bulut*"), para

182. In considering subjective impartiality, the Court has repeatedly declared that the personal impartiality of a Judge must be presumed until there is proof to the contrary.[244] In relation to the objective test, the Court has found that this requires that a tribunal is not only genuinely impartial, but also appears to be impartial. Even if there is no suggestion of actual bias, where appearances may give rise to doubts about impartiality, the Court has found that this alone may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.[245] The Court considers that it must determine whether or not there are "ascertainable facts which may raise doubts as to...impartiality."[246] In doing so, it has found that in deciding "whether in a given case there is a legitimate reason to fear that a particular Judge lacks impartiality the standpoint of the accused is important but not decisive.... *What is decisive is whether this fear can be held objectively justified.*"[247] Thus, one must ascertain, apart from whether a judge has shown actual bias, whether one can apprehend an appearance of bias.

183. The interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention.

184. Nevertheless, the rule in common law systems varies. In the United Kingdom, the court looks to see if there is a "real danger of bias rather than a real likelihood",[248] finding that it is "unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[249] However, other common law jurisdictions have rejected this test as being too strict, and cases such as *Webb, R.D.S.,* and the *South African Rugby Football Union* case use the reasonable person as the arbiter of bias, investing him with the requisite knowledge of the circumstances before an assessment as to impartiality can be made.

31; *Castillo Algar v. Spain,* Judgment of 28 October 1998, Eur. Ct. H. R., Series A, No.95 (*"Algar"*), para. 43; *Incal v. Turkey,* Judgment of 9 June 1998, Eur. Ct. H. R , Series A, No.78 (*"Incal"*), para. 65.

[244] See *Le Compte, Van Leuven and de Meyere,* Judgment of 27 May 1981, Eur. Ct. H. R., Series A, No. 43, para. 58 (*"Le Compte"); Piersack,* para. 30; *De Cubber,* para. 25. In fact, there has yet to be a case in which a violation of Article 6 has been found under this element of the test.

[245] See *Sramek v. Austria,* Judgment of 22 October 1984, Eur. Ct. H. R., Series A, No.84, para.42; *Campbell and Fell v. United Kingdom,* Judgment of 28 June 1984, Eur. Ct. H. R., Series A, No.80, para. 85.

[246] *Hauschildt,* para. 48.

[247] *Ibid.* (emphasis added). See also *Algar,* para. 45*; Incal,* para. 71 and *Bulut,* para. 33.

[248] *R v. Gough,* [1993] A.C. 646 at 661.

[249] *Ibid.*

185. In the case of *Webb*, the High Court of Australia found that, in determining whether or not there are grounds to find that a particular Judge is partial, the court must consider whether the circumstances would give a fair-minded and informed observer a "reasonable apprehension of bias".[250] Similarly, the Supreme Court of Canada identified the applicable test for determining bias to be whether words or actions of the Judge give rise to a reasonable apprehension of bias to the informed and reasonable observer: "This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances".[251]

186. A recent case to confirm the above formula is the *South African Rugby Football Union Case,*[252] where the Supreme Court of South Africa stated that "[t]he question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." [253]

187. In the United States a federal Judge is disqualified for lack of impartiality where "a reasonable man, cognisant of the relevant circumstances surrounding a Judge's failure to recuse himself, would harbour legitimate doubts about the Judge's impartiality."[254]

188. This is also the trend in civil law jurisdictions, where it is required that a Judge should not only be actually impartial, but that the Judge should also appear to be impartial.[255] For example, under the German Code of Criminal Procedure, although Articles 22 and 23 are the provisions setting down mandatory grounds for disqualification, Article 24 provides that a Judge may be challenged for "fear of bias" and that such "[c]hallenge for fear of bias is proper if there is reason to distrust the impartiality of a Judge". Thus, one can challenge a Judge's partiality based on an

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[250] *Webb v. The Queen* (1994) 181 CLR 41, 30 June 1994. The court reasoned that "public confidence in the administration of justice is more likely to be maintained if the Court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question."

[251] *R.D.S. v. The Queen* (1997) Can. Sup. Ct, delivered 27 September 1997.

[252] *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application,* 1999 (7) BCLR 725 (CC), 3 June 1999 (*"South African Rugby Football Union").*

[253] *Ibid.,* para. 48.

[254] *U.S. v. Bremers et al.,* 195 F. 3d 221, 226 (5th Cir. 1999). Disqualification is governed by 28 USCS, Section 455 (2000), which provides that a Judge shall disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The Supreme Court has stated that "[t]he goal of section 455(a) is to avoid even the appearance of impartiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (citing *Hall v. Small Administration*, 695 F.2d 175, 179 (5th Cir. 1983).

[255] *See e.g.,* Arts. 22-24, German Code of Criminal Procedure (Strafprozeβordnung), Art 668 of the French Code de Procédure Pénale, Arts. 34-36, Italian *Codice de Procedura Penale,* and Arts. 512-519 of the Dutch Code of Criminal Procedure (Wetboek van Strafvordering). It should also be noted that as a general rule, these civil law systems also consider actual bias as being grounds for disqualification.

objective fear of bias as opposed to having to assert actual bias. Similarly in Sweden, a Judge may be disqualified if any circumstances arise which create a legitimate doubt as to the Judge's impartiality.[256]

3. A standard to be applied by the Appeals Chamber

189. Having consulted this jurisprudence, the Appeals Chamber finds that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
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> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[257]

190. In terms of the second branch of the second principle, the Appeals Chamber adopts the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[258]

191. The Appeals Chamber notes that Rule 15(A) of the Rules provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her

[256] Sections 13 and 14 of the Swedish Code of Judicial Procedure (1998).
[257] In the *Talić* Decision, it was found that the test on this prong is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question]... might not bring an impartial and unprejudiced mind" (para. 15).
[258] *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997.

> impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case. [259]

The Appeals Chamber is of the view that Rule 15(A) of the Rules falls to be interpreted in accordance with the preceding principles.

4. Application of the statutory requirement of impartiality to the instant case

(a) Actual Bias

192. As mentioned above,[260] the Appellant does not allege actual bias on the part of Judge Mumba. Accordingly, the Appeals Chamber sees no need to consider this aspect further in the instant case.

(b) Whether Judge Mumba was a party to the cause or had a disqualifying interest therein

193. With regard to the first branch of the second principle, the Appellant highlights the similarities in the circumstances of this case and that of *Pinochet*.[261] However, the *Pinochet* case is distinguishable from the instant case on at least two grounds.

194. First, whereas Lord Hoffmann was at the time of the hearing of that case a Director of Amnesty International Charity Limited, Judge Mumba's membership of the UNCSW was not contemporaneous with the period of her tenure as a Judge in the instant case.[262] Secondly, the close link between Lord Hoffmann and Amnesty International in the *Pinochet* case is absent here. As Lord Browne-Wilkinson said, "[o]nly in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties."[263] While Judge Mumba may have been involved in the same organisation, there is no evidence that she was closely allied to and acting with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the *Pinochet* case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three *amici*

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[259] Rule 14 also provides that a Judge must make a solemn declaration before taking up duties, in the following terms: "I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Tribunal…honourably, faithfully, impartially and conscientiously."
[260] *Supra*, para. 180.
[261] *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577 (*"Pinochet"*).
[262] Judge Mumba served on the UNCSW between 1992 and 1995.
[263] *Pinochet*, p. 589.

authors shared the goals of the UNCSW in general. There is, therefore, no basis for a finding in this case of partiality based on the appearance of bias test established in the *Pinochet* case.

(c) Whether the circumstances of Judge Mumba's membership of the UNCSW would lead a reasonable and informed observer to apprehend bias

195. The Appeals Chamber, in applying the second branch of the second principle, considers it useful to recall the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[264] The Appellant, relying on the findings in the *Pinochet* case, alleges that there was an appearance of bias, because of Judge Mumba's prior membership of the UNCSW and her alleged associations with the Prosecution lawyer and the three authors of one of the *amicus curiae* briefs.[265]

196. In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge. This presumption has been recognised in the jurisprudence of the International Tribunal,[266] and has also been recognised in municipal law. For example, the Supreme Court of South Africa in the *South African Rugby Football Union* case found:

> The reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.[267]

197. The Appeals Chamber endorses this view, and considers that, in the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal "can disabuse their minds of any irrelevant personal beliefs or predispositions." It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that Judge Mumba was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality . As has been stated, "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established.'"[268]

198. The Appellant suggests that, during her time with the UNCSW, Judge Mumba acted in a personal capacity and was "personally involved" in promoting the cause of the UNCSW and the Platform for Action. Consequently, she had a personal interest in the Appellant's case and, as this

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[264] *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.
[265] Appellant's Amended Brief, p. 127.
[266] See e.g., *Prosecutor v. Dario Kordić et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.
[267] *South African Rugby Football Union*, para. 48.
[268] Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352. Adopted in the subsequent Australian High Court decision in *Re Polities; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448.

created an appearance of bias, she should have been disqualified.[269] The Prosecutor argues that Judge Mumba acted solely as a representative of her country and, as such, was not putting forward her personal views, but those of her country.[270]

199. The Appeals Chamber finds that the argument of the Appellant has no basis. First, it is the Appeals Chamber's view that Judge Mumba acted as a representative of her country and therefore served in an official capacity. This is borne out by the fact that Resolution 11(II) of the UN Economic and Social Council that established the UNCSW provides that this body shall consist of "one representative from each of the fifteen Members of the United Nations selected by the Council."[271] Representatives of the UNCSW are selected and nominated by governments.[272] Although the Appeals Chamber recognises that individuals acting as experts in many UN human rights bodies do serve in a personal capacity, [273] the founding Resolution of the UNCSW does not provide for its members to act in such capacity. Therefore, a member of the UNCSW is subject to the instructions and control of the government of his or her country. When such a person speaks, he or she speaks on behalf of his or her country. There may be circumstances which show that, in a given case, a representative personally identified with the views of his or her government, but there is no evidence to suggest that this was the case here. In any event, Judge Mumba's view presented before the UNCSW would be treated as the view of her government.

200. Secondly, even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

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[269] Appellant's Amended Brief, pp. 122 and 135.
[270] Prosecutor's Response, paras. 6.13-6.15.
[271] Resolution adopted 21 June 1946, section 2(a).
[272] *Ibid.* Section 2(b) provides that "[W]ith a view to securing a balanced representation in the various fields covered by the Commission, the Secretary-General shall consult with the governments so selected before the representatives are finally nominated by these governments and confirmed by the Council."
[273] *E.g.*, Art. 17 of the Convention on the Elimination of Discrimination against Women (entering into force on 3 September 1981) which calls for the establishment of the Committee on the Elimination of Discrimination against Women to monitor the above, states that the "experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity..." Similarly, such language which expressly provides that members of committees shall act in their personal capacity is found in Art. 43(2) of the Convention on the Rights of the Child establishing the Committee on the Rights of the Child; Art. 8(1) of the International Convention on the Elimination of All Forms of Racial Discrimination establishing the Committee on the Elimination of all forms of Racial Discrimination; Art. 17(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishing the Committee against Torture; and Art. 28(3) of the International Covenant on Civil and Political Rights, establishing the Human Rights Committee.

201. Indeed, even if Judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations,[274] and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal. These resolutions condemned the systematic rape and detention of women in the former Yugoslavia and expressed a determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[275] In establishing the Tribunal, the Security Council took account "with grave concern" of the "report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia" and relied on the reports provided by, *inter alia*, the Commission of Experts and the Special Rapporteur for the former Yugoslavia, in deciding that the perpetrators of these crimes should be brought to justice.[276] The general question of bringing to justice the perpetrators of these crimes was, therefore, one of the reasons that the Security Council established the Tribunal.

202. Consequently, the Appeals Chamber can see no reason why the fact that Judge Mumba may have shared these objectives should constitute a circumstance which would lead a reasonable and informed observer to reasonably apprehend bias. The Appeals Chamber agrees with the Prosecutor's submission that "[c]oncern for the achievement of equality for women, which is one of the principles reflected in the United Nations Charter, cannot be taken to suggest any form of pre-judgement in any future trial for rape."[277] To endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification.

203. The Appeals Chamber recognises that Judges have personal convictions. "Absolute neutrality on the part of a judicial officer can hardly if ever be achieved."[278] In this context, the Appeals Chamber notes that the European Commission considered that "political sympathies, at least insofar as they are of different shades, do not in themselves imply a lack of impartiality towards the parties before the court".[279]

204. The Appeals Chamber considers that the allegations of bias against Judge Mumba based

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[274] Article 1(3) of the UN Charter includes as a purpose of the United Nations: "To achieve international co-operation in solving international problems of an economic, social cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..." Article 55(c) provides that based on respect for the principle of equal rights and self-determination of peoples, the United Nations will promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[275] UN Security Council Resolution 827(1993) (S/RES/827 (1993)). S/RES/798 (1992) directly addressed to crimes against women in Bosnia and Herzegovina and being appalled by the "massive, organised and systematic detention and rape of women" in Bosnia and Herzegovina, condemned it as "acts of unspeakable brutality."

[276] S/RES/808 (1993).

[277] Prosecutor's Response, para.6.23.

[278] *South African Rugby Football Union Case,* para. 42.

upon her prior membership of the UNCSW should be viewed in light of the provisions of Article 13(1) of the Statute, which provide that "[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law."

205. The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. Judge Mumba's membership of the UNCSW and, in general, her previous experience in this area would be relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. Therefore, Article 13(1) should be read to exclude from the category of matters or activities which could indicate bias, experience in the specific areas identified. In other words, the possession of experience in any of those areas by a Judge cannot, in the absence of the clearest contrary evidence, constitute evidence of bias or partiality.[280]

206. The Appellant has alleged that "Judge Mumba's decision [the Judgement] in fact promoted specific interests and goals of the Commission."[281] He states that she advocated the position that rape was a war crime and encouraged the vigorous prosecution of persons charged with rape as a war crime.[282] He erroneously states that this was the first case in which either the International Tribunal or the ICTR was offered the opportunity to reaffirm that rape is a war crime,[283] and that through this case the Trial Chamber expanded the definition of rape.[284] The Appellant alleges that this expanded definition of rape which emerged in the Judgement reflected that which had been adopted by the Expert Group Meeting, at which the three authors of one of the *amicus curiae* briefs and the Prosecution lawyer were present.[285] In his submissions, these circumstances could cause a reasonable person to reasonably apprehend bias.

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[279] *Crociani et al. v. Italy*, Decisions and Reports, European Commission of Human Rights, vol. 22 (1981) 147, 222.
[280] Such a statutory requirement for experience of this general nature is by no means novel to this Tribunal. *See e.g.*, Art. 36 of the Rome Statute; Art. 34 of the American Convention; Art. 39(3) of the European Convention; Art. 2 of the Statute of the International Court of Justice.
[281] Appellant's Amended Brief, p. 135.
[282] *Ibid.*, p. 122.
[283] Appellant's Reply, p. 47. Cf. *Čelebići* Judgement, paras. 478 - 479.
[284] Appellant's Amended Brief, p. 116.
[285] *Ibid.*

207. On the other hand, the Prosecutor argues that, in terms of the definition of rape, there is no evidence that Judge Mumba acted under the influence of the Expert Group Meeting or that she was even aware of it or its report. The Prosecutor states that the three authors of one of the *amicus curiae* briefs did not advance a definition of rape in their submissions (the Appellant does not dispute this statement[286]), and that in any event, the Appellant took no issue with the submissions made by the Prosecutor on the elements of rape during trial.[287]

208. The Appeals Chamber notes that there was no dispute at trial as to whether rape can, or should, be categorised as a war crime. The Prosecutor addressed the definition of rape in both her pre-trial brief and during the trial,[288] and, as found by the Trial Chamber, these submissions went unchallenged by the Appellant.[289] In addition, the Appellant confirmed during the oral hearing on the appeal that there was no issue raised at trial as to whether rape could be categorised as a war crime;[290] in fact, at the same hearing, he made no oral submission on the question of recusal.[291] For these reasons, the Appeals Chamber finds that the circumstances could not lead a reasonable observer, properly informed, to reasonably apprehend bias.

209. Moreover, the Appeals Chamber notes that both the International Tribunal and the ICTR have had the opportunity, prior to the Judgement, to define the crime of rape.[292]

210. With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime.[293] In the *Čelebići* Judgement, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war.[294] This recognition by the international community of rape as a war crime is also reflected in the Rome Statute where it is designated as a war crime.[295]

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[286] Appellant's Amended Brief, footnote 29.
[287] Prosecutor's Response, para. 6.30.
[288] Prosecutor's pre-trial Brief, pp. 14-15; transcript of trial proceedings in *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, p. 658 (this reference is 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).
[289] Judgement, para. 174.
[290] T. 98 (2 March 2000).
[291] T. 93 (2 March 2000).
[292] *Čelebići* Judgement, paras. 478 – 479; *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, para. 598.
[293] *Čelebići* Judgement, para. 476. The Lieber Code of 1863 considered rape by a belligerent to be punishable as a war crime (Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington D.C., 24 April 1863). Rape was prosecuted as a war crime under Control Council Law No. 10. Rape was also prosecuted as a war crime before the International Military Tribunal in Tokyo, with officials held criminally responsible for war crimes including rape committed by officers under their command.
[294] *Čelebići* Judgement, paras. 943 and 965.
[295] Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute.

211. The Appeals Chamber also finds without merit the allegation that Judge Mumba is shown to have been biased by the fact that the Judgement expanded the definition of rape in a manner which reflected the definition put forward by the Expert Group Meeting. There is no evidence that Judge Mumba was influenced by the latter definition. On the other hand, there was jurisprudence which led the Trial Chamber to take the direction which it took. In the case of *The Prosecutor v. Jean-Paul Akayesu* before the ICTR, the Trial Chamber, while acknowledging that there was no generally accepted definition of rape in international law and that there were also variations at the national level,[296] defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[297] This definition was subsequently adopted in the *Čelebići case*.[298]

212. In the instant case, there was no issue on this point at trial.[299] The Trial Chamber stated that it sought to arrive at an "accurate definition of rape based on the criminal law principle of specificity".[300] The Appeals Chamber recognises that the Trial Chamber was entitled to interpret the law as it stood.

213. Finally, the Appellant alleges that the association Judge Mumba had with the three authors of an *amicus curiae* brief created an apprehension of bias. He contends that, in filing the briefs before the Trial Chamber, the "amici actively assisted the prosecution in its effort to convict Mr. Furundžija by seeking to prevent the reopening of the trial after the Defence discovered that relevant documents had been withheld by the prosecution....the amici advanced legal arguments that assisted the prosecution in order to advance an agenda they shared with Judge Mumba."[301] The Appellant quotes sections of the briefs to illustrate the attitude which Judge Mumba shared; those sections, he says, reminded "the Tribunal that its ruling 'profoundly affects (a) women's equal rights to access to justice and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals."[302]

214. The Judgement notes that the *amicus curiae* briefs "dealt at great length with issues pertaining to the re-opening of the...proceedings" and the suggested scope of the reopening.[303] They did not address the question of rape or the Appellant's personal responsibility for the rapes in

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[296] *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 Sept. 1998, para. 596.
[297] *Ibid.,* para. 598.
[298] *Čelebići* Judgement, para. 479.
[299] Judgement, para. 174.
[300] *Ibid.*, para. 177.
[301] Appellant's Amended Brief, p. 118.
[302] *Ibid.*, p. 119.
[303] Judgement, para. 107.

question.[304] In any event, by the time the briefs were filed on 9 and 11 November 1998, the Trial Chamber had already decided to reopen the proceedings which commenced on 9 November 1998.[305]

215. The Appeals Chamber finds that there is no substance in the Appellant's allegations as contained in this ground of appeal. This ground therefore fails.

[304] The Appellant concedes that the *amicus curiae* briefs did not address the issue of the definition of rape (Appellant's Amended Brief, footnote 29).
[305] Judgement, para. 107.

VII. FIFTH GROUND OF APPEAL

A. Submissions of the Parties

1. The Appellant

216. The Appellant contends that the sentences of ten years' imprisonment for the commission of acts of torture and eight years' imprisonment for aiding and abetting an outrage upon personal dignity, in violation of the laws or customs of war, constitute "cruel and unusual punishment".[306] He submits that, in the event that the Appeals Chamber affirms either conviction, it should reduce the sentence to a length of time consistent with the emerging penal regime of the Tribunal.[307]

217. The Appellant submits that the sentence is too harsh in light of evidence which suggests the possibility that he could be innocent,[308] and that the judgements issued by the Tribunal to date demonstrate an emergent jurisprudence embodying several general sentencing principles. According to the Appellant, the first such principle is that crimes against humanity should attract a harsher sentence than war crimes. In support, he cites the Trial Chamber's opinion in *Prosecutor v. Duško Tadić* and the Appeals Chamber's agreement with the principle in *Prosecutor v. Dražen Erdemović*.[309] The second principle is that crimes resulting in the loss of human life are to be punished more severely than other crimes. The Appellant argues that in the Sentencing Judgement at trial in the *Tadić* case[310] ("the *Tadić* Sentencing Judgement"), in respect of a crime in which Duško Tadić participated, i.e., cruel and inhumane treatment leading to the death or disappearance of the victims, he received a sentence of three years additional to that received for the same crime when no death resulted.[311] Relying on the *Tadić* Sentencing Judgement, the Appellant submits that six years is an appropriate benchmark for a violation of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the victim's death.[312]

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[306] Appellant's Amended Brief, p. 139.
[307] *Ibid.*, p. 138 and T. 93 - 94 (2 March 2000).
[308] T. 94 - 95 (2 March 2000).
[309] Appellant's Amended Brief, pp. 140-145 (citing *Prosecutor v. Duško Tadić,* Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997; *Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 Oct.1997, para. 20).
[310] *Prosecutor v. Duško Tadić,* Case No.: IT-94-1-T, Sentencing Judgment, 14 July 1997.
[311] Appellant's Amended Brief, pp. 148-149.
[312] *Ibid.*, p. 149 and T. 95 - 96 (2 March 2000).

218. Referring to the *Čelibići* Judgement, the Appellant submits that the Trial Chamber in that case also reaffirmed the principle that crimes warrant a harsher penalty where they result in loss of human life.[313]

219. The Appellant further offers the judgement of the Trial Chamber in the *Aleksovski* case as an important precedent for the purposes of this appeal. In that case, Zlatko Aleksovski was sentenced to two and a half years' imprisonment for outrages upon personal dignity. By contrast, in respect of a crime of the same category, the Appellant has received eight years' imprisonment.[314]

220. Overall, the Appellant submits that, in order to ensure consistency between the sentence imposed on him and those imposed by the Trial Chamber in the *Tadić, Erdemović* and *Aleksovski* cases,[315] his sentence should be reduced to six years' imprisonment or less.[316]

2. The Respondent

221. The Respondent submits that a sentence is imposed in the exercise of a Trial Chamber's discretion. Therefore, the Appeals Chamber may not substitute its opinion for that of a Trial Chamber, unless it is demonstrated that the Trial Chamber's discretion has not been validly exercised due to error. The Respondent contends that the Appellant in this case failed to demonstrate an error in the exercise of the Trial Chamber's discretion in sentencing.[317]

222. The Respondent submits that every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case.[318]

223. The Respondent disputes the contention that there is a cognisable sentencing regime at the Tribunal, noting that the Appeals Chamber has only addressed the question of sentencing on one occasion.[319] Further, each of the sentences imposed by a Trial Chamber to date, which the Appellant contends reflect an emerging penal regime, is the subject of an appeal. The Respondent

[313] Appellant's Amended Brief, p. 150.
[314] Appellant's Amended Brief, p. 152.
[315] The Appellant refers to the *Tadić* Sentencing Judgement, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, Judgement, 25 June 1999 and *Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-T, Sentencing Judgement, 5 Mar. 1998 ("the Second *Erdemović* Sentencing Judgement"), respectively.
[316] Appellant's Amended Brief, pp. 154-157.
[317] Prosecutor's Response, paras. 7.6-7.7.
[318] *Ibid.*, para. 7.9.

submits that the *Erdemović* case[320] cannot serve as an appropriate guideline, as the circumstances surrounding that case were unique. The accused in that case pleaded guilty to the charges against him, and duress was treated as a significant mitigating factor. Therefore, the Respondent argues, *Erdemović* is clearly distinguishable from the instant case.[321]

224. Contrary to the Appellant's submission that the Appeals Chamber be guided by the sentences passed by the Trial Chambers to date, the Respondent submits that it would be desirable for the Appeals Chamber to establish appropriate sentencing principles in order to achieve consistency and even-handedness.[322]

225. The Respondent further argues that deterrence and retribution should be the primary goals of sentencing. In the Respondent's view, deterrence has two aspects, one "suppressive" and the other "educative". The Respondent submits that both of these aspects of deterrence and the aim of retribution would be defeated were the sentences imposed by the Tribunal generally lower than those typically imposed in national systems.[323]

226. As to the suppressive aspect, the Respondent contends that a prospective violator of international humanitarian law would not be dissuaded by the sanctions imposed by an international tribunal if they were lower than those imposed under national law. As to the educative aspect, the Respondent argues that lower sentences imposed by the International Tribunal would signal that genocide, crimes against humanity and war crimes are less serious than ordinary crimes under national law. Finally, the imposition by the International Tribunal of sentences lower than those prevailing in national jurisdictions would undermine the Tribunal's aim of contributing to the restoration of peace and security in the former Yugoslavia.[324]

227. The Respondent submits that the gravity of the crime must form the starting point for any determination of sentence. Rather than subscribing to some form of hierarchy between the offences generally, a Trial Chamber should impose a sentence which reflects the inherent gravity of the accused's criminal conduct.[325] The gravity of the crimes must ultimately be determined with regard

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[319] In fact, as of the date of this Judgement, the Appeals Chamber has addressed sentencing in two additional decisions, and in each instance has revised the sentence imposed by the Trial Chamber. See the *Tadić* Sentencing Appeals Judgement and the *Aleksovski* Appeals Judgement.
[320] *See* the Second *Erdemović* Sentencing Judgement.
[321] Prosecutor's Response, paras. 7.11-7.14 and T. 152 (2 March 2000)).
[322] Prosecutor's Response, paras. 7.16-7.17 and T. 155 (2 March 2000).
[323] Prosecutor's Response, paras. 7.25-7.27 and T. 156 (2 March 2000).
[324] Prosecutor's Response, para. 7.28 and T. 159 (2 March 2000).
[325] Prosecutor's Response, para. 7.33 and T. 158 (2 March 2000).

to the particular circumstances of the case; the degree of the accused's participation should be considered and, generally, the closer a person is to actual participation in the crime, the more serious the nature of his crime.[326] However, an individual who orders or plans a course of criminal conduct will be responsible for his role in having ordered all of the crimes committed by the perpetrators and his responsibility may, therefore, be greater.[327]

228. As a general proposition, the Respondent agrees with the Appellant that a crime that results in the death of the victim is more serious than a crime not involving the loss of human life. However, this principle may not apply in the circumstances of every case. The Respondent rejects the Appellant's argument that six years' imprisonment has been established as the "appropriate benchmark" for violations of the laws or customs of war when the accused is convicted of particularly cruel and terrorising treatment that did not result in the death of a victim.[328] The Respondent also highlights other factors which are to be considered, such as the personal circumstances of the accused, aggravating and mitigating factors, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[329]

229. The Respondent submits that the Appellant has not demonstrated that his sentence of ten years for torture was manifestly disproportionate to the gravity of the criminal conduct in question. The Trial Chamber found the Appellant guilty as a co-perpetrator of the act of torture, suggesting that the criminal conduct of the Appellant and that of Accused B were equally serious. Therefore, the sentence imposed cannot be regarded as disproportionate.[330] The Respondent adds that the sentence for outrages upon personal dignity reflects the Appellant's diminished role in this crime, although the conduct underlying this count was the same as that underlying the torture count.[331] The Prosecutor concludes that the Defence has failed to establish that the Trial Chamber abused its discretion in imposing the sentences.[332]

230. The Respondent further submits that, even if any weight is given to sentences imposed by Trial Chambers in other cases, the sentences do not appear to be inconsistent. The Respondent highlights as an example the accused Hazim Delić, in the *Čelebići* case, who received a sentence of fifteen years for rape. The Respondent contends that this sentence is probably the one most

[326] Prosecutor's Response, paras. 7.34-7.35.
[327] *Ibid.*, para. 7.35 and T. 160 (2 March 2000).
[328] Prosecutor's Response, para. 7.36.
[329] *Ibid.*, para. 7.37.
[330] *Ibid.*, para. 7.42-7.45.
[331] *Ibid.*, para. 7.46.
[332] *Ibid.*, para. 7.48 and T. 162 (2 March 2000).

analogous on its facts to the circumstances of this case.[333] Furthermore, the Respondent submits that, although sentences imposed by Trial Chambers should not serve as a point of reference before this Appeals Chamber, life imprisonment has been imposed in several cases before the ICTR and in the *Jelisić* case before this Tribunal a sentence of 40 years was imposed.[334] In the view of the Respondent, the overall ten-year sentence in this case is within the appropriate range, and on that basis the Appellant has shown no abuse of discretion by the Trial Chamber.[335]

231. Finally, the Respondent submits that the Appellant seems to suggest that an accused might be convicted where doubts about his innocence still exist, and that in such cases, doubts should function as a mitigating factor in sentencing.[336]

3. Appellant in Reply

232. The Appellant rejects the Respondent's arguments that his sentence is not inconsistent with the Tribunal's practice. He reiterates his objections to the emphasis placed by the Respondent on his interrogation of Witness A while she was being sexually assaulted, a scenario which he says is not supported by the evidence.[337]

233. The Appellant reiterates his position as submitted in the Appellant's Amended Brief, that the sentence imposed by the Trial Chamber is entirely inconsistent with those imposed at trial in the *Tadić,*[338] *Erdemović*[339] and *Aleksovski*[340] cases. He asserts that the Respondent made no attempt to reconcile the *Tadić* and *Aleksovski* sentencing decisions with that of *Furundžija,* and that such a reconciliation would, in any event, not have been possible.[341]

234. As regards the *Erdemović* case, the Appellant submits that in the First *Erdemović* Sentencing Judgement, the accused was sentenced to ten years' imprisonment for the commission of more than seventy murders, absent mitigating circumstances, but that, in the Second *Erdemović*

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[333] Prosecutor's Response paras. 7.49-7.52 (citing *Čelebići* Judgement, paras. 1285-1286) and T. 154 (2 March 2000).
[334] T. 163 (2 March 2000).
[335] T. 163-164 (2 March 2000).
[336] *Ibid.*
[337] Appellant's Reply, pp. 51-52.
[338] *Tadić* Sentencing Judgement and *Prosecutor v. Duško Tadić,* Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 Nov. 1999.
[339] *Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, ("the First *Erdemović* Sentencing Judgement"), and the Second *Erdemović* Sentencing Judgement.
[340] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999.
[341] Appellant's Reply, p. 52.

Sentencing Judgement, the accused received only a five-year sentence on account of duress and a plea-bargaining agreement reached with the Prosecutor.[342]

B. Discussion

235. The relevant provisions concerning sentencing procedure before the Tribunal are Articles 23 and 24 of the Statute and Rule 101 of the Rules.

Article 23 – Judgement

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

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

Article 24 – Penalties

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

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

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

Rule 101 – Penalties

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

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

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[342] *Ibid.*

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

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

236. Before addressing individual arguments concerning sentencing, it is worth examining the Appellant's overall contention on this ground. He submits that, in the event that the Appeals Chamber affirms either of the convictions at trial, the sentence relating to the upheld conviction should be reduced to a length of time consistent with the emerging penal regime of the Tribunal.[343] This submission implies that an "emerging penal regime" exists and is identifiable. Although the fundamental function of the Appeals Chamber is to determine whether the sentence imposed by the Trial Chamber is appropriate in terms of the Statute and the Rules, it may, nonetheless, be helpful to consider first whether there is, as contended by the Appellant, an emerging penal regime in the Tribunal.

237. The Appeals Chamber notes that the practice of the Tribunal with regard to sentencing is still in its early stages. Several sentences have been handed down by different Trial Chambers but these are now subject to appeal. Only three final sentencing judgements have been delivered: one by a Trial Chamber established for sentencing purposes following a successful appeal by the accused in *Erdemović*,[344] and the others by the Appeals Chamber in *Tadić*[345] and *Aleksovski*,[346] each of which has resulted in a revision of the sentence imposed by the original Trial Chamber. It is thus premature to speak of an emerging "penal regime",[347] and the coherence in sentencing practice that this denotes. It is true that certain issues relating to sentencing have now been dealt with in some depth; however, still others have not yet been addressed. The Chamber finds that, at this stage, it is not possible to identify an established "penal regime". Instead, due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case.

238. The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal.[348] Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a

[343] Appellant's Amended Brief, p. 139.
[344] Second *Erdemović* Sentencing Judgement.
[345] *Tadić* Sentencing Appeals Judgement.
[346] *Aleksovski* Appeals Judgement.
[347] Even including a decision from the ICTR Appeals Chamber (*Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, which affirmed the sentence imposed by a Trial Chamber), the number of final sentencing decisions from two Tribunals is limited to four.
[348] Prosecutor's Response, para. 7.17.

definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now. Thus, the Appeals Chamber will limit itself to the issues directly raised by this appeal.

239. One other preliminary matter merits consideration – the standard of review to be applied in an appeal against sentence. The Prosecutor submits that the Appeals Chamber should not substitute its opinion for that of a Trial Chamber unless it is demonstrated that the latter's discretion was not validly exercised.[349] The Appeals Chamber's finding in the *Tadić* Sentencing Appeals Judgement supports this view:

> Insofar as the Appellant argues that the sentence of 20 years was unfair because it was longer than the facts underlying the charges required, the Appeals Chamber can find *no error in the exercise of the Trial Chamber's discretion* in this regard. The sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute and the Appeals Chamber will not, therefore, quash the sentence and substitute its own sentence instead.[350]

The test of a discernible error in respect of the exercise of the Trial Chamber's discretion set out in paragraph 22 of the same judgement has been followed in the *Aleksovski* Appeals Judgement.[351]

1. Crimes against humanity attract harsher penalties than war crimes

240. In the Appellant's Amended Brief, the argument was advanced that a principle has emerged in the practice of the Tribunal that an act classified as a crime against humanity should be punished more severely than an act classified as a war crime.[352]

241. In support of this submission, the Appellant relies on, *inter alia,* certain decisions of this Tribunal.[353] In particular, he draws attention to the judgement of the Appeals Chamber in the *Erdemović* case in which the majority of the Appeals Chamber found that crimes against humanity should attract a harsher penalty than war crimes.[354]

242. This Chamber notes that, when the Appellant's Amended Brief was filed on 14 September 1999, the Judgement of the Appeals Chamber in the *Tadić* Sentencing Appeals Judgement was yet to be delivered.[355] In this latter case, the Chamber considered the case law now relied upon by the

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[349] Prosecutor's Response, para. 7.6 and T. 149 (2 March 2000).
[350] *Tadić* Sentencing Appeals Judgement, para. 20 (emphasis added). *See* also *Omar Serushago v. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000, para. 32.
[351] *Aleksovski* Appeals Judgement, para. 187.
[352] Appellant's Amended Brief, pp. 140-145.
[353] Notably the *Tadić* Sentencing Judgement and the Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997.
[354] Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997, para. 20.
[355] Although the *Tadić* Sentencing Appeal Judgement was pronounced prior to the oral hearings in this case, counsel for the Appellant did not change this line of argument.

Appellant, but reached a conclusion, by majority, contrary to that which the Appellant now advocates:

> [T]*here is in law no distinction between the seriousness of a crime against humanity and that of a war crime*. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.[356]

243. This Chamber notes that the same arguments now advanced by the Appellant were considered and rejected by the Appeals Chamber in the *Tadić* Sentencing Appeals Judgement. The question arises whether this Chamber should follow the *ratio decidendi* on this issue set out in that Judgement. In the recent *Aleksovski* Appeals Judgement the Appeals Chamber held that:

> [w]here, 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.[357]

The Appeals Chamber will follow its decision in the *Tadić* Sentencing Appeals Judgement on the question of relative gravity as between crimes against humanity and war crimes.

2. Crimes resulting in loss of life are to be punished more severely than other crimes

244. The Appellant submits, and the Prosecutor agrees in principle, that crimes which result in the loss of human life should be punished more severely.[358]

245. The Appellant submits that certain judgements of the Tribunal may serve as benchmarks for sentences to be handed down in relation to specific crimes. In particular, it is submitted that the judgements of the Trial Chambers in the *Tadić*[359] and *Erdemović*[360] cases establish the maximum sentence for war crimes as nine years' imprisonment in cases in which the violation led to the death of the victim.[361] In the *Tadić* case, a person convicted of crimes against humanity was consistently sentenced to an additional three years in cases that resulted in the death or disappearance of victims.

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[356] *Tadić* Sentencing Appeals Judgement, para. 69 (emphasis added). Further argument in support of this view was set out in the Separate Opinion of Judge Shahabuddeen in that same judgement. *See also Prosecutor v. Duško Tadić*, Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 Nov. 1999, Separate Opinion of Judge Robinson, in which Judge Robinson expressed the view that there is no basis for "the conclusion that, as a matter of principle, crimes against humanity are more serious violations of international humanitarian law than war crimes" (*ibid.*, p.10) and *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Judgement, 7 Oct. 1997, Separate and Dissenting Opinion of Judge Li, in which Judge Li stated "that the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another". *Ibid.*, para. 19.

[357] *Aleksovski* Appeals Judgement, para. 111. See also *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 92.

[358] *See* Appellant's Amended Brief, p. 145 -155, and Prosecutor's Response, para. 7.36.

[359] *Tadić* Sentencing Judgement.

[360] Second *Erdemović* Sentencing Judgement.

[361] Appellant's Amended Brief, p. 154.

From this the Appellant deduces that violations which do not result in death should receive a sentence three years less than for those from which death results. In view of the above, the Appellant submits that an appropriate benchmark sentence for a violation of the laws or customs of war that does not result in the death of the victim is six years.

246. The reasoning behind this proposed benchmark of six years depends in part on the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life. The Appeals Chamber considers this approach to be too rigid and mechanistic.

247. Since the *Tadić* Sentencing Appeals Judgement, the position of the Appeals Chamber has been that there is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter. It follows that the length of sentences imposed for crimes against humanity does not necessarily limit the length of sentences imposed for war crimes.

248. The argument implicitly advanced by the Appellant in support of a six-year benchmark sentence is that all war crimes should attract similar sentences. The reasoning may be summarised as follows: because war crimes not resulting in death received sentences of six years in *Tadić*, it stands to reason that war crimes not resulting in death in this case should receive the same or a similar sentence. The Appeals Chamber does not agree with this logic, or with the imposition of a restriction on sentencing which does not have any basis in the Statute or the Rules.

249. In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness. While acts of cruelty that fall within the meaning of Article 3 of the Statute will, by definition, be serious, some will be more serious than others. The Prosecutor submits that sentences must be individualised according to the circumstances and gravity of the particular offence. The Appeals Chamber agrees with the statement of the Prosecutor that "the sentence imposed must reflect the inherent gravity of the accused's criminal conduct",[362] which conforms to the statement of the Trial Chamber in the *Kupreškić* Judgement:

> The 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.[363]

[362] Prosecutor's Response, para. 7.32.
[363] *Kupreškić* Judgement, para. 852.

This statement has been endorsed by the Appeals Chamber in the *Aleksovski* Appeals Judgement,[364] and there is no reason for this Chamber to depart from it.

250. The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules. It may impose a sentence of imprisonment for a term up to and including the remainder of the convicted person's life.[365] As a result, an individual convicted of a war crime could be sentenced to imprisonment for a term up to and including the remainder of his life, depending on the circumstances.

251. The Appellant's submission regarding the appropriate length of benchmark sentences is contradicted by recent Appeals Chamber practice. In the *Tadić* Sentencing Appeals Judgement, the Appeals Chamber pronounced sentences of twenty years for wilful killings under Article 2 of the Statute and for murders under Article 3 of the Statute,[366] both of which surpass the nine-year benchmark which the Appellant argues is appropriate for war crimes resulting in death.

252. The Appellant further relies upon the judgement of the Trial Chamber in the *Aleksovski* case in order to establish a benchmark for sentencing. In that case, the convicted person was sentenced to two and a half years in prison for outrages upon personal dignity. However, in the recent *Aleksovski* Appeals Judgement, the Appeals Chamber found that there was a discernible error on the part of the Trial Chamber in the exercise of its discretion, namely:

> 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.[367]

The Appeals Chamber went on to sentence Zlatko Aleksovski to seven years, stating that, had it not been for an element of double jeopardy involved in the process, "the sentence would have been considerably longer."[368]

3. Additional arguments

253. The Appellant submits that "there are substantive issues that hang over the case" that suggest innocence is a possibility and that this should be considered in sentencing.[369] The Appeals

[364] *Aleksovski* Appeals Judgement, para. 182.
[365] Article 24 of the Statute and Rule 101(A) of the Rules.
[366] Noted by the Prosecutor at T. 154 (2 March 2000).
[367] *Aleksovski* Appeals Judgement, para. 187.
[368] *Ibid.*, para. 190.

Chamber rejects this argument. Guilt or innocence is a question to be determined prior to sentencing. In the event that an accused is convicted, or an Appellant's conviction is affirmed, his guilt has been proved beyond reasonable doubt. Thus a possibility of innocence can never be a factor in sentencing.

254. Accordingly, this ground of appeal must fail.

[369] T. 95 (2 March 2000).

VIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**, rejects each ground of appeal, dismisses the appeal, and affirms the convictions and sentences.

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

Mohamed Shahabuddeen
Presiding

Lal Chand Vohrah

Rafael Nieto-Navia

Patrick Lipton Robinson

Fausto Pocar

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

Judge Shahabuddeen, Judge Vohrah and Judge Robinson append declarations to this Judgement.

[SEAL OF THE TRIBUNAL]

IX. DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber. This declaration offers some comments on the basis of the principle of judicial impartiality, which is considered in the judgment, and on the way in which the principle works.

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2. As to the basis of the principle of impartiality, article 13, paragraph 1, of the Statute of the Tribunal expressly provides that the "judges shall be persons of ... impartiality...". That being so, as the judgment points out, it is not necessary to look further into the foundation of the requirement in international law. However, if it were necessary to do so, it would be my respectful opinion that the Statute is, on this point, appealing to a general principle of law. Recourse to general principles of law has to be had with care; it has not been frequent in the practice of the International Court of Justice. Nevertheless, there is weight in the view that, at any rate in the case of international judicial proceedings, the principle of impartiality rests on a general principle of law,[1] and not on customary international law. This is consistent with Waldock's observation that the "main spheres in which these [general] principles [of law] have been held to apply have been either the general principles of legal liability and of reparation for breaches of international obligations or the administration of justice" [2] The matter being one of fundamental importance to the administration of justice, there is no reason to suppose that that remark is inapplicable to criminal proceedings.

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[1] See *Oppenheim's International Law*, 9th end., Vol. I, Part 1 (Essex, 1992), p. 37, footnote 5; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1987), chapter 13; and Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* Vol. II (Cambridge, 1986), pp. 627 ff. and pp. 676 ff. As to whether the principle applies in non-judicial matters in international law, see, *inter alia, Article 3, paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq), (1925), P.C.I.J., Series B, No. 12,* p. 32*; Voting Procedure on Questions Relating to Reports and Petitions concerning the Territory of South-West Africa, I.C.J. Reports 1955*, pp. 99-100, separate opinion of Judge Lauterpacht; Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958), pp. 158-161; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. III (London, 1976), pp. 64-71, and, by him on the same subject, in *Anglo-American Law Review,* 1972, Vol. I, No. 4, pp. 482-498.

[2] H. Waldock, "General Course on Public International Law", 106 *Hague Recueil* 58 (1962-II).

3. The real problem in this case is to discover a standard by which that general principle of law may be applied in particular circumstances. Is the standard a norm of customary international law? No doubt, a new rule of customary international law may override a general principle,[3] or add to it, or subtract from it, or otherwise qualify it. But, if the question is whether there has emerged in customary international law a norm setting a standard for the operation of the general principle of law concerning impartiality, it would be necessary to examine the evolution of customary international law on the point, and that inquiry would of course have to be done in accordance with the principles regulating that evolution. It is settled that uniformity of acceptance or observance[4] is not required for proof of the emergence of a new norm of customary international law, generality being enough. Yet, given the divergent position[5] adopted in a major law area such as that of England and Wales (and possibly in other countries), there could be doubt as to whether it is correct to say that a new norm of customary international law has crystallised as regards the standard by which an application of the principle of impartiality should be made.

4. But I do not believe that it is necessary to consider whether there has emerged a customary norm as to the standard by which a determination is to be made as to whether the principle of impartiality has been breached in particular circumstances. The duty of the Appeals Chamber is the same as that of any court charged with responsibility for implementing a principle. That duty is to interpret, and to apply the principle as interpreted, to the circumstances of the particular case. In discharging that duty, the Appeals Chamber may see value in consulting the experience of other judicial bodies with a view to enlightening itself as to how the principle is to be applied in the particular circumstances before it. However, in doing that, it does not have to undertake a comparative review designed to show whether a new customary norm has come into being on the basis of general concordance of state practice.

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[3] See Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996,* Vol. III (The Hague, 1997), p. 1606.
[4] The phenomenon of the "persistent objector" need not be considered.
[5] See *Reg. v. Gough* [1993] A.C. 646, HL.

5. In effect, the principle of impartiality itself authorises the Tribunal to interpret it and to apply it as interpreted to any set of circumstances. A new customary norm does not have to be found. In this respect, I would suggest a distinction between the emergence of a new customary norm prescribing how an existing principle is to be applied to particular circumstances before a court and a judicial interpretation of an existing principle as to how it is to apply to those circumstances. In the first case, what is applied is not the original principle, but the original principle as modified or qualified by the new customary norm; in the second case, what is applied is the original principle as explained by the interpretation. The distinction may be criticised as semantic; I do not think it is.

6. The second case (in which a principle is interpreted) seems consonant with the nature of a general principle of law. The part of international law to which such a principle belongs "does not consist ... in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short Law".[6] Such principles "are not so much generalisations reached by application of comparative law ... as particularizations of a common underlying sense of what is just in the circumstances".[7] They "are, in substance, an expression of what has been described as socially realisable morality".[8]

7. An influential consideration lies in the nature of international law itself. As was once submitted by Paul Reuter, international law is "nécessairement simple et un peu rustique".[9] The observation recalls Hall's famous footnote that "there is no place for the refinements of the courts in the rough jurisprudence of nations".[10] I take that to mean not that refinements may not be necessary, but that they are not to

[6] Bin Cheng, *op. cit.*, p. 24.
[7] Rosenne, *op. cit.*, p.1605.
[8] Sir Hersch Lauterpacht, *op. cit.*, p. 172.
[9] *1959 I.C.J. Pleadings, Temple of Preah Vihear,* Vol. II, p. 85.
[10] W.E.Hall, *A Treatise on International Law,* 8th edn. (Oxford, 1924), p.395, footnote 2.

be found ready-made. The system must work with the equipment that it has: needed refinements must be added by prudent interpretation of basic principles. This has to be kept in mind in considering the operation of a general principle. Because such a principle is broad, the necessity for interpreting it whenever it is applied is inescapable. But the function of interpretation is limited; if it exceeds the proper needs of the case, the spectre of an imperial judiciary arises. On the international plane, that is even more unacceptable than it is on the national.

8. As mentioned above, the search for the correct interpretation of a general principle may involve consultation of the experience of other jurists faced with a similar problem, the object being the scientific one of learning from their responses to an equivalent situation. The consultation is not made for the purpose of determining whether a new norm of customary international law has emerged; if this were the object, there would be the ponderous necessity of executing a more systematic survey.

9. Further, and perhaps more importantly, there could be a difference in results flowing from the employment of different methods of search. Conceivably, the question whether there has emerged a new norm of customary international law setting a standard as to how a general principle is to be applied could draw the answer that no such customary norm has emerged, with the result that (on the assumption that the emergence of such a norm is necessary) the general principle could not be applied. Indeed, if that approach were taken to other general principles (such as that, for example, relating to good faith), it might be found that, for similar reasons, they were largely inoperable - in which case, there would be little value in speaking of a general principle as something which could by itself produce a concrete result. A more satisfactory position is that the court is under an obligation to apply a general principle in any event, it being however useful for it to see if judicial experience elsewhere assists it in deciding how the principle is to be interpreted in relation to the particular circumstances before it.

10. In sum, courts of law often undertake the task of interpreting a principle in the light of judicial experience elsewhere before applying the principle to the particular problem calling for solution. A court may (as has happened) select an

interpretation even if it is at variance with that in some legal systems. So may a Chamber of the Tribunal. Naturally, in doing so, it would be good sense for it to give weight to views more generally favoured. But numbers do not always add up to wisdom; and so, like a municipal court, a Chamber of the Tribunal could strike out in a new direction. Why does it have this freedom? Because it is only consulting the experience of others, and not limited by a standard set by a norm of customary international law.

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11. As to the way in which the principle of impartiality works, the Appeals Chamber correctly notes that the principle prohibits not only actual bias but also an appearance of bias. If (difficult as this may be) actual bias is proved, that is of course an end to the case. But what is the position where the allegation is that, although subjectively there was no bias, objectively there was an appearance of it? How is such an allegation to be evaluated?

12. The problem is alleviated to the extent that it is settled that an appearance of bias exists where the judge is party to the cause, or where he has a proprietary or financial interest in it, or a non-pecuniary interest in its outcome of the kind explained in *Pinochet (No. 2)*.[11] Possibly, although these circumstances may be so, the judge could subjectively be still free of bias. But that is not the point; it is the objective appearance of the thing which matters. And it is accepted that, if any of those things is proved, that is conclusive of there being an inadmissible appearance of bias. The judge stands disqualified without the need for further inquiry; proof of the reaction of others is not required. But what where none of those matters can be proved? Other circumstances may suggest an appearance of bias. By what standard are such circumstances to be assessed?

13. The standard has to be effective for the purpose of giving meaning to the principle which it seeks to apply. So, the principle may be recalled. It has been variously put. In Louis Renault's memorable aphorism, "Il ne suffit pas que la

justice soit juste, encore faut-il qu'elle le paraisse".[12] With little change, the remark was later repeated by President Jules Basdevant[13] stating, "Il ne suffit pas que la justice soit juste, il faut encore qu'elle le paraisse". The phrase corresponds to, and, in Renault's formulation, ante-dates, Lord Hewart's oft-cited dictum that it "is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[14]

14. However, as it has been rightly said, the continued citation of Lord Hewart's statement "in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".[15] The suspicions of an overly sensitive and uninformed observer are not determinative. On the other hand, it would not be correct to tilt to the other extreme and say that the principle is breached only if, from the point of view of the court considering the matter, there is a real danger of bias. The litmus test of what is acceptable and what is not is the need to maintain public confidence in the integrity of the system under which justice is administered. Public confidence need not be disturbed by the reactions of the hypersensitive and the uninformed, but there are cases in which it can be shaken by an appearance of bias even though, from the point of view of a court considering the matter, it may not be thought that there was a real danger of that disposition.

15. What is the test to be used in locating the point at which public confidence in the administration of justice would be shaken? The test, as indicated by the general tendency of the jurisprudence, is to ask whether a fair-minded and informed member of the public would reasonably apprehend bias in all the circumstances of the case. To that question, the evidence in this matter returns a negative answer.

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[11] [1999] 1 All ER 577, HL, at pp. 586-589 of the speech of Lord Browne-Wilkinson.
[12] See *La Juridiction internationale permanente, Colloque de Lyon* (Paris, 1987), p. 6.
[13] President Jules Basdevant, *Discours prononcé pour le cinquantième anniversaire de la première conférence de la paix,* La Haye, 1949.
[14] *R. v. Sussex JJ., ex parte McCarthy* [1924] 1 K.B. 256, at p. 259.
[15] *R. v. Camborne JJ., ex parte Pearce* [1955] 1 Q.B. 41, at p. 52.

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

Mohamed Shahabuddeen

Dated this twenty-first day of July 2000
At The Hague
The Netherlands

[SEAL OF THE TRIBUNAL]

X. DECLARATION OF JUDGE LAL CHAND VOHRAH

THE RELATIVE SERIOUSNESS OF CRIMES AGAINST HUMANITY VIS-À-VIS WAR CRIMES

1. I am in full agreement with the findings of the Judgement and its disposition except for the determination made in paragraph 243.[1] As much as I appreciate the cold logic of the *Tadić* Sentencing Appeals Judgement drawing no distinction between crimes against humanity and war crimes,[2] I have the following observations to make.

2. When I sat as a member of the Appeals Chamber in the *Erdemović* case, I was part of the majority that agreed with the original Sentencing Judgement in *Tadić*.[3] *Erdemović*, in extending the view expressed in *Tadić*, held that all things being equal, crimes against humanity are intrinsically more serious than war crimes, and this distinction should ordinarily be reflected in the sentencing.[4] I still subscribe to that view despite recent jurisprudence, including that advanced in the present Judgement, that stipulates an opposing view. Hence this Declaration to reinforce and develop my previous position on this issue.

3. In the post World War II trial at Nuremberg, there was no apparent distinction between the seriousness of a war crime and a crime against humanity in the Judgement of the International Military Tribunal, largely because these two crimes were considered jointly, not separately, in the Judgement. However, there was something of a distinction between crimes against peace – which was referred to as "the supreme crime" – and the other crimes within the jurisdiction of the Tribunal. The IMT Judgement stated: "The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; *it is the supreme international*

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[1] *Furundžija Judgement*, para. 243, stating "The Appeals Chamber will follow its decision in the *Tadić* Sentencing Appeals Judgment on the question of relative gravity as between crimes against humanity and war crimes."

[2] *Prosecutor v. Duško Tadić*, Judgement in Sentencing Appeals, Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, at para. 69.

[3] *Prosecutor v. Duško Tadić*, Sentencing Judgment, Case No. IT-94-1-T, T. Ch. II, 14 July 1997, para. 73 ("A prohibited act committed as part of a crime against humanity . . . is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.")

[4] See *Prosecutor v. Dražen Erdemović*, Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 20 ("[A]ll things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime." [emphasis in original]).

crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[5] Although all things were not equal, and some persons found guilty by the Tribunal played a greater role in perpetrating or responsibility for crimes than others and the sentences appropriately reflected this role, as a general rule, most persons convicted by the IMT of crimes against peace were sentenced to death by hanging or life imprisonment, and thus attracted a harsher sentence than those convicted solely of war crimes and crimes against humanity.[6]

4. As noted by Judge Cassese, "one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them."[7] However, he goes on to emphasize that it is an entirely different matter when all things are equal, as the issue then becomes "whether the very same fact imputed to an accused, if characterised as a war crime, may be regarded as more or less serious than if it is instead defined as a crime against humanity."[8]

5. While all crimes cannot be placed on a continuum of seriousness or within a hierarchy of gravity, there are certain crimes that will always be regarded as the worst crimes it is possible to commit, and these include genocide and crimes against humanity. These crimes are considered the "crime of crimes"[9] primarily because they are committed against a group as such or are committed generally against a large number of people, and often committed on discriminatory grounds. Indeed, if the majority's view that war crimes and crimes against humanity are *prima facie* indistinguishable as to inherent gravity, that principle would seemingly apply to there also being no hierarchical difference between war crimes and crimes against peace or between war crimes and genocide. I find this position to be inherently flawed, as it fails to take into account *inter alia* the broader nature of the crimes or the different interests the prohibitions of the crimes are intended to protect.

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[5] 1 Trial of the Major War Criminals before the International Military Tribunal, Nurenberg, 14 November 1945 – 1 October 1946, Judgement (1947) at p.186 [emphasis added].

[6] More precisely, of the 19 persons found guilty by the IMT, twelve were sentenced to death. Of these twelve, seven were convicted of Counts I and II for Common Plan or Conspiracy to commit a crime against peace (Count 1) or Crimes against Peace (Count II); thus only five received a death sentence when convicted solely for War Crimes (Count III) and/or Crimes against Humanity (Count IV). Of the twelve persons convicted of Counts I or II, seven were given a death sentence, three were sentenced to life imprisonment, and two received a term of 10 years' or 15 years' imprisonment; of the 12 persons convicted of crimes including Count II, seven received sentences of death, three received life sentences, and two received a term of years (thus, there is no major discrepancy between sentencing on Counts I and II, although only 8 were convicted of both).

[7] *Prosecutor v. Duško Tadić*, Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese, Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 January 2000, para. 7.

[8] *Ibid.* at para. 10 [emphasis in original].

[9] See discussion in *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, T.Ch. I, 4 September 1998, at paras. 10-33, and as highlighted in this Declaration, *infra*. Also note that in the debates on Security

6. Naturally, a Chamber must look at the individual circumstances of each case and the convicted person's degree of culpability in determining a sentence, and in many circumstances when all things are not equal, a war crime might warrant a heavier penalty than a crime against humanity or genocide. For example, a war crime of wilful killing would likely warrant a heavier penalty than an unsuccessful attempt to commit genocide, and a war crime of torture might warrant a longer sentence than an inhumane act constituting a crime against humanity. It is important to re-emphasize that in such instances, all things are *not* equal. When all things *are* equal – for the same act, a person is convicted of torture as a war crime or is convicted of a torture as a crime against humanity – although the injury to the individual tortured may be the same, the injury to society would necessarily be greater if a crime against humanity has occurred. This extended injury should ordinarily be reflected in the sentence.

7. In addition, in my view, it appears to be inherently incompatible for the Chamber to hold that as a general rule, crimes involving death are more serious than crimes not involving death, while at the same time holding that there is no hierarchy of crimes, all things being equal.[10] Some crimes are considered worse than death, such as breaking a person's spirit, torturing a person physically while permitting that person to live thereafter in constant pain or humiliation, or destroying a person mentally, which may each be more destructive in the long term than outright execution. There is in my view an irreconcilable contradiction in holding on the one hand that all things being equal there is no inherent distinction between war crimes and crimes against humanity, including in the imposition of sentences, yet holding on the other hand that crimes resulting in death deserve more severe punishment than crimes not resulting in death.

8. Genocide is committed with the intent to destroy more than an individual, but an individual as part of a protected group as such; crimes against humanity are committed through means of a widespread or systematic attack against a civilian population; war crimes are crimes committed with a nexus to an armed conflict. If acts constituting genocide or crimes against humanity are committed in the context of and with a nexus to an armed conflict, and thus also constitute war crimes, then for it to be held that the additional elements required for constituting genocide or crimes against humanity and the fact that a broader society is affected by such crimes do not deserve to be reflected in the sentence of a person convicted of these crimes, amounts to a failure to take into consideration the exceptionally egregious nature of genocide and crimes against humanity.

Council Resolution 955, establishing the ICTR, the representative of Rwanda referred to genocide as "the crime of crimes." See UN Doc. S/PV.3453, 8 November 1994.

While this statement is not intended to minimize the heinousness of war crimes, it is intended to reflect the broader context of and additional elements required to prove crimes against humanity and genocide. If all things being equal war crimes are not considered more serious and not penalized more harshly, a prosecutor would not go to the trouble to prove the additional elements required to establish genocide and crimes against humanity. There is undoubtedly a greater stigma attached to a conviction for genocide or crimes against humanity as opposed to a war crime. As has been reflected in several judgements, genocide was committed in Rwanda. To infer that this crime is not necessarily more serious than a war crime undermines the integrity of the convictions of genocide and crimes against humanity in the Tribunals and the gravity of the enormous harm caused by the Rwandan genocide during which nearly one million people were slaughtered.

9. In the *Kambanda* case before the ICTR, the Trial Chamber noted that the Statute did not rank the various crimes within the jurisdiction of the Tribunal or the sentences to be imposed and therefore, theoretically, there was no distinction between the crimes. However, it then emphasized that in imposing the sentence, the Trial Chamber should take into account "such factors as the gravity of the offence."[11] The Chamber went on to insist: "The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity."[12] Although it had no difficulty in holding that war crimes were not as serious as genocide and crimes against humanity, the Chamber found it "more difficult . . . to rank genocide and crimes against humanity in terms of their respective gravity."[13] It opined that "genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence."[14] Picking out genocide and crimes against humanity as the most serious crimes, the *Kambanda* Trial Chamber determined that "precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately."[15]

10. As *Blaškić* recognized, the *Kambanda* Trial Chamber considered war crimes as "crimes of a lesser seriousness" in relation to genocide and crimes against humanity, and noted that this view

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[10] See Legal Findings in Ground Five of the present Judgement.

[11] *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, T.Ch. I, 4 September 1998, at paras. 12-13. The Chamber also recalled that in determination of sentences, it had to take into account a number of factors, pursuant to the Statute and Rules, such as "gravity of the offence, the individual circumstances of the accused, [and] the existence of any aggravating or mitigating circumstances". *Ibid.,* para. 29.

[12] *Ibid.*, para. 14.

[13] *Ibid.*

[14] *Ibid.,* para. 16. The Chamber also referred to genocide and crimes against humanity as crimes "which are particularly revolting to the collective conscience alone". *Ibid.*, para. 33. See also para. 14, stating that genocide and crimes against humanity "are crimes which particularly shock the collective conscience."

[15] *Ibid.,* para. 17.

was followed in subsequent cases, which thereby established a "genuine hierarchy of crimes and this has been used in determining sentences" in the ICTR.[16] After reviewing the case law of the ICTY in relation to establishing a hierarchy of crimes at the sentencing phase, including the differing opinions on the issue set down in the *Tadić* and *Erdemović* cases, the *Blaškić* Chamber stated that "it appears that the case-law of the Tribunal is not fixed. The Trial Chamber will therefore confine itself to assessing seriousness based on the circumstances of the case."[17]

11. For the reasons cited above and in my previous decisions, and those articulated by Judge Cassese in *Tadić*,[18] I find myself still of the view that when all things are equal, a person convicted of a crime against humanity commits a more serious crime than a person convicted of a war crime and ordinarily this additional gravity requires that the person convicted of a crime against humanity should receive a longer sentence than a person convicted of the same act as a war crime. This view would naturally include genocide which, also considered a crime against humanity, is similarly inherently more serious than a war crime; all things being equal, it should be recognized and punished as such. This should not be taken to support the Appellant's argument in the present case that his sentence for war crimes should be reduced. If the Appellant had been charged with and convicted of a crime against humanity for the same acts, all things being equal, my view is simply that a conviction for crimes against humanity should warrant a higher sentence than a conviction for war crimes.

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

Judge Lal Chand Vohrah

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands

[SEAL OF THE TRIBUNAL]

[16] *Prosecutor v. Tihomir Blaškić*, Judgement, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, at para. 800.
[17] *Ibid.*, paras. 801-802.
[18] *Tadić,* Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese, *supra* note 7.

XI. DECLARATION OF JUDGE PATRICK ROBINSON

1. This Declaration is not prompted by disagreement with the Chamber's Judgement; rather, its purpose is to comment on the question of a methodology and technique for the interpretation and application of the Tribunal's Statute and Rules.

2. In relation to the fourth ground of appeal, the provisions for interpretation and application are Articles 13 and 21 of the Statute and Rule 15(A), which provide:

Article 13

> 1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.
>
> ...

Article 21

> ....
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing . . .

Rule 15

> (A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

3. Where the meaning of a provision is plain, no problem arises. But where the meaning is ambiguous, the methodology and technique in interpretation may be crucial and decisive. The meaning of Rule 15 is not plain. In such a case, it is important to ascertain whether there is a rule of customary international law that impacts upon the interpretation and application of the provision.

4. The Report of the Secretary-General[1] stresses the need for the Tribunal to apply rules of customary international law to determine the criminality of conduct so as to avoid conflict with the principle, *nullum crimen sine lege*. But the Tribunal would, in any event, be obliged to apply customary international law, since under Article 1 of the Statute, it is empowered to prosecute persons for serious violations of international humanitarian law, an integral component of which is customary international law.[2] The other component is, of course, conventional international law.

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[1] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704 ("Report of the Secretary-General") para. 34.

[2] The question of applicable law is explicitly dealt with, (and in a hierarchical manner), in Article 21 of the Statute establishing the International Criminal Court. See Rome Statute of the International Criminal Court, adopted at Rome

5. If there is in general a need to ascertain whether a rule of customary international law impacts on the interpretation of the Statute and Rules, it is all the more important to conduct that exercise in relation to the construction of those provisions which concern the fundamental rights of the accused,[3] because over time, and particularly, in the post-war era, many such rules have developed, and now abound in that area.

6. If there is a relevant rule of customary international law, due account must be taken of it, for more than likely, it will control the interpretation and application of the particular provision. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that:

> 3. There shall be taken into account, together with the context:
>
> ...
>
> (c) any relevant rules of international law applicable in the relations between the parties.[4]

7. Significantly, the paragraph "in the light of the general rules of international law in force at the time of its conclusion", which was in the International Law Commission's 1964 Draft Articles on the Law of Treaties, was amended by the deletion of the words "in force at the time of its conclusion" so as to take account of "the effect of an evolution of the law on an interpretation of legal terms in a treaty".[5] Therefore, the relevant rule of international law need not have been in force at the time of the conclusion of the treaty being interpreted; it need only be in force at the time of the interpretation of the treaty.

8. If there is no relevant rule of customary international law, the relevant provision in the Statute or the Rules will be interpreted in accordance with the other elements of Article 31 of the Vienna Convention, that is, good faith, textuality, contextuality (note that the Vienna Convention treats relevant rules of international law in connection with the context) and teleology.

9. Three points need to be highlighted in relation to the interpretation of the Statute and Rules.

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on 17 July 1998, A/CONF.183/9. Although the Tribunal's Statute does not have such a provision, the regime of its applicable law would be roughly the same. Article 21(1)(b) of the Rome Statute provides that "the Court shall apply . . . in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."

[3] Article 21 of the Statute lists the rights of the accused; the list is not exhaustive. The accused is entitled to what the Secretary General calls the "internationally recognized standards." Report of the Secretary-General, para. 106.

[4] The Tribunal has on several occasions had recourse to the general rule of interpretation in Article 31(1) of the Vienna Convention on the Law of Treaties for the purpose of interpreting the Statute. Article 31(1) provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Appeals Chamber has held that "Although the Statute is not a treaty, it is a *sui generis* international legal instrument resembling a treaty." *Joseph Kanyabashi v. The Prosecutor*, Case No. ICTR-96-15-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 3 June 1999, para. 15.

[5] See paragraph 16 of the Commentary of the International Law Commission on Article 27 of the Draft Articles on the Law of Treaties, I.L.C.Y.B. (1966), Book IX, Vol. II, pp. 222.

10. A relevant rule of customary international law does not necessarily control interpretation. For the Statute may itself derogate from customary international law, as it does in Article 29 by obliging States to co-operate with the Tribunal and to comply with requests and orders from the Tribunal for assistance in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.[6] This derogation from the customary principle of sovereignty has been highlighted in the *Blaskić* Decision.[7]

11. Secondly, in interpreting the Statute and Rules due account must be taken of the influence of context and purpose on the ordinary meaning to be given to a particular provision. Contextual interpretation calls for account to be taken of the international character of the Tribunal, in contradistinction to national courts from whose jurisdictions many of the provisions in the Statute and Rules are drawn. However, contextual interpretation highlighting this difference should not be taken too far, at any rate, not so far as to nullify fundamental rights which an accused has under customary international law. Teleological interpretation calls for account to be taken of the fundamental purpose of the Statute, to ensure fair and expeditious trials of persons charged with violations of international humanitarian law so as to contribute to the restoration and maintenance of peace in the former Yugoslavia.[8]

12. Thirdly, in seeking to ascertain whether there is a relevant rule of customary international law, the Tribunal, being a court, albeit an international one, would no doubt be influenced by the decisions of other courts and tribunals. Decisions of national courts are, of course, not binding on the Tribunal. However, it is accepted that such decisions may, if they are sufficiently uniform, provide evidence of international custom. [9] It is perfectly proper, therefore, to examine national decisions on a particular question in order to ascertain the existence of international custom. The Tribunal should not be shy to embark on this exercise, which need not involve an examination of decisions from every country. A global search, in the sense of an examination of the practice of every state, has never been a requirement in seeking to ascertain international custom, because what one is looking for is a sufficiently widespread practice of states accompanied by *opinio juris*. [10]

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[6] Article 29(1) of the Statute.

[7] *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-AR108 *bis,* Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, para. 26.

[8] Report of the Secretary-General, para. 26.

[9] Brownlie, Principles of Public International Law (5th ed. 1998), p. 5. As Oppenheim comments: "Decisions of municipal courts . . . are not a source of law in the sense that they directly bind the state from whose courts they emanate. But the cumulative effect of uniform decisions of national courts is to afford evidence of international custom (although the weight to be attached to that evidence will vary with the status of the courts and the intrinsic merits of the decisions). *Oppenheim's International Law*, Vol. 1 (9th ed., 1997), p. 41.

[10] Article 38 of the Statute of the International Court of Justice requires the Court to apply "international custom, as evidence of a general practice accepted as law. . .".

13. In ground four of this appeal, the Appellant challenges the impartiality of Judge Mumba. The impartiality of judges is required by Articles 13(1) and 21 of the Statute. It is beyond dispute that the impartiality of judges is a requirement of customary international law. The provisions in the Statute reflect this requirement. The Judgement does not highlight in explicit terms the customary character of this requirement. It is apparently taken for granted. The Chamber does, however, conclude that the "fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognised as being an integral component of the requirement that an accused should have a fair trial."[11]

14. The Judgement cites provisions from other human rights instruments to support that conclusion.[12] I would have been more content with a specific identification of the customary character of the principle of judicial impartiality. Consequently, although that customary character is self-evident, I very much regret that the Chamber felt that it "need look no further than Article 13(1) of the Statute for the source of that requirement."[13]

15. However, the real issue raised by the ground of appeal is the significance of Rule 15, which seeks to give effect to the customary requirement of judicial impartiality. The question which the Chamber had to resolve was the standard to be employed in determining a breach of that customary requirement. In my view, the Chamber should have sought to ascertain whether any rule of customary international law had developed in relation to that standard.

16. Although the Judgement examines provisions in the European Convention on Human Rights, decisions of the European Court of Human Rights, decisions from some common law countries - the United Kingdom, Australia, South Africa and the United States[14]- and observes the "trend in civil law jurisdictions",[15] it does not do so for the purpose of ascertaining whether there is any relevant rule of customary international law.

17. The finding which the Chamber makes based upon this examination, is that "there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias."[16] That finding, however, was not sufficient to resolve the issues raised by the interpretation of Rule 15, for it left unanswered the further question as to the sub-standard or criterion to be employed for determining when, objectively, there is an appearance of bias. The Appeals Chamber considered

[11] This Judgement, para. 177.
[12] *Ibid.*, p. 54, n. 241.
[13] *Ibid.*, para. 177.
[14] *Ibid.*, paras. 181 – 187.
[15] *Ibid.*, para. 188.
[16] *Ibid.*, para. 189.

that "the following principles should direct it in interpreting and applying the impartiality requirement of the Statute":[17]

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> i) a Judge is a party to the cause, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[18]

18. The Judgement, although not explicitly following the path that I would have wished it to take, has come very close to doing so, and, perhaps, may be understood by some as having done so.

19. The Chamber's examination of decisions of national courts and international tribunals is very much akin to the approach advocated in this Declaration, and could provide a sufficient foundation for a determination as to whether a rule of custom had emerged as to the standard for determining a breach of the customary requirement of impartiality. I arrive at this conclusion bearing in mind that a global search is not required to establish customary international law, and that the decisions of national courts cited reflect the position, not only in those countries, but in many others.

20. It would not be too bold to characterise the Chamber's finding – "that there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias"[19] – as reflecting a customary standard for determining whether there is a breach of the principle of judicial impartiality.

21. This finding is consistent with the general principle that justice must not only be done, but that it must also be seen to be done.[20] It may be that there is implicit in the Chamber's characterisation of its finding as "a general rule" a recognition that it has a customary basis.

22. The question arises as to whether the principles which the Chamber draws from its finding of the general rule could be said to reflect customary international law. As to the first, that a judge is not impartial if actual bias is shown, there is no controversy, and I would characterise that

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[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] Lord Hewart CJ in *R. v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.

principle as reflecting international custom. The real difficulty however is with the second, that is, where there is an unacceptable appearance of bias. Here, it would require some boldness to say that a customary rule has emerged, not in relation to the principle itself – an unacceptable appearance of bias – but, rather in relation to what constitutes, or the indicia of, an unacceptable appearance of bias, and more so, in relation to the second of those indicia - where the circumstances lead a reasonable observer, properly informed, to reasonably apprehend bias. But I agree, nonetheless, with the conclusion drawn by the Chamber that Rule 15 should be interpreted in the light of those indicia.

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

Patrick Lipton Robinson

Dated this twenty-first day of July 2000
At The Hague,
The Netherlands.

[SEAL OF THE TRIBUNAL]

Annex A – Glossary of Terms

Aleksovski Appeals Judgement	*Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar. 2000.
Amended Indictment	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-PT, Amended Indictment, 2 June 1998.
Appellant	Anto Furundžija.
Appellant's Amended Brief	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Defendant's Amended Appellate Brief [Public Version], 23 June 2000.
Appellant's Reply	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appellant's Reply Brief [Public Version], 23 June 2000.
Bungalow	A well-known hostelry in the village of Nadioci, Central Bosnia.
Čelebići Judgement	*Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-T, Judgement, 16 Nov. 1998.
Confidential Decision	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Confidential Decision, 15 June 1998.
Defence	Defence for Anto Furundžija.
Eur. Ct. H. R.	Prior to 1996, the official publication of the Registry of the European Court of Human Rights was entitled "Publications of the European Court of Human Rights." Thereafter, the title was changed to "Reports of Judgments and Decisions."
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.
First *Erdemović* Sentencing Judgement	*Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov. 1996.
HVO	Croatian Defence Council.
Holiday Cottage	Building adjacent to the Bungalow - living quarters of the Jokers.
ICCPR	International Covenant on Civil and Political Rights, 1966.
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.
Indictment	*Prosecutor v. Anto Furundžija,* Case No. IT-95-17/1-T, Indictment, 2 Nov. 1995.
International Tribunal or ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
Jokers	A special unit of the military police of the HVO.
Judgement	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 Dec. 1998.
Kupreškić Judgement	*Prosecutor v. Zoran Kupreškić et al*, Case No. IT-95-16-T, Judgement, 14 Jan. 2000.
Large Room	A room in the Holiday Cottage where the events alleged in paragraph 25 of the Amended Indictment occurred.
Pantry	A room in the Holiday Cottage where the events alleged in paragraph 26 of the Amended Indictment occurred.
Prosecutor or Respondent	Office of the Prosecutor.
Prosecutor's Response	*Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution dated 30 September 1999, 28 June 2000.
PTSD	Post-Traumatic Stress Disorder.
Re-opened proceedings	Post-trial proceedings commencing on 9 November 1998, pursuant to the Trial Chamber's Decision of 16 July 1998. These proceedings ended on 12 November 1998.
Rome Statute	Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. A/CONF. 183/9.
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.

Second *Erdemović* Sentencing Judgement	*Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 Mar. 1998.
SFRY	Socialist Federal Republic of Yugoslavia.
Statute	Statute of the International Tribunal.
T. (2 March 2000)	Transcript of hearing on appeal in *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A. 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 Appeals Judgement	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999.
Tadić Sentencing Judgment	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Sentencing Judgment, 14 July 1997.
Tadić Sentencing Appeals Judgement	*Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan. 2000.