UNITED NATIONS

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

Case No.: IT-97-24-A

Date: 22 March 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **22 March 2006**

PROSECUTOR

v.

MILOMIR STAKIĆ

JUDGEMENT

The Office of the Prosecutor:
Mr. Mark J. McKeon
Ms. Helen Brady
Mr. Xavier Tracol
Ms. Barbara Goy
Ms. Katharina Margetts

Counsel for the Appellant:
Mr. Branko Lukić
Mr. John Ostojić

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of two appeals[1] from the written Judgement rendered by Trial Chamber II on 31 July 2003 in the case of *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T ("Trial Judgement").

2. Milomir Stakić ("Appellant") was born on 19 January 1962 in the Municipality of Prijedor, located in what is now the Republika Srpska region of Bosnia and Herzegovina.[2] He began his career as a physician, but became actively involved in politics during the run-up to the 1990 multi-party elections in Bosnia and Herzegovina.[3] In November 1990, as a member of the Serbian Democratic Party ("SDS"), he was elected to the Prijedor Municipal Assembly, becoming Vice-President of that body in January 1991.[4] In September 1991, he was elected Vice-President of the SDS Municipal Board, and in January 1992, he was elected President of the self-proclaimed Assembly of the Serbian People of the Municipality of Prijedor.[5]

3. On 29 and 30 April 1992, the SDS staged what the Trial Chamber termed a *coup d'état* in Prijedor, hereafter referred to as the "take-over".[6] During the turbulent months that followed, the Appellant became acting President of the Municipal Assembly, President of the Prijedor Municipal Crisis Staff (later renamed the "War Presidency"), which was established in May 1992 and effectively assumed all the duties of the Municipal Assembly on the grounds that the region was in a state of emergency.[7] He served in those positions until January 1993, when he was removed from his position as President of the Municipal Assembly and went back to full-time practice as a physician.[8]

4. In an indictment filed on 27 March 2001, the Appellant was charged with complicity in genocide while he was President of the Municipality of Prijedor Crisis Staff.[9] The Indictment was subsequently amended, and the Appellant ultimately went to trial facing charges of genocide, complicity in genocide, extermination, murder as a crime against humanity, murder as a violation of

[1] Stakić's Notice of Appeal, 1 September 2003; Prosecution's Notice of Appeal, 1 September 2003.
[2] Trial Judgement, para. 1.
[3] Trial Judgement, paras 3-4.
[4] Trial Judgement, paras 5, 336.
[5] Trial Judgement, para. 336.
[6] Trial Judgement, paras 67-84.
[7] Trial Judgement, paras 88-101, 336.
[8] Trial Judgement, para. 7.
[9] Indictment, 27 March 2001.

the laws and customs of war, persecutions, deportation, and other inhumane acts (forcible transfer).[10]

5. The Trial Judgement was issued on 31 July 2003. The Trial Chamber found the Appellant not guilty of the crime of genocide (Count 1), complicity in genocide (Count 2) and other inhumane acts (forcible transfer) as a crime against humanity (Count 8).[11] The Trial Chamber found the Appellant guilty of extermination as a crime against humanity (Count 4); murder as a violation of the laws and customs of war (Count 5); and persecutions as a crime against humanity (Count 6), incorporating the crimes of murder as a crime against humanity (Count 3) and deportation as a crime against humanity (Count 7).[12] The Appellant was sentenced to life imprisonment.[13] Both the Appellant[14] and the Office of the Prosecutor ("Prosecution")[15] have appealed the decision.

6. The Appeals Chamber heard oral submissions regarding these appeals on 4, 5 and 6 October 2005. Having considered the written and oral submissions of the Appellant and the Prosecution, the Appeals Chamber hereby renders its Judgement.

[10] Fourth Amended Indictment, filed 11 April 2002 (dated 10 April 2002) ("Indictment").
[11] Trial Judgement, Disposition.
[12] Trial Judgement, Disposition.
[13] Trial Judgement, Disposition.
[14] Stakić Appeal Brief, 8 March 2004.
[15] Prosecution Appeal Brief, 17 November 2003.

II. THE STANDARD FOR APPELLATE REVIEW

7. On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the ICTY[16] and the ICTR.[17] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[18]

8. Any party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the decision. An allegation of an error of law which has no chance of changing the outcome of a decision may be rejected on that ground.[19] Even if the party's arguments are insufficient to support the contention of an error, however, the Appeals Chamber may conclude for other reasons that there is an error of law.[20]

9. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[21] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[22] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[23] The Appeals Chamber will not review the entire trial record *de novo*; rather it "will in principle only take into account … evidence referred to by the Trial Chamber in the body of the Judgement or in a

[16] *Kvočka* Appeal Judgement, para. 14, citing *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac* Appeal Judgement, paras 35-48; *Kupreškić* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.
[17] *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.
[18] *Kupreškić* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247.
[19] *Kvočka* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.
[20] *Kvočka* Appeal Judgement, para. 16; *Kordić* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6.; *Kupreškić* Appeal Judgement, para. 26. *See* also *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.
[21] *Krnojelac* Appeal Judgement, para. 10.
[22] *Kvočka* Appeal Judgement, para. 17; *Kordić* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15.
[23] *Kvočka* Appeal Judgement, para. 17; *Kordić* Appeal Judgement, para. 17. *Blaškić* Appeal Judgement, para. 15.

related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal."[24]

10. When considering alleged errors of fact on appeal from the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[25] In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".[26] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškić,* wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[27]

11. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[28] Arguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[29]

12. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[30] Further, "the Appeals Chamber cannot be

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[24] *Blaškič* Appeal Judgement, para. 13.
[25] *Kvočka* Appeal Judgement, para. 18; *Kordić* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
[26] *Furundžija* Appeal Judgement, para. 37, referring to *Tadić* Appeal Judgement, para. 64. *See* also *Kvočka* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Aleksovski* Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 18.
[27] *Kvočka* Appeal Judgement, para. 19, citing *Kupreškić* Appeal Judgement, para. 30. *See* also *Kordić* Appeal Judgement, para. 19, fn. 11; *Blaškić* Appeal Judgement, paras 17-18.
[28] *Kajelijeli* Appeal Judgement, para. 6, referring to *Niyitegeka* Appeal Judgement, para. 9. *See* also *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[29] *Kajelijeli* Appeal Judgement, para. 6, referring to *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[30] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002, para. 4(b). *See* also: *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies."[31]

13. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing.[32] Furthermore, the Appeals Chamber may dismiss arguments which are evidently unfounded without providing detailed reasoning.[33]

[31] *Kajelijeli* Appeal Judgement, para. 7, referring to *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac* Appeal Judgement, paras 43, 48; *Niyitegeka* Appeal Judgement, para. 10.
[32] *Kunarac* Appeal Judgement, para. 47; *Kajelijeli* Appeal Judgement, para. 8.
[33] *Kajelijeli* Appeal Judgement, para. 8, referring to *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac* Appeal Judgement, para. 48; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.

III. THE PROSECUTION'S THIRD GROUND OF APPEAL: THE GROUP(S) ALLEGEDLY TARGETED FOR GENOCIDE

14. The Trial Chamber acquitted the Appellant of genocide, concluding that the Prosecution had not introduced sufficient evidence to establish that "the Bosnian Croat group was … targeted".[34] The Trial Chamber also found that while the Prosecution had proven "a comprehensive pattern of atrocities against [Bosnian] Muslims in Prijedor",[35] the evidence did not show beyond a reasonable doubt that the Appellant sought to destroy the Muslim group in whole or in part.[36] In its third ground of appeal, the Prosecution argues that the Trial Chamber erred in law by separately considering whether the Appellant was guilty of genocide against Muslims and against Croats instead of defining the group allegedly targeted for genocide as "non-Serbs". The Prosecution further argues in the alternative that the Trial Chamber erred in fact when it found that the Bosnian Croat group was not separately targeted by acts amounting to the *actus reus* for genocide.

15. In the first and second grounds of appeal, the Prosecution challenges the Trial Chamber's conclusion that the Appellant lacked the requisite *dolus specialis* for genocide. Because the question of how to define the group allegedly targeted for genocide is logically antecedent to questions about the Appellant's *mens rea*, the Appeals Chamber considers the Prosecution's third ground of appeal first. The Appeals Chamber will then consider the Prosecution's arguments regarding the Appellant's *mens rea*.

A. The Trial Chamber's alleged error in defining the target group

16. The Prosecution argues that the Trial Chamber committed an error of law when, in the process of determining whether the Appellant committed genocide, it declined to define the target group as all the non-Serbs in Prijedor Municipality and instead required the Prosecution to establish genocide separately with respect to both Bosnian Croats and Bosnian Muslims.[37] Elaborating, the Prosecution submits that the Trial Chamber offered no legal basis for explicitly rejecting the "negative approach" adopted by the *Jelisić* Trial Chamber,[38] an approach which, according to the Prosecution, is more entrenched than any other in the jurisprudence of the Tribunal and the ICTR.[39] The Prosecution argues that the *Jelisić* approach finds support in the *Krstić* and *Rutaganda* Trial Judgements, pointing out that these Judgements contain language suggesting that target groups

[34] Trial Judgement, para. 545.
[35] Trial Judgement, para. 546.
[36] Trial Judgement, para. 553.
[37] Prosecution Appeal Brief, paras 4.3-4.10.
[38] *See Jelisić* Trial Judgement, para. 71.
[39] Prosecution Appeal Brief, paras 4.3-4.4.

should be subjectively defined by the manner in which the alleged perpetrator perceived the group.[40] The Prosecution adds that the Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 – a Commission that examined alleged crimes in the former Yugoslavia before the Tribunal was formed – suggested that it may be permissible to define target groups by reference to national, ethnical, racial, or religious characteristics that individuals lack.[41] The Prosecution further submits that requiring it "to prove separate targeting of [Muslims and Croats] does not accord with the practical realities of conflicts of this nature or with the facts of this case", and that such a requirement "is not supported by any authority".[42]

17. The Appellant responds that acceptance of the "negative approach" would expand the definition of genocide, thereby diluting the "significance" of the "primary historical examples of" that crime.[43] He adds that both UN General Assembly Resolution 96(I) (1946) – which called for the drafting of a Convention explicitly barring genocide – and the Preamble to the Convention on the Prosecution and Punishment of the Crime of Genocide explain that the crime of genocide entails "denial of the right to existence of entire human groups".[44] The Appellant observes, moreover, that in *Akayesu*, a Trial Chamber of the ICTR referred to the Genocide Convention's *travaux préparatoires* to conclude that, absent intent to destroy a protected group, no act can amount to genocide, no matter how atrocious that act is.[45] In any event, the Appellant argues, because he did not possess the specific intent necessary to commit genocide, the question of whether target groups may be negatively defined proves irrelevant in this case.[46]

18. As a preliminary matter, the Appeals Chamber rejects the Appellant's argument that it need not address whether target groups may be negatively defined. Because evidence of intent to destroy may be inferred from an accused's actions or utterances *vis-à-vis* the targeted group, it is impossible to establish with certainty whether the Appellant possessed the necessary intent to destroy if the target group itself has not been defined.

19. The Trial Chamber held that "where more than one group is targeted [by discriminatory attacks allegedly amounting to genocide], it is not appropriate to define the group in general terms

[40] Prosecution Appeal Brief, paras 4.7-4.8, citing *Krstić* Trial Judgement, para. 557; *Rutaganda* Trial Judgement, para. 56.
[41] Prosecution Appeal Brief, para. 4.6, citing Commission of Experts Report, para. 96.
[42] Prosecution Appeal Brief, para. 4.9.
[43] Stakić Response Brief, paras 167-169.
[44] Stakić Response Brief, para. 169.
[45] Stakić Response Brief, para. 170, citing *Akayesu* Trial Judgement, para. 519, citing UN GAOR 6th Committee, 72nd Meeting (1948), p. 87, statement of the Representative of Brazil: "[G]enocide [is] characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide."
[46] Stakić Response Brief, para. 152.

as, for example, 'non-Serbs'."[47] Rather, it held that the elements of genocide must be considered separately in relation to each specific group – in this case Bosnian Muslims and Bosnian Croats.[48] In so holding, the Trial Chamber departed without explanation from the "negative approach" taken by the Trial Judgement in *Jelisić*, an approach which consists of "identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics.[49] Thereby, all individuals thus rejected would, by exclusion, make up a distinct group."[50] The *Jelisić* Trial Chamber had found that approach "consistent with the object and purpose of the [Genocide] Convention" as well as with the Commission of Experts Report. Following the Trial Chamber's decision in the present case, the *Brđanin* Trial Chamber also rejected the *Jelisić* approach without explanation.[51] The question whether the group targeted for genocide can be defined negatively is one of first impression for the Appeals Chamber.

20. Article 4 of the Tribunal's Statute defines genocide as one of several acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, *as such*".[52] The term "as such" has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity. Yet when a person targets individuals because they lack a particular national, ethnical, racial, or religious characteristic, the intent is not to destroy particular groups with particular identities as such, but simply to destroy individuals because they lack certain national, ethnical, racial or religious characteristics.

21. This reading of Article 4 finds support in the etymology of the term "genocide", and in the definition of the crime given by Raphaël Lemkin, the scholar who first conceptualised the term. Raphaël Lemkin explained that he created the word "genocide" by combining "the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing)".[53] The combined term therefore describes "the destruction of a nation or of an ethnic group".[54] Raphaël Lemkin elaborated that genocide "is intended … to signify a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups".[55] "The objectives of such a plan", he added, "would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups".[56] Indeed, Raphaël Lemkin explained that genocide

[47] Trial Judgement, para. 512.
[48] Trial Judgement, para. 512.
[49] *Jelisić* Trial Judgement, para. 71.
[50] Trial Judgement, para. 512, citing *Jelisić* Trial Judgement, para. 71.
[51] *Brđanin* Trial Judgement, paras 685-686.
[52] Article 4(2) of the Statute (emphasis added).
[53] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79.
[54] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79.
[55] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79.
[56] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944), p. 79.

constitutes such a serious offence in part because the world loses "future contributions" that would be "based upon [the destroyed group's] genuine traditions, genuine culture, and … well-developed national psychology." Thus, genocide was originally conceived of as the destruction of a race, tribe, nation, or other group with a particular positive identity – not as the destruction of various people lacking a distinct identity.

22. The drafting history of the Genocide Convention, whose second article is repeated verbatim in Article 4(2) of the Tribunal's Statute, shows that the Genocide Convention was meant to incorporate this understanding of the term genocide – an understanding incompatible with the negative definition of target groups. General Assembly Resolution 96(I) defined genocide as the "denial of the right of existence of entire human groups".[57] Members of the General Assembly's Sixth Committee, which prepared the final text of the Genocide Convention, echoed this view, making clear that leading countries viewed genocide as the destruction of "human groups",[58] not just the destruction of individuals because they have, or lack, national, ethnical, racial, or religious characteristics. Perhaps even more tellingly, members of the Sixth Committee declined to include destruction of political groups within the definition of genocide, accepting the position of countries that wanted the Convention to protect only "definite groups distinguished from other groups by certain well-established", immutable criteria.[59] Given that negatively defined groups lack specific characteristics, defining groups by reference to a negative would run counter to the intent of the Genocide Convention's drafters.

23. Debates within the Sixth Committee about whether "cultural genocide" should be proscribed also show that Committee members did not envision the negative definition of target groups. Supporters of the "cultural genocide" concept "argued that a group could be suppressed by extinguishing [its] specific traits, as well as by physical destruction."[60] Opponents of the concept, who found it too vague, succeeded in keeping the Convention focused on the physical destruction of groups.[61] The mere fact that it was considered, however, shows that the Convention's drafters

[57] UN G.A. Res. 96(I) (1946).
[58] *See* UN GAOR 6th Committee, 73rd Meeting (1948), p. 91 (statement of the Representative of the United States) (observing that genocide is "the denial of the right to live of entire human groups"); UN GAOR 6th Committee, 73rd Meeting (1948), p. 92 (statement of the Representative of the United Kingdom) (stating that the Genocide Convention should bar only destruction of "human groups"); UN GAOR 6th Committee, 73rd Meeting (1948), p. 96 (statement of the Representative of the Union of Soviet Socialist Republics) (stating that "Genocide [i]s a crime aimed at the physical destruction, in whole or in part, of definite groups").
[59] UN GAOR 6th Committee, 73rd Meeting (1948), p. 96 (statement of the Representative of the Union of Soviet Socialist Republics); *see* also UN GAOR 6th Committee, 74th Meeting (1948), p. 99 (statement of the Representative of Iran) (noting that "[c]ertain States feared … the inclusion of political groups" and preferred to protect only "groups, membership of which was inevitable"); UN GAOR 6th Committee, 74th Meeting (1948), p. 105 (statement of the Representative of the Union of Soviet Socialist Republics) (stating the Soviet view that the "criterion must be of an objective character").
[60] Whitaker Report, para. 32.
[61] Whitaker Report, para. 32.

viewed target groups as groups with specific distinguishing characteristics. As previously explained, unlike positively defined groups, negatively defined groups have no unique distinguishing characteristics that could be destroyed.

24. Since the Genocide Convention was adopted, experts have continued to discuss the possibility of a ban on "cultural genocide."[62] Moreover, pointing to the words "as such" in the Genocide Convention, they have reiterated that genocide focuses on the destruction of groups, not individuals.[63] This suggests that there has been no relevant change in how the Genocide Convention's provisions on target groups have been understood. Indeed, observing that members of the Sixth Committee felt that "genocide should generally be regarded as a crime committed against a group of individuals permanently possessing certain common features",[64] the UN Economic and Social Council's 1978 Study on the Prevention and Punishment of the Crime of Genocide suggested that the Genocide Convention protects, for instance, a group comprised of "persons of a common national origin"[65] or "any religious community united by a single spiritual ideal."[66] Thus, well after the Convention was adopted, leading commentaries continued to suggest that genocide entails the destruction of unique, positively defined groups with particular identities.

25. The Prosecution raises arguments regarding support in the jurisprudence for a subjective definition of the target group. The Appeals Chamber considers these arguments to be misguided for two reasons. First, contrary to what the Prosecution argues, the *Krstić* and *Rutaganda* Trial Judgements do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgement in *Krstić* found only that "stigmatisation … by the perpetrators" can be used as "a criterion" when defining target groups – not that stigmatisation can be used as the sole criterion. Similarly, while the *Rutaganda* Trial Chamber found national, ethnical, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnical, racial, or religious group, it also held that "a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide

[62] *See, e.g.,* Whitaker Report, para. 33.
[63] *See* Report of the ILC on its 43rd Sess., p. 102 (noting that one element of genocide is the intent "to destroy, in whole or in part, one of the groups protected by the" Genocide Convention); Report of the ILC on its 48th Sess., p. 88 (noting that genocide requires intent "to destroy a group and not merely one or more individuals who are coincidentally members of a particular group").
[64] 1978 ECOSOC Genocide Study, para. 56.
[65] 1978 ECOSOC Genocide Study, para. 59.
[66] 1978 ECOSOC Genocide Study, para. 78, citing Antonio Planzer, *Le crime de génocide* (thesis) (St. Gallen, F. Schwald A.G.) (1956), p. 98).

Convention."[67] Other Trial Judgements from the ICTR have also concluded that target groups cannot be only subjectively defined.[68]

26. Second, the Appeals Chamber notes that whether or not a group is subjectively defined is not relevant to whether a group is defined in a positive or a negative way, which is the issue now before the Chamber. Consequently, when a target group is defined in a negative manner (for example non-Serbs), whether the composition of the group is identified on the basis of objective criteria, or a combination of objective and subjective criteria, is immaterial as the group would not be protected under the Genocide Convention.

27. The Prosecution cites only one source actually suggesting that the "negative approach" might be permissible: the Commission of Experts Report. The relevant statement is as follows:

> If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A. In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition. It seems relevant to analyse the fate of the non-A group along similar lines as if the non-A group had been homogenous.[69]

Reliance on the statement of the Commission of Experts in support of a purely negative approach is not persuasive. The Appeals Chamber considers that the Commission, when stating that "each group as such is protected" is, in effect, acknowledging that proof would be necessary that each individual group which makes up the aggregate group is itself a positively defined target group within the terms of the Convention. Only then may more than one protected group be aggregated into a larger 'negative' group for the purposes of protection under Article 4 of the Statute. In such circumstances, it would be inaccurate to suggest that the larger group is in fact defined only by a negative approach.

28. The Appeals Chamber accordingly finds that the Trial Chamber did not err in concluding that the elements of genocide must be separately considered in relation to Bosnian Muslims and Bosnian Croats. The Prosecution's challenge to this conclusion of the Trial Chamber is dismissed.

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[67] *Rutaganda* Trial Judgement, paras 56-57.

[68] In the *Musema* Trial Judgement, para. 162, the Trial Chamber stated that "a subjective definition alone is not enough". In the *Semanza* Trial Judgement, para. 317, the Trial Chamber held that "the determination of whether a group" can be defined as a target group "ought to be assessed … by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators" (emphasis in original). In the *Bagilishema* Trial Judgement, para. 65, the Trial Chamber was even more explicit, noting that the concept of a national, ethnical, racial, or religious group "must be assessed in light of a particular political, social, historical, and cultural context," and that membership in "the targeted group must be an objective feature of the society in question".

[69] Commission of Experts Report, para. 96.

B. The Trial Chamber's alleged error regarding the targeting of the Bosnian Croats

29. As an alternative to its argument about target group definition, the Prosecution asserts that the Trial Chamber erred in fact when it found that "there was insufficient evidence to show that the Bosnian Croats were a targeted group."[70] Elaborating, the Prosecution contends that this finding is inconsistent with the Trial Chamber's own correct assertion that, "[a]s pointed out by the Trial Chamber in *Semanza*, 'there is no numeric threshold of victims necessary to establish genocide'."[71] Just because there were relatively few Bosnian Croats in Prijedor, the Prosecution argues, does not mean that they were not targeted.[72] In fact, the Prosecution contends, there was ample evidence in the Trial Chamber's own findings that authorities in Prijedor had targeted Bosnian Croats for destruction as a group.[73]

30. The Prosecution points in particular to the SDS's stated goal of "separation from … the Bosnian Muslims and Bosnian Croats"[74]; the Appellant's reference to both Croats and Muslims as "our former friends", his knowledge that they were being ethnically cleansed, and his declaration that "we will not create a common state again"[75]; Radio Prijedor's propaganda against "non-Serbs"[76]; the Prijedor Red Cross conclusion that Croats were being pressured to leave the ARK[77]; the removal of Croat politicians from the municipal government after the take-over[78]; the looting and destruction of Croat properties and Catholic churches[79]; the shelling of a Croat village and killing of seventy-seven Bosnian Croats[80]; the prevention of Croats from working[81]; the detention of Croats and mistreatment in detention camps[82]; and the almost 50% reduction in the Croat population of Prijedor, which was attributable to the Appellant.[83]

31. In arguing that Bosnian Croats were targeted, the Prosecution also points to other evidence not cited by the Trial Chamber. In particular, the Prosecution argues, the record shows that: one "Croat victim found dead in a … field 'had the letter "U" … shaved in his head,' which was clearly

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[70] Prosecution Appeal Brief, para. 4.11.
[71] Prosecution Appeal Brief, para. 4.12, citing Trial Judgement, para. 522, *Semanza* Trial Judgement, para. 316.
[72] Prosecution Appeal Brief, paras 4.13-4.14.
[73] Prosecution Appeal Brief, para. 4.15. In addition to citing findings made in the Trial Judgement, the Prosecution points out that the Trial Chamber's Rule 98*bis* Decision found that there was "ample evidence that could lead a reasonable trier of fact to the conclusion that there were targeted killings of Bosnian Muslims and Bosnian Croats as ethnical/national groups." Prosecution Appeal Brief, para. 4.15, citing Rule 98*bis* Decision, para. 31.
[74] Prosecution Appeal Brief, para. 4.19, citing Trial Judgement, paras 548, 819.
[75] Prosecution Appeal Brief, para. 4.18, citing Trial Judgement, paras 404, 497, 614, 825.
[76] Prosecution Appeal Brief, para. 4.17, citing Trial Judgement, paras 52, 105-107.
[77] Prosecution Appeal Brief, para. 4.19, citing Trial Judgement, paras 320, 691.
[78] Prosecution Appeal Brief, para. 4.17, citing Trial Judgement, para. 473.
[79] Prosecution Appeal Brief, para. 4.17, citing Trial Judgement, paras 278, 284-285, 288, 303-304, 809, 811-812.
[80] Prosecution Appeal Brief, para. 4.16, citing Trial Judgement, paras 269, 653.
[81] Prosecution Appeal Brief, para. 4.17, citing Trial Judgement, para. 307.
[82] Prosecution Appeal Brief, para. 4.16, citing Trial Judgement, para. 162, 188, 233, 238, 807, 821.
[83] Prosecution Appeal Brief, para. 4.21, citing Trial Judgement, paras 706, 712.

a reference to the Croat Ustaša"[84]; another Croat arrested by Serb police was told "fuck you Ustacha's mother [*sic.*] … we [are] going to kill all of you balijas and ustashas [*sic.*] …"[85]; a Croat detainee in one of the camps established in Prijedor Municipality was ordered to hold up the three-finger Serb salute while he was beaten.[86] According to the Prosecution, "[t]he only reasonable inference from [the combination of this evidence and the Trial Chamber's factual findings] is that Bosnian Croats were also targeted for destruction."[87]

32. The Appellant submits that the evidence does not support the Prosecution's claim that Bosnian Croats were a group targeted for genocide. According to the Appellant, the Prosecution can only argue the Croat group was targeted by diluting the requirements for a genocide conviction – the Appellant suggests that genocide convictions are proper only when many members of a large, recognised group (like Bosnian Croats) are killed, permitting the inference that the group was targeted, and that here the Prosecution seeks to define the target group narrowly, as Croat men of military age in Prijedor Municipality, so that evidence some were killed would show the group was targeted.[88] Moreover, the Appellant contends, there was much evidence in the record indicating that he never exhibited any ethnic prejudices against anyone (including Croats), that Croats continuously held high ranks within the Bosnian Serb Army, that Croat businesses and employees continued to work in the same manner after the take-over, and that Croats were treated the same as all other nationalities in benefits eligibility.[89] There was also evidence that a number of Croat towns and religious sites were not systematically targeted and destroyed.[90]

33. The Appeals Chamber notes that the Trial Chamber found that "the majority of victims of acts potentially [constituting the *actus reus* of genocide under] the Statute belong[ed] to the Bosnian Muslim group."[91] Then, observing that "the number of Croats in the Municipality of Prijedor was limited," the Trial Chamber concluded that "the evidence of crimes committed against Croats [was] insufficient to allow it to conclude that the Bosnian Croat group was separately targeted."[92]

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[84] Prosecution Appeal Brief, para. 4.20, citing Witness M/Ex. S39 (Rule 92*bis* Statement), ERN 0102-8891 (second ellipsis in original). The Trial Chamber explained that, after it occupied "the Kingdom of Yugoslavia in 1941, the German Nazi regime created the 'Independent State of Croatia', headed by an anti-Serb Ustaša regime. Allied with Germany and Italy, Croatian fascists (Ustašas) fought both Serb monarchists (Četniks) and communists (Tito's partisans)" (Trial Judgement, para. 23). The Trial Chamber cited the term "Ustaša" as an example of derogatory language used by Radio Prijedor when referring to non-Serbs (Trial Judgement, para. 105).
[85] Prosecution Appeal Brief, para. 4.20, citing Witness M/Ex. S39 (Rule 92*bis* Statement), ERN 0102-8893.
[86] Prosecution Appeal Brief, para. 4.20, citing Witness M/Ex. S39 (Rule 92*bis* Statement), ERN 0102-8894.
[87] Prosecution Appeal Brief, para. 4.22.
[88] Stakić Response Brief, paras 176-184.
[89] Stakić Response Brief, paras 150-156.
[90] Stakić Response Brief, paras 157- 159.
[91] Trial Judgement, para. 545.
[92] Trial Judgement, para. 545.

34. Contrary to what the Prosecution argues, the Trial Chamber did not find that, because the Bosnian Croat group in Prijedor Municipality was of limited size, there was insufficient evidence to support a conclusion that it had been separately targeted. Instead, the Trial Chamber simply noted the limited number of Bosnian Croats in Prijedor Municipality, and independently concluded that "the evidence of crimes committed against Croats" was insufficient to allow it to conclude that this group had been separately targeted.[93] The Appeals Chamber may reverse this conclusion only if no reasonable Trial Chamber could have failed to find that the Bosnian Croat group was targeted.[94]

35. It is true, as the Prosecution points out, that the Trial Chamber identified a number of individual violent acts whose victims were members of the Bosnian Croat group. Croats were killed in an attack on the village of Briševo, some Croat homes in the Municipality of Prijedor were looted and destroyed, and certain Catholic churches were also destroyed.[95] Moreover, the Trial Chamber noted that the Prijedor Red Cross found "great pressure for citizens of Muslim or *Croatian* nationality to leave the AR Krajina."[96] Yet the fact that some Croats, some Croat properties, and some sites of importance to Croats were victimised does not necessarily compel the conclusion that the Croat group as such was targeted by acts that could constitute the *actus reus* for genocide. Indeed, at the close of the Prosecution's case, the Appellant asserts, and the Prosecution does not deny, the Trial Chamber found there was insufficient evidence to conclude that certain Croat towns were the subject of attacks.[97] In light of the totality of the evidence concerning crimes against Croats, then, it was not unreasonable for the Trial Chamber to have found that it could not "conclude that the Bosnian Croat group was separately targeted."[98]

C. Conclusion

36. The Appeals Chamber concludes that the Trial Chamber did not err in law either by defining the groups allegedly targeted for genocide as Bosnian Muslims and Bosnian Croats rather than "non-Serbs", or by finding that the Bosnian Croat group was not separately targeted for genocide. This ground of appeal is dismissed.

[93] Trial Judgement, para. 545.
[94] *See Vasiljević* Appeal Judgement, paras 120, 128, 131.
[95] Trial Judgement, paras 269, 278, 284-285, 288, 303-304, 809, 811-812.
[96] Trial Judgement, paras 320, 691 (emphasis added).
[97] Stakić Response Brief, para. 157; Prosecution Reply Brief, para. 3.8; *see* also Rule 98*bis* Decision para. 136.
[98] Trial Judgement, para. 545.

IV. THE PROSECUTION'S FIRST AND SECOND GROUNDS OF APPEAL: *MENS REA* FOR GENOCIDE

37. The Trial Chamber acquitted the Appellant of genocide against Bosnian Muslims because it was "not satisfied that [he] possessed the requisite *dolus specialis*".[99] According to the Trial Chamber, though the evidence established "that the common goal of the members of the SDS in the Municipality of Prijedor, including Dr. Stakić as President of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group."[100] Under the first and second grounds of its appeal, the Prosecution raises six challenges to this conclusion. First, it contends that the Trial Chamber erred in considering the *mens rea* of others – namely, the direct perpetrators of the crimes in Prijedor – rather than focusing on the Appellant's mental state alone. Second, it argues that the Trial Chamber improperly required the Prosecution to prove an intent to kill *all* Bosnian Muslims in the region. Third, the Prosecution argues that the Trial Chamber confused motive with intent, erroneously concluding that because the Appellant's ultimate motive was simply to remove the Bosnian Muslims from Prijedor, he did not intend to destroy the group as a means to that end. Fourth, the Prosecution argues that the Trial Chamber erroneously failed to consider the Appellant's intent to inflict conditions of life calculated to bring about destruction. Fifth, it contends that the Trial Chamber failed to draw proper inferences from the Appellant's utterances. Finally, the Prosecution maintains that the Trial Chamber ignored or gave insufficient weight to several categories of relevant evidence bearing on the Appellant's *mens rea*, and the only reasonable inference from the totality of the evidence is that the Appellant intended to destroy the Bosnian Muslim population in part. The Appeals Chamber will consider each of these contentions in turn.

38. Before addressing these arguments, the Appeals Chamber notes that in its analysis the Trial Chamber took the view that the third category of joint criminal enterprise was inapplicable to the crime of genocide.[101] The Appeals Chamber notes that this view was subsequently clarified by the Appeals Chamber in another case, such that it is now clear that the third category of joint criminal enterprise and the crime of genocide are indeed compatible.[102] The Appeals Chamber, however, will not consider whether the Trial Chamber should have found the Appellant guilty of genocide

[99] Trial Judgement, para. 553.
[100] Trial Judgement, para. 553.
[101] Trial Judgement, paras 530, 558.
[102] *See Brdanin* Decision on Interlocutory Appeal, paras 9-10.

pursuant to the third category of joint criminal enterprise, as the Prosecution expressly declined to argue that the Trial Chamber should have done so.[103]

A. *Mens Rea* of other perpetrators

39. In Paragraph 555 of the Judgement, the Trial Chamber stated:

> The Trial Chamber has considered whether anyone else on a horizontal level in the Municipality of Prijedor had the *dolus specialis* for genocide by killing members of the Muslim group but concludes that there is no compelling evidence to this effect. Simo Drljača, Prijedor Police Chief, played an important role in establishing and running the camps, and was portrayed by the evidence as being a difficult or even brutal person, but the Trial Chamber is not satisfied that Drljača pulled the Crisis Staff into a genocidal campaign.

The Prosecution argues that these statements improperly focus on the mental state of other perpetrators rather than on that of the Appellant alone.[104]

40. In context, however, it is clear that the Trial Chamber did not suggest that genocidal intent on the part of others was a prerequisite to convicting the Appellant for genocide. Rather, it simply considered whether the apparent intentions of others – such as other members of the Crisis Staff – could provide indirect evidence of the Appellant's own intentions when he agreed with those others to undertake criminal plans. The Trial Chamber also considered the direct evidence of the Appellant's mental state, including his statements, and found it insufficient to establish genocidal intent.[105] The Appeals Chamber sees no error in this approach.

B. Intent to kill all Muslims in Prijedor

41. In paragraph 553 of its Judgement, the Trial Chamber found that there was insufficient evidence of an intention to achieve a Serbian municipality "by destroying in part the Muslim group". It reasoned, in relevant part:

> Had the aim been to kill all Muslims, the structures were in place for this to be accomplished. The Trial Chamber notes that while approximately 23,000 people were registered as having passed through the Trnopolje camp at various times when it was operational and through other suburban settlements,[106] the total number of killings in Prijedor municipality probably did not exceed 3,000.[107]

The Prosecution argues that the Trial Chamber erroneously took the failure to kill all Muslims in the Prijedor municipality as indicative of a lack of intent to destroy the Muslim group. The Appellant responds simply that the Trial Chamber did not "require all members of the group to be killed" in order to establish genocidal intent.

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[103] Prosecution Reply Brief, para. 1.10.
[104] Prosecution Appeal Brief, paras 3.119-3.121.
[105] Trial Judgement, paras 553-557.

42. Contrary to what the Prosecution argues, paragraph 553 does not suggest that the Trial Chamber thought genocide requires intent to kill all members of the target group. In that very paragraph, the Trial Chamber specifically found that the Prosecution had not proven that the Appellant sought to "destroy[] *in part* the Muslim group."[108] To be sure, the Trial Chamber also found that "[h]ad the aim been to kill all Muslims, the structures were in place for this to be accomplished."[109] Yet the Trial Chamber cited this fact because it constitutes evidence that the Appellant did not seek to destroy the Bosnian Muslim group in whole *or in part* – the fact that more Bosnian Muslims could have been killed, but were not, indicates that the Appellant lacked *dolus specialis.* While the Trial Chamber might have expressed itself more clearly, it did not commit any error.

C. The relationship between motive and intent

43. In Paragraph 553 of its Judgement, the Trial Chamber stated:

> While the Trial Chamber is satisfied that the common goal of the members of the SDS in the Municipality of Prijedor, including Dr. Stakić as President of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest. As one member of the ECMM delegation which visited Prijedor Municipality in late August 1992 pointed out, "the conclusion to be drawn from what we have seen is that the Muslim population is not wanted and is being systematically kicked out by whatever method is available".[110]

44. The Prosecution argues that the Trial Chamber improperly conflated the questions of motive and intent, concluding that because the Appellant's underlying motive (to establish a Serb municipality, which could be achieved by mere displacement of non-Serbs) was not necessarily genocidal, he must have lacked genocidal intent.[111] The Appellant asserts that the Prosecution misunderstands the significance of the Trial Chamber's conclusion that he sought to eliminate Muslims from Prijedor. The Appellant contends that the Trial Chamber merely found that it had insufficient evidence suggesting that he sought to eliminate Muslims from Prijedor by physically destroying the Muslim group and thus he lacked genocidal intent.[112] According to the Appellant, the

[106] Ex. S434.
[107] *Ewa Tabeau*, T. 8414-8417.
[108] Trial Judgement, para. 553, (emphasis added).
[109] Trial Judgement, para. 553, (emphasis in original).
[110] Ex. S166; *Charles McLeod*, T. 5130, T. 5161-5162.
[111] Prosecution Appeal Brief, paras 3.71-3.77.
[112] Stakić Response Brief, paras 105-111.

Trial Chamber rightly distinguished between intent to displace members of a group and intent to destroy that group.[113]

45. The Prosecution is correct that the Tribunal's jurisprudence distinguishes between motive and intent; in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.[114] The Appeals Chamber agrees with the Appellant, however, that the Trial Chamber expressly distinguished between the "goal" of the operation – that is, motive – and the methods that the Appellant intended to employ in order to bring that goal about. With respect to the latter, the Trial Chamber found "insufficient evidence of an intention to [achieve the goal] by destroying in part the Muslim group". The Trial Chamber specifically considered whether the Appellant intended to achieve his goal through particular actions, including killing and imposing of inhumane conditions of life, which amounted to genocide. The Appeals Chamber sees no error in this approach.

D. Conditions of life calculated to bring about destruction

46. Paragraph 557 of the Trial Judgement states:

> For the same reasons [as set forth above with respect to acts of killing and bodily harm], the Trial Chamber finds that the *dolus specialis* has not been proved in relation to "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Trial Chamber recalls in this context that deporting a group or part of a group is insufficient if it is not accompanied by methods seeking the physical destruction of the group.

The Prosecution argues that the Trial Chamber erred in focusing exclusively on acts of deportation; instead, it contends, the Trial Chamber should have considered whether the atrocious living conditions in the detention camps and during the deportation process were calculated to bring about the destruction of the Bosnian Muslim population.[115]

47. It is true that the Trial Chamber did not specifically discuss whether the conditions that prevailed in detention camps and deportation convoys constituted evidence of an intent to destroy the population through the infliction of intolerable conditions of life. But a Trial Chamber need not spell out every step of its analysis. Here, rather than repeating itself unnecessarily, the Trial Chamber referred back to its analysis in previous paragraphs in relation to the Appellant's mental state – for instance, its conclusion that the Appellant's public statements suggested that his intention was only to displace the Bosnian Muslim population and not to destroy it. This analysis

[113] Stakić Response Brief, paras 33-57.
[114] *See Jelisić* Appeal Judgement, para. 49; *Tadić* Appeal Judgement, para. 269.
[115] Prosecution Appeal Brief, paras 3.88-3.105.

was equally applicable to all of the alleged genocidal acts, including the imposition of intolerable living conditions pointed to by the Prosecution.

48. Moreover, the Trial Chamber's reference to deportation in this paragraph does not suggest that it thought that the *only* relevant "conditions of life" were the acts of deportation themselves. Indeed, as the Prosecution itself observes, the Trial Chamber's own factual findings elsewhere in the Judgement illustrate that it was well aware of the evidence demonstrating the terrible conditions in the camps and on deportation buses.[116] It can be assumed that the Trial Chamber took this evidence into account when it considered the *mens rea* question, even if it made no specific reference to it.[117] The Prosecution's related argument that this evidence, in combination with the other evidence adduced at trial, required an inference of genocidal intent will be considered in Section F below.

E. Inferences from the Appellant's utterances

49. The Prosecution argues that the Trial Chamber erred in its assessment of the Appellant's utterances. It argues that the Trial Chamber gave inadequate weight to the Appellant's derogatory statements, his use of the term *čišćenje* (cleansing) to describe certain military operations, his participation in a propaganda campaign that demonised Bosnian Muslims and Croats, and certain statements acknowledging (although denying) allegations of genocide.

50. The Appellant responds that the Trial Chamber drew reasonable inferences from his statements, and that it was not compelled to draw an inference of genocidal intent from his statements.[118] Evidence at trial demonstrates that at various times he spoke of his desire for peace in Prijedor,[119] and that he did not give nationalistic or incendiary speeches.[120]

51. In paragraph 554 of its Judgement, the Trial Chamber stated:

> Even though Dr. Stakić helped to wage an intense propaganda campaign against Muslims, there is no evidence of the use of hateful terminology by Dr. Stakić himself from which the *dolus specialis* could be inferred. Statements made by Dr. Stakić do not publicly advocate killings and while they reveal an intention to adjust the ethnic composition of Prijedor, the Trial Chamber is unable to infer an intention to destroy the Muslim group. This inference cannot be drawn from Dr. Stakić's remark that Muslims in Bosnia "were created artificially"[121] and his interview in January 1993 with German television, while demonstrating intolerance of Muslims, advocated the removal of "enemy" Muslims from Prijedor rather than the physical elimination of all Muslims. The interview concludes with the statement: "those who stained their hands with blood will not be able to return.

[116] *See* Prosecution Appeal Brief, paras 3.99-3.104.
[117] *See, e.g.*, *Ntakirutimana* Appeal Judgement, para. 397.
[118] Stakić Response Brief, paras 125-149.
[119] *See* Stakić Response Brief, paras 127(n), 134, 136, 147 (describing evidence indicating the Appellant made peaceful statements).
[120] Stakić Response Brief, paras 127(b), 127(c), 127(h), 127(i).
[121] Ex. S187, p. 5; T. 5692.

> Those others, if they want…when the war ends, will be able to return".[122] The intention to displace a population is not equivalent to the intention to destroy it.

52. The Trial Chamber thus clearly considered the Appellant's derogatory statements and propaganda, and the Appeals Chamber concludes that its assessment of them was reasonable. Evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent. It is true, as the Prosecution suggests, that utterances might constitute evidence of genocidal intent even if they fall short of express calls for a group's physical destruction; a perpetrator's statements must be understood in their proper context. In the context of events such as those occurring at Prijedor, ethnic slurs and calls for ethnic cleansing might reasonably be understood as an implied call for the group's destruction.[123] But it is for the Trial Chamber in the first instance to draw factual inferences from indirect evidence. On the facts of this case, the Prosecution has not demonstrated that no reasonable Trial Chamber could fail to conclude that the Appellant's utterances demonstrated his genocidal intent beyond a reasonable doubt. The Appeals Chamber will consider the implications of the utterances in combination with the remainder of the evidence in the following section.

F. The Trial Chamber's assessment of the totality of the evidence

53. In addition to the specific legal and factual errors set forth above, the Prosecution argues generally that the totality of the evidence points to only one reasonable conclusion: that the Appellant's genocidal intent was established beyond a reasonable doubt.[124] In failing to reach this conclusion, the Prosecution contends, the Trial Chamber improperly compartmentalised its inquiry, considering the *mens rea* evidence separately with respect to the various genocidal acts alleged rather than taking into account the totality of the evidence. Moreover, it ignored or underweighted several of its own factual findings: (1) that the Appellant participated in "a campaign to create a greater Serbia, which entail[ed] the elimination of specific ethnic/religious groups from the Municipality of Prijedor"[125]; (2) that widespread and systematic attacks on the Muslim population took place, including "atrocities", killings, beatings, and destructive conditions of life[126]; (3) that certain acts targeted the foundation of Bosnian Muslim and Croat identities, including destruction of religious sites and homes, use of derogatory slurs, frequent rape and sexual assault, arbitrary dismissals from jobs, and targeting of Bosnian Muslim and Croat leaders for death or slander[127];

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[122] Ex. S365-1, p. 4.
[123] The Appeals Chamber does not agree with the Prosecution's rather strained contention that the Appellant's denials that genocide was occurring constituted evidence of his genocidal intent. The Trial Chamber could just as reasonably have concluded that the denials reflected a desire not to receive unwarranted blame.
[124] Prosecution Appeal Brief, paras 2.22, 3.11-3.12, 3.69, 3.126.
[125] Prosecution Appeal Brief, para. 3.15
[126] Prosecution Appeal Brief, paras 3.16 (h), (i), 3.18-3.24, 3.47-3.55.
[127] Prosecution Appeal Brief, paras 3.25-3.46.

and (4) that the Appellant knew about these crimes, was criminally responsible for them, and had discriminatory intent with respect to them.[128]

54. The Appellant responds that the Trial Chamber rightly concluded that there was insufficient evidence to prove that he or others in Prijedor had the requisite *dolus specialis*,[129] and that it considered all the relevant factors.[130] Denying that a plan or the intent to destroy non-Serbs in Prijedor municipality can be inferred from the nature and scope of the crimes committed against Muslims and Croats,[131] the Appellant observes that "[t]he fact that a lot of people died does not in and of itself result in the occurrence of genocide",[132] as these crimes were random, spontaneous, and isolated.[133] In support of his contention the Appellant lists Bosnian Croat and Bosnian Muslim religious sites that were left intact,[134] and adds that the Prosecution conceded that "at the very least, an additional twelve [Muslim] villages within Prijedor municipality" were never attacked.[135] The Appellant suggests that other evidence in the trial record belies the notion that there was a plan or an intent to destroy non-Serbs in Prijedor.[136]

55. The Appeals Chamber agrees with the Prosecution that the Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state. Nonetheless, it does not appear that the Trial Chamber's piecemeal approach had any effect on its conclusion. The reasons it gave with respect to Article 4(1)(b) and (c) simply cross-referenced its analysis of mental state with respect to Article 4(1)(a), in which it concluded that there simply was no evidence in the record (including, for example, the Appellant's statements) that proved that the Appellant sought to destroy the Muslim population. In reaching this conclusion, it must be assumed, the Trial Chamber was obviously aware of its own factual findings, but found them insufficient to establish intent beyond a reasonable doubt.

56. The Appeals Chamber cannot find that this conclusion was unreasonable. Without question, the Trial Chamber made factual findings which could, in principle, be taken as evidence that the Appellant intended to destroy the Bosnian Muslim group in part, including those identified by the

[128] Prosecution Appeal Brief, paras 3.60-3.67.
[129] Stakić Response Brief, paras 20, 30, 79-82.
[130] Stakić Response Brief, para. 30.
[131] Stakić Response Brief, para. 87.
[132] Stakić Response Brief, para. 122.
[133] Stakić Response Brief, paras 89-99.
[134] Stakić Response Brief, para. 95, citing *Brdanin* Rule *98bis* Decision, para. 14.
[135] Stakić Response Brief, para. 92.

Prosecution above. But when the Prosecution appeals from factual findings against it, it bears a heavy burden of persuasion. The Appeals Chamber cannot conclude that the evidence in this case is so unambiguous that a reasonable Trial Chamber was *obliged* to infer that intent was established beyond a reasonable doubt. To the contrary, the evidence could reasonably be seen as consistent with the conclusion the Trial Chamber did draw: that the Appellant merely intended to displace, but not to destroy, the Bosnian Muslim group. To be sure, he was willing to employ means to this end that ensured that some members of the group would be killed and others brutalised, and this was surely criminal – but not necessarily genocidal, absent evidence proving beyond a reasonable doubt that he sought the destruction of the group as such. The Trial Chamber's conclusion that this evidence was lacking was reasonable, particularly in light of certain contrary evidence, such as the Appellant's statement that Bosnian Muslims who did not take part in hostilities would be permitted to return to Prijedor after the war.

57. For these reasons, the Prosecution's first and second grounds of appeal are dismissed.

[136] Stakić Response Brief, paras 87(a), (b), (c), (g), (h).

V. JOINT CRIMINAL ENTERPRISE AND THE MODE OF LIABILITY APPLIED BY THE TRIAL CHAMBER

A. The mode of liability applied by the Trial Chamber

58. In its analysis of the responsibility of the Appellant, the Trial Chamber specifically rejected the application of joint criminal enterprise as a mode of liability despite the fact that it had been pleaded by the Prosecution both in the Indictment[137] and at trial.[138] Although the Trial Chamber acknowledged the Appeals Chamber's holdings recognising the joint criminal enterprise doctrine,[139] it expressed some reservations about that doctrine[140] and stated that "a more direct reference to 'commission' in its traditional sense should be given priority before considering responsibility under the judicial term 'joint criminal enterprise'."[141] Thus, in lieu of joint criminal enterprise, the Trial Chamber applied a mode of liability which it termed "co-perpetratorship". This mode of liability appears to be new to the jurisprudence of this Tribunal. The Trial Chamber explained the characteristics of this mode of liability and then applied it in order to describe the responsibility of the Appellant.[142]

59. Neither party has appealed the Trial Chamber's application of this mode of liability. However, the question of whether the mode of liability developed and applied by the Trial Chamber is within the jurisdiction of this Tribunal is an issue of general importance warranting the scrutiny of the Appeals Chamber *proprio motu*. The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers. To avoid such uncertainty and ensure respect for the values of consistency and coherence in the application of the law, the Appeals Chamber must intervene to assess whether the mode of liability applied by the Trial Chamber is consistent with the jurisprudence of this Tribunal. If it is not consistent, the Appeals Chamber must then determine whether the Trial Chamber's factual findings support liability under another, established mode of liability, such as joint criminal enterprise.

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[137] Indictment, para. 26: "Milomir STAKIĆ participated in the joint criminal enterprise, in his roles as set out … above. The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state, including a campaign of persecutions through the commission of the crimes alleged in Counts 1 to 8 of the Indictment." *See* also paras 25, 27–29. The Trial Chamber noted that "[t]he Prosecution … pleaded all three categories of joint criminal enterprise in relation to all the Counts charged in the Indictment", Trial Judgement, para. 427.
[138] *See* Prosecution Final Trial Brief, para. 82.
[139] Trial Judgement, paras 431-436.
[140] Trial Judgement, para. 441.
[141] Trial Judgement, para. 438.
[142] Trial Judgement, paras 468-498.

60. With this goal in mind, the Parties were requested to present oral submissions to the Appeals Chamber during the Appeal Hearings, responding *inter alia* to the following question: "If the Appellant's responsibility were to be analysed in terms of joint criminal enterprise ("JCE"), would the elements of JCE be fulfilled based on the findings of the Trial Chamber?"[143]

61. The Appellant argued that the factual findings of the Trial Chamber do not support the finding of joint criminal enterprise.[144] The Prosecution submitted that the evidence at trial was "sufficient to sustain a conviction on a JCE theory",[145] and furthermore that some of the Trial Chamber's findings can easily be interpreted to support liability under a joint criminal enterprise theory.[146] While clearly stating that joint criminal liability could be found to attach based on the findings at trial, the Prosecution expressed its concerns that (1) neither party had challenged the mode of liability in the Trial Judgement and any answer in the hearing would be in the abstract; (2) the question should not be decided by the Appeals Chamber except after full briefing and argumentation by the parties; (3) the Trial Chamber itself did not analyse the evidence on a joint criminal enterprise theory; and (4) any such analysis would require a review of the entire record.[147]

62. Upon a careful and thorough review of the relevant sections of the Trial Judgement, the Appeals Chamber finds that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of "co-perpetratorship". This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is "firmly established in customary international law"[148] and is routinely applied in the Tribunal's jurisprudence.[149] Furthermore, joint criminal enterprise is the mode of liability under which the Appellant was charged in the Indictment, and to which he responded at trial.[150] In view of these reasons, it appears that the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal. This invalidates the decision of the Trial Chamber as to the mode of liability it employed in the Trial Judgement.

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[143] Order for the Preparation of the Appeal Hearing, 26 September 2005, para. 5.
[144] AT. 230-236.
[145] AT. 302.
[146] AT. 302, 303, 308, referring to pp. 42-66 of the Prosecution Final Trial Brief.
[147] AT. 300-302
[148] *Tadić* Appeal Judgement, para. 220.
[149] *See Kvočka* Appeal Judgement, para. 79; *Vasiljević* Appeal Judgement, para. 95; *Krstić* Appeal Judgement, paras 79–134; *Ojdanić* Decision on Jurisdiction, paras 20, 43; *Furundžija* Appeal Judgement, para. 119; *Krnojelac* Appeal Judgement paras 29-32; *Čelebići* Appeal Judgement, para. 366; *Tadić* Appeal Judgement, para. 220, *Prosecutor v. Radoslav Brdanin & Momir Talić,* Case No: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24; *Babić* Judgement on Sentencing Appeal, paras 27, 38, 40.
[150] Prosecution's Final Pre-Trial Brief, (Revised April 2002), 5 April 2002, paras 3, 4, 13, 20, 21, 82, 98, 125.

63. For these reasons, the Appeals Chamber finds that the relevant part of the Trial Judgement must be set aside. In order to remedy this error, the Appeals Chamber will apply the correct legal framework to the factual conclusions of the Trial Chamber to determine whether they support joint criminal enterprise liability for the crimes charged.

B. The requirements for joint criminal enterprise liability

64. The Tribunal's jurisprudence recognises three categories of joint criminal enterprise liability.[151] Regardless of the category at issue, or the charge under consideration, a conviction requires a finding that the accused participated in a joint criminal enterprise. There are three requirements for such a finding. First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.[152] Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required.[153] There is no need for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[154] Third, the participation of the accused in the common purpose is required.[155] This participation need not involve the commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.

65. The *mens rea* required for a finding of guilt differs according to the category of joint criminal enterprise liability under consideration. For first category, or "basic" joint criminal enterprise liability, it must be shown that the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed.[156] For second category joint criminal enterprise liability, it must be shown that an organised criminal system exists – as is the case with concentration or detention camps. The accused must be shown to have personal knowledge of the system and intent to further the criminal purpose of the system[157] – the personal knowledge may be proven by direct evidence or by reasonable inference from the accused's position of authority.[158] The third or "extended" category of joint criminal enterprise liability allows conviction of a participant in a joint criminal enterprise for certain crimes committed by other participants in the joint criminal enterprise even though those crimes were outside the common purpose of the enterprise. The accused can be found to have third category joint criminal enterprise liability if he

[151] *Vasiljević* Appeal Judgement, paras 96-99; *see* also *Tadić* Appeal Judgement, paras 195-225; *Krnojelac* Appeal Judgement, paras 83-84.
[152] *Tadić* Appeal Judgement, para. 227.
[153] *Tadić* Appeal Judgement, para. 227.
[154] *Tadić* Appeal Judgement, para. 227.
[155] *Tadić* Appeal Judgement, para. 227.
[156] *Tadić* Appeal Judgement, para. 228.
[157] *Tadić* Appeal Judgement, paras 202-203.
[158] *Tadić* Appeal Judgement, para. 228.

or she intended to further the common purpose of the joint criminal enterprise and the crime was a natural and foreseeable consequence of that common purpose.[159] In other words, liability attaches "if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*".[160] The crime must be shown to have been foreseeable to the accused in particular.[161]

C. The application of joint criminal enterprise to the factual findings

66. In the present case, the Indictment did not explicitly mention the categories of the joint criminal enterprise doctrine pursuant to which the Appellant was charged. But no such express language was necessary, because the Indictment's allegations nonetheless made it clear that the Prosecution intended to rely on both the first and third categories of joint criminal enterprise. In paragraph 26 of the Indictment, the Prosecution alleged that the purpose of the joint criminal enterprise was a campaign of persecutions that encompassed the crimes alleged in counts 1 through 8 of the Indictment. In this paragraph, it was plainly alleging a basic joint criminal enterprise: the crimes alleged were within the common purpose. In paragraphs 28 and 29 of the Indictment, however, the Prosecution set out an alternative theory:

> Alternatively, the accused is individually responsible for the crimes enumerated in Counts 1 to 8 on the basis that these crimes were natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise and **Milomir STAKIĆ** was aware that these crimes were the possible consequence of the execution of the joint criminal enterprise.[162]
>
> Despite his awareness of the possible consequences, **Milomir STAKIĆ** knowingly and wilfully participated in the joint criminal enterprise. On this basis, he bears individual criminal responsibility for these crimes under Article 7(1) in addition to his responsibility under the same article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of these crimes.[163]

The language of these paragraphs mirrors the requirements for the third category of joint criminal enterprise. The Appeals Chamber considers that this method of pleading satisfies the requirement, set forth in the *Kvočka* Appeal Judgement, that the Prosecution plead in the Indictment the specific category of joint criminal enterprise on which it intends to rely.[164]

67. The Appeals Chamber will therefore first consider whether the Trial Chamber's factual findings establish that the Appellant participated in a joint criminal enterprise as alleged in the Indictment, and in the process the Appeals Chamber will determine what crimes – according to the Trial Chamber's factual findings – the common purpose of the joint criminal enterprise

[159] *Tadić* Appeal Judgement, para. 204.
[160] *Tadić* Appeal Judgement, para. 228 (emphasis in original). *See* also *Kvočka* Appeal Judgement, para. 83.
[161] *Tadić* Appeal Judgement, para. 220.
[162] Indictment, para. 28.
[163] Indictment, para. 29.

encompassed. The Appeals Chamber will then consider whether the Trial Chamber's factual findings show that the Appellant bears first category joint criminal enterprise liability for the crimes encompassed by the criminal common purpose; the Appeals Chamber will do so by considering whether the Trial Chamber's factual findings show that these crimes were committed and that the Appellant participated in the joint criminal enterprise with the intent that they be committed. Next, the Appeals Chamber will consider whether the Trial Chamber's factual findings establish that the Appellant bears third category joint criminal enterprise liability for crimes committed outside the scope of the common purpose.

1. Did the Appellant participate in a joint criminal enterprise?

(a) The participants in the alleged joint criminal enterprise

68. The Indictment identified the participants in the joint criminal enterprise as follows:

> Numerous individuals participated in this joint criminal enterprise, including Milomir STAKIĆ, Milan KOVAČEVIĆ, Simo DRLJAČA, other members of the Prijedor Crisis Staff, members of the Assembly of the Serbian People in Prijedor Municipality and Assembly's Executive Committee, Radoslav BRĐANIN, General Momir TALIĆ and Stojan ŽUPLJANIN, other members of the ARK Crisis Staff, the leadership of the Serbian republic and the SDS, including Radovan KARADŽIĆ, Momcilo KRAJIŠNIK and Biljana PLAVŠIĆ, members of the Assembly of the ARK and the Assembly's Executive Committee, the Serb Crisis staffs of the ARK municipalities, members of the VRS, Serb and Bosnian Serb paramilitary forces and others.[165]

In line with the Indictment and its assessment of the evidence, the Trial Chamber found that the following persons, whom it called "co-perpetrators", participated in the common goal of the "co-perpetratorship":[166]

> the authorities of the self-proclaimed Assembly of the Serbian People in Prijedor Municipality, the SDS, the Prijedor Crisis Staff, the Territorial Defence and the police and military. In particular, Dr. Stakić acted together with the Police Chief, Simo Drljača, prominent members of the military such as Colonel Vladimir Arsić and Major Radmilo Željaja [*sic.*], the president of the Executive Committee of Prijedor Municipality, Dr. Milan Kovačević, and the Commander both of the Municipal Territorial Defence Staff and the Trnopolje camp, Slobodan Kuruzović.[167]

69. The Appeals Chamber considers that the Trial Chamber's findings demonstrate that there was a plurality of persons that acted together in the implementation of a common goal. This group included the leaders of political bodies, the army, and the police who held power in the Municipality of Prijedor.

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[164] *Kvočka* Appeal Judgement, para. 42.
[165] Indictment, para. 27.
[166] *See* Section V.C(1)(b) *infra*.
[167] Trial Judgement, para. 469.

70. The Appeals Chamber notes that the Trial Chamber found the participants to include Radmilo Zeljaja and Slobodan Kuruzović, although neither name was expressly mentioned in the Indictment. However, the Indictment did plead that the participants in the joint criminal enterprise included "members of the VRS, Serb and Bosnian Serb paramilitary forces". This reference would thus include Zeljaja, who was Chief of Staff of the 343rd Motorised Brigade,[168] and Kuruzović, who was the Commander of the Prijedor TO Municipal Staff and the Trnopolje camp.[169] As such, the Trial Chamber could reasonably find that these individuals participated in the criminal plan charged in the Indictment.

(b) The Common Purpose of the alleged joint criminal enterprise

71. The Indictment identified the common purpose as follows:

> The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state, including a campaign of persecutions through the commission of the crimes alleged in Counts 1 to 8 of the Indictment.[170]

In addition, it specified that:

> This campaign included imposing conditions of life that would force the non-Serb population to leave the area, deportations and forced expulsions.[171]

72. The Trial Chamber proceeded to find that the identified group of individuals participated in the implementation of a common goal, the objective of which was:

> consolidating Serb power in the municipality [of Prijedor] by forcing non-Serbs to flee or be deported, thereby changing fundamentally the ethnic balance in the municipality.[172]

The Trial Chamber also found that:

> What is crucial is that these crimes formed part of a persecutorial campaign headed *inter alia* by Dr. Stakić as (co-)perpetrator behind the direct perpetrators. He is criminally responsible for all the crimes and had a discriminatory intent in relation to all of them…[173]

Furthermore the Trial Chamber found that:

> [T]here was a persecutorial campaign based on the intent to discriminate against all those who were non-Serb or who did not share the above-mentioned plan to consolidate Serbian control and dominance in the Municipality of Prijedor.[174]

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[168] Trial Judgement, para. 87.
[169] Trial Judgement, paras 64, 87.
[170] Indictment, para. 26.
[171] Indictment, para. 23.
[172] Trial Judgement, para. 475. *See* also Trial Judgement, paras 470, 471, 479, 496, 629.
[173] Trial Judgement, para. 818
[174] Trial Judgement, para. 819.

73. The Appeals Chamber finds that the common goal identified by the Trial Chamber amounted to a common purpose within the meaning of the Tribunal's joint criminal enterprise doctrine. This common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control ("Common Purpose"). As the Trial Chamber's findings show, this took place in the period relevant for the Indictment (30 April – 30 September 1992) – hence, the Trial Chamber deemed this goal to have been achieved.[175] The campaign consisted of criminal acts prescribed in the Statute of this Tribunal,[176] notably the crimes against humanity of persecutions, deportation and other inhumane acts (forcible transfer) punishable under Articles 5(h), 5(d) and 5(i) of the Statute respectively.

(c) The Appellant's participation in the Common Purpose

74. The Indictment pleaded[177] that the Appellant participated in the Common Purpose of the joint criminal enterprise while serving in a variety of roles, including Vice-President of the SDS Municipal Board in Prijedor; President of a shadow, parallel Assembly of the Serbian People of Prijedor Municipality; President of the Prijedor Municipal Assembly and head of the Prijedor Municipal Council for National Defence; President of the SDS Crisis Staff of Prijedor Municipality, which later became known as the War Presidency[178]; and President of the Prijedor Municipal Crisis Staff.[179] More specifically, the Indictment stated that:

> Milomir STAKIĆ participated in the functioning of the Crisis Staff and actively carried out his duties as President. He presided over Crisis Staff meetings and signed the majority of orders/decisions issued by the Crisis Staff. These orders/decisions included an order to establish the Omarska and Keraterm detention camps; the principal purpose of which was the persecution of the non-Serb population…[180]

> …a member of the Prijedor Crisis Staff, Milomir STAKIĆ co-operated fully with the VRS, the Civil Defence and the Public Security Station through their senior officers or organs of those institutions. Although the Crisis Staff was not within the army's chain of command, it synchronised and co-ordinated the measures and actions essential for the waging of armed combat and provided logistical support.[181]

75. The Trial Chamber found that during the period relevant for the Indictment, namely from 30 April to 30 September 1992, the Appellant held the following positions in the Municipality of Prijedor: Vice President of the SDS Municipal Board, President of the self-proclaimed Assembly of the Serbian people of the Municipality of Prijedor, President of the Municipal Assembly, President

[175] Trial Judgement, para. 706.
[176] *Vasiljević* Appeal Judgement, para. 100.
[177] Indictment, para. 26.
[178] The name change from the Crisis Staff to War Presidency took place on 31 May 1992. (Trial Judgement, para. 98).
[179] Indictment, para. 22.
[180] Indictment, para. 24.
[181] Indictment, para. 25.

of the Prijedor Municipal People's Defence Council, President of the Prijedor Municipal Crisis Staff and President of the Municipal Assembly of Prijedor.[182] The Trial Chamber found that "… as the highest representative of the civilian authorities, Dr. Stakić played a crucial role in the co-ordinated co-operation with the police and army in furtherance of the plan to establish a Serbian municipality in Prijedor."[183] In addition, the Trial Chamber found that the Appellant was "… one of the main actors in the persecutorial campaign",[184] "actively participated in setting up and running [the camps],"[185] and "took an active role in the organisation of the massive displacement of the non-Serb population out of Prijedor municipality."[186]

76. The Appeals Chamber considers that these findings of the Trial Chamber clearly demonstrate that the Appellant acted in furtherance of the Common Purpose and played an important role in it.

77. On the issue of the role and status of the Appellant in the Municipality of Prijedor, the Appeals Chamber heard evidence from Witness BT106. In a statement which was admitted into evidence, Witness BT106 seemed to suggest, albeit vaguely, that the role and importance of the Appellant in the Municipality of Prijedor was limited. In order to verify the content and reliability of this statement, the Appeals Chamber summoned this witness *proprio motu* to give oral evidence pursuant to Rule 98. During the hearing, the Appeals Chamber questioned Witness BT106 as to the role of the Appellant in the Municipality of Prijedor. It became apparent that Witness BT106 had little knowledge of either the governance structure of the Municipality of Prijedor or the actions of the Appellant. Consequently, the Appeals Chamber finds that the evidence of BT106 does not cast any doubt on the findings reached by the Trial Chamber concerning the role of the Appellant in the Municipality of Prijedor or his participation in the Common Purpose.

78. The Trial Chamber's factual findings therefore support the conclusion that the Appellant participated in a joint criminal enterprise the Common Purpose of which was to persecute, deport, and forcibly transfer[187] the Bosnian Muslim and Bosnian Croat populations of Prijedor. To determine whether the Appellant bears first category joint criminal enterprise liability for the crimes encompassed by the Common Purpose, the Appeals Chamber will proceed to examine whether the

[182] Trial Judgement, para. 336.
[183] Trial Judgement, para. 822.
[184] Trial Judgement, para. 823.
[185] Trial Judgement, para. 400. *See* also Trial Judgement, para. 595 "…[the Appellant] actively participated in and threw the full support of the civilian authorities behind the decision to establish the infamous Keraterm, Omarska, and Trnopolje camps."
[186] Trial Judgement, para. 601. *See* also Trial Judgement, para. 479, "The response to the incidents at Hambarine and Kozarac in late May 1992 heralded the first in a series of measures taken by the Crisis Staff, in co-operation with the military and the police, to rid the municipality of non-Serbs."
[187] *See* Section VIII.C.2(c) *infra.*

Appellant intended to further the criminal Common Purpose, and whether the crimes at issue were in fact committed.

2. Did the Appellant intend to further the Common Purpose of the joint criminal enterprise?

79. The Indictment states that:

> The accused Milomir STAKIĆ, and the other members of the joint criminal enterprise, each shared the state of mind required for the commission of each of these offences, more particularly, each, was aware that his or her conduct occurred in the context of an armed conflict and was part of a widespread or systematic attack directed against a civilian population.[188]

80. The Appeals Chamber considers that various findings of the Trial Chamber reveal the existence of a shared intent among the participants in the joint criminal enterprise. In paragraph 364 of the Judgement, the Trial Chamber found that:

> Evidence supports the finding that the civilian authorities, the police and the military co-operated on the same level within the municipality of Prijedor in order to achieve their aforementioned common goals at any cost.[189]

81. In paragraph 477 of the Trial Judgement, the Trial Chamber found that there was an "agreement amongst members of the Crisis Staff to use armed force against civilians and to establish the Omarska, Keraterm and Trnopolje camps"[190] and that:

> the Crisis Staff, presided over by Dr. Stakić, was responsible for establishing the Omarska, Keraterm and Trnopolje camps, and, as discussed before, that there was a coordinated co-operation between the Crisis Staff, later the War Presidency, and members of the police and the army in operating these camps.[191]

82. As to the intent of the Appellant to further the Common Purpose, the Trial Chamber found that:

> The evidence shows that Dr. Stakić as the leading figure in the municipal government, worked together with the Police Chief, Simo Drljača, the highest ranking man in the military, Colonel Vladimir Arsić, and the President of the Executive Board, Dr. Milan Kovačević to implement the SDS-initiated plan to consolidate Serb authority and power within the municipality.[192]

It noted further that:

> Dr. Stakić knew that his role and authority as the leading politician in Prijedor was essential for the accomplishment of the common goal. He was aware that he could frustrate the objective of achieving a Serbian municipality by using his powers to hold to account those responsible for crimes, by protecting or assisting non-Serbs or by stepping down from his superior positions.[193]

[188] Indictment, para. 26.
[189] Trial Judgement, para. 364.
[190] Trial Judgement, para. 477.
[191] Trial Judgement, para. 377.
[192] Trial Judgement, para. 593, (citations omitted).
[193] Trial Judgement, para. 498.

83. With regard to the intent of the Appellant in the commission of the crimes constituting the Common Purpose, the Trial Chamber found that the Appellant was one of the main actors of the persecutorial campaign[194] which was based on the "intent to discriminate against non-Serbs".[195] With regard to the crimes of deportation and forcible transfer[196] (Article 5(d) and 5(i) of the Statute), the Trial Chamber found that "the [Appellant] intended to deport the non-Serb population from Prijedor municipality."[197]

84. The Appeals Chamber considers that the Trial Chamber's factual findings demonstrate that the crimes of persecution, deportation, and forcible transfer were in fact committed in accordance with the Common Purpose of this joint criminal enterprise,[198] and that the Appellant shared the intent to further this Common Purpose, and had the intent to commit the underlying crimes.

(v) Conclusion

85. For the foregoing reasons, an application of the legal framework of joint criminal enterprise to the factual findings of the Trial Chamber leads the Appeals Chamber to conclude that there was a joint criminal enterprise of the first category operating in the Municipality of Prijedor in the period relevant to the Indictment. The Appeals Chamber finds that the Appellant was a participant in that joint criminal enterprise, made a substantial contribution to the implementation of the Common Purpose, and shared the intent to further it.

3. Does the Appellant incur third category joint criminal enterprise liability for certain crimes falling outside the scope of the enterprise?

86. Having established the existence of a joint criminal enterprise, the Appeals Chamber now turns to the remaining question of whether the factual findings of the Trial Chamber also support a finding of joint criminal enterprise liability for certain crimes beyond the scope of that enterprise.

87. As noted above, for the application of third category joint criminal enterprise liability, it is necessary that: (a) crimes outside the Common Purpose have occurred; (b) these crimes were a natural and foreseeable consequence of effecting the Common Purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.

[194] Trial Judgement, para. 823.
[195] Trial Judgement, para. 826. *See* also Trial Judgement, para. 818.
[196] *See* Section VIII.C.2(c) *infra.*
[197] Trial Judgement, para. 712.
[198] Trial Judgement, paras 488, 712, 774-816, 818, 823, 826.

(a) The crimes falling outside the Common Purpose

88. In the Indictment, the Prosecution pleaded third category joint criminal enterprise liability in the following terms:

> Alternatively, the accused is individually responsible for the crimes enumerated in Counts 1 to 8 on the basis that these crimes were natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise and Milomir STAKIĆ was aware that these crimes were the possible consequence of the execution of the joint criminal enterprise.

Counts 1 to 8 encompassed the crimes of genocide, complicity in genocide, murder as both a war crime and a crime against humanity, extermination, persecutions, deportation and other inhumane acts (forcible transfer).

89. As the Appeals Chamber has established first category joint criminal enterprise liability for persecutions, deportation and other inhumane acts (forcible transfer), and as the Prosecution here expressly denies that it alleges third category joint criminal enterprise liability for genocide, the following analysis is restricted to the crimes of murder (as both a war crime and a crime against humanity) and extermination.

90. The Trial Chamber found that the killings alleged in paragraphs 44 and 47 of the Indictment were proved and that these amounted to murder both as a war crime and as a crime against humanity.[199] In addition, because of their massiveness, they also amounted to the crime against humanity of extermination.[200] The Trial Chamber estimated that more than 1,500 people were killed.[201] The Trial Chamber divided these killings into three categories: (1) killings committed in detention facilities by guards or outsiders permitted to enter these facilities ("camp killings"); (2) killings committed during organised convoys by police and/or military units assigned for the "protection" of those travelling in the convoy ("convoy killings"); and (3) killings committed as a result of armed military and/or police action in non-Serb or predominantly non-Serb areas of Prijedor Municipality ("municipality killings").

(b) The crimes were a natural and foreseeable consequence of efforts to carry out the Common Purpose

91. In paragraph 29 of the Indictment, the Prosecution pleaded in the following terms the Appellant's awareness of the possible consequences of participating in the joint criminal enterprise:

> Despite his awareness of the possible consequences, **Milomir STAKIĆ** knowingly and wilfully participated in the joint criminal enterprise. On this basis, he bears individual criminal

[199] Trial Judgement, para. 632.
[200] Trial Judgement, paras 651-655.
[201] Trial Judgement, para. 654.

> responsibility for these crimes under Article 7(1) in addition to his responsibility under the same article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation, or execution of these crimes.

92. The Appeals Chamber considers that the commission of these crimes was a natural and foreseeable consequence of the implementation of the Common Purpose as described above.[202] As it was established at trial, the Appellant

> … and his co-perpetrators acted in the awareness that crimes would occur as a direct consequence of their pursuit of the common goal. The co-perpetrators consented to the removal of Muslims from Prijedor by whatever means necessary and either accepted the consequence that crimes would occur or actively participated in their commission.[203]

93. Regarding the camp killings, the Trial Chamber concluded that it "is satisfied beyond reasonable doubt that Dr. Stakić, as President of the Crisis Staff in Prijedor, actively participated in and threw the full support of the civilian authorities behind the decision to establish the infamous Keraterm, Omarksa and Trnopolje camps".[204] The Appellant "was one of the co-perpetrators in a plan to consolidate Serb power in the municipality at *any* cost, including the cost of the lives of innocent non-Serb civilians in the camps", and he "simply accepted that non-Serbs would and did die in those camps".[205] Furthermore, the Trial Chamber found that the Appellant was "fully aware that large numbers of killings were being committed in the camps", and that he was aware of the pervasive atmosphere of impunity for wrongdoing which prevailed in the camps, and which was likely to result in the death of the detainees.[206]

94. As to the convoy killings, the Trial Chamber found that many killings occurred during the transportation to camps of the non-Serb civilian population. The Trial Chamber found that the primary perpetrators of these crimes were members of the Prijedor "Intervention Platoon" established by the Crisis Staff presided over by the Appellant.[207] As this platoon was comprised of individuals with criminal records and people recently released from jail, the Trial Chamber found that "[t]o entrust the escort of a convoy of unprotected civilians to such groups of men, as Dr. Stakić along with his co-perpetrators on several occasions did in order to complete the plan for a purely Serb municipality, is to reconcile oneself to the reasonable likelihood that those travelling on the convoy will come to grave harm and even death."[208] Thus the Trial Chamber concluded that the Appellant "took an active role in the organisation of the massive displacement of the non-Serb

[202] This Common Purpose was the establishment of Serb power in the Municipality of Prijedor through deportations, forcible transfers and a campaign of persecutions.
[203] Trial Judgement, para. 496.
[204] Trial Judgement, para. 595.
[205] Trial Judgement, para. 598.
[206] Trial Judgement, para. 599.
[207] Trial Judgement, para. 600.
[208] Trial Judgement, para. 600.

population out of Prijedor municipality",[209] and that, along with his co-perpetrators, the Appellant reconciled himself to the reasonable likelihood that those travelling on convoys would come to grave harm and even death.[210]

95. Concerning the municipality killings, the Trial Chamber found that "many killings [were] committed by the Serb armed military and police forces in the Municipality of Prijedor during the period of the Indictment",[211] and that the co-operation of all the pillars of the civil and military authorities created and maintained an environment of impunity which "endangered the lives of all non-Serb citizens of Prijedor municipality".[212] The Trial Chamber confirmed its finding that the killings were foreseeable to the Appellant:

> The Trial Chamber does not believe that the conscious object of Dr. Stakić's participation in the creation and maintenance of this environment of impunity was to kill the non-Serb citizens of Prijedor municipality. However, it is satisfied that Dr. Stakić, in his various positions, acted in the knowledge that the existence of such an environment would in all likelihood result in killings, and that he reconciled himself to and made peace with this probable outcome.[213]

96. In relation to the crime of extermination, the Trial Chamber found that the Appellant "possessed the requisite intent to kill, including the intent to cause serious bodily harm in the reasonable knowledge that it was likely to result in death"[214] and that "[k]illings were perpetrated on a massive scale against the non-Serb population of Prijedor municipality."[215] Furthermore, the Trial Chamber concluded that the Appellant:

> … because of his political position and role in the implementation of the plan to create a purely Serb municipality, was familiar with the details and the progress of the campaign of annihilation directed against the non-Serb population. [The Appellant] was aware of the killings of non-Serbs and of their occurrence on a massive scale. The Trial Chamber is therefore convinced that [the Appellant] acted with the requisite intent, at least *dolus eventualis*, to exterminate the non-Serb population of Prijedor municipality in 1992 and finds [the Appellant] guilty of this crime, punishable under Article 5(b) of the Statute.[216]

97. In finding that the Appellant acted at least with *dolus eventualis* to commit extermination, the Trial Chamber concluded that the commission of extermination was likely, the Appellant was aware of this, and he had reconciled himself to that likelihood. This finding fulfills the requisite elements required for third category joint criminal enterprise liability: the crime of extermination was a natural and foreseeable consequence of carrying out the Common Purpose of the joint criminal enterprise, and the Appellant reconciled himself to that outcome.

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[209] Trial Judgement, para. 601.
[210] Trial Judgement, para. 600.
[211] Trial Judgement, para. 603.
[212] Trial Judgement, para. 615.
[213] Trial Judgement, para. 616.
[214] Trial Judgement, para. 656.
[215] Trial Judgement, para. 661.
[216] Trial Judgement, para. 661.

98. In light of these findings, the Appeals Chamber concludes that the factual findings of the Trial Chamber demonstrate that the Appellant had the requisite *mens rea* to be found responsible under the third category of joint criminal enterprise for the crimes of murder (as a war crime and as a crime against humanity) and extermination.

D. The concept of *dolus eventualis* ("advertent recklessness") within the context of joint criminal enterprise

99. The Appellant has raised a number of arguments challenging the Trial Chamber's use of *dolus eventualis* as a form of *mens rea*, submitting that the Trial Chamber impermissibly enlarged the *mens rea* requirement for the crimes against humanity of murder, extermination and persecutions, as well as the war crime of murder, and that by doing so the Trial Chamber violated the principles of *nullum crimen sine lege*[217] and *in dubio pro reo.*[218] However, since the Appeals Chamber has, in the preceding paragraphs, established that the Appellant incurred first category joint criminal enterprise responsibility for the crimes of persecutions, deportation and other inhumane acts (forcible transfer), and that the Appellant incurred third category joint criminal enterprise responsibility for the crimes of murder and extermination, the Appeals Chamber considers that it is appropriate to address these challenges insofar as they may apply to convictions entered pursuant to joint criminal enterprise theories. In this framework, the issue is whether reliance on *dolus eventualis* in the context of joint criminal enterprise violates the principles of *nullum crimen sine lege* and *in dubio pro reo.*

100. In the *Ojdanić* Decision on Jurisdiction,[219] the Appeals Chamber recognised the existence of joint criminal enterprise as a mode of liability in customary law existing as early as 1992:[220]

> The Appeals Chamber was satisfied [in *Tadić*], and is still satisfied now, that the Statute provides, albeit not explicitly, for joint criminal enterprise as a form of criminal liability and that its elements are based on customary law.[221]

101. A basis in customary law having been established, the Appeals Chamber in that case came to the conclusion that the notion of joint criminal enterprise did not violate the principle *nullem crimen sine lege.*[222] As the concept of *dolus eventualis* (or "advertent recklessness") is clearly

[217] Stakić Appeal Brief, paras 274, 322, 336, 351; Stakić Reply Brief, para. 116.
[218] Stakić Appeal Brief, paras 272, 322; Stakić Reply Brief, para. 115.
[219] *Ojdanić* Decision on Jurisdiction, paras 34 *et seq.*
[220] *See* also *Krnojelac* Appeal Judgement, para. 29.
[221] *Ojdanić* Decision on Jurisdiction, para. 21.
[222] *Ojdanić* Decision on Jurisdiction, para. 41.

"required for the third form of joint criminal enterprise",[223] the same conclusion is applicable in the instant case. As joint criminal enterprise does not violate the principle of legality, its individual component parts do not violate the principle either.

102. The Appeals Chamber is also of the opinion that the Appellant is unable to rely upon the principle of *in dubio pro reo* in the instant case. As the Appeals Chamber has previously stated in the *Ojdanić* Decision on Jurisdiction:

> The interpretation of Article 7(1) given by the Appeals Chamber in *Tadić* … simply leave[s] no room for it. Insofar as concerns the question whether joint criminal enterprise is recognized in customary international law, the Appeals Chamber has no doubt that the application of the principle *in dubio pro reo* could help to resolve.[224]

103. The Appeals Chamber therefore concludes that, in the instant case, the use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of *nullum crimen sine lege* and *in dubio pro reo.*

E. Conclusion

104. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber's factual findings support the Appellant's liability for the crimes of persecutions, deportation and inhumane acts (forcible transfer)[225] pursuant to the first category of joint criminal enterprise, and for the crimes of extermination and murder pursuant to the third category of joint criminal enterprise.

[223] *Tadić* Appeal Judgement, para. 220.
[224] *Ojdanić* Decision on Jurisdiction, para. 28.
[225] *See* Section VIII.C.2(c) *infra.*

VI. THE APPELLANT'S FIRST GROUND OF APPEAL: ALLEGED EXPANSION OF THE INDICTMENT

105. The Appellant presents three arguments under his first ground of appeal. The first argument is that the Trial Chamber erred by relying on "acts" originating from outside the time-period of the Indictment, in violation of an alleged understanding with the Prosecution.[226] The Appellant's second argument is that the Trial Chamber prevented him from contesting the alleged error during the proceedings at trial.[227] His third argument is that the Trial Chamber impermissibly used his status as a commander as an aggravating factor in sentencing.[228]

A. The Appellant's "understanding" with the Prosecution

106. The Appellant contends that he had an "understanding" with the Prosecution, whereby no act, conduct or evidence prior to 30 April 1992 would be considered against him.[229] He refers specifically to the Pre-Trial Conference of 10 April 2002[230] during which the Trial Chamber considered the Appellant's "Motion Objecting to the Form of the Third Amended Indictment."[231] The Appellant objected *inter alia* to paragraph 27 of the Third Amended Indictment, which alleged that:

> [the] joint criminal enterprise came into existence no later than the establishment of the Assembly of the Serbian people in Bosnia and Herzegovina on 24 October 1991 and continued throughout the period of the conflict in Bosnia and Herzegovina until the signing of the Dayton Accords in 1995.[232]

The Appellant notes that the Trial Chamber found that this modification constituted a "significant change" to the Indictment,[233] compared to the Second Amended Indictment, which read:

> The criminal enterprise [in which the Appellant allegedly participated] came into existence prior to the declaration of the "Assembly of the Serbian People of Prijedor Municipality" of 17 January 1992 on the "joining" of "Serbian territories in Prijedor Municipality" with the "ARK". From about 22 May 1992, the campaign escalated to include the destruction, in part, of the Bosnian

[226] Stakić Appeal Brief, paras 1-24, 32-40, 47-54. In his Reply Brief, the Appellant alleges that the Trial Judgement convicted him for "conduct and actions outside the period of the indictment", Stakić Reply Brief, para. 15.
[227] Stakić Appeal Brief, para. 26.
[228] Stakić Appeal Brief, paras 41-43.
[229] Stakić Appeal Brief, para. 16.
[230] Stakić Appeal Brief, para. 18, referring to T. 1521 *et seq. See* also Stakić Reply Brief, para. 3.
[231] Motion Objecting to the Form of the Third Amended Indictment, 27 March 2002; *see* the discussion below regarding the history of the third Indictment against the Appellant.
[232] The Third Amended Indictment was filed as an annex to the Prosecution's Request for Leave to Amend the Indictment, 28 February 2002. The Trial Chamber granted the Request in its Decision on Prosecution's Motion for Leave to Amend the Indictment, 4 March 2002, and the Third Amended Indictment was accepted.
[233] Stakić Appeal Brief, para. 18, referring to T. 1535.

> Muslims and Bosnian Croats in Prijedor, as such, in particular their leadership. The enterprise existed at least until 30 September 1992.[234]

107. The Prosecution disputes the Appellant's claim that an understanding was reached at the pre-trial conference of 10 April 2002, and notes the absence of specific references by the Appellant to the record demonstrating such an understanding.[235] It argues that, at the pre-trial conference, it "explained that the events [prior to 30 April 1992] were relevant as a matter of evidence and need not be pleaded."[236]

108. The Appeals Chamber notes that the transcript of the 10 April 2002 pre-trial conference reads in relevant part:

> The Trial Chamber: Then we may probably come to the last point of concern. Of course, it's also for the Defence to come with one or another point. But in paragraph 27, the former paragraph 20, apparently there is **an exchange of dates**. In the former version, under paragraph 20(A), it was alleged that the crime was committed prior to the declaration of the assembly of 17 January, 1992. And then, going on, "the enterprise existed at least until 30 September, 1992." Now, we can read that the starting point is 24 October, and this needs some declaration, "this joint criminal enterprise continued throughout the period of the conflict in Bosnia-Herzegovina until the signing of the Dayton accords in 1995." Here, for me, it seems to be, yes, **a significant change of the period of time**.[237]
>
> The Prosecution: Your Honour, this case is a smaller part of the Brdanin/Talić and Krajišnik/Plavšić and eventually the Milošević case. There is the joint enterprise, we say, throughout, that the whole period, from the evidence, began not later than the 1st assembly of the Serbian people, which was in October, and continued through until the end of the conflict enforced upon the participants by the Dayton accords. We're not suggesting that Stakić's part in it is any greater in the original indictment, but the enterprise we say is one enterprise, and that is the reason why it is now -- it's the same in all of the indictments. That's the period. Stakić played his part in that enterprise. We're looking for consistency, and that's the reason.[238]
>
> The Trial Chamber: … Not to be misunderstood, is it alleged that Dr. Stakić himself participated in the entire joint criminal enterprises during the entire time, or is it possible for the Office of the Prosecutor to limit within these dates, October 1991, Dayton 1995, the period of time where it's the alleged responsibility of Dr. Stakić?[239]
>
> The Prosecution: Your Honour, it is. **That's a matter of evidence as opposed to pleading**. Your Honour, we're alleging his participation in a single joint enterprise. So that's what's pleaded in the indictment. We're not for one moment suggesting that up until the Dayton accords Dr. Stakić was playing a part in it.[240]
>
> The Trial Chamber: Of course, one has to balance the interests I hear of the Office of the Prosecutor and the Defence, and to be honest, **I wouldn't regard it as a question of evidence only**; it's a question for which period of time the accused is held responsible, and to prepare his own Defence, I believe it's necessary…[241]

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[234] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-PT, Second Amended Indictment, filed 27 November 2001 ("Second Amended Indictment"), para. 56(a).
[235] Prosecution Response Brief, para. 2.2, fn. 38.
[236] Prosecution Response Brief, para. 2.3, fn. 41.
[237] T. 1535 (emphasis added).
[238] T. 1535.
[239] T. 1536.
[240] T. 1536 (emphasis added).
[241] T. 1536. (emphasis added).

> The Prosecution: If Your Honour looks at the counts, Your Honour will see the period. That's the period. That's the period ***for which we're holding him liable***, so between the 30th of April, 1992, and the 30th of September, 1992. That's in the counts itself.[242]

109. It appears that a statement by the Trial Chamber ("I wouldn't regard it as a question of evidence only")[243] is interpreted by the Appellant to mean that the "trial chamber clearly and unambiguously confirmed that any evidence beyond the [Indictment] period would be considered defective."[244] However, it is clear from the context that the question of the admissibility of evidence falling outside the scope of the Indictment was not actually addressed. Instead, the Trial Chamber was merely suggesting that a certain provision of the Indictment made it unclear what the Appellant was being charged with; in response, the Prosecution provided clarification by pointing to another provision of the Indictment. The Trial Chamber's request for clarification of the charges did not constitute a ruling concerning the admissibility of evidence. Nor did the Prosecution's statements concerning the proper interpretation of the Indictment suggest that no evidence would be introduced concerning events prior to 30 April 1992. To the contrary, the Prosecution explained that while it did not seek to charge the Appellant with criminal liability for events prior to 30 April 1992, it would seek to introduce evidence relating to certain prior events in order to place the charged conduct in its proper context within a continuing joint criminal enterprise.

110. The Appellant's allegations concerning an "understanding" with the Prosecution are based on an erroneous interpretation of the trial record. The Appeals Chamber holds that the Appellant did not have an understanding with the Prosecution on this point. Accordingly, this sub-ground of appeal is dismissed.

B. The Trial Chamber's alleged reliance on "acts" outside the Indictment period

111. The Appellant contends that on the basis of the Indictment, the only criminal conduct at issue was that occurring between 30 April 1992 and 30 September 1992.[245] The Appellant refers to the Trial Judgement, which provides that "the Indictment … covers the Municipality of Prijedor during a specific period (30 April 1992 to 30 September 1992)".[246] The Appellant submits that the Trial Chamber thus erred in law by considering "acts" from as early as 7 January 1992.[247] He points to language in the Trial Judgement which states:

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[242] T. 1536 (emphasis added).
[243] T. 1536.
[244] Stakić Reply Brief, para. 3.
[245] Stakić Appeal Brief, para. 24; Stakić Reply Brief, para. 3.
[246] Trial Judgement, para. 19.
[247] Stakić Appeal Brief, para. 33. The Appeals Chamber notes that the Appellant appears to include as "acts" outside the temporal scope of the Indictment both "material facts" (for example *see* Stakić Appeal Brief, paras 4-5, 33) and "evidence" (Stakić Appeal Brief, paras 6, 11, 36, 47-51).

> Apart from noting here that immediately after 30 April 1992 the Accused moved from Omarska into an apartment in the town of Prijedor, the Trial Chamber will discuss the events of the period between 7 January 1992 and the end of September 1992 elsewhere in this Judgement as they form part of the Accused's alleged criminal conduct (including alleged preparatory acts).[248]

112. Specifically, the Appellant claims that the Trial Chamber erred in admitting evidence concerning certain events which occurred prior to the Indictment period and which, he alleges, were not clearly alleged in the Indictment. These included the common goal and objective of 19 December 1991, the Serbian Assembly of 7 January 1992, the Appellant's role and authority prior to 30 January 1992, and the claim of Witness Donia that the Serbian Assembly was "denounced by other political leaders."[249] He also challenges the admission of certain post-Indictment period evidence for the same reasons: (1) a January 1993 report authored by Simo Drljača concerning the build-up of reserve police units in Prijedor Municipality from April-December 1992[250]; (2) a November 1992 document by Milan Kovačević which includes instructions for establishing and issuing certificates to citizens wishing to leave Prijedor[251]; (3) an undated interview with the Appellant in which he speaks, *inter alia,* about "the Muslims who were created artificially"[252]; (4) Witness Budimir's evidence[253]; (5) a January 1993 document (Exhibit S269)[254]; (6) a CD-ROM presented by Ljubica Kovačević (Exhibit D43)[255]; (7) an interview with the Appellant dated 13 January 1993 (Exhibits D92-99)[256]; and (8) an interview with Colonel Radmilo Zeljaja dated May 1994 (Exhibit S274).[257]

113. While the Prosecution agrees that an accused cannot be convicted for criminal acts falling outside the period of the Indictment, it submits that the Tribunal's Rules and jurisprudence do not preclude the admission of evidence falling outside the period of the Indictment as long as this evidence is relevant to the charges against the accused.[258] It specifically argues that Article 18(4) of the Statute, read with Rule 47(C), requires the Prosecution to state the material facts underpinning the charges in the Indictment, "but not the evidence by which such facts are to be proven."[259] It claims that the evidence cited by the Appellant in this ground of appeal – although it concerns

[248] Trial Judgement, para. 6 (footnote omitted).
[249] Trial Judgement, para. 341.
[250] Stakić Appeal Brief, para. 52, referring to Trial Judgement, para. 117, citing Ex. S268. The Appellant cites in his brief another report by Simo Drljača (Ex. S353). However, the Appeals Chamber notes that this report is dated 16 August 1992 and is thus within the temporal scope of the Indictment.
[251] Stakić Appeal Brief, para. 53, referring to Ex. S376.
[252] Stakić Appeal Brief, para. 54, referring to Trial Judgement, para. 927, citing Ex. S187.
[253] Stakić Appeal Brief, para. 48, fn. 42, referring to T.13098.
[254] Stakić Appeal Brief, paras 48-49.
[255] Stakić Appeal Brief, para. 51, fn. 44, referring to Trial Judgement 329, citing Ex. D43-1.
[256] Stakić Appeal Brief, para. 51, fn. 44, referring to Trial Judgement 366, citing Ex. D92-99.
[257] Stakić Appeal Brief, para. 51, fn. 44, referring to Trial Judgement 368 (*see* Ex. S274).
[258] Prosecution Response Brief, para. 2.7.
[259] Prosecution Response Brief, para. 2.3.

events outside the Indictment period – is relevant to prove events properly falling within the Indictment period.[260]

114. With respect to the evidence concerning the pre-Indictment period, the Prosecution argues in the alternative that most of the acts in question were in fact pleaded in the Indictment.[261] As to Witness Donia's claim concerning the Serbian Assembly, it notes that "there is no legal requirement to set out every aspect of a witness's evidence in an Indictment."[262]

115. The Appellant's arguments under this ground of appeal raise two related questions: first, whether the Indictment was pleaded with sufficient particularity with respect to the facts in question; and second, whether the Trial Chamber erred in admitting the evidence in question. The Appeals Chamber will consider these questions in turn.

1. Were the cited preparatory and post-Indictment period "acts" material facts that should have been pleaded in the Indictment?

116. The Appeals Chamber has stated that the question of whether an indictment is pleaded with sufficient particularity depends upon whether it sets out the material facts of the Prosecution case "with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence."[263] There is thus a clear distinction between the material facts upon which the Prosecution relies, which must be pleaded, and the evidence proffered to prove those material facts.[264]

117. The indictment must be read in its entirety when determining whether material facts have been pleaded. The Appeals Chamber has previously held that:

> the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused.[265]

[260] Prosecution Response Brief, para. 2.7.
[261] Specifically, the Prosecution states that the common goal was pleaded in the Indictment, paras 5, 8, 26, 27; the Appellant's authority and role prior to 30 April 1992 are detailed in the Indictment, paras 17, 21, 22-25, 30, 31, 38; the Serbian Assembly of 7 January 1992 is outlined in the Indictment, para. 7. Prosecution Response Brief, para. 2.4.
[262] Prosecution Response Brief, para. 2.4.
[263] *Kupreškić* Appeal Judgement, para. 88.
[264] *Kupreškić* Appeal Judgement, para. 88.
[265] *Kupreškić* Appeal Judgement, para. 89.

(a) The pre-Indictment period "acts"

118. The Appellant contests the Trial Chamber's reliance on the "common goal/objective 19 December 1991"[266] which was expressed in the "Instructions" issued by the Main Board of the Serbian Democratic Party of Bosnia and Herzegovina and later adopted by the SDS Prijedor Municipal Board. The Appeals Chamber notes that a common purpose, design or plan is a material fact concerning the existence of a joint criminal enterprise and, as such, must be pleaded in the Indictment.[267] In the instant case, the purpose of the joint criminal enterprise was clearly set out in paragraph 26 of the Indictment. Likewise, the evidence concerning the Serbian Assembly of 7 January 1992 (including Witness Donia's evidence) also related to the establishment of the Common Purpose. Thus, all of these "acts" merely amount to evidence of a material fact already pleaded; they did not need to be pleaded separately. The "Instructions" and the common goal or objective referred to therein constitute evidence of the material fact and therefore did not need to be pleaded.

119. The Appellant's authority and role in the joint criminal enterprise during the Indictment period are evidently material facts,[268] and these were clearly pleaded.[269] However, his political role and public positions held prior to 30 April 1992 are not material facts because he has not been charged with any crimes relating to his role before the Indictment period. The events before the Indictment period described by the Prosecution's evidence provide only context relating to the establishment of the joint criminal enterprise. The Appellant's authority and role prior to 30 April 1992 did not therefore need to be pleaded in the Indictment.

(b) The post-Indictment period "acts"

120. The Appeals Chamber finds that none of the post-Indictment period "acts" cited by the Appellant amount to material facts which must be pleaded. The January 1993 report prepared by Simo Drljača on the developments of reserve police units is evidence going to the authority of the Appellant during the relevant period. The document by Milan Kovačević dated November 1992 regarding certificates for departure from Prijedor as well as Exhibit D43 constitute evidence related to the alleged crimes of deportation and other inhumane acts (forcible transfer). The undated interview of the Appellant with British Channel 4 constitutes evidence going to the Appellant's

[266] Stakić Appeal Brief, para. 37.
[267] *Kvočka* Appeal Judgement, para. 42.
[268] *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000, paras 15-16.
[269] A review of paras 17, 21, 22-25 and 30 of the Indictment read in light of the time-period set out in paras 40, 53 and 57, shows that the Appellant's participation in the joint criminal enterprise was based on his multi-faceted role during the relevant time-period of the Indictment.

mens rea for the crime of persecutions. Witness Budimir's testimony constitutes evidence related to the leadership structure in Prijedor. Exhibit S269 is evidence going to the change of leadership in the Municipality of Prijedor. Exhibits D92-99 and Exhibit S274 are evidence going to the co-operation between the civilian and the military authorities in Prijedor.

121. The Appeals Chamber thus concludes that the material facts referred to by the Appellant were properly pleaded. The remainder of the "acts" referred to in fact constituted evidence, which did not need to be pleaded. Therefore the Appellant's submission that the Appeals Chamber committed an error of law in relying on material facts not pleaded in the Indictment is dismissed.

2. Did the Trial Chamber err in relying on evidence outside the scope of the Indictment?

122. As a general principle, the Appeals Chamber observes that the Trial Chamber did not commit any error of law in relying on evidence originating from outside the time-period of the Indictment. Indeed, the Trial Chamber pursuant to Rule 89(C) has the discretion to admit any "relevant evidence which it deems to have probative value."[270] The specific question before the Appeals Chamber is whether the Trial Chamber abused its discretion in violation of Rule 89(C) by considering that evidence outside the scope of the Indictment had probative value.

123. The pre-Indictment period evidence includes the "Instructions" and the common goal or objective referred to therein, the "Appellant's authority", his political role held prior to 30 April 1992, the "Serbian Assembly of 7 January 1992" and Witness Donia's evidence. The Appeals Chamber finds that the Trial Chamber did not abuse its discretion by relying on the evidence at issue insofar as it had probative value in defining the development of the Common Purpose which was in place during the relevant period of the Indictment as well as the role played by the Appellant during that period. The Appellant has not demonstrated that the Trial Chamber erred in concluding that the cited evidence had probative value to the case.

124. As regards the January 1993 report, the Appellant submits that the Trial Chamber relied on this report for "determining a planned build-up of reserve police officers that purportedly were utilised to effectuate the crimes charged against [the] Appellant".[271] The Appeals Chamber finds that the relevant passage in the Trial Judgement clearly states that the report is considered only "[w]ith regard to the period relevant to the Indictment."[272] Further, counsel for the Appellant

[270] *See* also *Kupreškić* Appeal Judgement, para. 31, citing Rule 89(C) and 89(D).
[271] Stakić Appeal Brief, para. 52.
[272] Trial Judgement, para. 117.

himself unambiguously confirmed the relevance of this report to the period of the Indictment.[273] Therefore, the Trial Chamber did not err in relying on it insofar as it was probative.

125. With regard to the document prepared by Milan Kovačević as well as Exhibit D43, although these documents were issued after the period of the Indictment, they were clearly relevant to the alleged charges of deportation and forcible transfer, illustrating the manner in which deportations were carried out during the period of the Indictment. As a result, the Trial Chamber did not err in considering that these documents had probative value for the crimes charged.

126. As for the Appellant's undated interview with British Channel 4 in which he speaks, *inter alia,* about "the Muslims who were created artificially",[274] the Appeals Chamber notes that the Trial Chamber relied on this statement in two contexts.[275] The first is with regard to the *mens rea* of the crime of persecutions. The Trial Chamber relied *inter alia* on the "abusive and discriminatory remark that Muslims … were created artificially" to be "satisfied beyond reasonable doubt that the Accused had the intent to discriminate against non-Serbs … during the relevant time in 1992".[276] The second is with regard to the character of the Accused as that was considered in the sentencing section. The Trial Chamber found that the statement constituted evidence of the Appellant's "real intentions and feelings" about Muslims during the period of the Indictment.[277]

127. The question to be answered by the Appeals Chamber is whether the Trial Chamber erred in relying on this post-Indictment period statement. Before answering that question, the Appeals Chamber will first consider the relevant statement in the context of the interview from which it was taken:

> Reporter:
>
> How would you explain to the people in England, to the audience in England, what has happened here over the last six months?
>
> Stakić:
>
> Firstly, I would like to greet viewers in England. For us here, the reports of the London press and television, and especially official London, are a kind of measure of the balance of powers in the world and the situation in the world. However, it is difficult to explain from here what is actually happening here to the people who live in England and on the island, who are an integral part of Europe, but who are nevertheless a little separated from Europe and are quite far from the Balkans.

[273] T. 7037, 27 August 2002. (Judge Schomburg: "But you agree that this report covers […] the period of time covered as well by the Indictment, the last nine months of 1992?"; Mr. Ostojić: "It certainly seems to suggest that, yes, Your Honour.")
[274] Ex. S187, p. 5. The Trial Chamber held that the interview took place toward the end of 1992 (*see* Trial Judgement, paras 497, 698). The Appellant dates the interview December 1992 or early 1993 (Stakić Appeal Brief, para. 54).
[275] A third reference to the statement is made with regard to the crime of genocide, but in this case the Trial Chamber did not attach any probative value to it. *See* Trial Judgement, para. 554.
[276] Trial Judgement, paras 825-826.
[277] Trial Judgement, para. 927, referring to Ex. S187.

> Those of us who have lived here for centuries, I mean the Serbs and the other peoples, *I also mean the Muslims, who were created artificially*, who were against the Serbs in the previous two wars, while the Serbs were on the side of the allies both times. And this was from the very beginning, in other words, not at the very end of the war. What should have been done…actually, a little more time should have been devoted to getting to know the spirit and mentality of this people. Both times, in both the world wars…previous wars, we Serbs with our broadmindedness forgave everything, all the crimes that were committed by the Ustashas, mobilised from among the Croatian people and the Muslim people…where we suffered more by their hand than by the hand of fascist Germany, where on Kozara alone, 14,000 children were killed.[278]

128. The Appeals Chamber first notes that the statement at issue appears within a broad historical remark made by the Appellant: there is no direct connection with the relevant period of the Indictment. However, the Trial Chamber did not abuse its discretion in assuming that an expression of ethnic or religious bias made by the Appellant during late 1992 was probative of his likely state of mind earlier that same year. Accordingly, the Trial Chamber did not err in relying on the statement to establish the Appellant's intent for the crime of persecutions, nor in viewing it as probative of his character for sentencing purposes.

129. The Trial Chamber relied on the evidence of Witness Budimir to establish that "for a short period of time in 1992, most of the Crisis Staff members, including Dr. Stakić, wore uniforms and carried pistols, although there was no obligation to do so."[279] Similarly, the Trial Chamber relied on the evidence at issue to establish the structure and role in Prijedor of the National Defence Council as well as the competencies of the Crisis Staff during the period of the Indictment.[280] Thus, Witness Budimir's testimony related directly to the events alleged during the Indictment period, and the Trial Chamber did not err in relying on it.

130. With respect to Exhibit S269, the Appeals Chamber notes that the Trial Chamber admitted this exhibit into evidence because it was relevant to the date of the change of leadership in the Municipality of Prijedor.[281]

131. Finally, as regards Exhibits D92-99 and Exhibit S274, although these documents were issued after the period of the Indictment, they were clearly relevant to establish the degree of co-operation between the civilian and the military authorities during the period of the Indictment. Therefore, the Trial Chamber did not commit any error in referring to it.

132. In conclusion, the Appellant's submission that the Trial Chamber abused its discretion in violation of Rule 89(C) by referring to pre and post-Indictment period evidence is dismissed.

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[278] Ex. S187, p. 5 (emphasis added).
[279] Trial Judgement, para. 371.
[280] Trial Judgement, paras 86, 92.
[281] T. 7038.

C. Did the Trial Chamber prevent the Appellant from contesting "acts" outside the temporal scope of the Indictment?

133. The Appellant submits that the Trial Chamber did not allow him the opportunity to present his own evidence originating from outside the time-period of the Indictment,[282] and that it prohibited him from asking questions and calling witnesses related to this time-period.[283] Specifically, the Appellant submits that the Trial Chamber restricted and curtailed his cross-examination of Dr. Donia, an expert witness called by the Prosecution, by stating the following:

> … all the parties should try to restrict comments and questions on the alleged time, April 1992, September 1992, and of course Prijedor and immediate surrounding areas.[284]… To conclude, I think I was quite clear in saying we have only a limited time of responsibility at stake here in our case. … And therefore, I have to ask you, **concentrate yourselves first of all on this limited time and the limited area**.[285]

134. The Appeals Chamber notes that the Appellant has not shown, by reference to either the trial record or the Trial Judgement, that the Trial Chamber prevented him from introducing relevant evidence.[286] The only specific reference offered by the Appellant is the Trial Chamber's statement in paragraph 927 that it was "convinced that [the Appellant] was determined and resolute", despite the fact that some witnesses characterised the Appellant in a potentially conflicting manner. This assertion, however, discloses no error on the part of the Trial Chamber. As noted above, the Trial Chamber may determine which witness testimony is more credible "without necessarily articulating every step of the reasoning in reaching a decision on these points."[287] Further, this finding neither supports, nor is related to, the Appellant's allegation that he was prevented from introducing relevant evidence.

135. As to the cross-examination of Witness Donia, the Appeals Chamber finds that the Appellant's citations of the trial record are selective and misleading. A complete examination of the excerpt reveals that while the Trial Chamber did restrict the cross-examination of Witness Donia, it did not restrict it in such a manner as to enforce "its ruling in the time parameters and scope of the Indictment only on the defense",[288] as the Appellant alleges. The relevant passages of the disputed exchange are as follows:

> Counsel for the Appellant: …, Your Honour, I would like to confine the questions to the dates in the fourth amended indictment from April 30th, 1992, through September of 1992. However, other witnesses, and in particular Dr. Donia respectfully in his report, has gone beyond those areas. I

[282] Stakić Appeal Brief, para. 11.
[283] Stakić Appeal Brief, para. 26.
[284] T. 2125.
[285] T. 2127-2128 (emphasis added).
[286] Stakić Appeal Brief, paras 11, 50, 55.
[287] *Kordić* Appeal Judgement, para. 19, fn. 11; *Kupreškić* Appeal Judgement, para. 32.
[288] Stakić Appeal Brief, para. 25.

> believe for the Defence in order to show the situation and the tensions that we believe were existing and we believe Dr. Donia concurs were existing at that time in Prijedor, prior to April of 1992, and through September 1992, is relevant and imperative to obtain both a fair trial for Dr. Stakić and a complete understanding of the situation in that region. And I say this most respectfully, and I'm just looking for guidance. I can limit my questions, but just would like to know if that was the intent of the Court.[289]
>
> The Trial Chamber: To be very frank on this, I don't know whether, counsel, you are aware of the fact that the Trial Chamber already in the beginning asked the Office of the Prosecutor to show us some self-restraint as regards the time covered by this expert witness. And it's not only the time, also the region. Please be aware that we professional Judges regard this as part of, let's say, public domain, that there were overall tensions between the ethnic groups in the former Yugoslavia, and therefore, we really should -- all the parties should try to restrict comments and questions on the alleged time, April 1992, September 1992, and of course Prijedor and immediate surrounding areas. This was my point when you came to Čelebići, for example. Thank you.[290]
> …
>
> The Trial Chamber: To conclude, I think I was quite clear in saying we have only a limited time of responsibility at stake here in our case. You know this time, and you know the region. **Of course, you can go to the surrounding areas. This is of some importance.** But it was on purpose that I asked both parties in the beginning not to start history with the tribes in the 5th and 6th century. It doesn't make sense at all. And I said it quite clearly to the Office of the Prosecutor and the same is of course true for the Defence. And therefore, I have to ask you, **concentrate yourselves first of all on this limited time and the limited area**. And please, allow me one additional remark: As this is not a jury, I, as a Defence counsel, have always learned that it's more convincing to make some points and leave the evaluation to the Judges. Thank you. I think it's enough, and we should continue with the cross-examination now.[291]

136. The clarification emphazised above makes clear that the Appellant was in fact permitted to cross-examine Witness Donia on matters outside the geographic and temporal scope of the Indictment, but was simply cautioned against extending this inquiry to irrelevant matters. In any event, the Appellant merely points to this exchange but does not show how this alleged error invalidates the Trial Chamber's decision.

137. This sub-ground of appeal is accordingly dismissed.

D. Pleading the Appellant's status of commander as an aggravating circumstance

138. The Appellant alleges that the Indictment did not sufficiently inform him as to how his status as commander could be used as an aggravating circumstance in determining his sentence, and that he was therefore prevented from contesting this matter at trial.[292] He further submits that the Trial Chamber was "satisfied that the relationship between the police and the Municipal Assembly was one of co-operation, not subordination."[293] In light of this absence of a finding of a superior-

[289] T. 2123-2125.
[290] T. 2125.
[291] T. 2127–2128 (emphasis added).
[292] Stakić Appeal Brief, para. 41, referring to Trial Judgement, paras 912-913.
[293] Stakić Appeal Brief, para. 42, referring to the Trial Judgement, para. 370.

subordinate relationship between the police and the Municipal Assembly, the Appellant submits that the Trial Chamber erred in law and fact when it utilised Article 7(3) as an aggravating factor.[294]

139. The Prosecution submits that the Appellant has "misconstrued the relevant jurisprudence" and that his status as a commander constitutes a matter of evidence which does not need to be pleaded in an indictment.[295] The Prosecution points to paragraphs 30, 31 and 38 of the Indictment and argues that the command role was "explicitly set out".[296]

140. The Appeals Chamber notes that the Appellant was charged with crimes under Article 7(1) as well as Article 7(3). Since the Appellant's command role is directly relevant to the nature of responsibility for the crimes charged under Article 7(3), it constitutes a material fact, which must be pleaded in the Indictment.

141. The Appeals Chamber is satisfied that the Appellant's command role was sufficiently pleaded in paragraphs 30, 31 and 38 of the Indictment, as follows:

> 30. Milomir Stakić, while holding positions of superior authority is also individually criminally responsible for the acts or omissions of his subordinates, pursuant to Article 7(3) of the Statute of the Tribunal. Milomir Stakić, by virtue of his role as President of the Prijedor Crisis Staff and Head of the National Defence Council in Prijedor Municipality, had control and authority over the TO and police forces that participated in the crimes alleged in this Indictment.
>
> 31. Milomir Stakić knew or had reason to know that all crimes alleged in this indictment were about to be committed or had been committed by his subordinates and he failed to take necessary and reasonable measures to prevent such acts or punish the perpetrators thereof. The accused is therefore criminally responsible under Article 7(3) of the Statute of the Tribunal.
>
> …
>
> 38. Milomir Stakić whilst holding the positions of superior authority as set out in the foregoing paragraphs is also criminally responsible for the acts of his subordinates, pursuant to Article 7(3) of the Tribunal Statute. A superior is responsible for the acts of his subordinate(s), if he knew or had reason to know that his subordinate(s) were about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof.

142. The Appellant's further allegation that he should have been informed of how his command role might be used against him in sentencing is inconsistent with the jurisprudence of this Tribunal. The Appeals Chamber has previously found that "as a matter of principle, there is no requirement that the Prosecution plead aggravating factors in an indictment. Such a requirement is not reflected in the Statute or Rules of this Tribunal."[297]

[294] Stakić Appeal Brief, paras 43-45.
[295] Prosecution Response Brief, para. 2.3.
[296] Prosecution Response Brief, para. 2.4.
[297] *Kupreškić* Appeal Judgement, para. 376.

143. The Appellant's appeal on this point is thus dismissed. The question of whether the Appellant's superior position can be used as an aggravating factor in sentencing is examined below in the section on sentencing.

VII. THE APPELLANT'S SECOND AND THIRD GROUNDS OF APPEAL: ALLEGED VIOLATIONS OF THE RIGHT TO A FAIR TRIAL AND MISCARRIAGE OF JUSTICE

A. Alleged violations of the Appellant's right to a fair trial

144. The Appellant's second ground of appeal comprises a number of alleged factual and legal errors which, the Appellant claims, denied him a fair trial. Specifically, he submits that the Trial Chamber erred in: (1) denying the Appellant's request to obtain expert witnesses[298] and refusing to admit expert evidence on various topics[299]; (2) denying the Appellant's motion for a mistrial based on violations of Rule 68 by the Prosecution[300]; (3) denying the Appellant the right to introduce Rule 92*bis* evidence[301]; (4) admitting certain of the Prosecution's Rule 92*bis* evidence[302]; (5) issuing Rule 91 warnings to Defence witnesses[303]; and (6) admitting "unreliable and untrustworthy" evidence.[304] As a remedy, the Appellant requests that the Appeals Chamber reverse his convictions,[305] grant him a new trial[306] or substantially reduce his sentence.[307]

1. Denial of the Appellant's request to obtain expert witnesses and to admit expert evidence

145. The Appellant argues[308] that the Trial Chamber abused its discretion and erred as a matter of law when it denied his request for funds to retain expert witnesses.[309] He claims that the refusal of the Trial Chamber (1) violated the "principle of equality of arms,"[310] and (2) denied him "the right … to adequately present [his] defence through experts."[311] He cites Articles 20 and 21 of the Statute, which guarantee the right to a fair trial and equality, in support of his argument.[312] He then

[298] Stakić Appeal Brief, paras 60-88.
[299] Stakić Appeal Brief, paras 89-159.
[300] Stakić Appeal Brief, paras 160-169.
[301] Stakić Appeal Brief, paras 170-177.
[302] Stakić Appeal Brief, paras 178-186.
[303] Stakić Appeal Brief, paras 187-192.
[304] Stakić Appeal Brief, paras 193-204.
[305] Stakić Appeal Brief, paras 64, 88, 186.
[306] Stakić Appeal Brief, paras 64, 88, 147, 156, 169, 186, 192, 195, 204.
[307] Stakić Appeal Brief, paras 156, 186, 195.
[308] During oral argument before the Appeals Chamber, the Appellant presented several new citations to the record to support his arguments, in essence supplementing the arguments made in his Appeal Brief. This is not proper procedure, as the Prosecution did not have the opportunity to respond to this new information (*see* Rule 111). Further, as the additional citations are to the record, it is clear that all of the additional information provided was available to the Appellant at the time his appeal brief was due. However, the Appeals Chamber will consider these citations to the extent that they were clearly connected to an argument made in his Appeal Brief. Where mere citations were presented without argument, however, the Appeals Chamber cannot construct the argument *sua sponte*, and accordingly dismisses these submissions as unfounded. *See Kvočka* Appeal Judgement, para. 15.
[309] Stakić Appeal Brief, para. 60.
[310] Stakić Appeal Brief, para. 61.
[311] Stakić Reply Brief, para. 32, *see* also Stakić Appeal Brief, para. 61.
[312] Stakić Appeal Brief, para. 65.

cites several judgements from the European Court of Human Rights to argue that a party must be given the opportunity "to make known any evidence needed for their claims to succeed".[313] The Appellant also cites English and U.S. law for the proposition that opinions of experts are generally admissible in adversarial systems.[314]

146. The Appellant maintains that the Trial Chamber unfairly allowed the Prosecution to call "at least 8 recognised experts and 3 quasi experts", although only three were formally designated as experts, and it did not allow the Defence to do the same.[315] Similarly, he complains that during the trial, the Prosecution "promoted" certain fact witnesses as experts and the Trial Chamber "accepted" them "as possessing expertise."[316]

147. The Appellant submits that although he requested experts in seven fields, the Trial Chamber only granted him permission to call the history and military experts.[317] He argues that the experts he requested could have rebutted the Prosecution's expert testimony, and that they therefore should have been permitted to testify.[318]

148. The Prosecution responds that while it had proposed eleven experts, it only called three of them at trial. The Trial Chamber then directed the Prosecution to call two additional experts pursuant to Rule 98. The other witnesses in question, the Prosecution explains, testified as witnesses of fact, not as experts.[319] Furthermore, the Prosecution maintains that the Trial Chamber was correct in holding that the Appellant had failed to justify the introduction of expert testimony,[320] and notes that despite this failure, the Trial Chamber permitted him two expert witnesses on the basis of the principle of equality of arms.[321]

149. The Appeals Chamber notes that Article 21 of the Statute provides that "[a]ll persons shall be equal before the International Tribunal," which has been interpreted to require an "equality of arms" between the parties.[322] The Appeals Chamber has found that the principle of equality of arms "goes to the heart of the fair trial guarantee."[323] While equality of arms does not mean that the Appellant is necessarily entitled to the same means and resources available to the Prosecution, it

[313] Stakić Appeal Brief, para. 66, fns 60-62.
[314] Stakić Appeal Brief, para. 68, fn. 63.
[315] Stakić Appeal Brief, para. 84. *See* also paras 79-84.
[316] Stakić Appeal Brief, paras 85-88.
[317] Stakić Appeals Brief, paras 112-113.
[318] Stakić Appeal Brief, paras 113-117; Stakić Decision on Request for Approval of Defence Experts.
[319] Prosecution Response Brief, para. 3.4, citing *Čelebići* Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of the Witnesses, 20 March 1997, para. 10.
[320] Prosecution Response Brief, paras 3.5, 3.8, 3.23.
[321] Prosecution Response Brief, para. 3.23.
[322] *See Tadić* Appeal Judgement, paras 44, 56; *Čelebići* Decision on the Prosecution's Motion for an Order requiring Advance Disclosure of Witnesses by the Defense, 4 February 1998, para. 49.
[323] *Orić* Decision on Length of Defence Case, para. 7.

does require a judicial body to ensure that neither party is put at a disadvantage when presenting its case, particularly in terms of procedural equity.[324] In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, taking into account the "principle of basic proportionality" and (2) was the accused permitted a fair opportunity to present his case.[325]

150. At the same time, Rules 89(C) and (D) provide that the Trial Chamber may admit any relevant evidence which it deems to have probative value and may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Rule 65*ter*(G) states that before the accused's case is presented, the Pre-Trial Judge shall order the Defence to file a list of witnesses it intends to call, which includes, among other things, (a) the name or pseudonym of each witness (b) a summary of the facts to which each witness will testify and (c) the points in the indictment to which each witness will testify. The Trial Chamber is then called upon to make its discretionary ruling on whether or not to admit the expert testimony.[326] Finally, under Rule 73*ter*(C), the Trial Chamber sets the number of witnesses the Defence may call after hearing the Defence and considering the file submitted to the Trial Chamber by the Pre-Trial Judge pursuant to Rule 65*ter*(L)(ii).

151. The Defence, in its 2 October 2002 Request for Approval of Defence Experts, asked the Trial Chamber to approve experts in seven areas.[327] The Defence failed, however, to specify either the names of the proposed experts or an explanation as to what fact and point in the Indictment to which each expert would testify, as required by Rule 65*ter*(G). Instead, the Defence merely submitted that:

> The foregoing is requested in order to secure that Dr. Stakić obtains a fair trial and that the principle of equality of arms is adhered to pursuant to the Rules of Procedure and Evidence of the Tribunal. In addition, the rationale for seeking the approval of the foregoing is to objectively and specifically address issues raised in the 4th Amended Indictment as well as to rebut, clarify and supplement the 'evidence' offered by the OTP in their case in chief.[328]

[324] *Orić* Decision on Length of Defence Case, para. 7; *Kayishema and Ruzindana* Appeal Judgement, para. 69.
[325] *Orić* Decision on Length of Defence Case, paras 7-9.
[326] Rule 65*ter*(G). In addition, the party offering an expert must disclose the expert's statement within the time limit set by the Pre-Trial Judge – generally done before the opening of a party's case – and then the opposing party must challenge the expert within 30 days or such other time as prescribed by the Trial Chamber (Rule 94*bis*).
[327] The Defence submission requested the following experts, among others: (1) Academic Historians, (2) Constitutional Law Expert, (3) Demographer, (4), Police Experts, (5) Military Expert, (6) Handwriting Expert, (7) "Journalistic Ethics."
[328] Request for Approval of Defence Experts, 2 October 2002, p. 2.

152. The Trial Chamber approved two expert Defence witnesses pursuant to Rule 73*ter* – an historian and a military expert – and denied the five other requests for experts in constitutional law, demography, police practices, handwriting and journalistic ethics as "unsubstantiated."[329]

153. The Appeals Chamber finds that this ruling was within the discretion of the Trial Chamber. Given the Appellant's failure to comply with the requirements of Rule 65*ter*(G), the Trial Chamber's conclusion that his requests for experts were unsubstantiated was correct.

154. On 8 November 2002, the Trial Chamber ordered the Defence to file, by 11 November 2002, the information required by Rule 65*ter*(G) with respect to all of the witnesses it planned to call during the remainder of 2002. It further ordered that information concerning witnesses the Defence intended to call between 8 January and 21 March 2000 be filed by 18 November 2002.[330]

155. Although the Appellant did not provide this information, the Trial Chamber again considered the Appellant's requests for expert witnesses during a 25 November 2002 hearing. At this hearing, the Defence orally requested that the Trial Chamber reconsider its 8 October order limiting the Defence to two experts.[331] The Trial Chamber heard arguments on each of the experts it had denied, and confirmed its prior ruling. The Appellant now challenges the denial of each of the experts. The Appeals Chamber will consider his arguments in turn.

(a) The handwriting expert

156. The Appellant contends that the Trial Chamber improperly assisted the Prosecution, first, by requesting retention of a handwriting expert, Mr. C.H.W. Ten Camp, under Rule 98 and second, by not allowing the Appellant to call his own handwriting expert to rebut Mr. Ten Camp's testimony.[332] He maintains that Mr. Ten Camp himself testified that consultation with two handwriting experts was necessary in order to reach a reliable conclusion.[333]

157. Second, the Appellant argues that Mr. Ten Camp's testimony was "deficient and unreliable" because he could only state that the signatures on crucial documents in question were "possibly" or "probably" those of the Appellant.[334] He accordingly claims that because the Trial Chamber relied heavily on this evidence in its Judgement, the standard of proof beyond a reasonable doubt was not met.[335] The Appellant claims that it had "consulted with" a handwriting expert, Jack Hayes, who, if

[329] *Stakić* Decision on Request for Approval of Defence Experts, p. 3.
[330] Order for Defense to File More Information On Its Rule 65*ter*(G) Witnesses, 8 November 2002, p. 4.
[331] T. 9408, 25 November 2002.
[332] Stakić Appeal Brief, para. 90.
[333] Stakić Appeal Brief, para. 109.
[334] Stakić Appeal Brief, paras 99-101; Stakić Reply Brief, para. 44.
[335] Stakić Appeal Brief, para. 103.

called to testify, would have challenged the reliability and authenticity of the facsimile documents on which the Trial Chamber relied. He claims that with this testimony, the Trial Chamber could not have concluded beyond a reasonable doubt that the Appellant had authored those documents.[336]

158. The Trial Chamber denied the request for a second handwriting expert as it found that: (1) it was not correct that Mr. Ten Camp recommended a second expert and (2) the Defence had not demonstrated that Mr. Hayes would have superior knowledge or scientific methods.[337] These conclusions are supported by the record, and the Appeals Chamber concludes that the refusal to allow a second handwriting expert was within the Trial Chamber's discretion pursuant to Rules 65*ter*(G) and 73*ter*(C). Moreover, the Trial Judgement demonstrates that the Trial Chamber was aware of the limitations of Mr. Ten Camp's testimony;[338] there is no indication that the Trial Chamber gave his testimony as to the documents in question more weight than it merited. Because the Trial Chamber did not rely solely on these documents in order to determine the Appellant's role in the relevant events, it is not necessary that the documents alone establish his guilt beyond a reasonable doubt. The Appeals Chamber can see no error in the Trial Chamber's assessment, and this sub-ground of appeal is dismissed.

(b) The police expert

159. The Appellant claims that although the Prosecution sought to hold him responsible for the acts or omissions of police personnel, the Prosecution did not establish that he had any authority over the police.[339] He further argues that his Bosnian police expert, Dr. Duško Vejnović, would have shown that the Appellant and the "local civilian leadership of Prijedor" did not have control over the police forces because the police chain of command was instead controlled by "the Republican level Ministry of Interior Affairs".[340] The Appellant also points out that other Trial Chambers have appointed experts relating to the "unique make up of the Bosnian police."[341]

160. As a preliminary matter, the Appeals Chamber rejects the Appellant's suggestion that discretionary decisions made by other Trial Chambers (to call police experts) were somehow binding on the Trial Chamber in this case. Judicial discretion can be defined as "the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules

[336] Stakić Appeal Brief, paras 146-47.
[337] T. 9440.
[338] *See* Trial Judgement, para. 387 (stating that Mr. Ten Camp had identified the possible author of a document).
[339] Stakić Appeal Brief, para. 123.
[340] Stakić Appeal Brief, para. 124.
[341] Stakić Appeal Brief, para. 127.

and principles of law."[342] A Trial Chamber's exercise of discretion, by definition, can and likely will vary from trial to trial depending on a variety of different factors.

161. The Appeals Chamber agrees with the Appellant that a police expert could have clarified the *de jure* relationship between the police and the military. However, it is not the *de jure*, but the *de facto* relationship between the civilian leadership and the police that was material to the question of effective control in this case.[343] As the Trial Chamber's conclusions would be unaffected by an explanation of the *de jure* relationship between the police and the civilian authorities, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in denying the request for a police expert, and this sub-ground of appeal is dismissed.

(c) The constitutional law expert

162. Pursuant to Rule 92*bis*, the Trial Chamber, upon the Appellant's request, admitted Professor Pavle Nikolić's expert report on constitutional issues, which Professor Nikolić had prepared for another trial. The Appellant claims that the denial of his request to further develop aspects of that report through his own witness, so that it would relate specifically to Prijedor and the allegations against him, rendered his trial unfair.[344]

163. The Trial Chamber ruled that it did not need a constitutional law expert as it was within the competence of the Trial Chamber to determine the relevant legal questions at issue, which were (1) whether or not the principle of command responsibility embodied in Article 7(3) of the Statute enjoyed the status of customary international law in 1992; and (2) whether application of these principles would amount to a retroactive application of substantive criminal law.[345]

164. The Appeals Chamber agrees with the Trial Chamber that there was no justification for the introduction of expert testimony as to issues of international criminal law; the Trial Chamber was perfectly competent to pronounce on such issues without the assistance of a legal expert. To the extent that the Appellant sought to introduce expert testimony as to domestic constitutional issues such as the legal obligations of the Crisis Staff, it would have been within the Trial Chamber's discretion to admit such testimony. However, particularly given that the Trial Chamber had already admitted, upon the Appellant's request, the report of Professor Nikolić on these issues, it was reasonable for the Trial Chamber to conclude that it was not necessary to hear further expert testimony. Moreover, the Appellant had failed to provide a written explanation as to why the additional expert was needed, as required by the Rules, even after being specifically ordered to do

[342] Black's Law Dictionary (8th ed. 2004).
[343] Trial Judgement, paras 469, 470, 472, 473, 477, 479, 482, 488.
[344] Stakić Appeal Brief, paras 131-134.

so by the Trial Chamber. The Appeals Chamber concludes that the Trial Chamber did not abuse its discretion in denying the Appellant's request, and this sub-ground of appeal is dismissed.

(d) The demographer

165. The Appellant claims that when he attempted to rebut the evidence of the Prosecution's demographer, Dr. Ewa Tabeau, the Trial Chamber denied his request to introduce an expert witness, and explicitly stated that it would not rely on Dr. Tabeau's testimony. Contrary to this assurance, the Appellant claims that the Trial Chamber then "based its finding of guilt, in part, on the evidence offered [by Dr. Tabeau]."[346] He further claims that he was unfairly denied the opportunity to call his own expert demographer.

166. The Appeals Chamber notes that when the Trial Chamber asked the Appellant on 25 November 2002 whom he wished to call as a demographer, the Defence asked for two to three more weeks to provide the Trial Chamber with a name. The Trial Chamber then informed the Appellant that because this information had been due six months previously, as a part of its 65*ter*(G) motion, it would not delay proceedings any further. The Trial Chamber additionally pointed out that the Rules allowed the Appellant to raise the issue again at the end of the case, and the Trial Chamber would be required "to revisit this question."[347] In light of the ample opportunities the Trial Chamber provided to the Appellant to seek to call his own expert, and the Appellant's failure to comply with the appropriate procedures, the Appeals Chamber sees no error in this regard on the Trial Chamber's part.

167. The Appeals Chamber does not agree with the Appellant's submission that the Trial Chamber explicitly stated that it would not rely on Dr. Tabeau's testimony. While the Presiding Judge did indicate that he viewed demographic evidence as irrelevant to certain factual questions,[348] his statement could not reasonably be understood by the Appellant to mean that the Trial Chamber would not refer at all to evidence offered by the demographer. The Trial Chamber specifically allowed a demographer to be called as a witness who could offer relevant evidence on the various charges. In the absence of a clear indication to the contrary, it was to be expected that the Trial Chamber would rely on that evidence to the degree it considered appropriate.

168. In light of the foregoing, the Appeals Chamber concludes that the Appellant has not shown that without reference to Dr. Tabeau's report the Trial Chamber would have reached a different

[345] T. 9440.
[346] Stakić Appeal Brief, para. 140.
[347] T. 9421.
[348] Judge Schomburg stated, "we don't want to rely on demographics, … it doesn't make any sense for the purposes we have before us, especially to count 1 and 2, and please take it that it's not relevant." T. 9525.

conclusion as to his culpability.[349] The Trial Chamber did not err in refusing a Defence demographer and in relying on Dr. Tabeau, and this sub-ground of appeal is dismissed.

(e) Expert called to rebut Witness Vulliamy

169. Edward Vulliamy, a British journalist who had been present in Prijedor municipality during 1992, testified as to certain events that took place there. The Appellant argues that although Witness Vulliamy was presented as a fact witness for the Prosecution, he actually testified as an expert witness. In support of this argument, he cites portions of the trial transcript in which Witness Vulliamy, in response to the Defence's question of whether he was asked to be an expert witness, answered "Yes. I recall that it was my sort of label."[350]

170. The Appellant then submits that Witness Vulliamy lacked expertise and misunderstood the Balkans because he could not speak B/C/S and thus received his information second-hand. He also argues that the Trial Chamber erred in denying his requests to call James Bisset, John Peter Maher and David Binder to "clarify the flaws of Mr. Vulliamy's conclusions" concerning the widespread and systematic nature of the crimes, and that an acquittal or a new trial is thus required.[351] He further contends that Witness Vulliamy's testimony was contradicted by an article that he had written on 7 August 1992 (introduced as Exhibit D25), and that by failing to address this article, the Trial Chamber violated the reasoned opinion requirement.[352] In addition, the Appellant also argues that he should have been permitted to introduce the transcripts of Professor Robert Hayden's testimony in the *Tadić* trial on the "widespread and systematic" issue.

171. The record makes clear that Witness Vulliamy's comment regarding his status as an expert related not to this case, but to a discussion the Witness had had with the Prosecution concerning potential testimony in another case. His status as a potential expert in another case is irrelevant to the current appeal.[353] In this case, he was listed as a fact witness and referred to by the Prosecution and the Trial Chamber as such. His testimony was thus not based on second-hand information, as alleged by the Appellant. Indeed, Witness Vulliamy testified that, among other things, he visited the Omarska and Trnopolje camps, viewed deportations, attended a meeting with the Crisis Staff, and interviewed the Accused himself for approximately an hour to an hour and a half in the Accused's office at a health centre in Prijedor.[354] While Witness Vulliamy's introductory description of his

[349] Stakić Appeal Brief, paras 138-143.
[350] Stakić Appeal Brief, para. 87, citing T. 8042.
[351] Stakić Appeal Brief, para. 150, *see* also paras 88, 149.
[352] Stakić Reply Brief, paras 52-53.
[353] The trial transcript shows that the Prosecution had discussed the possibility of Vulliamy testifying as an expert in the case against Duško Tadić, not in the case against the Appellant.
[354] T. 7939-7949, 7953- 7963, 7981-7988, 8011, 8079-8080.

background described in detail his substantial experience as a journalist, nowhere in the record did the Trial Chamber or the Prosecution refer to him as an expert witness.[355] The Appeals Chamber therefore rejects the Appellant's submissions on this point.

172. The Appeals Chamber also notes that Exhibit D25 – Witness Vulliamy's 7 August 1992 article on Omarska and other detention camps – does not meaningfully contradict his testimony given at trial, contrary to what the Appellant contends in his reply.[356] As the witness explained on cross-examination, after this article was published, he continued to receive information on further abuses in the Prijedor area, which changed his understanding as to the extent of the abuses in that region.[357] As for the argument that the Trial Chamber was required to cite Exhibit D25 in order to give a reasoned opinion, the Appeals Chamber notes that a Trial Chamber has discretion to select which submissions merit detailed analysis in writing.[358] The Trial Chamber may dismiss clearly unfounded arguments without providing detailed reasoning, as it did in this instance.[359] The Trial Chamber, thus, did not err in failing to address Exhibit D25 in its Judgement.

173. The Trial Chamber denied the Defence's oral request on 25 November 2002 for an expert to rebut Witness Vulliamy, finding that it was capable of assessing his testimony without the opinions of the proposed journalists who had never been to Prijedor.[360] The Trial Chamber did not hear from any expert witnesses regarding the widespread and systematic nature of the attack, instead choosing to rely on numerous fact witnesses, including Witness Vulliamy, for its finding that the crimes committed were widespread and systematic.[361] While such an inquiry requires findings of both law and fact, the ultimate legal conclusion is to be drawn by the Trial Chamber.[362] The Appeals Chamber finds that the Trial Chamber acted within its discretion in deciding to rely solely on fact witnesses for its findings on this subject. The Appellant has not demonstrated any error which would invalidate the decision, and this sub-ground of appeal is dismissed.

(f) The designation of Nicolas Sebire as an expert

174. Nicholas Sebire, an investigator with the Prosecution, testified as to the identification of bodies found in the Prijedor region. The Appellant claims that, although Witness Sebire was technically designated as a fact witness, the Prosecution "represented" him as an expert to the Trial

[355] T. 7898-7904.
[356] Ex. D25. *See* the discussion of this Ex. D25 in Section VIII.A *infra.*
[357] T. 8053-8060.
[358] *Kajelijeli* Appeal Judgement, para. 8. *See* also, *Niyitegeka* Appeal Judgement, para. 11; *Ntakirutimana* Appeal Judgement, para. 15; *Rutaganda* Appeal Judgement, para. 19; *Kunarac* Appeal Judgement, para. 47.
[359] *Kvočka* Appeal Judgement, para. 15, citing *Kunarac* Appeal Judgement, para. 98; *Krnojelac* Appeal Judgement, para. 16; *Blaškić* Appeal Judgement, para. 13; *Kordić* Appeal Judgement, paras 21-23.
[360] T. 9440-9441.
[361] Trial Judgement, paras 129-334.

Chamber, who "accepted and promoted Sebire as a bonafide expert" and cited his testimony throughout the Trial Judgement.[363]

175. During the trial, the Trial Chamber on one occasion referred to Witness Sebire as an expert when the Presiding Judge stated:

> [P]lease don't blame an expert witness [referring to Sebire] for … what was done …[364]

176. This statement was, subsequently, clarified by the Prosecution:

> Before I address the issue related to document signatures, can I briefly just address the Court's comments regarding the witness yesterday. Mr. Sebire, as he made clear, did not come here as an expert on medical matters or on other matters of expertise. His job, which I think he has done a tremendous job of, is collecting over 20,000 pages of documents and trying to organise them in some way that it would be presentable to a court of law.[365]

177. Five days later, on 9 September 2002, the Prosecution stated:

> I'm not aware of NGO exhumations in the area of Prijedor. They may have funded the state authorities, or provided assistance. But Mr. Sebire is the expert. He can tell us. I don't believe they are.[366]

178. Finally, on 27 September 2002, during cross-examination, the Defence asked Witness Sebire:

> Q. …but you're not an expert in that area. Correct?
>
> A. That is correct. I am an investigator. I work for the Office of the Prosecutor. I am not an expert. My report only summarizes the work of people that was done by the Bosnian commission for tracing missing persons, archaeologists, and other colleagues from the OTP.

179. Thus, despite the one reference on 9 September 2002, the Appeals Chamber finds that it is clear from the trial record that the Trial Chamber was not misled or confused as to whether Witness Sebire was an expert. Clarifications were made both by the witness and the Prosecution as to his status and the Trial Chamber was aware that the witness was not an expert, and this sub-ground of appeal is dismissed.

(g) Psychiatrist or criminologist

180. The Appellant submits that he is entitled to a new trial or a substantial reduction in his sentence because the Trial Chamber denied his request to tender evidence from either a forensic

[362] T. 9442.
[363] Stakić Appeal Brief, paras 85, 86.
[364] T. 7445.
[365] T. 7446.
[366] T. 7655.

criminal analyst named Dr. Russler, or a psychiatrist or a neuropsychiatrist. He maintains that Dr. Russler would have testified to his state of mind and whether he held "a propensity or willingness" to commit the crimes for which he was convicted.[367] He further claims that the fact that the Trial Chamber in the *Dragan Nikolić* case requested such an expert demonstrates that the Trial Chamber erred in not calling a similar expert here.[368]

181. The Prosecution responds that the Appellant had agreed with the Trial Chamber and dropped his request for a psychiatrist or criminologist in November 2002, with the possibility of re-applying for such expert testimony by showing that it was in the "interest of justice," and that the Appellant never made such an application.[369] It argues that the Appellant cannot compare his case to the use of an expert criminologist by the Trial Chamber in the *Dragan Nikolić* case because the Defendant in that case both admitted to his crimes and expressed remorse, neither of which the Appellant has done.[370] The Prosecution again argues that the Appellant has not shown how or why the Trial Chamber's decision was erroneous or an abuse of discretion.[371]

182. The Appellant's argument with respect to the proposed psychologist or criminologist fails because the Appellant himself dropped this request for expert testimony. During his trial, the Appellant decided not to pursue the admission of a psychiatrist or criminologist, and the Trial Chamber at the time noted that it may subsequently grant a request for additional time to present evidence if this is in the interests of justice, pursuant to Rule 73*ter*(F).[372] The Appellant declined to call an expert psychiatrist or criminologist to testify, and did not later avail himself of the remedy expressly referred to and offered by Rule 73*ter*(F). The Appellant has not demonstrated why in these circumstances the Trial Chamber abused its discretion, and this sub-ground of appeal is dismissed.

2. Alleged violations of Rule 68 by the Prosecution

183. The Appellant submits that after the conclusion of the Prosecution's case, the Prosecution disclosed excerpts from over thirty witness statements pursuant to Rule 68 which included "significant exculpatory material" that "contradicted the evidence and arguments advanced by the Prosecution."[373] The Appellant further argues that the Prosecution had this material prior to trial, but did not turn it over despite his requests to do so.[374] He claims that without access to this

[367] Stakić Appeal Brief, para. 152.
[368] Stakić Appeal Brief, para. 155, referring to the *Dragan Nikolić* Sentencing Judgement, paras 280, 282.
[369] Prosecution Response Brief, para. 3.43.
[370] Prosecution Response Brief, para. 3.44.
[371] Prosecution Response Brief, para. 3.46.
[372] T. 9424-9426.
[373] Stakić Appeal Brief, para. 161.
[374] Stakić Appeal Brief, para. 164, citing Defence Motion for Mistrial, 15 November 2002.

undisclosed material, he was denied the opportunity to confront witnesses and could not properly prepare for trial.[375]

184. In response, the Prosecution argues that although there was a Rule 68 violation,[376] the Trial Chamber considered all of the relevant facts surrounding the violation in its decision on the Appellant's 15 November 2002 motion for a mistrial.[377] In that decision, the Trial Chamber recognised a "serious violation of Rule 68", but concluded that the Prosecution's late disclosure would not have affected its Rule 98*bis* Decision for a Judgement of Acquittal.[378]

185. The Trial Chamber also ruled that any prejudice to the Appellant from this violation could be cured by allowing him to call or recall any witness after demonstrating to the Trial Chamber that he would have presented his case differently had he had access to the disclosed material.[379] The Prosecution claims that the Appellant was only interested in six witnesses out of those covered by its late disclosure – Vojo Pavičić, Ranko Travar, Slavko Budimir, Slobodan Kuruzović, Simo Mišković and Srđo Srdić – three of whom testified at trial (Witnesses Travar, Budimir and Kuruzović).[380] The Prosecution also points out that the Defence recalled two Prosecution witnesses – Muharem Murselović and Nusret Sivac – as a result of the Trial Chamber's ruling.[381]

186. The Appellant replies that "the Prosecution to this day has not produced any Rule 68 materials in its possession of … alleged co-perpetrators such as Simo Drljača, Milan Kovačević, Colonel Vladimir Arsić, and Major Radmilo Zeljaja," and states that the *Krstić* Appeal Judgement requires "strict compliance with disclosure obligations."[382] As to this specific submission, the Appeals Chamber refers to its Decision of 20 July 2004 in which it decided that this is not a

[375] Stakić Appeal Brief, paras 166, 168, 169; Stakić Reply Brief, para. 63.
[376] After the close of its case, the Prosecution turned over summaries of exculpatory portions of 35 witness statements to the Defence. It claims that the disclosure delay was not due to malice, but "oversight" (Prosecution Response Brief, paras 3.49, 3.55). The Trial Chamber then ordered the disclosure of the witnesses' full interview transcripts (Prosecution Response Brief, para. 3.49).
[377] Prosecution Response Brief, para. 3.48.
[378] Prosecution Response Brief, para. 3.48, referring to Decision on Rule 98*bis* Motion for Judgement of Acquittal, 31 October 2002; T. 9438.
[379] T. 9436-9439; Prosecution Response Brief, paras 3.51-3.52; s*ee Prosecutor v. Furundžija,* IT-95-17-T, Decision, 16 July 1998, para. 21; *see* also *Prosecutor v. Radislav Brdanin,* Case No. IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68*bis* and Motion for Adjournment While Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 26.
[380] Prosecution Response Brief, para. 3.50.
[381] Prosecution Response Brief, para. 3.53.
[382] Stakić Reply Brief, para. 64; *Krstić* Appeal Judgement, para. 215. The Appellant states that because he was found guilty as an "indirect co-perpetrator," the Prosecution has a duty to produce Rule 68 materials that refer not only to him, but also to his co-perpetrators (Stakić Reply Brief, paras 63-64). The Appeals Chamber has refused to permit this ground of appeal because it was raised for the first time in the Appellant's Reply Brief. *See* Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response, 20 July 2004, para. 9.

permissible ground of appeal as it was raised for the first time only in the Appellant's Reply Brief.[383]

187. The Appeals Chamber notes that Rule 68(i) provides that:

> The Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.[384]

188. The disclosure of Rule 68 material "is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached."[385]

189. The Prosecution concedes that it violated Rule 68 in this case.[386] However, to show that the Trial Chamber erred with regard to its Rule 68 rulings, the Appellant must demonstrate that his case suffered material prejudice as a result.[387]

190. As the rules regarding sanctions are discretionary, not mandatory, in the absence of prejudice to the Appellant, the Appeals Chamber cannot say that the Trial Chamber abused its discretion in not sanctioning the Prosecution for these violations. The Appeals Chamber does note, however, that the Rules do not require a showing of malice before sanctions may be imposed, contrary to the assertions of the Prosecution.[388]

191. In the *Krstić* Appeal Judgement, this Chamber found that allowing the Appellant to admit additional evidence on appeal under Rule 115 was a sufficient cure to Rule 68 violations by the Prosecution.[389] The Appeals Chamber held accordingly that the Appellant in that case had been provided a fair trial.

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[383] Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response, para. 9.
[384] *See Prosecutor v. Kordić and Čerkez,* Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001; *Prosecutor v Tihomir Blaškić*, Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 42; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 22; *Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICT-97-19, Decision (Prosecutor's Request for Review of Reconsideration – Separate Opinion of Judge Shahabuddeen), 31 March 2000, para. 68.
[385] *Krstić* Appeal Judgement, para. 180.
[386] Prosecution Response Brief, para. 3.51.
[387] *Blaškić* Appeal Judgement, para. 268; *Krstić* Appeal Judgement, para. 153; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Appeals Chamber, 26 September 2000, para. 38.
[388] Prosecution Response Brief, para. 3.54.
[389] *Krstić* Appeal Judgement, para. 187. The Appeals Chamber notes that in *Krstić* the Prosecution's disclosures were made, in some cases, over two years after the Prosecution came into possession of the evidence and over three months after the trial had begun (*Krstić* Appeal Judgement, para. 196).

192. Likewise, the Trial Chamber in *Furundžija* held that reopening proceedings on issues related to a specific witness was adequate to ensure a fair trial following a breach of Rule 68.[390] Similarly, after concluding that Rule 68 had been violated, the Trial Chamber in this case allowed the Appellant to re-examine any witnesses already called by the Prosecution where the Defence could demonstrate that it would have put different questions to that witness on cross-examination if it had had access to the improperly withheld material. The Appellant accordingly requested that the Trial Chamber summon three additional witnesses and recall two Prosecution witnesses.[391]

193. Because the Appellant does not specify how he was prejudiced by the Rule 68 violation, and in light of the steps taken by the Trial Chamber, the Appeals Chamber finds that the Rule 68 violations were cured and that the Trial Chamber did not err in denying the Appellant's motion for a mistrial.

3. Denial of the Appellant's attempts to introduce Rule 92*bis* evidence

194. The Appellant submits that the Trial Chamber erred in not admitting nine witness statements on 17 February 2003 pursuant to Rule 92*bis*. The Trial Chamber declined to admit these statements as it found the evidence to be repetitive or not relevant.[392] The Appellant claims these rulings were erroneous for four reasons: (1) the Prosecution did not object to their admission; (2) certain of the statements were relevant and non-repetitive – specifically, those offered to rebut Dr. Slavko Tomić's testimony on *mens rea* and Milorad Lončar's testimony on unwillingness and inability to assist others; (3) evidence can be admitted under Rule 92*bis* "precisely because it [i]s cumulative"[393]; and (4) the nine proposed witness statements related to issues regarding the credibility of other witnesses.[394]

195. The Prosecution responds that the Appellant's argument that these witness statements would have addressed the credibility of other witnesses was not presented at trial, and hence the Trial Chamber cannot be faulted for failing to consider this reason.[395] Instead, it claims, the Appellant offered the statements, which were "in part [from] family members of Dr. Stakić"[396] on the issues of "cumulative evidence", "character … and reputation of Dr. Stakić" and "mitigation."[397] It points out that the Trial Chamber specifically stated that Stakić's character and reputation were not

[390] *See Furundžija* Trial Judgement, para. 22 (referring to a previous oral order in that case).
[391] T. 9630-9634, 9710-9712, 9889-9890, 9893.
[392] Stakić Appeal Brief, para. 174, citing T. 12162-12168 (private session).
[393] Stakić Appeal Brief, paras 175, 176, citing Rule 92*bis* A(i)(a)(emphasis added).
[394] Stakić Appeal Brief, para. 176.
[395] Prosecution Response Brief, para. 3.60.
[396] Prosecution Response Brief, para. 3.60.
[397] Prosecution Response Brief, para. 3.60.

controversial as "many Prosecution witnesses"[398] provided testimony similar to that of Defence witnesses, and that – citing the *Kunarac* Appeal Judgement[399] – these factors were not accorded "undue weight given the severity of the crimes".

196. Rule 92*bis* states that "a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to prove a matter other than the acts and conduct of the accused as charged in the indictment." The Appellant's first argument, that the Trial Chamber erred in denying the admission of certain Rule 92*bis* evidence simply because the Prosecution did not object, is unfounded; the plain language of the Rule gives to the Trial Chamber the discretion to decide whether to admit such statements.

197. The Appellant's second argument is that written statements on the issue of the Accused's *mens rea* should have been admitted pursuant to Rule 92*bis* because they were relevant and non-repetitive. As he offers essentially no reasoning on this point in his brief, the Appeals Chamber considers that the Appellant has not demonstrated that the Trial Chamber abused its discretion in determining that the relevant evidence did not meet the criteria for admission under Rule 92*bis*.

198. The Appellant's third argument – that certain evidence should have been allowed pursuant to Rule 92*bis* because it was cumulative – is also unavailing. First, the language of the Rule is merely permissive (the Trial Chamber "may admit"), thus leaving the decision to admit cumulative evidence to the discretion of the Trial Chamber. More importantly, the purpose of Rule 92*bis* is to promote efficiency and expedite the presentation of evidence while adhering to the requirements of a fair trial, not to encourage duplication of testimony which would unnecessarily delay proceedings.

199. The Appellant's fourth and final argument – that the proposed witness statements should be admitted under Rule 92*bis* because they would support the credibility of other witnesses – is not properly before the Appeals Chamber as it was not raised before the Trial Chamber. The Appellant has thus waived his right to make this argument.[400] During the trial, the Appellant argued that the Rule 92*bis* statements should be allowed "specifically on three issues: … cumulative evidence … character … and reputation … [and] mitigation;" he did not mention the credibility of other witnesses.[401] Because arguments may not be made *de novo* before this Chamber, this sub-ground of appeal is dismissed.

[398] Prosecution Response Brief, para. 3.61, citing Trial Judgement para. 927.
[399] Prosecution Response Brief, para. 3.61, citing Trial Judgement, para. 926; *Kunarac* Appeal Judgement, para. 33.
[400] T. 12150-12177 (private session).
[401] T. 12078.

4. Alleged improper admission of the Prosecution's Rule 92*bis* evidence

200. The Appellant argues that the Trial Chamber erred when it relied "exclusively" on sixteen of the Prosecution's Rule 92*bis* statements to prove the "acts and conduct" of the Accused, in violation of the clear terms of the Rule.[402] These sixteen statements, he argues, include evidence from Witnesses AA, E, F, H, I, K, M, N, T and Y, and evidence from Kerim Mešanović, Pero Rendić, Elvedin Nasić, Mustafa Mujkanović, Karim Jasić and Džemel Deomić.[403] He claims that the introduction of this evidence violated his right to a fair trial and that, had the Trial Chamber not admitted this evidence, it would not have reached the same decision or imposed a sentence of life imprisonment.[404] The Prosecution submits that these Rule 92*bis* statements were used to corroborate other evidence relied on by the Trial Chamber, and not to prove the "acts and conduct" of the Appellant.[405]

201. A review of the Trial Chamber's findings reveals that the evidence from each Rule 92*bis* witness was used to establish the context of the crimes, rather than the acts and conduct of the Appellant:

> (1) Evidence from Witness I corroborates other evidence that non-Serb houses were marked by a white cloth,[406] that women were raped in the Trnopolje camp,[407] and that killings occurred in Bišćani.[408]
>
> (2) Evidence from Witness F supports other testimony that there was an ultimatum issued to the town of Kozarac,[409] that women were raped in the Trnopolje camp,[410] and that Muslim and Croat houses in Kozarac were targeted for destruction.[411]
>
> (3) Evidence from Witness H was used to corroborate other testimony that described the conditions in the Omarska camp,[412] including sexual abuse that took place there.[413] Evidence from this witness also supports a finding that rape was committed in the Keraterm camp.[414]

[402] Stakić Appeal Brief, para. 178.
[403] Stakić Appeal Brief, para. 183.
[404] Stakić Appeal Brief, para. 185.
[405] Prosecution Response Brief, para. 3.64.
[406] Trial Judgement, para. 128.
[407] Trial Judgement, para. 244.
[408] Trial Judgement, para. 263.
[409] Trial Judgement, paras 141, 610.
[410] Trial Judgement, para. 244.
[411] Trial Judgement, para. 288.
[412] Trial Judgement, para. 167.
[413] Trial Judgement, para. 235.
[414] Trial Judgement, para. 240.

(4) Evidence from Witness Y supports other testimony that individuals were grossly mistreated and killed in the Keraterm camp.[415]

(5) Evidence from Witness E supplements evidence on the 24 July 1992 "Room 3 massacre" at the Keraterm camp, including names of individuals killed. This testimony also supports other evidence that 120 people were killed in the Omarska camp on 5 August 1992.[416]

(6) Evidence from Witness T corroborates other evidence that 44 people were taken out of the Omarska camp and told they would be exchanged, but were later found dead from gunshot wounds in Jama Lisac.[417] Witness T's testimony also supplements other evidence that witnesses were beaten at the Omarska camp during interrogations, including in the "White House," and other evidence on the destruction of Kozaruša.[418]

(7) Evidence from Witness K supports other evidence regarding mistreatment of prisoners in the Keraterm camp.[419]

(8) Evidence from Witness M supports a finding that 77 Bosnian Croats were killed in Briševo in July 1992.[420] This is the only evidence cited to support this finding.

(9) Evidence from Witness N was cited to describe a mine pit in Ljubija that was cordoned off by the Serbs.[421]

(10) Evidence from Witness AA supports other evidence that the Prijedor Catholic church was blown up by soldiers and police on 28 August 1992.[422]

(11) Evidence from Kerim Mešanović supplements evidence on the conditions in the "White House" at Omarska.[423] Kerim Mešanovic also offered testimony on the beatings in the courtyard of the detention cells in the SUP building in Prijedor.[424] His is the only evidence cited for the latter finding.

[415] Trial Judgement, paras 224, 238.
[416] Trial Judgement, paras 206, 212, 224.
[417] Trial Judgement, para. 210.
[418] Trial Judgement, paras 230, 232, 289.
[419] Trial Judgement, para. 238.
[420] Trial Judgement, para. 269.
[421] Trial Judgement, para. 273.
[422] Trial Judgement, para. 304.
[423] Trial Judgement, para. 167.
[424] Trial Judgement, para. 199.

(12) Evidence from Pero Rendić supplements other evidence as to the food served at the Omarska camp.[425]

(13) Evidence from Elvedin Nasić supports other evidence as to detentions and beatings at the Miška Glava Community Centre.[426]

(14) Evidence from Mustafa Mujkanović corroborates other evidence identifying individuals who were killed at the Trnopolje camp.[427]

(15) Evidence from Karim Jasić supplements other evidence on the restrictions of media available to residents of Prijedor during the summer of 1992.[428]

(16) Evidence from Džemel Deomić supplements evidence in Section I.E.4(d) of the judgement that detainees in the Omarska camp were beaten during interrogations.[429]

202. It is evident that none of the evidence admitted pursuant to Rule 92*bis* went to the "acts and conduct" of the Appellant as charged in the Indictment. Therefore the Trial Chamber did not err in admitting the statements pursuant to this Rule. This sub-ground of appeal is accordingly denied.

5. Rule 91 warnings to Defence witnesses

203. Rule 91(A) states that "[a] Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so." During the Trial, the Presiding Judge issued numerous Rule 91 warnings.[430] The Appellant argues that the Trial Chamber improperly issued Rule 91 warnings to several witnesses including Mićo Kos, Nada Markovski, Borislavka Dakić, Milovan Dragić and Stoja Radaković based on "improper inferences drawn from the prosecution's evidence."[431] The result, he argues, was to curtail the testimony of certain unspecified witnesses as they sought to avoid "further harassment, ridicule and embarrassment."[432]

204. In response, the Prosecution argues that the Appellant's claims are vague except with respect to Witness Kos.[433] The Prosecution argues that the Presiding Judge did not rely on inferences from other witnesses' testimony, but rather considered whether each individual witness

[425] Trial Judgement, para. 168.
[426] Trial Judgement, paras 197, 245.
[427] Trial Judgement, para. 226.
[428] Trial Judgement, para. 476.
[429] Trial Judgement, para. 781.
[430] T. 9832, 9838, 10379, 10444-10445, 11069, 11086.
[431] Stakić Appeal Brief, para. 187, fn. 219, 190.
[432] Stakić Appeal Brief, para. 191.

was "inherently contradictory, implausible or clearly evasive," and issued warnings only for such legitimate reasons.[434] Finally, the Prosecution argues that Rule 91 warnings are discretionary, and that the Appellant has not shown that the Trial Chamber abused its discretion.[435]

205. In general, Rule 91(A) gives the Trial Chamber broad discretion to warn of the duty to tell the truth, and does not limit the circumstances under which it may do so. Barring unusual circumstances – such as repeated warnings given to a witness without apparent justification, in a manner that a witness might reasonably find intimidating – a simple statement of this basic duty does not constitute ridicule or harassment of a witness, nor does it compromise an accused's right to a fair trial. Here, upon a close reading of the trial record, it is clear that in each case, the warnings were based on testimony that either appeared implausible or contradicted earlier testimony by the same witness.[436] A warning in such a context is perfectly appropriate, and the Appeals Chamber sees no error.

6. Admission of "unreliable and untrustworthy" evidence

(a) "Unreliable" evidence

206. The Appellant argues that the Trial Chamber erred in relying on the testimony of several of the Prosecution's fact witnesses.[437] Without further explanation, he asserts that their testimony was "unreliable, erroneous, and based upon hearsay or mere speculation and conjecture".[438] The Appellant attempts here to retry an aspect of its case before the Appeals Chamber. It is settled jurisprudence of the Tribunal that the trier of fact is best placed to assess the demeanour of a witness and the entirety of the evidence. As such, the Appeals Chamber defers to a Trial Chamber's findings of fact if they are reasonable.[439] As the Appellant has made no attempt to explain his argument or to demonstrate an error occasioning a miscarriage of justice, this sub-ground of appeal can be dismissed without further discussion.

(b) Evidence concerning Milorad Stakić

207. The Appellant submits that the Trial Chamber erred in admitting "improper comments and innuendos" to suggest that his brother, Milorad Stakić, was a driver at the Omarska Camp, when the

[433] Prosecution Response Brief, para. 3.69.
[434] Prosecution Response Brief, para. 3.72; reasons for Rule 91 warnings found in para. 3.74, fn. 250.
[435] Prosecution Response Brief, para. 3.71.
[436] Moreover, Rule 91 makes clear that a Trial Chamber need not have strong grounds to believe that a witness has testified falsely in order to issue a warning, for if a Trial Chamber does have such grounds, the Rule empowers it to go beyond a mere warning and authorise an investigation or prosecution.
[437] The Appellant refers in particular to the following witnesses: Murselović, Sivac, Mujadić, Kuruzović, and Karagić (Stakić Appeal Brief, para. 193).
[438] Stakić Appeal Brief, para. 193.

Prosecution knew that, in fact, the driver was an unrelated person who shared his brother's name.[440] He also claims that the Trial Chamber erred by failing to sanction the Prosecution for this misleading suggestion.[441]

208. The Prosecution responds that it was not improper for it to question Witness Vuleta[442] on whether the Appellant's brother, Milorad, worked in the iron ore mine at Omarska, even though the Prosecution had information that Milorad was living in Germany during the time in question. It maintains its line of questioning was "necessary to verify the information" and that Judge Schomburg's follow-up questions cleared up any possible confusion that may have resulted.[443]

209. During the trial, the Prosecution questioned defence Witness Vuleta on whether Mićo Stakić, who was a driver at the Omarska camp, was the same person as the Accused's brother, Milorad Stakić. While there was initially a degree of confusion, the trial transcript shows that the Trial Chamber clarified that the witness knew a driver at Omarska named Mićo, but that the Accused's brother, Milorad, was a different person who was living in Germany at the relevant time.[444] As the Trial Chamber did not mention this issue in its Trial Judgement, and there is no evidence of bad faith on the part of the Prosecution, the Appeals Chamber concludes that the Trial Chamber did not err in allowing this line of questioning.

(c) Evidence on the Appellant's flight from Prijedor

210. The Appellant argues that the Trial Chamber erred when it allowed the Prosecution to introduce evidence "by way of implication and innuendo" that he had fled to Prijedor after the Indictment against him was issued.[445] He claims that his evidence that he had chosen to relocate to complete his medical specialisation was more persuasive than the Prosecution's evidence at trial that he fled to evade arrest following the Indictment.[446]

211. In response the Prosecution claims that it did not allege that the Appellant fled because of his indictment, but because he knew that there had been an attempt to arrest his alleged co-perpetrator Simo Drljača. It further points out that the Presiding Judge stated that the Appellant's

[439] *Kordić* Appeal Judgement, fn. 12.
[440] Stakić Appeal Brief, paras 196-199.
[441] Stakić Appeal Brief, para. 200.
[442] T.11557, 11594–11595.
[443] Prosecution Response Brief paras 3.82-3.83.
[444] T. 11556-11558.
[445] Stakić Appeal Brief, paras 201, 202.
[446] Stakić Appeal Brief, paras 201, 202.

decision to move to Belgrade was irrelevant and that the Trial Judgement made no reference to the purported "flight."[447]

212. As to whether questioning the Appellant about his move to Belgrade precluded the Trial Chamber from drawing a reasoned opinion as to his guilt, the Appeals Chamber notes first that there is no basis for holding that the Trial Chamber erred in allowing evidence that the Appellant had fled to Prijedor.[448] Second, the Appeals Chamber observes that there is no discussion of the Appellant's move to Belgrade in the Trial Judgement, and therefore finds the argument that the Trial Chamber was prejudiced by this evidence to be unpersuasive. Further, the nature of the prejudice purportedly caused to the Appellant is not clearly outlined in his submissions. This sub-ground of appeal is denied.

B. Allegation that the Trial Chamber drew impermissible inferences, and thereby caused a miscarriage of justice

1. Submissions of the Parties

213. The Appellant argues that the Trial Chamber "drew impermissible inferences from circumstantial evidence" regarding his state of mind and degree of knowledge of the crimes being committed in the prison camps, "on the battlefield" and in the municipality in general.[449] He claims that these errors invalidate all of his convictions.[450]

214. The Appellant submits that under Article 21(3) of the Statute, as interpreted by the *Vasiljević*, *Tadić* and *Krnojelac* Appeal Judgements, if the only evidence of an accused's mental state is circumstantial, an inference of guilt should only be drawn when it is the only reasonable inference that can be drawn from the evidence.[451] He maintains that if a reasonable inference consistent with innocence can be drawn, then that inference must be drawn.[452] He argues that the Trial Chamber's Judgement is illogical as some of its factual findings do not support its findings of *mens rea* for Counts 4, 5 and 6.[453]

215. Specifically, the Appellant claims that the evidence does not support the inference that he knew of the conditions in the detention camps, the crimes committed there, or the fact that any

[447] Prosecution Response Brief, para. 3.87, citing T. 12386-87.
[448] Stakić Appeal Brief, paras 201-204.
[449] Stakić Appeal Brief, para. 205.
[450] Stakić Appeal Brief, para. 205; Stakić Reply Brief, para. 72.
[451] Stakić Appeal Brief, paras 206-207.
[452] Stakić Appeal Brief, para. 206, fn. 245.
[453] Stakić Appeal Brief, heading 3 following para. 209.

deaths (other than two from natural causes) occurred there.[454] He argues that several witnesses testified that he had no role in the police or the military, which controlled the camps, and that Police Chief Simo Drljača kept the conditions in the camp a secret and reported only to the authorities in Banja Luka.[455] In addition, the Appellant contends that the circumstantial evidence did not support the inference that he knew about the massacres of detainees taken from convoys in the region of Mount Vlašić.[456]

216. The Appellant also contends that the Trial Chamber erred in finding that he agreed to the consolidation of Serbian control in Prijedor in order to achieve the common goal of separating Serbs from the other two national communities.[457] He submits instead that the threat that Bosnian Muslim forces would take over JNA personnel and materiel more reasonably explains the evidence of the Serbian take-over of Prijedor than does the explanation that the Serb leadership desired an all-Serbian state.[458] He also argues that the Trial Chamber, in deriving this inference, failed to consider other reasonable inferences, namely that a reasonable person in his position (1) could have participated in the civil war that began well before the take-over of Prijedor, and (2) could have been in favour of the creation of a Bosnian Serb state without harbouring the intent to persecute non-Serbs.[459]

217. The Appellant challenges the Trial Chamber's interpretation of specific evidence on which it relied to conclude that a common criminal goal existed. He argues that because the document entitled "Instructions for the Organization and Activity of Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances", issued by the Main Board of the SDS, did not discuss the segregation of ethnic groups, it did not support a finding of a common criminal goal to separate the Serbs from the other ethnicities.[460] He also submits that because Radovan Karadžić's speech supporting the take-over in Prijedor was given on 12 May 1992, it could not be considered in the determination of his state of mind on 29 April 1992.[461] Last, he argues that the Trial Chamber's finding that "all participants were aware of where the decision to take over power would lead" is an "illogical leap" that violates the presumption of innocence and the required burden of

[454] Stakić Appeal Brief, paras 215, 221, 226, 357, 373.
[455] Stakić Appeal Brief, paras 220-228.
[456] Stakić Appeal Brief, paras 229-230.
[457] Stakić Appeal Brief, heading 4 following para. 231, citing Trial Judgement, paras 469-472.
[458] Stakić Appeal Brief, paras 232-249.
[459] Stakić Appeal Brief, para. 232.
[460] Stakić Appeal Brief, paras 237-241, referring to Ex. SK39.
[461] Stakić Appeal Brief, paras 242-243. The Appellant then offers a "more reasonable explanation for the take-over of Prijedor," which presents him as an uninformed civilian leader, who did not know about any atrocities and acted only in accordance with the existing laws, paras 244-245.

proof.[462] He maintains that no evidence has been proffered by the Prosecution as to his direct or indirect knowledge of the alleged crimes[463] or the intentions of his co-conspirators.[464]

218. The Prosecution counters that the Appellant's challenge to the reasonable doubt standard is irrelevant, as his conviction was not premised on "inferences" from circumstantial evidence, but on an evaluation of documentary evidence and witness testimonies.[465] It maintains that, based on the totality of the evidence, the Trial Chamber could come to no other reasonable conclusion but that the Appellant knew of the mass killings in the camps and in Prijedor Municipality, which provides the *mens rea* for his convictions.[466] It then submits that the Trial Chamber's finding that he could not have remained unaware of the killings was sufficient to find *mens rea* for murder pursuant to Article 3.[467] The Prosecution thus maintains that the Appellant has shown no error of law sufficient to invalidate the Trial Judgement, nor any error of fact sufficient to result in a miscarriage of justice.

2. Discussion

219. A Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime (as defined with respect to the relevant mode of liability) beyond a reasonable doubt.[468] This standard applies whether the evidence evaluated is direct or circumstantial.[469] Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented.[470] In such instances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven.[471] If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber will vacate the Trial Chamber's factual inference and reverse any conviction that is dependent on it.[472]

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[462] Stakić Appeal Brief, para. 249, citing Trial Judgement, para. 472.
[463] Stakić Reply Brief, paras 71, 77-78.
[464] Stakić Reply Brief, para. 73.
[465] Prosecution Response Brief, para. 4.12.
[466] Prosecution Response Brief, paras 4.4, 4.16.
[467] Prosecution Response Brief, para. 6.68. This argument is made only with reference to murder pursuant to Article 3.
[468] *Vasiljević* Appeal Judgement, para. 120; *Ntakirutimana* Appeal Judgement, para. 171; *Semanza* Trial Judgement, para. 148; *Musema* Trial Judgement, para. 108; *Čelebići* Trial Judgement, para. 601.
[469] *Kupreskić* Appeal Judgement, para. 303; *Kordić* Appeal Judgement, para. 834.
[470] *Čelebići* Appeal Judgement, para. 458; *Krnojelac* Trial Judgement, para. 67. With respect to a Trial Chamber's findings of fact on which the conviction does not rely, the Appeals Chamber will defer to the findings of the Trial Judgement where such findings are reasonable.
[471] *Čelebići* Appeal Judgement, para. 458; *Kvočka* Appeal Judgement, para. 18.
[472] The Accused must present clearly and in detail any such alternative inference he wishes the Appeals Chamber to consider. *See Vasiljević* Appeal Judgement, para. 12. *See* also *Blaškić* Appeal Judgement, para. 13; *Kunarac* Appeal Judgement, paras 43, 48; *Niyitegeka* Appeal Judgement, para. 10

220. The Appellant challenges the inferences drawn to support his convictions under Counts 4, 5 and 6. The Appeals Chamber thus must ask whether, for each count, a reasonable Trial Chamber could have found the relevant inferences consistent with the Appellant's guilt to be the only reasonable inferences it could draw from the evidence. For each of the three counts, the Appellant argues that alternative reasonable inferences should have been drawn from the evidence to the effect that (1) there was no common goal to consolidate Serbian control in Prijedor, and the Appellant in any event did not share the intent to participate in such a common goal; and (2) the Appellant was unaware of the various crimes committed.

(a) The existence of a Common Purpose and the Appellant's participation therein

221. As set out above in the section on joint criminal enterprise, the Appeals Chamber is satisfied that the Trial Chamber's factual findings support the conclusion that there was a Common Purpose to establish Serbian control in the Municipality of Prijedor through persecutions, deportations and forcible transfer. The Appellant argues, however, that the Trial Chamber could reasonably have inferred from the evidence that he desired the creation of a Bosnian Serb state without participating in the Common Purpose. The Appeals Chamber, cognisant of its decision to examine the Appellant's guilt through the mode of liability of joint criminal enterprise, considers that the Appellant's arguments on the inferences drawn by the Trial Chamber concern the question of whether the Appellant sought to further the Common Purpose.

222. The Appeals Chamber has already held that it considers that the findings of the Trial Chamber clearly demonstrate that the Appellant acted in furtherance of the Common Purpose and played an important role in it.[473] Furthermore, the Appeals Chamber has stated *supra* that the Appellant shared the intent of the joint criminal enterprise to further the Common Purpose and the crimes underlying it.[474]

223. In concluding that the Appellant was one of the "main actors in the persecutorial campaign"[475] the Trial Chamber relied on the existence of the Common Purpose,[476] the fact that the camps were established by a decision of the Crisis Staff, and various interviews. The Trial Chamber relied on this evidence to conclude that the Appellant was fully aware of the mass killings being committed in the detention camps, and of the conditions in these camps.[477]

[473] *See* Section V.C.1(c) *supra*.
[474] *See* Section V.C.1(c) *supra*.
[475] Trial Judgement, para. 823.
[476] Trial Judgement, para. 819.
[477] Trial Judgement, para. 823.

224. The Trial Chamber's conclusion that this evidence left no reasonable doubt as to the Appellant's participation in the Common Purpose was a reasonable one. The evidence clearly points to the existence of a goal to ethnically cleanse the Municipality of Prijedor through a campaign of persecution, and demonstrates that this goal was met through the perpetration of criminal acts against non-Serbs. It also clearly demonstrates the Appellant's intent to participate in the joint criminal enterprise aimed at achieving this goal. The Appellant's suggested alternative inference – that he desired to create a Bosnian Serb state without persecuting non-Serbs – is not reasonable on the facts, nor is it logically persuasive. Assuming that a "Bosnian Serb state" requires at least a majority of Bosnian Serb inhabitants, it is difficult to see, particularly in the context of this case, how such a state could be created without uprooting Muslims and Croats from their homes against their will.

225. Furthermore, the Appeals Chamber finds that the Appellant misconstrues the Trial Chamber's findings with respect to Radovan Karadžić's speech. The Trial Chamber stated that the common goal of Serb domination in Prijedor – as demonstrated by the Instructions and the decision to join the Autonomous Region of Krajina with Prijedor – "found its vibrant expression in Radovan Karadžić's six strategic goals…".[478] This does not suggest that the Trial Chamber relied on the speech as evidence of the Appellant's *mens rea*, but rather that it reflected the Common Purpose, or was an expression of it. Indeed, the Trial Chamber explicitly stated that "[b]y the time Karadžić set out these goals, preparations were already underway for the fulfilment of the first goal" of separating the Serbs from the other national communities.[479]

226. The Appeals Chamber notes that the Appellant suggests a further alternative inference to explain the Serb's take-over of Prijedor – a feared Bosnian Muslim attack. Even if such an inference was reasonable, which it is not necessary to decide here, it would in no way negate the evidence that led the Trial Chamber to conclude that there was a Common Purpose. At most, it may be informative as to part of the motive underlying the Common Purpose, but it does not undermine the inferences drawn from the evidence above.

227. The Appeals Chambers accordingly dismisses the submissions on this point.

(b) The Appellant's awareness of the crimes committed

228. With respect to the crimes of extermination, murder and persecutions (Counts 4, 5 and 6 respectively), the Appellant submits that a reasonable Trial Chamber could have inferred that,

[478] Trial Judgement, para. 471.
[479] Trial Judgement, para. 471.

during the time-period relevant to the Indictment, the Appellant was unaware of these crimes being committed and that he therefore did not have the requisite *mens rea*.

229. The Appeals Chamber has established above that the Trial Chamber's factual findings with respect to murder and extermination are legally sufficient to support individual criminal responsibility through joint criminal enterprise for the crimes of persecutions, murder, and extermination. It must now consider the Appellant's challenges to those underlying factual findings. The evidence establishing the *mens rea* for persecutions has already been discussed in the preceding section with respect to the Appellant's participation in the Common Purpose; because the Common Purpose consisted of a discriminatory ethnic cleansing campaign, the Appellant's submission that he was unaware of the underlying acts of persecutions is not a reasonable inference.

(i) Count 5: Murder

230. The Trial Chamber found that while it:

> [did] not believe that the conscious object of Dr. Stakić's participation in the creation and maintenance of this environment of impunity was to kill the non-Serb citizens of Prijedor municipality … it is satisfied that Dr. Stakić, in his various positions, acted in the knowledge that the existence of such an environment would in all likelihood result in killings, and he reconciled himself to and made peace with this probable outcome.[480]

231. In support of its finding that the Accused possessed the requisite *mens rea*, the Trial Chamber referred to a significant body of evidence.[481] Witnesses testified that the Appellant assumed the role of President of the Municipal Assembly after the SDS-led take-over on 30 April 1992.[482] There was also testimony that the previously elected President, Muhamed Čehajić, who opposed the war, was arrested, detained in Omarska camp and killed.[483] The Trial Chamber considered evidence that showed that the Appellant worked together with the Police Chief, Simo Drljača, the highest ranking military officer, Colonel Vladmir Arsić, and the President of the

[480] Trial Judgement, para. 616.
[481] Trial Judgement, paras 590-616; Witness Arifagić (T. 7074-7075), Witness B (T. 2263), Witness Brown (T. 8588-8590), Witness DD (T. 9486-9489), Witness DH (T. 13518) (closed session), Witness F (Rule 92*bis* statement in *Tadić* T. 1605-1606), Witness Kuruzović (T. 14437, 14576-14579), Witness Merdzanić (T. 7722-7723), Witness P (T. 3329-3331), Witness Poljak (T. 6333-6334), Witness R (T. 4273), Witness Sivać (T. 6765), Witness T (T. 2620) (closed session), Witness T (Rule 92*bis* statement in *Kvočka*, (T. 2620) (closed session), Witness U (T. 6214-6216), Ex. SK45, Ex. S47, Ex. S60, Ex. S79, Ex. S91, Ex. D178, Ex. S187-1, Ex. S240, Ex. S262, Ex. S345, Ex. S350, Ex. S353, Ex. S389-1, Ex. S407.
[482] Trial Judgement, paras 76, 79, 86, 87, 336, 492, 592; Ex. S47, Ex. S91, Ex. S112, Ex. S180, Ex. S187, Witness Kuruzović (T. 14437).
[483] Trial Judgement, paras 172-184; Witness A (T. 1909) (closed session), Witness Čehajić (T. 3051, 3090-3109, 3113-3114), Witness DD (T. 9555), Witness Sivać (T. 6629-6630), Ex. S389-4.

Executive Board, Dr. Milan Kovačević to implement the SDS-initiated plan to consolidate Serb power in the Prijedor Municipality.[484]

232. The Trial Chamber identified three categories of killings: camp killings, convoy killings and municipality killings.[485] In light of the Appeals Chamber's decision to assess the Appellant's guilt as a participant in a joint criminal enterprise, the matter to be determined is whether these killings were foreseeable to the Appellant when he undertook to further the Common Goal. If the killings were foreseeable to the Appellant, whether he was aware of their occurrence may still be relevant, but only insofar as such awareness might constitute evidence that further killings were foreseeable.

233. With respect to the camp killings, although the Trial Chamber found that it could not conclude that the Appellant ever visited the camps,[486] it did find sufficient evidence to conclude that the Appellant assisted in the establishment of the camps, was aware of the illegal activities occurring within them,[487] and "at some point became aware that killings and mistreatment were commonplace" and "accepted that non-Serbs would and did die in those camps."[488] In other words, the Trial Chamber was satisfied that killings in the camps were foreseeable to the Appellant. The Appellant's submission that the Appellant did not know that killings had occurred is insufficient to undermine this finding. The Appeals Chamber finds that the Trial Chamber did not err in concluding that the only reasonable inference from the evidence was that deaths in the camps were foreseeable to the Appellant, and that he willingly took that risk.

234. With respect to the convoy killings, the Trial Chamber cited documentary evidence that the Crisis Staff established an "Intervention Platoon" comprised of individuals with criminal records

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[484] Trial Judgement, paras 375, 469, 479, 593; Witness Budimir (T.12888, 12908, 13003), Witness Kovačević (T. 10217), Witness Kuruzović (T. 14510), Witness Travar (T. 13389); Ex. S28, Ex. S60.
[485] Trial Judgement, para. 594.
[486] Trial Judgement, paras 395, 399-400.
[487] Trial Judgement, paras 400, 401; Witness Kuruzović (T. 14590, 14716, 14813), Witness Vulliamy (T. 7912-7913, 7923); Ex. J13, Ex. S107, Ex. D137, Ex. S187, Ex. S250, Ex. S251, Ex. S353, Ex. S407. The Trial Chamber considered a variety of documentary evidence showing the Crisis Staff's role in running the camps, including a decision by the Crisis Staff to assign the duty of security for the Trnopolje camp to the Regional Command (Trial Judgement, para. 593, citing Ex. S250, p. 5) and a letter and a dispatch from Simo Drljača stating that the War Presidency had made a decision to substitute the police for the army in order to secure the Omarska, Keraterm and Trnopolje camps (Trial Judgement, paras 382-383, citing Ex. S251, p. 2). It also considered documents compiled by Serbian police authorities describing security issues within the camps (Trial Judgement, para. 384, citing Ex. S353), as well as documentary evidence showing that the Crisis Staff prohibited the release of detainees from the camps (Trial Judgement, paras 385-386; Ex. J13, Ex. S113, Ex. S115, Ex. S116, Ex. S250). In addition, the Trial Chamber considered testimony from witnesses who spoke directly to the Appellant about relatives detained in the camps, almost all of whom stated that knowledge of the killings and mistreatment in the camps was widespread (Trial Judgement, paras 179, 598; Witness Čehajić (T. 3075-3077)). It heard evidence that the Room 3 massacre at Keraterm camp was common knowledge (Trial Judgement, para. 394, citing evidence given by Witness Kuruzović (T. 14588-14589). *See* also Trial Judgement, para. 407, Witness Z (T. 7558-7560) (closed session)). Finally, it cited documentary evidence that the Appellant was aware of the conditions in Croat and Muslim detention camps, and was aware that deaths occurred at Omarska (Trial Judgement, paras 596-597, citing Ex. D92-92, Ex. S187-1).
[488] Trial Judgement, para. 598.

"with the objective of terrorising the non-Serb population in Prijedor."[489] Witness Kuruzović (commander of the Trnopolje camp) and other Witnesses – including survivors – testified that the intervention platoon led a massacre of approximately 200 men travelling in a convoy over Mount Vlašić on 21 August 1992,[490] and Witness Kuruzović, who had been present when the convoy over Mount Vlašić was formed, stated that he "may have discussed" this particular convoy informally with the Appellant.[491] The Trial Chamber concluded that:

> [t]o entrust the escort of a convoy of unprotected civilians to such groups of men, as Dr. Stakić along with his co-perpetrators on several occasions did in order to complete the plan for a purely Serb municipality, is to reconcile oneself to the reasonable likelihood that those travelling on the convoy will come to grave harm and even death.[492]

235. Witnesses also gave evidence about killings of unarmed non-Serb civilians destined for the camps by armed Serb escorts.[493] The Trial Chamber noted that the Appellant, as President of the Crisis Staff, "clearly kept himself informed about the progress of the displacement of the non-Serb citizens in Prijedor"[494] and concluded that the Appellant reconciled himself to the reasonable likelihood that passengers in certain convoys[495] would come to grave harm or death.[496]

236. On the basis of the evidence considered, the Trial Chamber did not err in concluding that the only reasonable inference was that it was foreseeable to the Appellant that killings would occur in the course of transporting deportees, and that the Appellant willingly undertook that risk. In

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[489] Trial Judgement, para. 600, citing Ex. S79.
[490] Trial Judgement, para. 600, citing Section I.E.3(h), which in turn cites survivors of the massacre, the commander of the Trnopolje camp, Slobodan Kuruzović, and other witnesses, fns 440-457.
[491] Trial Judgement, paras 219 and 601, citing testimony from Slobodan Kuruzović, T. 14576-14577.
[492] Trial Judgement, para. 600.
[493] Trial Judgement, para. 600, citing Section I.E.3(e-g), which in turn cites numerous witnesses to the killings, fns. 428-439.
[494] Trial Judgement, para. 601, citing Section II.8 of the Trial Judgement; Witness Budimir (T. 13144), Witness Janković (T. 10739-10740), Witness MacLeod (T. 5131), Witness Marjanović (T. 11707-11708), Witness Radaković (T. 11079), Witness Z (T. 7558-7560) (closed session), Ex. S166, Ex. S187-1, Ex. S358. In support of this observation, the Trial Chamber cited its earlier factual findings concerning the Appellant's knowledge of the deportation campaign. Specifically, it considered an interview with a British television crew in which the Appellant elaborated on the methods used to assist those "wishing to leave" and where they might go (Trial Judgement, para. 403; Ex. S187-1). The Trial Chamber relied on witnesses who gave oral testimony that the Appellant himself had seen "the long lines of Muslim and Croat men and women standing outside the SUP building waiting for permission to leave the municipality" (Trial Judgement, para. 404, Witness Janković (T.10739-40), Witness Budimir (T.13144), Witness Marjanović (T.11707-08), Witness Radaković (T.11079), Witness Z (T.7559)). Further, the Trial Chamber considered evidence indicating that the Crisis Staff redistributed land to the Serbs which formerly belonged to Muslims and Croats (Trial Judgement, para. 405; Ex. S158, Ex. S196). It also referred to the testimony of Witness McLeod, a representative of the European Community Monitoring Mission, suggesting that the Muslim population was systematically kicked out by whatever method was available (Trial Judgement, paras 406; Witness McLeod (T.5131), Ex. S166). Next, the Trial Chamber referred to a dispatch sent from the Command of the 1st Krajina Corps to the Prijedor Operative Group Command blaming the civilian and military authorities for the "needless spilling of Muslim blood" when the Muslim population was driven out from Prijedor (Trial Judgement, para. 408; Ex. S358).
[495] The Trial Chamber referred specifically to the following incidents: 44 women placed on a bus that departed from the Omarska camp during July 1992 were never seen again, and presumed killed (Trial Judgement, para. 210); at least 120 detainees left the Omarska camp in a convoy on 5 August 1992, some of whose corpses were later identified among 126 bodies in Hrastova Glavica (approx. 30km from Prijedor); six to eight men were killed *en route* to the Manjača camp on 6 August 1992, having boarded a bus from the Omarska camp (Trial Judgement, para. 213).
[496] Trial Judgement, para. 600.

particular, it was reasonable for the Trial Chamber to conclude that deliberately entrusting the transportation of unarmed civilians to a platoon of recently released convicted criminals who had been specifically assigned to execute an ethnic cleansing order in the context of a violent conflict was to deliberately place those civilians at risk of grave harm. Notably, it is not necessary for the Appellant to have known that a massacre would occur on a specific convoy or to have been aware of its details; what is relevant is the deliberate undertaking of a serious risk of death. The Trial Chamber reasonably concluded that this mental state was proven beyond a reasonable doubt.

237. With respect to the killings in the municipality generally, the Trial Chamber considered documentary evidence that the military units in Prijedor were heavily reinforced in early May 1992, which was known to the People's Defence Council, and thus the Appellant.[497] It also cited the publication *Kozarski Vjesnik*, which printed warnings and ultimatums delivered by the Crisis Staff to the public, calling on Muslim paramilitaries to surrender or "the Crisis Staff can no longer guarantee the security" of the population of Hambarine and the surrounding area.[498] The Trial Chamber also considered a report authored by Drljača, the Chief of the SJB, stating that "the Crisis Staff of Prijedor Municipality decided to intervene militarily in the village [Hambarine]".[499] The Trial Chamber concluded that the Appellant knew that the attack on Hambarine would result in civilian casualties.[500]

238. The Trial Chamber referred to testimony from a number of eyewitnesses regarding the Serb military take-over of the Kozarac area, which included attacks (including by artillery) on houses in the villages, and on unarmed civilians in flight, together with the subsequent surrender on 26 May 1992 of a large number of inhabitants who were then brought to the Trnopolje, Omarska and Keraterm camps.[501] It conducted a detailed examination of evidence from witnesses and exhibits showing that during military attacks by Serb forces, civilians were killed in Hambarine,[502] Bišćani,[503] Čarakovo,[504] Briševo[505] in the Ljubija football stadium,[506] and in the Ljubija iron ore

[497] Trial Judgement, para. 604; Ex. S345, Ex. S60.
[498] Trial Judgement, paras 606-608; Ex. S47, Ex. S389-1.
[499] Trial Judgement, para. 608; Ex. S353.
[500] Trial Judgement, para. 609.
[501] Trial Judgement, para. 612, Witness Arifagić (T. 7074-7075), Witness P (T. 3329-3331), Witness Poljak (T. 6333-6334), Witness R (T. 4273), Witness U (T. 6214-6216).
[502] Trial Judgement, para. 255; Witness Q (T. 3937, 3947-3954 (closed session), Ex. S15-25.
[503] Trial Judgement, paras 256-265; Witness Atilja (T. 5603-5611, 5614), Witness C (T. 2343-2345), Witness I (Rule 92*bis* statement, 12 and 14 July 2001), Witness S (T. 5879-5896, 5901-5914, 5917-5919, 5922-5952, 5959-5960, 5966-5970) (closed session), Witness X (T. 6862-6865, 6870), Ex. S211/S, Ex. S212.
[504] Trial Judgement, paras 266-268; Witness C (T. 2310-2311), Witness V (T. 5727-5742).
[505] Trial Judgement, para. 269.
[506] Trial Judgement, paras 270-272; Witness DD (T. 9637-9640), Witness Karagić (T. 5226, 5233-5241), Witness Nasić (Rule 92*bis* statement 1995, pp. 3, 4), Witness Q, (T. 3928-3931), Ex. S169.

mine.[507] It considered an ultimatum to the Muslim town of Kozarac read on Radio Prijedor by the Chief of Staff of the 343rd Motorised Brigade that the Territorial Defence and police in the Kozarac area had to lay down their weapons or the town would be razed.[508] Finally, the Trial Chamber cited documentary evidence that during the attacks in the municipality, information regarding the fighting was accessible through announcements of the Crisis Staff, which were broadcast hourly on Radio Prijedor, showing that the Crisis Staff was in control of the situation.[509] In the same bulletin, the Appellant stated that "čišćenje," or cleansing, was still ongoing in Kozarac "because those remaining are the most extreme and the professionals".[510]

239. On the basis of the evidence considered, it was reasonable for the Trial Chamber to conclude that the only reasonable inference to be made from the above-described evidence was that the municipality killings were foreseeable to the Appellant and that he willingly accepted the risk that they would occur. The Trial Chamber thus did not err.

(ii) Count 4: Extermination

240. The Appeals Chamber finds that the Appellant has failed to demonstrate that no reasonable trier of fact could have concluded that the only reasonable inference to be drawn from the evidence at trial was that the Appellant held the required *mens rea* for extermination. This challenge is assessed in light of the Appeals Chamber's recharacterisation of the Accused's responsibility pursuant to joint criminal enterprise.

241. The Trial Chamber found that:

> the Accused, because of his political position and role in the implementation of the plan to create a purely Serb municipality, was familiar with the details and the progress of the campaign of annihilation directed against the non-Serb populations. Dr. Stakić was aware of the killings of non-Serbs and of their occurrence on a massive scale.[511]

The Trial Chamber concluded that the Appellant possessed "at least *dolus eventualis*" with respect to the crime of extermination.[512] Within the framework of joint criminal enterprise liability, this conclusion demonstrates that it was foreseeable to the Appellant that the crime of extermination occurred as a result of the implementation of the Common Purpose.

[507] Trial Judgement, paras 273-274; Witness Karagić (T. 5242), Witness Nasić (Rule 92*bis* statement, p. 4), Ex. S169, photograph 4.
[508] Trial Judgement, para. 610; Witness Sivać (T. 6765), Witness T (T. 2620) (closed session).
[509] Trial Judgement, para. 614; Ex. S240-1.
[510] Trial Judgement, para. 614; Ex. S240-1.
[511] Trial Judgement, para. 661.
[512] Trial Judgement, para. 661.

242. The same evidence discussed above that demonstrated the Appellant's *mens rea* for murder also supports his *mens rea* for extermination, as that evidence also goes to support the allegations of mass killings such as those in Room 3 of the Keraterm camp and on Mount Vlašić.[513] Given the widespread killing, including numerous massacres, that took place (the Trial Chamber estimated that 1,500 persons were killed), it would not have been reasonable to conclude that the Appellant, in light of his position as head of the Crisis Staff, was unaware of the risk of extermination. Thus, consistent with the analysis in the previous section, it was reasonable for the Trial Chamber to conclude that these mass killings were foreseeable to the Appellant and that he willingly undertook the risk that they would occur.

(c) Conclusion

243. In view of all the foregoing reasons, the Appeals Chamber finds that the Trial Chamber did not err in drawing the inferences which it did. This ground of appeal is accordingly denied.

[513] *See* Section VII.B.2(b)(i) *supra*.

VIII. THE APPELLANT'S FOURTH GROUND OF APPEAL: THE TRIAL CHAMBER'S APPLICATION OF ARTICLE 5 OF THE STATUTE

244. The Appellant submits that the Trial Chamber erred in law and in fact in its application of various elements of Article 5 of the Statute, namely: the Trial Chamber's findings that the purported attack was "widespread" and "systematic"; the Trial Chamber's analysis of the respective requirements for extermination and persecutions; and the Trial Chamber's analysis of deportation.[514] Each of these alleged errors is addressed by the Appeals Chamber below.

A. The Trial Chamber's finding that the purported attack was "widespread" and "systematic"

245. The Appellant denies that the attacks were systematic, and submits instead that they were isolated,[515] "sporadic, random and uncontrollable, or committed by unrelated third parties."[516] The Appellant argues that the Prosecution's evidence, including military documents, demonstrates that only some of the potential targets of the attack were subjected to violence, and contends that this demonstrates that the attack was not systematic.[517] He further contends that the attack also was not "widespread", citing certain evidence submitted at trial by the Prosecution,[518] as well as findings made by another Trial Chamber in a decision in *Prosecutor v. Brđanin*, of which the Appellant invites the Appeals Chamber to take judicial notice.[519]

246. At issue is whether the Trial Chamber erred in concluding that the attacks against the non-Serb civilian population of the Prijedor Municipality, to which the Appellant was a party, were widespread or systematic. The jurisprudence of the Tribunal is clear that, for the purposes of crimes against humanity, an attack must be either "widespread" or "systematic" but need not be both.[520] The Appeals Chamber notes that the Trial Chamber, while recognising the disjunctive nature of the requirements, concluded that the attack was both widespread and systematic.[521]

[514] The Appeals Chamber has addressed the arguments raised by the Appellant against the standard of *mens rea* used by the Trial Chamber regarding murder and extermination in Section V.D *supra*.
[515] Stakić Appeal Brief, para. 257.
[516] Stakić Appeal Brief, para. 256. The Appellant cites Ex. D110, Ex. D146, Ex. D185, Ex. D238, Ex. D240, Ex. D306.
[517] Stakić Appeal Brief, para. 259.
[518] Stakić Appeal Brief, paras 264-266, referring to Ex. D25, Ex. S1.
[519] Stakić Appeal Brief, para. 263, referring to *Brdanin* Rule 98*bis* Decision, para. 14.
[520] *Kunarac* Appeal Judgement, paras 93, 97.
[521] Trial Judgement, paras 628, 630.

247. The Appellant's submissions appear to presume that a systematic attack against a civilian population must encompass the entire civilian population of the particular territory attacked.[522] That presumption is incorrect. As the Appeals Chamber has previously held:

> It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.[523]

Accordingly, an attack against a civilian population may be classified as systematic even where some members of that civilian population are not targeted.

248. The Appeals Chamber notes that the Trial Chamber found that the attack in the instant case was systematic because it had been prepared as of 7 January 1992 "when the Assembly of the Serbian People in Prijedor was first established" and the plan "to rid the Prijedor municipality of non-Serbs and others not loyal to the Serb authorities" was activated.[524] The Trial Chamber found that attacks ensued beginning in late May 1992, according to the plan, directed against the civilian populations in the locations of, *inter alia*, Hambarine and Kozarac, as well as "predominantly non-Serb areas including the Brđo region …, with hundreds of non-Serbs killed and many more arrested and detained by the Serb authorities."[525]

249. The majority of the exhibits cited by the Appellant provide no support for his argument that the attacks were in fact sporadic and random.[526] As for the Appellant's reference to exhibit D25, a newspaper article, and the testimony of its author, Witness Vulliamy, the Appeals Chamber considers that it is important to view both the testimony and exhibit D25 in context. Both illustrate Witness Vulliamy's observation that, on the specific date of his visit to Omarska on 7 August 1992, there was "no visible evidence of serious violence, let alone systematic extermination."[527] At trial, however, Witness Vulliamy provided the important qualification that this observation was made on a single day during the conflict.[528] Testimony from the same witness regarding the situation of the conflict in Prijedor after he had conducted further investigations sufficiently supports the Trial

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[522] Stakić Reply Brief, para. 91.
[523] *Kunarac* Appeal Judgement, para. 90.
[524] Trial Judgement, para. 629.
[525] Trial Judgement, para. 629.
[526] Stakić Appeal Brief, paras 250, 254, 256.
[527] Ex. D25, and Witness Vulliamy, T. 8049.
[528] Witness Vulliamy, T.8049: "Q: When you use the word "systematic" [in exhibit 25], what are you referring to? Witness Vulliamy: I'm saying that we didn't see any systematic extermination, by which I mean mass killing of individuals, that day in the camp before our eyes. Q: And did you before your eyes also, sir, note that there was no visible evidence of serious violence? Witness Vulliamy: During our very brief and restricted visit to Omarska that day, as I think I've already said and it's on the television, we did not get to see ourselves any -- well, I mentioned the wound, but I wouldn't call that systematic extermination. I didn't see any systematic extermination and that's what I'm saying here, but I think I go on to qualify that we had our suspicions about what was going on in the hut that they refused to allows [*sic.*] us into."

Chamber's finding that the attack was systematic.[529] In any event, the fact that a single witness did not see signs of serious violence on a particular day is not inconsistent with the Trial Chamber's finding that there was a systematic attack in the Municipality of Prijedor during the period relevant to the Indictment.

250. The Appellant has failed to demonstrate to the Appeals Chamber how the Trial Chamber's findings of the existence of a systematic attack were unreasonable in light of all the evidence. Therefore, the Appeals Chamber finds that there is no basis on which to overturn the finding by the Trial Chamber that the attack was systematic.

251. Having found that the Trial Chamber did not err in concluding that a systematic attack occurred, the Appeals Chamber finds that, for reasons of judicial economy, it is not necessary to address whether such an attack is also widespread.[530] The related submissions are accordingly dismissed.

B. Extermination as a crime against humanity

252. The Appellant submits that the Trial Chamber erred in its application of the *mens rea* required for extermination as a crime against humanity by broadly construing and redefining it.[531] As these arguments have been addressed in Section V,[532] the Appeals Chamber declines to consider them further here.

253. The Appellant argues that the Trial Chamber erred in law in three different ways in its treatment of extermination as a crime against humanity. First, the Appellant submits that, in addition to the requisite *mens rea*, a "vast scheme to commit collective murder" must be established, collective in nature and not directed at "singled out individuals",[533] and that a person charged with extermination must also be aware of this putative "vast scheme".[534] Next, the Appellant submits that the *mens rea* for the crime of extermination requires an intent to kill a large number of individuals, that "this number should be in the thousands in order to meet the threshold

[529] Witness Vulliamy gave evidence that "… there's no doubt that … that article [Ex. D25] and those that appeared in the very few weeks after it would have given the impression of a widespread - to use your term and not mine - a widespread and systematic persecution, yes"; Witness Vulliamy, T. 8046, T. 8049.
[530] *See* para. 246 *supra*.
[531] Stakić Appeal Brief, para. 270. The Appeals Chamber notes that the Appellant's brief refers to "Article 4 of the Statute" when referring to extermination as a crime against humanity (Stakić Appeal Brief, paras 267-268). Article 4 of the Statute governs genocide, and the Appeals Chamber proceeds on the basis that this was merely a typographic error, and the Appellant intended rather to refer to Article 5(b) of the Statute (extermination as a crime against humanity).
[532] *See* Section V.D *supra*.
[533] Stakić Appeal Brief, para. 284, referring to *Vasiljević* Trial Judgement, para. 227.
[534] Stakić Appeal Brief, paras 269, 288-291, 294, referring to the *Vasiljević* Appeal Judgement, paras 228-229, where it was held that, to be responsible for extermination, an accused must have known of the vast scheme of collective murder and have been willing to take part therein.

of severity and gravity of the crime…"[535] and that the acts making up the crime must be collective in nature and not directed at "singled out individuals."[536] The Appellant's other arguments concern the applicability of the *dolus eventualis* standard and/or the sufficiency of the evidence of his mental state, and have already been dismissed above.

254. In a separate section of his Appeal Brief,[537] the Appellant submits that his conviction for extermination "does not follow from a proper review of the totality of the evidence", and that the Trial Chamber itself concluded that he did not have the intent to kill the non-Serbs of the Municipality of Prijedor.[538] He argues that the only evidence that he knew of deaths in the camps related to two persons who had died of natural causes at Omarska,[539] and that this was gleaned from a solitary exhibit.[540]

255. The Prosecution understands the Appellant to be submitting that extermination has two subjective and six material elements.[541] The Prosecution submits that the Appellant's approach is a flawed "accumulation" of putative elements drawn from the *Vasiljević* and *Krstić* Trial Judgements,[542] which conflates the elements of the crime of extermination with the modes of liability.[543] Contrary to the Appellant's assertions, the Prosecution submits that the jurisprudence of the Tribunal and of the ICTR has established only two elements for the crime of extermination: the *actus reus* of mass killing, and the *mens rea* of an intent to kill or cause serious bodily harm "in the reasonable knowledge of the possibility of causing death on a massive scale."[544] Moreover, the Prosecution argues that the *Vasiljević* Trial Chamber's elucidation of the elements of extermination was incorrect, in part because it misinterpreted certain post-World War II precedents. Finally, it asserts that even if the Appellant's interpretation of the crime's elements were correct, those elements were satisfied here.

256. As a preliminary matter, the Appeals Chamber takes note of the Prosecution's submission that the *Vasiljević* Trial Chamber[545] may have erred in adopting the charging practices of the Prosecution in certain post-World War II cases. This matter has already been addressed by the

[535] Stakić Appeal Brief, para. 269, referring to the *Vasiljević* Trial Judgement, paras 216-233. The Appellant submits that the number of 486 deaths, in which he was implicated, does not meet the threshold required for extermination.
[536] Stakić Appeal Brief, para. 284. In his Reply Brief, paras 101-102, the Appellant, countering the Prosecution's Response, submits that there *is* authority for this proposition, and that the policy consideration to be weighed is the maintenance of the distinction between multiple murders and extermination.
[537] Stakić Appeal Brief, Section E, p. 57.
[538] Stakić Appeal Brief, paras 300-301, referring to Trial Judgement, para. 616.
[539] Stakić Appeal Brief, para. 302.
[540] Namely Ex. S152, "a report from Drljaca", Stakić Appeal Brief, para. 302.
[541] Prosecution Response Brief, para. 5.14.
[542] Prosecution Response Brief, para. 5.16.
[543] Prosecution Response Brief, paras 5.17, 5.34.
[544] Prosecution Response Brief, para. 5.16.
[545] *Vasiljević* Trial Judgement, para. 222.

ICTR Appeals Chamber in *Ntakirutimana,* in which a submission similar to that of the Appellant was dismissed as unfounded:

> The argument put forward by [the Appellants] stems from an erroneous interpretation of the *Vasiljević* Trial Judgement. In that case, [the] Trial Chamber … did not consider that the accused had to be in a position of authority for the crime of extermination. The paragraph of the *Vasiljević* Trial Judgement on which [the Appellants] rely is a simple outline of the policy for the crime of extermination as practised by tribunals after World War II, and has no impact on the definition of the crime. There was no finding in *Vasiljević* that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the killings of large numbers. As [the Appellants] have identified no other authority in support of their argument that the crime of extermination should be reserved for this category of individuals alone, and authorities of [the ICTR] and that of the ICTY have established otherwise, this ground of appeal is dismissed as unfounded.[546]

257. The Appeals Chamber adopts the reasoning of the ICTR Appeals Chamber in *Ntakirutimana* on this point. It now turns to the two questions which it understands the Appellant to be raising with respect to the crime of extermination: (a) is a "vast scheme of collective murder", and knowledge of such a scheme, required? (b) is the intent to kill a large number of victims required?

1. Is knowledge of a "vast scheme of collective murder" required?

258. The Appeals Chamber finds that the jurisprudence of the Tribunal does not support requirements of either a 'vast scheme of collective murder' or knowledge of such a scheme.[547] The Appellant has failed to refer to any other jurisprudence which might support such a requirement, and the Appeals Chamber is unaware of any. While the *Vasiljević* Trial Judgement, relied upon by the Appellant, may have opined that such a requirement would be "largely consistent" with the jurisprudence of the Tribunal, there is no indication that such a requirement exists.[548] The Appeals Chamber notes furthermore that the *Vasiljević* Trial Judgement did not include "knowledge of a vast scheme of collective murder" in its summation of the elements of the crime of extermination.[549]

259. Accordingly, the Appeals Chamber concurs with the finding of the Trial Chamber in the instant case that knowledge of a "vast scheme of collective murder" is not an element required for extermination, a crime against humanity.[550] The ICTR Appeals Chamber has clearly stated that the *actus reus* of extermination is "the act of killing on a large scale."[551] The *actus reus* also includes "subjecting a widespread number of people or systematically subjecting a number of people to

[546] *Ntakirutimana* Appeal Judgement, para. 539 (footnotes omitted).
[547] *Ntakirutimana* Appeal Judgement, para. 522. *See Ndindabahizi* Trial Judgement, para. 479.
[548] *Vasiljević* Trial Judgement, para. 226.
[549] *Vasiljević* Trial Judgement, para. 229.
[550] Trial Judgement, para. 640.
[551] *Ntakirutimana* Appeal Judgement, para. 516. *See* also *Vasiljević* Trial Judgement, para. 229.

conditions of living that would inevitably lead to death".[552] The *mens rea* required for extermination is that the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths.[553] The Appellant's contentions in this respect are therefore dismissed.

2. Is the intent to kill a large number of victims required?

260. The *mens rea* of extermination clearly requires the intention to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths.[554] This intent is a clear reflection of the *actus reus* of the crime.[555] The Appeals Chamber notes, however, that there is no support in customary international law for the requirement of intent to kill a certain threshold number of victims, as suggested here by the Appellant. This is consistent with the fact that there is no numerical threshold established with respect to the *actus reus* of extermination, as previously stated by the ICTR Appeals Chamber in *Ntakirutimana*:

> Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder. The Appeals Chamber agrees with the Trial Chamber that the crime of extermination is the act of killing on a large scale. The expressions "on a large scale" or "large number" do not, however, suggest a numerical minimum.[556]

261. Accordingly, the Appeals Chamber is unable to agree with the Appellant's submission that the crime of extermination requires the intent to kill thousands in order to meet the threshold of severity and gravity of the crime.

3. Did the Trial Chamber err in its consideration of the evidence related to the *mens rea* for extermination?

262. Where the Appellant submits that his conviction for extermination does not follow from a "proper review of the totality of the evidence", the Appeals Chamber notes that the portions of the Trial Judgement to which the Appellant refers to substantiate this submission are scant at best.[557]

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[552] *Ntakirutimana* Appeal Judgement, para. 522. The *Akayesu* Trial Judgement (para. 592) had also held that the victims be "named or described persons". The Appeals Chamber in *Ntakirutimana* dispensed with this requirement, and it is not necessary that a precise identification of certain named or described persons be established; it is sufficient that mass killings occurred (*Ntakirutimana* Appeal Judgement, para. 521).
[553] *Ntakirutimana* Appeal Judgement, para. 522.
[554] *Ntakirutimana* Appeal Judgement, para. 522.
[555] *Ntakirutimana* Appeal Judgement, para. 516. *See* also *Vasiljević* Trial Judgement, para. 229.
[556] *Ntakirutimana* Appeal Judgement, para. 516 (footnotes omitted). *See* also *Krstić* Trial Judgement, para. 501, where the *Krstić* Trial Chamber held that "while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited"; and the *Vasiljević* Trial Judgement, para. 227, fns 587, 229.
[557] The Appellant refers to only one paragraph in the Trial Judgement (para. 616), and one exhibit (Ex. S152), Stakić Appeal Brief, paras 300 *et seq*.

263. The Trial Chamber found that "[k]illings were perpetrated on a massive scale against the non-Serb population of Prijedor municipality" and that the Appellant, "because of his political position and role in the implementation of the plan to create a purely Serb municipality, was familiar with the details and the progress of the campaign of annihilation directed against the non-Serb population."[558] Furthermore, the Trial Chamber concluded that the Appellant, "as President of the People's Defence Council, was the key co-ordinator between [the Serb civilian, police, and military] authorities."[559] These facts led the Trial Chamber to find that the Appellant "was aware of the killings of non-Serbs and of their occurrence on a massive scale" and that he "acted with the requisite intent, at least *dolus eventualis*, to exterminate the non-Serb population of Prijedor municipality in 1992."[560]

264. The Appeals Chamber has clarified the mode of liability pursuant to which the Appellant is liable for extermination: the third category of joint criminal enterprise.[561] On the basis, *inter alia*, of the above findings, the Appeals Chamber has found the Appellant liable for the crime of extermination on the basis that massive killings of individuals were a natural and foreseeable consequence of the Common Purpose and that, despite being aware of this possibility, he nevertheless acted in furtherance of the Common Purpose.[562] The Appellant has not shown that the findings of the Trial Chamber on which the Appeals Chamber relied in reaching this conclusion are in error. The Appellant's argument is dismissed.

C. Deportation as a crime against humanity

1. Submissions of the Parties

265. The Appellant submits that the Trial Chamber erred in its application of the law on deportation. The Appellant considers deportation to be the forced displacement of persons across a national border, by expulsion or other coercive acts ("involuntarily"), from an area in which those persons are lawfully present, in a manner not justified by international law, by an actor who intends the forced displacement to be permanent.[563]

266. The Appellant submits that the Trial Chamber overlooked evidence at trial that showed that persons were leaving Prijedor voluntarily,[564] and that the Trial Chamber itself found that voluntary

[558] Trial Judgement, para. 661.
[559] Trial Judgement, para. 658.
[560] Trial Judgement, para. 661.
[561] *See* Section V *supra.*
[562] *See* Section V.D *supra*.
[563] Stakić Appeal Brief, para. 307.
[564] Stakić Appeal Brief, para. 308.

departures occurred even before the "take over" of the Prijedor Municipality by the Serbs,[565] and in particular, before the period specified in the Indictment.[566] The Appellant contends further that the Trial Chamber erred in inferring his guilt from the involvement of civilian authorities in these departures, when alternative inferences were available.[567]

267. The Appellant further argues that the Trial Chamber erred when it concluded that departures organised by international humanitarian organisations are not permitted under international law, and that he is criminally responsible for participating in such activities.[568] Rather, he submits that displacement – even if involuntary – does not constitute the crime of deportation when done in pursuit of humanitarian efforts to evacuate civilians from an area of hostilities,[569] and there may even be a duty to assist such displacement.[570] The Appellant points out that international humanitarian organisations[571] were involved in transporting non-combatants out of the region, that this humanitarian assistance was heavily solicited by "people who wanted to leave", and that these organisations sought and received assistance from the local authorities.[572]

268. The Appellant further avers that while the Trial Chamber recognised that the *mens rea* for deportation includes the intention to deport permanently,[573] it departed from this requirement in that it failed to infer that the Appellant, by co-operating with humanitarian organisations, lacked the intent to deport the non-Serb population permanently.[574]

269. The Prosecution responds that the Trial Chamber did not convict the Appellant for deportation, but instead included his acts constituting deportation under the count for persecutions (Count 6).[575] As such, the Prosecution avers that the Appellant confuses the findings of the Trial Chamber.[576]

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[565] Stakić Appeal Brief, para. 308.
[566] Stakić Appeal Brief, paras 308, 309.
[567] Stakić Appeal Brief, para. 310.
[568] Stakić Appeal Brief, paras 306, 311.
[569] Stakić Appeal Brief, para. 312.
[570] Stakić Appeal Brief, para. 313, citing Art. 17, Geneva Convention IV, which provides that "The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."
[571] "[S]uch as the Red Cross and UNHCR", Stakić Appeal Brief, para. 313.
[572] Stakić Appeal Brief, para. 313.
[573] Trial Judgement, para. 687.
[574] Stakić Appeal Brief, paras 315-317.
[575] Prosecution Response Brief, para. 5.48, referring to Trial Judgement, paras 712, 881.
[576] Prosecution Response Brief, para. 5.48.

270. The Prosecution denies that the Appellant's definition of deportation is correct, and instead argues that: (1) deportation does not require removal across a national border[577] but includes unlawful displacements within a State's boundaries[578]; and (2) deportation does not require the intent to forcibly displace the victims permanently.[579]

271. Regarding the border requirement, the Prosecution refers to the *Krnojelac* Appeal Judgement where the Chamber held that:

> acts of forcible displacement underlying the crime of persecution punishable under Article 5(h) of the Statute are not limited to displacements across a national border. … The forced character of displacement … entail[s] the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.[580]

Moreover, the Prosecution refers to the Statute of the Tribunal, which penalises deportation in both international and internal armed conflicts.[581] The Prosecution therefore submits that the Trial Chamber was correct when it held[582] that deportation encompasses forced population displacements both across internationally recognised borders and *de facto* boundaries.[583]

272. As to the permanence issue, the Prosecution disputes the Trial Chamber's legal holding. It submits that the Trial Chamber's premise that, as indicated by the Commentary to Geneva Convention IV, "deportation and forcible transfer are not by their nature provisional" does not support its conclusion that the accused must therefore possess "an intent that the transferred persons should not return".[584] Rather, the Prosecution contends that "provisional" displacement, in the context of the Commentary, refers to evacuations for humanitarian purposes. In the Prosecution's view, it is their lack of humanitarian justification and forcible nature, and not their intended permanence, that distinguishes deportation and forcible transfer from provisional evacuation. The Prosecution observes that neither the text of Geneva Convention IV nor the Appeals Chamber's jurisprudence supports a permanence requirement.

273. The Prosecution submits that in any event, there is ample evidence that the Appellant "intended the displacement of thousands [of people] to be final", such as his participation (albeit

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[577] Prosecution Response Brief, para. 5.50, citing *Krnojelac* Appeal Judgement, para. 218. The Prosecution avers that "[i]t is the forced character of the displacement, not the destination to which the victims are sent, that attracts criminal responsibility." Prosecution Response Brief, para. 5.51.
[578] Prosecution Response Brief, para. 5.53.
[579] Prosecution Response Brief, paras 5.56-5.60. The Prosecution Response Brief discusses the application of Geneva Convention IV in the *Naletilić and Martinović* Trial Judgement.
[580] *Krnojelac* Appeal Judgement, para. 218.
[581] Prosecution Response Brief, para. 5.52.
[582] Trial Judgement, para. 679.
[583] Prosecution Response Brief, paras 5.51, 5.52, AT. 318.
[584] Prosecution Response Brief, paras 5.54-5.55, citing Trial Judgement, para. 687.

indirect) in the destruction, confiscation and redistribution of Bosnian Muslim property.[585] Moreover, the Prosecution observes, the evidence also demonstrated that the displacement was involuntary and that, to the extent it had a humanitarian purpose, this was only because of a humanitarian crisis that the Appellant himself had deliberately created.[586]

2. Discussion

274. The Appellant raises a number of different issues in relation to the crime of deportation which require the Appeals Chamber's attention: (1) whether the crime of deportation requires a cross-border transfer; (2) whether deportation requires an intent to permanently displace the victims; and (3) whether the Trial Chamber erred in its analysis of the facts which led it to convict the Appellant for deportation so as to occasion a miscarriage of justice.

275. At the outset, however, the Appeals Chamber recognises that the Prosecution is correct that the Appellant was not actually convicted of deportations as a crime against humanity, but only as an underlying act of the crime of persecutions.[587] However, the Trial Chamber in this case did hold that the Appellant committed the crime of deportation;[588] it merely declined to enter a conviction because it concluded that to enter convictions for both deportation and persecutions would be impermissibly cumulative. Because the Appeals Chamber will vacate that conclusion below,[589] the question whether the Appellant should be liable for deportation as a crime against humanity is not moot.

(a) The elements of the crime of deportation

276. Article 5(d) of the Statute recognises deportation as a crime against humanity. The Appeals Chamber notes that, prior to the adoption of the Statute, deportation was considered a crime against humanity in other legal instruments such as in the Nuremberg Charter,[590] the IMT Judgement,[591] the Charter of the International Military Tribunal for the Far East,[592] (Allied) Control Council Law No. 10,[593] the International Law Commission's Principles of International Law Recognised in the Charter of the Nuremberg Tribunal (IMT),[594] and the 1954 Draft Code of Offences against the

[585] Prosecution Response Brief, para. 5.65.
[586] Prosecution Response Brief, paras 5.67-5.73.
[587] Trial Judgement, para. 881.
[588] Trial Judgement, para. 712.
[589] *See* Section X.B.1(b) *infra*.
[590] Article 6(c).
[591] *See* para. 290 *infra*.
[592] Article 5(c).
[593] Article II(1)(c).
[594] Principle VI(c); *see Yearbook of the International Law Commission, 1950*, vol. II, "Report of the International Law Commission to the General Assembly", p. 377

Peace and Security of Mankind.[595] However, neither the Statute nor the other instruments referred to above provide a clear definition of deportation.

277. The protected interests underlying the prohibition against deportation include the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location.[596] The same protected interests underlie the criminalisation of acts of forcible transfer, an "other inhumane act" pursuant to Article 5(i) of the Statute.[597]

278. The Appeals Chamber is of the view that the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. The Appeals Chamber considers that the *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis. These elements reflect the jurisprudence of the Tribunal to date.[598] However, a number of issues, including those raised here, are contentious and are accordingly clarified below.

(i) Forced character of the displacement

279. The definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement.[599] Factors other than force itself may render an act involuntary, such as taking advantage of coercive circumstances.[600] The Appeals Chamber has previously stated, albeit in the context of forcible displacement, that "it is the absence of genuine choice that makes displacement unlawful", a statement which is equally applicable to deportation.[601] Therefore, while persons may consent to (or even request[602]) their removal, that

[595] Article 2(11), *see Yearbook of the International Law Commission, 1954*, vol. II, "Report of the International Law Commission to the General Assembly", p. 150. Subsequent to the adoption of the Statute, other instruments have also recognised deportation as a crime against humanity. *See e.g.* Article 3(d) of the Statute of the ICTR; Article 18(g) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind; and Article 7(1)(d) of the Rome Statute of the International Criminal Court.
[596] The Trial Chamber *in casu* described it thus: "[i]n essence, the prohibition against deportation serves to provide civilians with a legal safeguard against forcible removals in time of armed conflict and the uprooting and destruction of communities by an aggressor or occupant of the territory in which they reside" (Trial Judgement, para. 681).
[597] *Krnojelac* Appeal Judgement, para. 218. As noted in the discussion above, the Appellant was indicted for forcible transfer (Count 8), but that count was dismissed by the Trial Chamber. *See infra* for further consideration of the Trial Chamber's treatment of forcible transfer.
[598] *See Krnojelac* Trial Judgement, para. 474, where deportation is defined as "the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." For a substantially similar definition, *see Blaškić* Trial Judgement, para. 234.
[599] *Krnojelac* Trial Judgement, para. 475. *See* also *Krnojelac* Appeal Judgement, para. 233.
[600] *Kunarac* Appeal Judgement, para. 129, (in the context of rape).
[601] *Krnojelac* Appeal Judgement, para. 229.

consent must be real in the sense that it is given voluntarily and as a result of the individual's free will, assessed in the light of the surrounding circumstances.[603]

280. In the *Krstić* Trial Judgement, for example, the Trial Chamber held that "despite the attempts by the VRS to make it look like a voluntary movement, the Bosnian Muslims of Srebrenica were not exercising a genuine choice to go, but reacted reflexively to a certainty that their survival depended on their flight."[604]

281. The Appeals Chamber therefore agrees with the statement made in the *Krnojelac* Trial Judgement that the term "forced", when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.[605]

282. The determination as to whether a transferred person had a genuine choice is one to be made within the context of the particular case being considered. In the instant case, the Trial Chamber concluded that "the atmosphere in the municipality of Prijedor during the time relevant to the Indictment was of such a coercive nature that the persons leaving the municipality cannot be considered as having voluntarily decided to give up their homes."[606] As is clear from the discussion above, such a finding was open to the Chamber as a matter of law. The Appellant's allegation that the departures were "voluntary" because of the absence of physical force is thus without merit.

283. With respect to the factual basis for the Trial Chamber's finding, the Appellant has not demonstrated how the Trial Chamber's conclusions about the coercive atmosphere pervading the Municipality of Prijedor are such that no reasonable trier of fact could have made them.[607] Consequently, the Appeals Chamber finds that the Trial Chamber did not err either as a matter of law or fact in finding that the departures were involuntary, and therefore unlawful.

284. As to the Appellant's argument that international law permits involuntary removal on humanitarian grounds, the Appeals Chamber observes that the Geneva Conventions do allow such removals under certain limited circumstances. The Appeals Chamber notes that international law recognises certain grounds permitting forced removals, and that if an act of forced removal is

[602] *Krnojelac* Appeal Judgement, para. 229.
[603] *Kunarac* Trial Judgement, para. 460, cited with approval in *Kunarac* Appeal Judgement, paras 127-128 (in the context of rape).
[604] *Krstić* Trial Judgement, para. 530.
[605] *Krnojelac* Trial Judgement, para. 475, citing the *Krstić* Trial Judgement, para. 529.
[606] Trial Judgement, para. 707.

carried out on such a basis, that act cannot constitute the *actus reus* of the crime of deportation. Article 19 of Geneva Convention III provides for the evacuation of prisoners of war out of the combat zone and into internment facilities, subject to numerous conditions.[608] Article 49 of Geneva Convention IV provides that:

> … the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.[609]

285. Article 17 of Additional Protocol II recognises that the displacement of the civilian population may be ordered "for reasons related to the conflict" where *inter alia* "the security of the civilians involved or imperative military reasons so demand".

286. The displacements at issue in the current case were held by the Trial Chamber to be unlawful because of their involuntary nature. This finding was reasonable based on the facts considered by the Trial Chamber. None of the provisions set out above justify forced removals merely because of the involvement of an NGO. The Appeals Chamber considers, therefore, that the participation of an NGO in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful.

287. Although displacement for humanitarian reasons is justifiable in certain situations,[610] the Appeals Chamber agrees with the Prosecution that it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity. In the instant case, the evidence supports only one reason why it might arguably have been safer for Bosnian Muslims in Prijedor to be displaced: the dangers posed to them by the criminal scheme of persecutions undertaken by the Appellant and his co-perpetrators.

(ii) Cross-border transfer

288. The Trial Chamber found it necessary that for the purposes of deportation, the displacement take place across either "internationally recognised borders [or] *de facto* boundaries, such as

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[607] During the Appeal Hearings (AT. 208), the Appellant referred to para. 707 of the Trial Judgement as being another factual conclusion having "no support in the evidence." The Appeals Chamber disagrees. A plain reading of the Trial Judgement from para. 688 demonstrates the basis for the findings set out in para. 707.

[608] Article 19 of Geneva Convention III reads as follows: "Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone."

[609] Geneva Convention IV, Article 49.

[610] *See* Article 17 of Additional Protocol II.

constantly changing frontlines, which are not internationally recognised".[611] The Trial Chamber also seemingly endorsed the view that the value of a cross-border requirement for the crime of deportation is negligible, since "what has in the jurisprudence been considered two separate crimes [deportation and forcible transfer] is in reality one and the same crime."[612] With divergent views from the parties before it, the Appeals Chamber finds it necessary to examine the question in some detail.

289. The following survey of relevant international law and authority supports the Appeals Chamber's conclusion that deportation as a crime against humanity under Article 5(d) of the Statute requires that individuals be transferred across a state border or, in certain circumstances, a *de facto* border. The Appeals Chamber notes that certain sources to which it refers clearly concern deportation as a war crime rather than as a crime against humanity. The Appeals Chamber believes that reference to these sources is instructive because deportation as a crime against humanity developed out of deportation as a war crime – as a way of extending the scope of the crime's protection to civilians of the same nationality as the perpetrator.[613]

a. WWII-related jurisprudence

290. The IMT Judgement considered the issue of deportation as a crime against humanity, as did a number of trials conducted under Control Council Law No. 10. The IMT Judgement states that "[w]hole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort"[614] and "[b]y the middle of April, 1940, compulsory deportation of labourers to Germany had been ordered in the Government General; and a similar procedure was followed in other eastern territories as they were occupied. A description of this compulsory deportation from Poland was given by Himmler."[615] Furthermore, "Frank introduced the deportation of slave labourers to Germany in the very early stages of his administration",[616] and reference is made to the "mass deportation of almost 120,000 of Holland's 140,000 Jews to Auschwitz", and the final solution, under Seyss-Inquart,[617] while

[611] Trial Judgement, para. 679.
[612] Trial Judgement, para. 680.
[613] Bassiouni, M. Cherif., Crimes Against Humanity in International Criminal Law, (The Hague/London/Boston: Kluwer Law International, 1999), pp. 60, 70-71.
[614] IMT Judgment, Vol I (1947), p. 227.
[615] IMT Judgment, Vol I (1947), p. 244.
[616] IMT Judgment, Vol I (1947), p. 297.
[617] IMT Judgment, Vol I (1947), p. 329.

Von Schirach was found to have participated in the deportation of Jews from Vienna to the "ghetto of the East."[618]

291. In the case of *United States of America v. Milch*, conducted under Control Council Law No. 10, the Concurring Opinion of Judge Philips stated that "[d]isplacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime."[619] This statement was cited with approval in the case of *United States of America v. Alfried Krupp et al*.[620]

b. The Geneva Conventions and Additional Protocols

292. Article 49 of the Geneva Convention IV provides as follows:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.[621]

293. Article 85 of Additional Protocol I precludes an Occupying Power from transferring parts of its own civilian population into the territory it occupies, or from deporting or transferring all or part of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention.

294. Article 17 of Additional Protocol II dealing with non-international armed conflicts provides in the relevant part that "[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict." While Article 17 does not expressly address deportation or forcible transfer, this provision draws a careful distinction between displacement within the territory in which a person lives and compelled movement to another territory.[622]

c. The ILC Draft Code

295. The 1991 precursor to the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, pre-dating the acts alleged as deportation in this case, states that "[d]eportation, already

[618] IMT Judgment, Vol I (1947), p. 319.
[619] *Milch* Judgment, Concurring Opinion of Judge Phillips, p. 865.
[620] *Krupp* Judgment, pp. 1432-1433.
[621] *See* also Article 147, Geneva Convention IV. "Presumably, a transfer is a relocation within the occupied territory, and a deportation is a relocation outside the occupied territory", Henckaerts, Deportation and Transfer of Civilians in Time of War, *Vanderbilt Journal of International Law*, Vol 26, 1993, p. 472 as cited in the *Krnojelac* Trial Judgement, fn. 1429.

included in the 1954 [D]raft Code, implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State."[623] This clarification was incorporated *verbatim* into the Commentary on Article 18(g) of the 1996 ILC Draft Code[624] which includes, as crimes against humanity, "arbitrary deportation or forcible transfer of population."[625]

d. The ICRC study on customary international humanitarian law

296. In 2005, the ICRC published its study on the current state of customary international humanitarian law.[626] In this study, Rule 129 provides as follows:

> A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand.
>
> B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

Deportation is clearly prohibited as a crime where the conflict encompasses an occupied territory. This rule confirms the law as established under Article 49 of Geneva Convention IV that deportation applies to displacements crossing the border of an occupied territory.

297. The Appeals Chamber is fully cognisant that the ICRC study post-dates the period relevant to the Indictment in the current case. Rule 129 is nonetheless instructive because it demonstrates that, as of the time the crimes at issue in this case were committed, the offence of deportations still required displacement across a border – though Rule 129 says little about what type of borders satisfy this requirement.

e. The jurisprudence of the Tribunal

298. At least one Trial Chamber of the Tribunal has taken the view that no cross-border transfer is required in order for deportation to be established.[627] The Trial Judgement in the instant case

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[622] *See* C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), pp. 1472-1474.
[623] Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, UN Doc. A/46/10, p. 104.
[624] 1996 ILC Draft Code, Article 18(g), the commentary of which (para. 13) provides that "Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State."
[625] Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN Doc. A/51/10, p. 100, para. 13.
[626] Henckaerts, J-M. and Doswald-Beck, L. *Customary International Humanitarian Law*, *Vol. 1: Rules* (Cambridge 2005).

concluded that a border requirement of some kind is necessary, but that the nature of this border was somewhat flexible:

> [I]t would make little or no sense to prohibit acts of deportation, in the words of the Security Council, "regardless of whether they are committed in an armed conflict, international or internal in character" and at the same time to limit the possibility of punishment to cases involving transfers across internationally recognised borders only.[628]

As a result, the Trial Chamber concluded that transfer across "*de facto* boundaries, such as constantly changing frontlines, which are not internationally recognised" would be sufficient for the purposes of deportation.

299. On other occasions, however, Trial Chambers have found that the crime of deportation requires a cross-State border transfer.[629] The *Krstić* Trial Judgement held that deportation and forcible transfer "are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State."[630]

f. Finding

300. In the view of the Appeals Chamber, the crime of deportation requires the displacement of individuals across a border. The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country, as illustrated in Article 49 of Geneva Convention IV and the other references set out above. Customary international law also recognises that displacement from 'occupied territory', as expressly set out in Article 49 of Geneva Convention IV[631] and as recognised by numerous Security Council Resolutions, [632] is also sufficient to amount to deportation. The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.

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[627] *Nikolić* Rule 61 Decision, para. 23.
[628] Trial Judgement, para. 678.
[629] *Krstić* Trial Judgement, para. 521; *Krnojelac* Trial Judgement, paras 474, 476. *See* also the Rule 98*bis* Decision, para. 130.
[630] *Krstić* Trial Judgement, para. 521. The Appeals Chamber notes that the *Brdanin* Trial Chamber agreed with the distinction drawn in *Krstić*: *Brdanin* Trial Judgement, para. 542.
[631] "Individual or mass forcible transfers, as well as *deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country*, occupied or not, are prohibited, regardless of their motive." (Emphasis added).
[632] United Nations Security Council Resolutions: S/RES/469 (1980); S/RES/484 (1980); S/RES/607 (1988); S/RES/608 (1988); S/RES/636 (1989); S/RES/641 (1989); S/RES/681 (1990); S/RES/694 (1991); S/RES/726 (1992); S/RES/799 (1992) (concerning deportations to Lebanon). *See* also the following United Nations General Assembly Resolution A/RES/40/161 (D-E) (1985).

301. In the instant case, the Trial Chamber has advocated an expansive view of deportation, encompassing displacements across "constantly changing frontlines".[633] It is clear from the facts of the case that the constantly changing frontlines in question are neither *de jure* state borders nor the *de facto* borders of occupied territory,[634] either of which would automatically be sufficient to amount to deportation under customary international law, as discussed above. Therefore, it is necessary to examine whether customary international law would support a finding that "constantly changing frontlines" may amount to *de facto* borders sufficient for the purposes of the crime of deportation.

302. The Trial Judgement does not refer to any evidence that demonstrates that transfers across constantly changing frontlines may amount to deportation under customary international law. Similarly, the Prosecution, which favours the finding of the Trial Chamber, does not identify any evidence in support of this view. The Appeals Chamber has itself been unable to find support for such a finding. It therefore concludes that the Trial Chamber's finding in this respect in fact expands criminal responsibility by giving greater scope to the crime of deportation than exists under customary international law, and thus violates the principle of *nullum crimen sine lege*. In the view of the Appeals Chamber, such an approach is not legally justified, nor is it necessary – the application of the correct definition of deportation would not leave individuals without the protection of the law. Individuals who are displaced within the boundaries of the State or across *de facto* borders not within the definition of deportation, remain protected by the law, albeit not under the protections afforded by the offence of deportation. Punishment for such forcible transfers may be assured by the adoption of proper pleading practices in the Prosecution's indictments – it need not challenge existing concepts of international law.

303. As the Appeals Chamber holds that displacements across constantly changing frontlines are not sufficient under customary international law to ground a conviction for deportation, it concludes that, to the extent the Trial Chamber convicted the Appellant of deportations for displacements across such changing frontlines, the Trial Chamber erred as a matter of law and exceeded the scope of its jurisdiction.

(iii) Is there a requirement of an intent to permanently displace the victims of deportation?

304. There has been a lack of consistency in the jurisprudence of the Tribunal regarding the requisite *mens rea* for the offence of deportation. Several Judgements have entered convictions for

[633] Trial Judgement, para. 679.

deportation without making any findings on a putative intent to deport permanently.[635] Conversely, the *Blagojević and Jokić, Brđanin, Simić et al.*, and *Naletilić and Martinović* Trial Chambers, as well as the Trial Chamber in this case, all required that the perpetrator act with the intent that the removal of the persons be permanent.[636]

305. The Judgements requiring an intent to permanently remove the victims rely for their authority on a statement in the ICRC Commentary on Article 49 of Geneva Convention IV.[637] The Commentary states that:

> Unlike deportation and forcible transfers, evacuation is a provisional measure entirely negative in character, and is, moreover, often taken in the interests of the protected persons themselves.[638]

The Trial Chamber in this case appears to have interpreted this statement to mean that "the intent of the perpetrator must be that the victim is removed, which implies the aim that the person is not returning."[639]

306. Article 49 of Geneva Convention IV itself, the underlying instrument prohibiting deportation regardless of the motive behind the act, contains no suggestion that deportation requires an intent that the deportees should not return.[640] The Appeals Chamber is concerned that care should be taken not to read too much into the Commentary on Geneva Convention IV, and finds that the Commentary to Article 49 in particular is primarily an attempt to distinguish "evacuation", a form of removal permitted by the Convention which is by definition provisional, from the crimes of deportation and forcible transfer.

307. The Appeals Chamber therefore chooses to follow the text of Article 49 and concludes that deportation does not require an intent that the deportees should not return. The Trial Chamber therefore erred when it reached a contrary conclusion on the basis of the ICRC commentary.[641] Because the Trial Chamber found that the Appellant intended to permanently displace the deportees, however, the Trial Chamber's error proved harmless in this case. The Appeals Chamber

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[634] With respect to the borders of occupied territory, no case of occupation was pleaded, nor was a finding of occupation made by the Trial Chamber.
[635] *Milošević* Rule 98*bis* Decision, para. 78 (referring to deportation and forcible transfers of civilians); *Krnojelac* Appeal Judgement, paras 209-225 (referring to persecutions by way of deportation and expulsion); *Krstić* Trial Judgement, paras 519-532 (referring to deportation and forcible transfers of civilians).
[636] *Blagojević* Trial Judgement, para. 601; *Brđanin* Trial Judgement, para. 545; *Simić et al.* Trial Judgement, para. 134; *Naletilić and Martinović* Trial Judgement, para. 520; Trial Judgement, para. 687. *See* also *Krnojelac* Appeal Judgement, Separate Opinion of Judge Schomburg, para. 16.
[637] ICRC Commentary (GC IV), pp. 277-283.
[638] ICRC Commentary (GC IV), p. 280.
[639] *See* Trial Judgement, para. 687, fn. 1346, citing the *Naletilić and Martinović* Trial Judgement.
[640] Article 49 of Geneva Convention IV.
[641] *See* Trial Judgement, para. 687.

only corrects this error so that, in future cases, Trial Chambers will not require proof of intent to permanently displace deportees.

(iv) Conclusion

308. On the basis of the reasoning set out above, the Appeals Chamber rejects the Appellant's submissions with respect to the legality of departures organised by international humanitarian organisations. In relation to the question whether the Trial Chamber correctly applied the elements of the crime of deportation, the Appeals Chamber finds that the Trial Chamber erred in its characterisation of both the element of a cross-border transfer and the requisite *mens rea* for the crime of deportation.

(b) Whether the Trial Chamber erred in its analysis of the facts regarding deportation

309. As to the question of whether the Trial Chamber erred in inferring the Appellant's guilt from the involvement of civilian authorities in the departures, the Appeals Chamber considers that the Appellant misconstrues the findings of the Trial Chamber.[642]

310. The Trial Chamber's findings as to the Appellant's responsibility for the deportation of civilians from the Municipality of Prijedor were clearly not inferred from the involvement of civilian authorities. The Trial Chamber found that non-Serb civilians were fleeing the Prijedor area in order to escape the hostile environment[643] created in part by the Appellant himself, together with the Serb authorities, which "was of such a coercive nature that the persons leaving the municipality cannot be considered as having voluntarily decided to give up their homes".[644] Not only was this eventuality foreseen, it was indeed the intended result of a plan in which the Appellant was a participant.[645] Given that the Trial Chamber clearly did not base its finding of responsibility for deportations on the inference suggested by the Appellant, the Appeals Chamber declines to consider this argument.

311. The Appellant also makes a general assertion that the Trial Chamber erred in failing to consider the totality of the evidence and drew improper inferences from the evidence it did review. However, the Appellant does not identify any specific instance in which this might be the case. This further unsubstantiated submission by the Appellant is accordingly dismissed.

[642] Stakić Appeal Brief, para. 314.
[643] Trial Judgement, para. 314.
[644] Trial Judgement, para. 707.
[645] *See* Section V *supra.*

(c) The effect of the Trial Chamber's error on the Appellant's convictions

312. Having established that the Trial Chamber erred in law, it is necessary for the Appeals Chamber to apply the correct legal definition of deportation to the factual findings of the Trial Chamber. In this way, the Appeals Chamber may establish whether it is convinced beyond reasonable doubt as to the challenged factual findings before that finding is confirmed on appeal.

(i) The Trial Chamber's treatment of forcible transfer

313. As a preliminary matter, the Appeals Chamber notes that forcible transfer was charged in the Indictment as an "other inhumane act" pursuant to Article 5(i) of the Statute.[646] The Trial Chamber, however, found that the use of Article 5(i) to attach criminal liability to forcible transfers raised serious concerns, and held that:

> the crime of 'other inhumane acts' subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness [which] might violate the fundamental criminal law principle *nullum crimen sine lege certa*.[647]

In light of this consideration, the Trial Chamber concluded that a conviction based on Article 5(i) for acts of forcible transfer as inhumane acts could not be entered.[648]

314. While neither party appealed this issue in the instant case, the Appeals Chamber finds that it is a matter of great importance to the consistency of the Tribunal's jurisprudence such that it warrants an examination *proprio motu*.

315. The Appeals Chamber notes first that the notion of "other inhumane acts" contained in Article 5(i) of the Statute cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law.[649] The function of this provision as a residual category is clear, as spelled out by the Trial Chamber in the *Kupreškić* Trial Judgement, which found that Article 5(i) was:

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[646] Indictment, paras 17(l), 19, 25, 41(1), 43 and 45 (within a genocidal campaign), 54(4) (within a persecutory campaign), 58, 59.
[647] Trial Judgement, para. 719, citing the Rule 98*bis* Decision, para. 131.
[648] Trial Judgement, para. 724.
[649] The crime of other inhumane acts has been included in the following international legal instruments: Article 6(c) of the Nuremberg Charter; Article 5(c) of the Tokyo Charter; Article II(c) of Control Council Law No. 10. The crime of other inhumane acts is also referred to in Principle 6(c) of the Nuremberg Principles of 1950 and the ILC Draft Code (Article 18). Convictions have been entered on this ground pursuant to Control Council Law No. 10: *see e.g.* the Medical Judgment (p.198), the Justice Judgment (pp. 23, 972, 1200), the Ministries Judgment (pp. 467-475, 865), and the High Command Judgment (pp. 465, 580). The Appeals Chamber also notes that numerous human rights treaties also prohibit inhuman and degrading treatment: *see e.g.* ICCPR (Article 7), the European Convention on Human Rights (Article 3), the Inter-American Convention on Human Rights (Article 5) and the African Charter on Human and People's Rights (Article 5).

> [d]eliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.[650]

316. The Appeals Chamber endorses this statement and notes that the provision has been widely used within the Tribunal's case-law.[651]

317. In the instant case, the Prosecution charged forcible transfer (in Count 8 of the Indictment) as the act underlying Article 5(i).[652] Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries.[653] The *mens rea* does not require the intent to transfer permanently. The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer.[654] The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege*. Furthermore, acts of forcible transfer have been accepted in other cases before the Tribunal as specifically substantiating the notion of other inhumane acts pursuant to Article 5(i).[655] In view of the foregoing, the Appeals Chamber finds that acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.[656] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that a conviction based on Article 5(i) for acts of forcible transfer could not be entered.

318. The Appeals Chamber now turns to consider the findings of the Trial Chamber regarding deportation to see whether, in light of the correct definition of that crime, they may amount to either deportation or forcible transfer.

(ii) Applying the correct legal definitions of deportation and forcible transfer to the facts

319. The Trial Chamber's error with respect to the *mens rea* of deportation has no effect with respect to its findings on that crime. In reaching its conclusion that acts of deportation had taken

[650] *Kupreškić* Trial Judgement, para. 563.
[651] *Kordić* Appeal Judgement, para. 117; *Vasiljević* Trial Judgement, para. 234; *Galić* Trial Judgement, paras 151-153; *Naletelić and Martinović* Trial Judgement, para. 247; *Krnojelac* Trial Judgement, para. 130; *Kvočka* Trial Judgement, para. 206; *Kordić* Trial Judgement, para. 269; *Kupreškić* Trial Judgement, para. 563. For the ICTR, *see e.g. Kayishema and Ruzindana* Trial Judgement, para. 150.
[652] Indictment, paras 58, 59.
[653] *Krnojelac* Trial Judgement, para. 474; *Krstić* Trial Judgement, para. 521. *See* also *Stakić* Rule 98*bis* Decision, in which the Trial Chamber found that forcible transfer relates to displacement within a State.
[654] Article 17 of Protocol II similarly prohibits the "displacement" of civilians.
[655] *See Krstić* Trial Judgement, para. 523; *Kupreškić* Trial Judgement, para. 566.

place, the Trial Chamber was satisfied that the Appellant possessed the intent to transfer the victims on a permanent basis. The correct legal standard, an intent to transfer persons on a non-provisional basis, is therefore necessarily also met. As a result, the Appeals Chamber finds that the Trial Chamber's error regarding the *mens rea* did not adversely affect the Appellant's rights and does not require a reversal of its findings.

320. In contrast, the Trial Chamber's error with respect to the nature of the cross-border transfer does affect the factual findings of that Chamber. The Appeals Chamber is satisfied that at least one act amounts to deportation under the definition set out above. This act concerns the forcible transfer of Witness Čehajić, who was transported by convoy from Prijedor on 5 September 1992 and arrived in Karlovac, Croatia, one day later.[657] The Appeals Chamber also notes the Trial Chamber's finding that two other witnesses testified to being transported in convoys bound for Karlovac in Croatia.[658] A review of the evidence on which the Trial Chamber relied reveals that they were transported from Prijedor to Karlovac after the end of the period of the Indictment.[659] Likewise, the Trial Chamber's finding that 1,561 people were transferred from the Trnopolje Camp in the Municipality of Prijedor to Karlovac[660] cannot with certainty be placed within the Indictment period.[661] Accordingly, the Appeals Chamber declines to enter findings of deportation for these incidents.

321. Numerous findings in the Trial Judgement relate to forced displacements across frontlines between the parties to the conflict, as well as between locations under Serb control. Forcible transfer across such borders and between such locations is not sufficient to ground a conviction for deportation. However, the Appeals Chamber is satisfied beyond reasonable doubt that the following incidents amount to acts of forcible transfer:

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[656] *See* the definition of other inhumane acts set out in the *Kordić* Appeal Judgement, para. 117: "the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case-by-case basis with due regard for the individual circumstances".
[657] Trial Judgement, para. 693, citing Witness Čehajić (T. 3099).
[658] Trial Judgement, para. 693.
[659] Trial Judgement, para. 693, citing Witness C and Witness Murselović. Witness C's convoy left Manjača for Karlovac on 18 December 1992 via Banja Luka, Bosanska Gradiška, across the Sava river to Croatia and on to Karlovac (T. 2342-2343). Witness Murselović's convoy left Manjača for Karlovac on 14 or 15 November 1992 via Banja Luka, Gradiška, and Nova Gradiška (in Croatia) to Karlovac (T. 2772).
[660] Trial Judgement, paras 316, 696, Ex. S43.
[661] The relevant findings in the Trial Judgement on the convoy, together with the underlying evidence, are: Para. 316 / Witness C (T. 2343): Witness C says nothing relevant about this convoy. Para. 696 / Ex. S90: Ex. S90 is the minutes of a session of the National Defence Council of the Prijedor Municipal Assembly dated 29/09/92, reporting the planned provision of an escort, vehicles & fuel to the convoy in question. No date of the convoy is given. Para. 696 / Ex. 424: Ex. 424 is a National Security Service report, Banja Luka sector, dated 23/10/92, mentioning the departure of 1561 persons with Red Cross assistance. No date for the departure is specified. Para. 696 / Ex. S435: Ex. S435 is an ICRC Press communiqué dated 2 October 1992 confirming the ICRC as having evacuated 1,560 people on 1 October 1992 – the only evidence to provide a date, which falls outside the temporal scope of the Indictment.

(1) A convoy from the Trnopolje camp in the Municipality of Prijedor to Skender Vakuf, consisting of five buses, that departed on 18 July 1992[662];

(2) A convoy from Omarska in the Municipality of Prijedor to the Manjača and Trnopolje camps on 6 August 1992[663];

(3) A convoy from the Municipality of Prijedor through Banja Luka and Skender Vakuf towards Travnik (non-Serb controlled territory) on 17 August 1992[664];

(4) A convoy from Tukovi Stadium in the Municipality of Prijedor to Travnik (non-Serb controlled territory) on 21 August 1992[665];

(5) A convoy from the Municipality of Prijedor to Travnik (non-Serb controlled territory) on or about 28 August 1992[666];

(6) Daily convoys and trucks from the Municipality of Prijedor to "non-Serb controlled areas", *inter alia* Travnik in or about August 1992.[667]

Consequently, the Appeals Chamber finds that the Trial Chamber was correct in its finding with respect to deportation under Article 5(d) of the Statute in relation to the Trnopolje-Karlovac transfer, but should have entered a conviction for other inhumane acts under Article 5(i) of the Statute for the other acts discussed above.

D. Persecutions as a crime against humanity

322. The Appellant submits that the Trial Chamber erred in its application of the *mens rea* required for persecutions as a crime against humanity, pursuant to Article 5 of the Statute, in that it broadly construed and redefined the required *mens rea*[668] in violation of the principles *in dubio pro reo* and *nullum crimen sine lege*.[669] As this submission has been dealt with in Section V,[670] the Appeals Chamber declines to consider it further except in so far as any issue unique to persecutions is raised.

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[662] Trial Judgement, para. 699, referring to Ex. S354.
[663] Trial Judgement, para. 693, referring to Witness A, who was one of 1,360 people in this convoy.
[664] Trial Judgement, paras 814-815, referring to Witness Vulliamy (T. 7984).
[665] Trial Judgement, paras 693, 700, referring, respectively, to Witness X, Witnesses B and Witness Z.
[666] Trial Judgement, para. 319, citing Witness Kuruzović (T. 14456); para. 693, citing Witness B (T. 2257, 2263).
[667] Trial Judgement, paras 314, 318, 693.
[668] Stakić Appeal Brief, para. 321.
[669] Stakić Appeal Brief, para. 322.
[670] *See* Section V.D *supra*. The Appellant also submits that the Trial Chamber drew impermissible inferences regarding his *mens rea* for persecutions. This submission has been dealt with in the section on Miscarriage of Justice and will not be considered further here. *See* Section VII.B *supra*.

323. The Appellant submits further that the *mens rea* required for persecutions consists of two elements, namely the *mens rea* for the crimes underlying persecutions, and the specific discriminatory intent required for persecutions, or *dolus specialis*.[671] The Appellant submits that the Trial Chamber correctly identified, but erroneously departed from, these requirements insofar as it accepted *dolus eventualis* as sufficient to prove the *mens rea* for the acts underlying persecutions, which it alleges is a "lower threshold" than required for persecutions.[672] He also claims that the Trial Chamber provided inadequate analysis of how the *dolus specialis* requirement for persecutions was met, and asserts that the totality of the evidence demonstrates that he lacked discriminatory intent and was instead "a promoter of peace".[673] In his Reply Brief, the Appellant challenges the inference drawn by the Trial Chamber that the Appellant's rhetoric was "merely the typical language of a politician hiding his real political intentions."[674]

324. The Prosecution submits that the Appellant fails to substantiate his assertion that there are two elements of *mens rea* required for persecutions, which in the Prosecution's understanding means that the specific intent required for persecutions also applies to the underlying crime.[675] Rather, the specific discriminatory intent requirement is merely supplementary and does not change the *mens rea* required for the underlying act.[676] Further, the Prosecution submits that the Trial Chamber did not err in finding the *mens rea* of the underlying acts to include *dolus eventualis*[677] and points out that the Trial Chamber found[678] that the Appellant acted with discriminatory intent in any event.[679]

325. The Prosecution submits that the Appellant has failed to substantiate the error he alleges regarding the Trial Chamber's evaluation of the evidence.[680] The Prosecution responds that the two items of evidence[681] relied upon by the Appellant are cited out of context and do not undermine the "overwhelming totality of evidence" establishing the Appellant's discriminatory intent beyond

[671] Stakić Appeal Brief, para. 323.
[672] Stakić Appeal Brief, para. 325.
[673] Stakić Appeal Brief, paras 327-333.
[674] Trial Judgement, para. 343 (the Appellant erroneously cites para. 341 in his Reply Brief, para. 113).
[675] Prosecution Response Brief, para. 5.77.
[676] Prosecution Response Brief, para. 5.80.
[677] Prosecution Response Brief, paras 6.14 *et seq.*
[678] Trial Judgement, para. 818.
[679] Prosecution Response Brief, para. 5.81, after noting that it is nevertheless relevant to determine the specific discriminatory intent of the direct perpetrators.
[680] Prosecution Response Brief, paras 5.75, 5.82.
[681] Namely, Ex. D56 and Ex. SK46, referred to in the Trial Judgement, paras 102 and 343 respectively. The Appellant's reliance, in another section of his Brief, on character evidence allegedly showing that he harboured no prejudice against non-Serbs (Stakić Appeal Brief, paras 439-441) and noted by the Prosecution (Prosecution Appeal Brief, para. 5.84) is not relevant to the factual determination of the requisite *mens rea* for persecutions. The Appellant neither raised that argument in respect of this issue, nor did he attempt to show how a reasonable trier of fact would not have come to the same conclusion as the Trial Chamber with respect to the character evidence.

reasonable doubt.[682] The Appellant has not demonstrated that the Trial Chamber erred in concluding that the Appellant acted with discriminatory intent.[683]

326. The Trial Judgement found the Appellant guilty of persecutions based on the underlying acts[684] of murder and deportation,[685] as well as torture,[686] physical violence,[687] rape,[688] constant humiliation and degradation,[689] and destruction of or willful damage to religious and cultural buildings.[690]

327. The Appeals Chamber notes that the definition of persecutions is well established in the jurisprudence of the Tribunal. The crime consists of:

> [a]n act or omission that: (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[691]

328. As the Trial Chamber correctly held, in addition to the chapeau requirements of knowledge of a widespread or systematic attack against a civilian population, the *mens rea* for persecutions consists of the intent to commit the underlying act and the intent to discriminate on political, racial or religious grounds.[692] The discriminatory intent requirement amounts to a "*dolus specialis.*"[693]

329. The Trial Chamber carefully considered evidence of the Appellant's personal discriminatory intent; such intent was neither presumed nor "transferred" from the direct perpetrators. Indeed, the Trial Chamber found that "it is immaterial for the assessment of the intent of the indirect perpetrator whether or not the actor had such a discriminatory intent".[694]

330. The Trial Chamber reasoned that the crimes "formed part of a persecutorial campaign headed *inter alia* by Dr. Stakić as [a] (co-)perpetrator behind the direct perpetrators"[695]; that "as the highest representative of the civilian authorities, Dr. Stakić played a crucial role in the co-ordinated co-operation with the police and army in furtherance of the plan to establish a Serbian municipality

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[682] Prosecution Response Brief, para. 5.82.
[683] Prosecution Response Brief, para. 5.84.
[684] Trial Judgement, para. 826 generally.
[685] *See* the Trial Judgement's Disposition.
[686] Trial Judgement, para. 785.
[687] Trial Judgement, para. 790.
[688] Trial Judgement, para. 806.
[689] Trial Judgement, para. 808.
[690] Trial Judgement, para. 813.
[691] *See Kordić* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 131; *Vasiljević* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, para. 185.
[692] Trial Judgement, para. 738.
[693] Trial Judgement, para. 737.
[694] Trial Judgement, para. 741.
[695] Trial Judgement, paras 818, 819.

in Prijedor"[696]; and that the Appellant "was thus one of the main actors in the persecutorial campaign."[697]

331. The Appellant refers to "other credible evidence" which allegedly demonstrates his lack of discriminatory intent, but limits himself to a brief discussion of only two exhibits "[d]ue to the page limitations."[698]

332. The first exhibit to which the Appellant refers is exhibit D56. This exhibit is an announcement from the "new leadership and government", read out on Radio Prijedor repeatedly on 30 April 1992.[699] The announcement is signed "the new leadership and government of the Municipality of Prijedor"[700] but is attributed to the Appellant, and is relied upon by him in his Appeal Brief to show that he expressed a desire for peaceful co-existence in Prijedor.

333. It is not disputed that in the announcement the Appellant professed that the take-over of power in the municipality of Prijedor was motivated by the objective of taking full responsibility for the peaceful and secure life of all citizens and peoples in it, "the protection of their property, the establishment of the rule of law, the organising of the economy, and normal life in the town and in the villages in the area of the municipality."[701]

334. The Appeals Chamber notes, however, that in the same speech the Appellant described how "war and slaughter, burning and destruction, charred homes, screams of terror" were "the aim of the fanatical and slavish rump leadership of Bosnia and Herzegovina", that "normal life and work" had been "disrupted by the single party and single nationality authorities of the Party of Democratic Action",[702] and that women and children from the Muslim population from Prijedor had "left for Croatia, Slovenia, Austria, and Germany where they spread lies saying that they were fleeing from massacres being prepared for them by the Serbian people."[703]

335. The Appeals Chamber is not persuaded that exhibit D56 supports the Appellant's case that he lacked the requisite discriminatory intent. Even if it did, however, this would not be sufficient to

[696] Trial Judgement, para. 822.
[697] Trial Judgement, para. 823.
[698] Stakić Appeal Brief, para. 329.
[699] Trial Judgement, paras 68, 102. Ex. D56 was submitted at trial by counsel for the Appellant and read aloud during proceedings by Witness Marjanović, T. 11652.
[700] Witness Marjanović, T. 11656.
[701] Ex. D56, T. 11654.
[702] The Party of Democratic Action was a political party representing Muslim interests.
[703] Ex. D56, T. 11653-11654.

undermine the Trial Chamber's conclusion, firmly based on other evidence,[704] that the Appellant possessed the requisite discriminatory intent.

336. The second exhibit to which the Appellant refers is exhibit SK46. This, the Appellant avers, shows that he had no intention other than to promote peace in Prijedor Municipality, a contention with which the Trial Chamber expressly disagreed following its analysis of that and other evidence. The Trial Chamber found that the Appellant's statement in exhibit SK46 "was merely the typical language of a politician hiding his real political intentions",[705] a finding which the Appellant contests as an error in law in that the inference drawn was not the only reasonable inference available.

337. The Appeals Chamber notes that the Trial Chamber did not simply dismiss the Appellant's statement as insincere. Rather, the Trial Chamber placed the statement in the context of other "compelling evidence" that illustrated, beyond a reasonable doubt, that the Appellant's true intention was to ensure the April 1992 take-over of power in Prijedor.[706] The Appeals Chamber considers that the Trial Chamber's conclusion was a reasonable one.

338. Despite broad allegations that the Trial Chamber drew other impermissible inferences, the Appellant does not identify any specific instance in which this might be the case. This further unsubstantiated submission by the Appellant is accordingly dismissed.

339. The Appeals Chamber concludes that the Trial Chamber did not err in its consideration of the evidence on the Appellant's *mens rea* for persecutions. Accordingly, the arguments of the Appellant are dismissed.

[704] In reference to murder: Trial Judgement, para. 777, fn. 1457, referring to Witness S, and fn. 1458, referring to Ex. S212; Trial Judgement, para. 778, fn. 1459, referring to Witness X, T. 6886-6914; Trial Judgement, para. 779, fn. 1460, referring to Witness Q, T. 3998-3999 (closed session). In reference to destruction of religious buildings: Trial Judgement, para. 812, fn. 1499, referring to pp. 3-4 of Witness AA's 92*bis* statement, Witness Čehajić, T. 3102, Witness H's 92*bis* transcript in *Sikirica*, T. 2257, Witness Beglerbegović, T. 4142, and Witness DF, T. 10099 (closed session); and Trial Judgement, para. 815, fn. 1502, referring to Witness Vulliamy, T. 7984.
[705] Trial Judgement, para. 343.
[706] Trial Judgement, paras 344, 346, 359, 364, 377, 389, 400-401, 404.

IX. THE APPELLANT'S FIFTH GROUND OF APPEAL: THE TRIAL CHAMBER'S APPLICATION OF ARTICLE 3 OF THE STATUTE

340. Under his fifth ground of appeal, the Appellant claims that the Trial Chamber erred in its consideration of the evidence establishing a "nexus" between the acts of the Appellant and the armed conflict, as required by Article 3 of the Statute.[707] He cites the *Tadić* Trial Judgement for the proposition that for an offence to constitute a violation of international humanitarian law, a Trial Chamber must be satisfied "that *each* of the alleged acts was in fact closely related to the hostilities."[708] Here, the Appellant claims, the Trial Chamber did not specifically analyse the required nexus with respect to each alleged act. Instead, the Trial Chamber relied only on the three particular instances cited in paragraph 576 of the Trial Judgement. The killings in Prijedor occurred later than those instances, the Appellant notes, and cannot be assumed to share the same nexus to the armed conflict.[709] The Appellant observes that most of the acts in question were committed by the police and not the military, and argues that they are no more closely related to the armed conflict than were the crimes alleged in the *Akayesu* case before the ICTR, where no nexus was found.[710]

341. The Prosecution responds that the Trial Chamber considered the nexus criteria set out in the *Kunarac* Appeal Judgement, which are settled law,[711] and correctly found that the crimes of the Appellant met these criteria.[712] It adds that it is the Appellant's connection to the *hostilities* – not to one of the parties involved in the conflict – that is relevant to the nexus analysis and that the distinction between involvements with the military *versus* the police is irrelevant.[713]

342. For Article 3 to apply, the crime charged must be committed in a time of armed conflict and an accused's acts must be closely related to that conflict.[714] The latter requirement is known as the "nexus" requirement. The nexus need not be a causal link, "but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it

[707] Stakić Appeal Brief, paras 334, 340. The Appellant's other arguments under this ground, concerning the evidence and legal requirements related to his *mens rea*, are considered elsewhere in this Judgement and will not be addressed here.
[708] *Tadić* Trial Judgement, para. 573 (emphasis added).
[709] Stakić Appeal Brief, paras 346-347.
[710] Stakić Appeal Brief, paras 342-344.
[711] Prosecution Response Brief, para. 6.3, citing *Kunarac* Appeal Judgement, para. 59; Trial Judgement, para. 569.
[712] Prosecution Response Brief, paras 6.4, 6.8, citing Trial Judgement, paras 158, 347 *et seq*, 373, 491, 576, 589, 591, 596, 600, 614, 616.
[713] Prosecution Response Brief, para. 6.5.
[714] *Tadić* Appeal Decision on Jurisdiction, paras 67, 70; *Kunarac* Appeal Judgement, para. 55; *Rutaganda* Appeal Judgement, paras 569-571.

was committed."[715] The Appeals Chamber has thus held that "if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict."[716] To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[717] For example, Article 3 crimes need not be committed in the area of armed conflict, but must at least be "substantially related" to this area, which at least includes the entire territory under control of the warring parties.[718] It is essential, however, that a Trial Chamber establish the existence of a geographical and temporal linkage between the crimes ascribed to the accused and the armed conflict.

343. The Trial Chamber here found that an armed conflict existed in the geographic area and time-period relevant to the Indictment.[719] It then concluded that there was a nexus "between this armed conflict and the acts of the Accused."[720] At first glance, the Trial Chamber's nexus analysis is brief, demonstrating the connection between the Crisis Staff and the military by examining only two specific instances: the attacks on Hambarine and Kozarac.[721] The Appellant was ultimately found guilty of many other crimes under Article 3, including July 1992 killings in Bišćani, Čarakovo, Briševo, the Ljubija football stadium and the Ljubija iron ore mine area.[722]

344. While it would have been preferable had the Trial Chamber incorporated by reference all of the relevant analysis it undertook elsewhere into the section specifically addressing the nexus requirement, the Appeals Chamber notes that the Trial Judgement must be considered as a whole. When considered as a whole, it is clear from the Trial Judgement that the requisite nexus analysis was indeed undertaken in paragraphs 590 to 616. For each of the three categories of killings the Trial Chamber considered – the camp killings, the convoy killings and the municipality killings – the Trial Chamber sufficiently demonstrated that the Appellant's Article 3 crimes were linked to the armed conflict.

[715] *Kunarac* Appeal Judgement, para. 58.
[716] *Kunarac* Appeal Judgement, para. 58.
[717] *Tadić* Appeal Decision on Jurisdiction, para. 70.
[718] *Kunarac* Appeal Judgement, paras 60, 64.
[719] Trial Judgement, para. 571.
[720] Trial Judgement, paras 575-576.
[721] Trial Judgement, paras 569-570, 576. The Trial Chamber specifically found that the Appellant issued an ultimatum to the residents of Hambarine that they should surrender their weapons or suffer the consequences, that the Crisis Staff made the decision to intervene militarily in Hambarine, that the Appellant stated, referencing the Crisis Staff, "we made a decision that the army and police go up there […]", and also cited to various evidence that the Appellant maintained close contacts with the military (Trial Judgement, para. 576).
[722] Trial Judgement, paras 588, 616.

345. The Trial Chamber found that the convoy and municipality killings occurred in and between various villages in the Prijedor region from May to July 1992.[723] The killings were therefore geographically and temporally linked with the armed conflict which the Trial Chamber found to exist in the Prijedor Municipality between 30 April and 30 September 1992.[724] The Trial Chamber also found that the crimes with which the Appellant was charged were linked to the conflict on the basis of evidence presented at trial. Chief among this evidence was the Trial Chamber's finding that the war effort in Prijedor was overseen, directed and co-ordinated by the Appellant as President of the Crisis Staff.[725] Indeed, the Trial Chamber's findings make clear that the very existence of the Crisis Staff (later called the War Presidency) was a function of the conflict; it was there to organise "defence activities".[726] All of the crimes the Appellant carried out through his role as President of the Crisis Staff were thus, in effect, carried out "under the guise of the armed conflict".

346. The Appeals Chamber reiterates that a Trial Chamber may draw its own reasonable conclusions based on the facts of the case before it, and is not bound by the factual findings of another case. The Trial Chamber in the *Akayesu* case found that evidence that Akayesu wore a military jacket, carried a rifle, assisted the military on their arrival in Taba and allowed the military to use his office was insufficient to establish a nexus between Akayesu and the armed conflict.[727] That case involved very different factual circumstances, however, and is of no import here. The Appeals Chamber finds that the Trial Chamber reasonably drew its conclusions that a nexus existed on the facts before it.

347. The Appellant's contention that there was not a sufficient connection shown between himself and the police, who were the direct perpetrators of many of the crimes for which he was found guilty as a co-perpetrator, is also unconvincing. The relevant question is whether the Appellant's acts were connected to the armed conflict – not to a particular group. In any event, it was adequately shown that there was co-ordination between the police and the military in conducting the armed conflict in Prijedor during the time-period in the Indictment. The Trial Chamber found that a police report demonstrated that the Crisis Staff made the decision to invade Hambarine and that the Appellant himself stated: "*we* made a decision that the army and the police go up there [Kozarac]…".[728] In addition, in its discussion of the *mens rea* for murder pursuant to Article 3, the Trial Chamber references Section III.B.2 of the Trial Judgement (paras 469-498), which describes the co-ordinated acts of the Appellant and prominent members of the police and

[723] Trial Judgement, paras 210-219, 251-274.
[724] Trial Judgement, paras 571-574.
[725] Trial Judgement, paras 99-100, 137, 159, 356–359, 366-374, 402-408, 469, 477, 479, 484, 486-488, 576.
[726] Trial Judgement, para. 356.
[727] *Akayesu* Trial Judgement, paras 641-643.
[728] Trial Judgement, para. 576.

military to consolidate Serbian control in Prijedor.[729] These findings adequately demonstrate that the Appellant acted under the guise of armed conflict in conjunction with the police as well as the military.

348. Finally, even if there were a time discrepancy between the Prijedor killings and the three events referred to in paragraph 576 of the Trial Judgement, this inconsistency would not undermine the nexus finding, as those prior events are sufficiently linked to the later crimes for which the Appellant was convicted.[730] Both the ultimatum to the residents of Hambarine and the attack on Kozarac occurred in May 1992, during the period of armed conflict considered by the Trial Chamber.[731] Further, as stated above, a more detailed consideration of the connections between the Appellant's crimes and the armed conflict was given by the Trial Chamber in other sections of the Judgement.[732]

349. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber's conclusion that the crimes for which the Appellant has been found guilty were closely related to the armed conflict is not in error.

[729] Trial Judgement, para. 593.
[730] Para. 576 refers to an ultimatum to the residents of Hambarine to surrender their weapons, an SJB report stating that it was the Crisis Staff who decided to invade Hambarine, and an interview in which the Appellant stated that the Crisis Staff decided to attack the town of Kozarac.
[731] Trial Judgement, paras 131, 141-152, 571, 576.
[732] *See* paras 345-346 *supra*.

X. THE APPELLANT'S SEVENTH AND THE PROSECUTION'S FOURTH GROUNDS OF APPEAL: CUMULATIVE CONVICTIONS

350. Both the Prosecution and the Appellant advance grounds of appeal alleging that the Trial Chamber erred in law in its application of the law on cumulative convictions. As both appeals overlap to a significant degree, the Appeals Chamber will deal with both appeals in this section.

A. Arguments of the parties

1. Prosecution's Appeal

351. The Trial Chamber declined to enter convictions for murder and deportation in light of its conviction for persecutions based on, *inter alia*, the same underlying acts. It reasoned that the crime of persecutions most accurately captured the nature of the Appellant's criminal conduct taken as a whole.[733] The Prosecution argues that the Trial Chamber does not have the discretion to choose among convictions on this basis. Here, it argues, it is appropriate to enter multiple convictions based on the same underlying acts because the standard set in the *Čelebići* Appeal Judgement is satisfied: each of the crimes comprises at least one materially distinct element that is not present in the other. The Prosecution notes that the discriminatory intent requirement for persecutions is not required for murder or deportation, and that the *actus reus* elements for murder and deportation are not required for persecutions.[734]

352. The Prosecution also submits that each of the crimes listed as a crime against humanity under Article 5 of the Statute seeks to protect different social interests and values,[735] and that the materially distinct elements of each crime reflect these different social interests and values.[736] For example, the crime of deportation reflects the right to freedom of movement and the crime of persecutions protects the identity of political, racial and religious groups.[737] The Prosecution argues that the protected legal values should be considered when determining whether cumulative convictions would promote the interests of justice.[738]

353. The Appellant responds that as the *Čelebići* Appeal Judgement adopted the test for cumulative convictions as stated in the case of *Blockburger v. United States*,[739] it thereby accepted the rationale and ramifications of the test as reflected in the jurisprudence of the United States

[733] *See* Trial Judgement, para. 870, 880.
[734] Prosecution Appeal Brief, paras 5.21-5.28, 5.38-5.44.
[735] Prosecution Appeal Brief, para. 5.45.
[736] Prosecution Appeal Brief, paras 5.45-5.52.
[737] Prosecution Appeal Brief, para. 5.51.
[738] Prosecution Appeal brief, para. 5.45, fn. 449, citing *Kupreškić* Trial Judgement, paras 695, 710.

Supreme Court.[740] The Appellant submits that in this context a "societal values" analysis has no role to play in the application of the *Blockburger* test.[741] Moreover, he submits that, in determining whether the "materially distinct element" test is satisfied, it is necessary to focus on the substantive elements of the crime and not on the chapeau requirements.[742] A proper application of the test leads to the conclusion that he should not be cumulatively convicted for the crimes of murder, deportation and persecutions set out in Count 3, 6 and 7 of the Indictment as they arise out of the same purported conduct and describe the same or similar criminal acts.[743]

2. Appellant's Appeal

354. In his own appeal, the Appellant argues that the Trial Chamber was correct in holding that, where the same facts underlie charges of persecutions and another crime against humanity, the persecutions charge will always be more specific and the other charge should thus be dismissed. He contends, however, that the Trial Chamber failed to apply this holding correctly, in that it convicted him cumulatively for both persecutions and extermination as a crime against humanity based on the same facts.[744] In response, the Prosecution reiterates that the *Čelebići* test should govern, and observes that extermination and persecutions each comprise at least one materially distinct element: extermination requires mass killing, while persecutions requires discriminatory intent.[745]

B. Discussion

355. The two-pronged legal test to be applied in determining whether cumulative convictions are permissible was established by the Appeals Chamber in the *Čelebići* Appeal Judgement ("*Čelebići* test"), which stated:

> Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of

[739] *Blockburger v. United States*, 284 U.S. 299, (1932).
[740] Stakić Response Brief, para. 193.
[741] Stakić Response Brief, para. 195, Stakić Reply Brief, para. 162.
[742] Stakić Response Brief, para. 200.
[743] Stakić Response Brief, paras 203-204.
[744] Stakić Appeal Brief, paras 534-544.
[745] Prosecution Response Brief, paras 8.3-8.5.

> which contains an additional materially distinct element, then a conviction should be entered only under that provision.[746]

356. Whether the same conduct violates two distinct statutory provisions is a question of law.[747] Therefore, the *Čelebići* test focuses on the legal elements of each crime that may be the subject of a cumulative conviction rather than on the underlying conduct of the accused.[748] The *Kordić* Appeal Judgement explained that:

> When applying the *Čelebići* test, what must be considered are the legal elements of each offence, not the acts or omissions giving rise to the offence. What each offence requires, as a matter of law, is the pertinent inquiry. The Appeals Chamber will permit multiple convictions for the same act or omission where it clearly violates multiple distinct provisions of the Statute, where each statutory provision contains a materially distinct element not contained in the other(s), and which element requires proof of a fact which the elements of the other statutory provision(s) do not. The cumulative convictions test serves twin aims: ensuring that the accused is convicted only for distinct offences, and at the same time, ensuring that the convictions entered fully reflect his criminality.[749]

For the purposes of applying the *Čelebići* test, the legal elements of the crime include the *chapeau* requirements of the particular crime.[750]

357. The test is clear, and the Appeals Chamber considers it unnecessary to deal with the peripheral submissions of the parties concerning tests in domestic jurisdictions or the underlying social values and interests reflected in particular crimes.[751]

358. The law on cumulative convictions as established in the *Čelebići* Appeal Judgement was correctly stated by the Trial Chamber in the Trial Judgement.[752] However, the Trial Chamber went on to further qualify the test, stating that "in the exercise of its discretion, [the Chamber would] convict only in relation to the crime that most closely and most comprehensively reflects the totality of the accused's criminal conduct".[753] In the view of the Appeals Chamber, such an exercise of discretion constitutes an error of law. When the evidence supports convictions under multiple counts for the same underlying acts, the test as set forth in *Čelebići* and *Kordić* does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements.

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[746] *Čelebići* Appeal Judgement, paras 412-413.
[747] *Kordić* Appeal Judgement, para. 1032.
[748] Both parties have indicated their agreement with this principle in their submissions. However, the Appeals Chamber notes that the Appellant also makes the inconsistent submission that it is the conduct of the accused that matters in the application of the test. The Appeals Chamber disagrees with this submission. *See* Prosecution Appeal Brief, para. 5.23, Prosecution Reply Brief, para. 4.2; Stakić Response Brief, paras 200, 205, Stakić Reply Brief, para. 162.
[749] *Kordić* Appeal Judgement, para. 1033 (footnotes omitted).
[750] *Kunarac* Appeal Judgement, para. 177.
[751] Prosecution Response Brief, paras 8.6-8.7. *See* Prosecution Appeal Brief, paras 5.26, 5.35-5.36, 5.45-5.52; Stakić Appeal Brief, para. 542, fn. 555, Stakić Response Brief, paras 189-199; Stakić Reply Brief, paras 159-160, 162-163.
[752] Trial Judgement, para. 869.
[753] Trial Judgement, para. 870.

1. The application of the cumulative convictions test.

(a) Murder as a crime against humanity and persecutions

359. The permissibility of cumulative convictions for the crimes of murder as a crime against humanity under Article 5(a) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute was specifically considered in the *Kordić* Appeal Judgement. The Appeals Chamber found in that case that the crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of murder, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate.[754] The crime of murder was held to require proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions – proof that the accused caused the death of one or more persons.[755] Therefore, cumulative convictions for the crimes of murder as a crime against humanity under Article 5(a) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute are permissible. The Trial Chamber erred in finding otherwise.

(b) Deportation and persecutions

360. The crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of deportation, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate.[756] The crime of deportation requires proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions – proof that the accused forcibly displaced civilians across a border.[757] Therefore, cumulative convictions are permissible for the crimes of deportation as a crime against humanity under Article 5(d) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute. The Trial Chamber erred in finding otherwise.

(c) Other inhumane acts (forcible transfer) and persecutions

361. Although the Trial Chamber did not enter a conviction for the "other inhumane act" of forcible transfer (hereinafter "other inhumane acts") and thus did not apply the *Čelebići* test to the distinction between this crime and that of persecutions, the Appeals Chamber has established above

[754] *Kordić* Appeal Judgement, para. 1041.
[755] *Kordić* Appeal Judgement, para. 1041.
[756] *See Kordić* Appeal Judgement, para. 1041.
[757] *See* Section VIII.C *supra.*

that the Trial Chamber erred in not entering a conviction for other inhumane acts. As a result, the Appeals Chamber proceeds to this analysis.

362. The crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of other inhumane acts, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate. The crime of other inhumane acts requires proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions – namely proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. Therefore, cumulative convictions are permissible for the crimes of other inhumane acts as a crime against humanity under Article 5(i) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute.

(d) Extermination and persecutions

363. In apparent contradiction to its own conclusion that the crime of persecutions will always be the more specific crime where more than one crime under Article 5 of the Statute is established, the Trial Chamber convicted the Appellant for the crime of extermination on the basis that it "reflect[s] the totality of the accused's culpable conduct directed both at individual victims and at groups of victims on a large scale".[758] As stated above, the test applied by the Trial Chamber was erroneous. The Appeals Chamber therefore proceeds to conduct a proper application of the *Čelebići* test.

364. The crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of extermination, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate. The crime of extermination under Article 5(b) of the Statute requires an element that is not required to be proven in establishing the crime of persecutions – namely proof that the acts of the accused caused the death of a large number of people. Therefore, cumulative convictions for the crimes of extermination as a crime against humanity under Article 5(b) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute are permissible.

2. The effect of the errors of law

365. It remains for the Appeals Chamber to consider the permissibility of cumulative convictions for deportation, other inhumane acts (forcible transfer), murder, and extermination, where the underlying acts or omissions are the same.

[758] Trial Judgement, para. 877.

366. As may be seen from the paragraphs above, the crimes of deportation, other inhumane acts and extermination all require proof of materially distinct elements not required by the other crimes. The crime of deportation requires proof that the accused participated in the forcible displacement of civilians across a border.[759] The crime of other inhumane acts requires proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity.[760] The crime of extermination is the act of killing on a large scale.[761] However, the crime of murder does not require any material elements to be proven over and above those required for the crime of extermination. Therefore, where the elements of the crimes of murder under Article 5(a) of the Statute and extermination under Article 5(b) of the Statute are established on the basis of the same underlying facts, the crime of extermination is considered the more specific crime and cumulative convictions under Articles 5(a) and 5(b) of the Statute are thus impermissible.[762]

367. In summary, a proper application of the cumulative convictions test in this case allows convictions to be entered for the Article 5 crimes of extermination, deportation, other inhumane acts and persecutions. A conviction cannot be entered for the crime of murder under Article 5 as this crime is impermissibly cumulative with the crime of extermination. The effect, if any, of this finding on sentencing will be considered under the section dealing with that ground of appeal.

[759] *See* Section VIII.C *supra.*
[760] *Kordić* Appeal Judgement, para. 1041.
[761] *See* the discussion of the crime of extermination in the section on Article 5(b) *supra*, and *Ntakirutimana* Appeal Judgement, para. 542.
[762] *See Ntakirutimana* Appeal Judgement, para. 542. *See* also *Kajelijeli* Trial Judgement, para. 886, *Kayishema and Ruzindana* Trial Judgement, paras 647-650, *Rutaganda* Trial Judgement, para. 422, *Musema* Trial Judgement, para. 957, *Semanza* Trial Judgement, paras 500-505.

XI. THE APPELLANT'S SIXTH GROUND OF APPEAL: SENTENCING

368. As his sixth ground of appeal, the Appellant submits that the Trial Chamber committed a discernible error in imposing a life sentence and requests a new trial on sentencing or, in the alternative, a significantly reduced sentence.[763] The arguments advanced by the Appellant are addressed in the following sections.

A. Alleged misconduct of the Prosecution

369. The Appellant argues that the Trial Chamber did not adequately take into account in sentencing the shortcomings and misconduct of the Prosecution as outlined in paragraph 13 of the Trial Judgement.[764] The Prosecution responds that there is no evidence or finding of alleged misconduct. The Prosecution submits that the Trial Chamber observed that there were certain shortcomings on the issue of disclosure of Rule 68 material which the Trial Chamber remedied and which has no bearing on sentencing.[765] In reply, the Appellant submits that the Trial Chamber noted the Prosecution's shortcomings because it was troubled by the "sharp trial tactics and self governance used by the Prosecution in refusing to tender evidence".[766]

370. The Appeals Chamber notes that the Appellant is correct in submitting that the Trial Chamber expressed its concerns about the shortcomings of the Prosecution in the presentation of "certain available and crucial evidence".[767] It is also true, however, that, as noted by the Prosecution, the Trial Chamber did take action to remedy these shortcomings such as calling witnesses *proprio motu* pursuant to Rule 98 and ordering the Prosecution to produce additional evidence.[768] The Appellant has not demonstrated in his rather scant submissions the legal basis on which the Trial Chamber should have taken these shortcomings into account as a mitigating factor, in view of the fact that the Trial Chamber had already taken action to remedy them. In view of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error. For this reason, this argument is dismissed.

B. Alleged failure to hear an expert criminologist or psychiatrist

371. The Appellant argues that the Trial Chamber erred in refusing to hear the evidence of an expert criminologist or psychiatrist which would have been relevant to sentencing as it related to his

[763] Stakić Appeal Brief, para. 376.
[764] Stakić Appeal Brief, para. 375.
[765] Prosecution Response Brief, para. 7.3.
[766] Stakić Reply Brief, para. 128.
[767] Trial Judgement, para. 13.
[768] Trial Judgement, para. 13.

propensity to commit crimes.[769] The Appellant refers to the *Dragan Nikolić* Sentencing Judgement, where the Trial Chamber relied on such an expert to reduce the accused's sentence from life imprisonment to 23 years.[770] The Appellant claims that such evidence was essential to this case and would have led to a lesser sentence.[771]

372. As the Prosecution notes, the Appellant agreed during the trial to strike from his list of witnesses a medical expert[772] and a forensic criminal expert.[773] The Trial Chamber made clear to the Appellant that he could in any case, pursuant to Rule 73*ter*(F), seek additional time to call a medical expert at a later stage.[774] The Appellant did not do so and cannot expect the Appeals Chamber to compensate for his own failure at trial. Furthermore, as to the comparison with the *Nikolić* case, the Appeals Chamber recalls that the Trial Chamber had the discretion to determine which experts it wanted to hear depending on the circumstances of the case before it and that it is therefore not bound to follow the approaches adopted in other cases. For these reasons, the Appeals Chamber finds that the Trial Chamber did not commit a discernible error. This argument is dismissed.

C. Allegation that the sentence of life imprisonment be limited to the gravest of crimes

373. The Appellant argues that the maximum sanction of life in prison should be reserved for situations where an individual is found to have personally committed the most serious crime possible, namely genocide.[775] He claims that imposing the maximum sanction to lesser offences than genocide may undermine deterrence, leading to the commission of graver crimes because the sanctions would be the same.[776]

374. The Prosecution submits that there is no jurisprudence from the Tribunal to support the claim that life imprisonment is reserved only for persons convicted of genocide[777] and that the Trial Chamber's consideration of retribution and deterrence is consistent with the approach adopted in other cases.[778]

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[769] Stakić Appeal Brief, para. 394.
[770] Stakić Appeal Brief, para. 395, referring to *Dragan Nikolić* Sentencing Judgement, paras 39, 252. The Sentence was reduced to 20 years on Appeal.
[771] Stakić Appeal Brief, paras 394-395.
[772] T. 9424.
[773] T. 9426.
[774] T. 9424.
[775] Stakić Appeal Brief, para. 396.
[776] Stakić Appeal Brief, para. 399.
[777] Prosecution Response Brief, para. 7.8.
[778] Prosecution Response Brief, para. 7.11, referring to *Čelebići* Trial Judgement, para. 1234 and *Kambanda* Trial Judgement, para. 58.

375. The Appeals Chamber stresses that there is no hierarchy of the crimes within the jurisdiction of the Tribunal and that, contrary to what the Appellant alleges, the sentence of life imprisonment can be imposed in cases other than genocide. Under Rule 101(A) of the Rules, the maximum penalty is life imprisonment, and this can be imposed for any of the crimes under the Tribunal's Statute. The concrete gravity of the crime remains "the litmus test" in the imposition of an appropriate sentence.[779] The Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.[780] By doing so, Trial Chambers contribute to the promotion of and respect for the rule of law and respond to the call from the international community to end impunity "while ensuring that the accused are punished solely on the basis of their wrongdoings and receive a fair trial".[781] The Appeals Chamber considers that it is by imposing sentences in line with these principles and not by making abstract distinctions among crimes as suggested by the Appellant, that the principles of retribution and deterrence are fully respected. In this case, the Appellant was convicted as a co-perpetrator of extremely serious crimes, including an extermination campaign that the Trial Chamber estimated killed approximately 1,500 people in Prijedor municipality.[782] The Appeals Chamber considers that it was consistent with the above-outlined principles, and therefore within the Trial Chamber's discretion, to decide that a life sentence was appropriate for this crime.

376. For these reasons, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in the imposition of a life sentence. The Appellant's argument is therefore dismissed.

D. The principle of proportionality and the sentencing practices of the Tribunal and of the ICTR

377. The Appellant asserts that the Trial Chamber failed to adequately consider the principle of proportionality and ignored his submissions on this issue.[783] The Appellant points to the fact that he was convicted as an indirect co-perpetrator and that the other defendants who personally perpetrated the crimes received much lighter sentences.[784] The Appellant submits that many cases from the ICTR, World War II Tribunals and this Tribunal support the proposition that his sentence was excessive.[785]

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[779] *Aleksovski* Appeal Judgement, para. 182; *Čelebići* Appeal Judgement, para. 731; *Jelisić* Appeal Judgement, para. 101.
[780] *Čelebići* Appeal Judgement, para. 717; *Dragan Nikolić* Appeal Judgement, para. 9.
[781] *Dragan Nikolić* Appeal Judgement, para. 46.
[782] Trial Judgement, para. 654.
[783] Stakić Appeal Brief, para. 404.
[784] Stakić Appeal Brief, paras 414-416.
[785] Stakić Appeal Brief, paras 418-421, 426-435.

378. The Appellant submits that the principle of proportionality requires that the sentences imposed against the other "indirect" perpetrators be analysed in order to harmonise his sentence with theirs.[786] In particular, he observes that the sentences given to defendants Kvočka, Krnojelac, Mučić, Todorović, and Plavšić ranged between seven and eleven years even though, he contends, those individuals' culpability was the same or greater than his own; he also cites the 35 year sentence given to defendant Krstić.[787] The Appellant also maintains that indirect perpetration is a lesser form of culpability equivalent to aiding and abetting, and cites the *Vasiljević* Appeal Judgement's holding that "aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator."[788]

379. The Prosecution contends that the Trial Chamber based its reasoning on both the Appellant's role and the gravity of the offences[789] and that it therefore did consider the principle of proportionality.[790] It notes how the Trial Chamber referred to the Appeals Chamber's jurisprudence[791] in support of its position that the final sentence imposed in other cases can be of little assistance in this case[792] and argues that the Appellant has failed to establish that the Trial Chamber erred in characterising this case as "unique".[793]

380. The Appeals Chamber wishes to clarify that, as noted by the Trial Chamber,[794] the fact that an accused is found guilty as an "indirect co-perpetrator" does not in itself entitle him to a lower sentence. It is settled in the jurisprudence of the Tribunal that the length of the sentence depends first of all on the gravity of the crime and that "[t]he 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."[795] Moreover, the Appeals Chamber notes that the role of the "indirect co-perpetrators" can be very significant, particularly in cases of large scale crimes which could not be committed without the help of the indirect co-perpetrators in such ways as planning, instigating, co-ordinating or organising. Such is the case of the Appellant. In finding that the Appellant was an "indirect co-perpetrator", the Trial Chamber did not suggest that the Appellant had a limited role in the events unfolding in the Municipality of Prijedor. Quite to the contrary, throughout its judgement the Trial Chamber took care to explain the relevance of the role

[786] Stakić Appeal Brief, para. 425.
[787] Stakić Appeal Brief, paras 426-429; Stakić Reply Brief, paras 132-133.
[788] *Vasiljević* Appeal Judgement, para. 182.
[789] Prosecution Response Brief, para. 7.5.
[790] Prosecution Response Brief, para. 7.12.
[791] Trial Judgement, para. 928, citing *Čelebići* Appeal Judgement, para. 821; *Kupreškić* Appeal Judgement, para. 443.
[792] Prosecution Response Brief, para. 7.16.
[793] Prosecution Response Brief, para. 7.18.
[794] Trial Judgement, para. 918.
[795] *Aleksovski* Appeal Judgement, para. 182, citing *Kupreškić* Trial Judgement, para. 852 (emphasis added).

of the Appellant in the implementation of the common criminal goal. For instance, the Trial Chamber found that the Appellant

> …played a unique pivotal role in co-ordinating the persecutory campaign carried out by the military, police and civilian government in Prijedor.[796]

Furthermore, the Appeals Chamber has clarified above that the role of the Appellant was in fact that of a participant in the joint criminal enterprise[797] and that his role in the commission of the crimes underlying the Common Purpose was by no means minimal. For this reason, the Appeals Chamber concludes that the role the Appellant played as an "indirect co-perpetrator" did not justify the imposition of a lower sentence.

381. As to the comparison the Appellant draws with other cases, the Appeals Chamber recalls that "[a] previous decision on sentence may provide guidance if it relates to the same offence and was committed in substantially similar circumstances".[798] However, the Appeals Chamber also reiterates that "while [it] does not discount the assistance that may be drawn from previous decisions rendered, it also concludes that this may be limited."[799] The reason for this limitation is set out in Article 24(2) of the Statute which requires the Trial Chamber to take into account the gravity of the offence and the individual circumstances of the convicted person in imposing a sentence.

382. The Trial Chamber did take into account the Appellant's argument pertaining to a comparison with other cases.[800] It compared all the cases mentioned by the Appellant, apart from the *Krstić* case, but found that comparisons with such cases were inappropriate as the Appellant's case was of a "unique" nature.[801] The Appeals Chamber notes that the *Krstić* case can be distinguished from the instant case: Krstić was found guilty for aiding and abetting a joint criminal enterprise, while the Appellant participated in the common plan of a joint criminal enterprise, was aware that the crimes were a possible consequence of the execution of the Common Purpose and nevertheless acted in furtherance thereof.

383. In view of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error in concluding that his case could not be compared with other cases. Accordingly, this sub-ground of appeal is dismissed.

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[796] Trial Judgement, para. 906.
[797] *See* Section V *supra*.
[798] *Furundžija* Appeal Judgement, para. 250; *Čelebići* Appeal Judgement, para. 720.
[799] *Čelebići* Appeal Judgement, para. 721.
[800] Trial Judgement, para. 933.
[801] Trial Judgement, para. 931.

E. Allegation that the sentence was imposed because the Appellant was found guilty by association

384. The Appellant argues that the Trial Chamber "repeatedly engage[d] in guilt by association" by considering him together with police, military and other leaders[802] and that this prejudice is specifically demonstrated by the Trial Chamber's approach to the Omarska camp.[803] He submits that there was conflicting evidence concerning whether the Appellant was part of a delegation to the Omarska centre. Although the Trial Chamber indicated that there was not enough evidence to show that the Appellant had in fact visited the camp, the Trial Chamber speculated that the Appellant must have arrived in a subsequent automobile and joined the other persons touring the camp and held that he had knowledge of and actively engaged in the operation of the camp.[804]

385. The Prosecution argues that the Appellant was found guilty not by association, but rather because of his acts and role in co-ordinating the co-operation between the police, military and politicians[805] and that the Trial Chamber relied on evidence other than the alleged visit to Omarska camp to conclude that the Appellant had knowledge of the crimes committed there.[806] The Appellant replies that the Prosecution fails to recognise the graduation of sentence and the importance of assessing the responsibility of alleged co-indictees.[807]

386. The Appeals Chamber fails to see how the arguments raised by the Appellant reveal that he has been found "guilty by association". First, as to the circumstances of the Appellant's visit to Omarska, the Appeals Chamber notes that the Trial Chamber came to the conclusion that it was not proven beyond reasonable doubt that the Appellant was "among the members of the delegation visiting the Omarska camp".[808] Second, the role of the Appellant in relation to the detention facilities as spelled out in the Trial Judgement reveals much more than "guilt by association": the Trial Chamber found that the Crisis Staff – presided over by the Appellant – had a "management and oversight function in relation to the camps".[809] Finally, the Trial Chamber made clear that it would determine the appropriate sentence "only according to the specific and individual role of the Accused in the commission of the offences" and that "the possible responsibility of deceased co-indictees will not influence the sentence to be pronounced against Dr. Stakić."[810]

[802] Stakić Appeal Brief, para. 452.
[803] Stakić Appeal Brief, para. 453.
[804] Stakić Appeal Brief, para. 453.
[805] Prosecution Response Brief, para. 7.26.
[806] Prosecution Response Brief, para. 7.27.
[807] Stakić Reply Brief, para. 124.
[808] Trial Judgement, para. 399.
[809] Trial Judgement, para. 389.
[810] Trial Judgement, para. 905.

387. In light of these considerations, the Appeals Chamber finds the Appellant has failed to show that the Trial Chamber found the Appellant guilty by association. The arguments of the Appellant are therefore dismissed.

F. Whether the Trial Chamber imposed a minimum sentence

388. The Appellant submits that the Trial Chamber committed a discernible error by (1) effectively imposing a minimum sentence on him; (2) imposing conditions on the review of that sentence[811] when such authority is reserved to the relevant Host State[812]; and (3) usurping[813] the competence vested in the President of the Tribunal to ultimately decide such matters.[814]

389. The Prosecution argues that, as expressly acknowledged by the Trial Chamber, Rules 123 to 125 of the Rules remain unaffected by the Disposition, that the Host States remain competent to notify the Tribunal of the Appellant's eligibility for pardon or commutation of sentence under their municipal laws, and that the President of the Tribunal retains the discretionary power to grant pardon or commutation.[815]

390. In sentencing the Appellant to life imprisonment, the Trial Chamber stated that:

> The then competent court … shall review this sentence and if appropriate suspend the execution of the remainder of the punishment of imprisonment for life and grant early release, if necessary on probation, if: … **20 years** have been served calculated in accordance with Rule 101(C) from the date of Dr. Stakić's deprivation of liberty for the purposes of these proceedings, this being the "date of review".[816]

391. Contrary to the Appellant's contention, the Appeals Chamber holds that the Disposition does not impose a minimum sentence on the Appellant and does not preclude a review of the Appellant's sentence before he has served 20 years; indeed, the Trial Chamber made it clear that provisions relevant to sentences remain unaffected by the Disposition.[817] According to the Rules, should the laws of the Host State allow for the pardon or commutation of the Appellant's life sentence before 20 years have passed, then the Host State shall notify the Tribunal of such eligibility (Rule 123 of the Rules) and the President of the Tribunal shall determine whether pardon or commutation is appropriate (Rule 124 of the Rules). In this regard, therefore, the Trial Chamber did not commit any discernible error.

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[811] Stakić Appeal Brief, para. 455. The Appellant argues that Trial Chambers lack authority to intervene in decisions regarding probation, early release, pardon and commutation of sentence.
[812] Stakić Appeal Brief, paras 459-460.
[813] Stakić Appeal Brief, para. 456.
[814] Stakić Appeal Brief, paras 463-468.
[815] Prosecution Response Brief, para. 7.31.
[816] Trial Judgement, p. 253 (emphasis in original). *See* also Trial Judgement, p. 254.

392. On the other hand, the Appeals Chamber finds that the Disposition appears to impose a "20-year review obligation" on the Host State. This is inconsistent with the regime set forth in the Statute and Rules. The Statute,[818] Rules,[819] relevant Practice Direction,[820] and Model Agreement for enforcing sentences[821] each provide that eligibility of a convicted person for pardon, early release or commutation of sentence is determined by the law of the State in which the convicted person is serving his sentence.[822] These instruments also define the precise nature of the supervisory role of the Tribunal in this situation, granting the President of the Tribunal the power to make a final determination in each case.[823] The Appeals Chamber is of the view that imposing a 20-year review obligation on the courts of the Host State is contrary to these provisions as it imposes on the Host State both the date of review[824] and the relevant considerations when conducting the review,[825] thereby supplanting applicable municipal laws. Further, by vesting the courts of the Host State with the power to suspend the sentence, the Trial Chamber effectively removes the power from the President of the Tribunal to make the final determination regarding the sentence.

393. The Appeals Chamber finds that the Trial Chamber acted *ultra vires* in imposing a review obligation on the Host State and therefore committed a discernible error. The related part of the Trial Judgement's Disposition must be set aside. This error was clearly relevant to the determination of the sentence and, therefore, the Appeals Chamber will take it into account when revising the Appellant's sentence.

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[817] Trial Judgement, para. 937, referring to Rules 123-125 of the Rules, and to the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, IT/146, 7 April 1999.

[818] Article 28 of the Statute provides that "[i]f, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she may be eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly."

[819] Rule 123 of the Rules provides that "[if] according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility."

[820] The Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, which was issued by President Gabrielle Kirk McDonald "in order to establish an internal procedure for the determination of applications for pardon, commutation of sentence and early release of persons convicted by the International Tribunal" provides that "[u]pon a convicted person becoming eligible for pardon, commutation of sentence or early release under the law of the State in which the convicted person is serving his or her sentence ("the Enforcing State"), the Enforcing State shall, in accordance with its agreement with the International Tribunal on the enforcement of sentences…notify the International Tribunal accordingly."

[821] "If, pursuant to the applicable national law of the requested State, the convicted person is eligible for pardon or commutation of the sentence, the requested State shall notify the Registrar accordingly." Article 8(1), Agreement between the Government of Norway and the United Nations on the enforcement of sentences of the International Criminal Tribunal for the Former Yugoslavia (24 April 1998). The International Tribunal's agreement with Norway is, *mutatis mutandis*, identical to the Model Agreement. *See* also Tolbert, "Enforcement of Sentences" p. 535, fn. 10.

[822] It is notable that the issues in question here are explicitly addressed in the Statute and Rules, which otherwise provide little guidance to the relationship between the Host State and the Tribunal.

[823] Article 28 of the Statute, Rules 124 and 125 of the Rules, Practice Direction, paras 5-11.

[824] Trial Judgement, p. 253.

[825] Trial Judgement, p. 254.

G. Alleged violation of the prohibition against cruel, inhumane and degrading punishment

394. The Appellant argues that in his case a life sentence constitutes a form of punitive retribution rather than social rehabilitation, and as such constitutes cruel, inhumane and degrading punishment.[826] In support of this argument, the Appellant asserts that many States, including the former Yugoslavia, do not allow for life sentences because they are considered cruel, inhumane and degrading.[827] In addition, the Appellant argues that a sentence of life imprisonment is incompatible with the essential aims of reformation and social rehabilitation set forth in Article 10 of the ICCPR.[828]

395. The imposition of a life sentence is envisaged in Rule 101(A) of the Rules. Where the crimes for which an accused is held responsible are particularly grave, the imposition of a life sentence does not constitute a form of inhumane treatment but, in accordance with proper sentencing practice common to many countries, reflects a specific level of criminality. Neither Article 7 nor Article 10 of the ICCPR prohibits life imprisonment. Nor has the Appellant shown the existence of a rule in international criminal law prohibiting the imposition of life imprisonment. For the foregoing reasons, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error in imposing the sentence of life imprisonment. This argument is accordingly dismissed.

H. Alleged failure to consider the sentencing practice in the courts of the former Yugoslavia

396. The Appellant argues that the Trial Chamber erroneously concluded that the maximum sentence under the laws of the former Yugoslavia was life imprisonment.[829] The Appellant contends that had the Trial Chamber consulted legal scholars it would have sentenced the Appellant to 20 years' imprisonment, which is the maximum under the penal code of the SFRY.[830] The Appellant submits that in exceeding this maximum sentence, the Trial Chamber attempted to re-write the law of the SFRY,[831] violating the principles of *nullum crimen sine lege* and *nulla poena sine lege*, which prohibit retroactive crimes and punishments.[832] Further, the Appellant asserts that in failing to

[826] Stakić Appeal Brief, para. 483.
[827] Stakić Appeal Brief, paras 480-481.
[828] Stakić Appeal Brief, para. 482.
[829] Stakić Appeal Brief, paras 475, 486.
[830] Stakić Appeal Brief, paras 476, 487.
[831] Stakić Appeal Brief, para. 489.
[832] Stakić Appeal Brief, para. 469.

ascertain the correct maximum sentence, the Trial Chamber denied him the right to be fully informed[833] and denied the Appellant a fair trial.[834]

397. The Prosecution responds that the sentencing practice of the former Yugoslavia is only one factor to be taken into account when imposing a sentence, that it is within the Trial Chamber's discretion to decide on the weight to be accorded to it[835] and that the Trial Chamber did take this factor into account.[836]

398. Article 24(1) of the Statute provides that in determining a sentence "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". It is settled jurisprudence of the Tribunal that this provision of the Statute "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[837] The Trial Chamber acted in accordance with the settled jurisprudence and the applicable law of this Tribunal. Moreover, the Trial Chamber did not claim that courts in the former Yugoslavia would have imposed a sentence of life imprisonment for these offences; rather, the Trial Chamber stated that those courts would have imposed the death penalty or a sentence of greater than five years' imprisonment, with the possibility of substituting a twenty-year term for a death sentence.[838] It took into account the general practice regarding prison sentences in the former Yugoslavia[839] but did not decide the sentence as if it were bound by it. The Trial Chamber correctly established that the maximum sentence to be imposed by the Tribunal is life imprisonment, as provided for by Rule 101(A) of the Rules.[840] Because the Trial Chamber was bound to apply the law of this Tribunal and not that of the former Yugoslavia, the Appellant's contention that the Trial Chamber attempted to re-write the law of the SFRY and by doing so violated the principles of *nullum crimen sine lege* and *nulla poena sine lege* is without merit.

399. In view of the foregoing, the Appeals Chamber finds that the Trial Chamber did not commit a discernible error, and the argument of the Appellant is dismissed.

[833] Stakić Appeal Brief, para. 489.
[834] Stakić Appeal Brief, para. 490.
[835] Prosecution Response Brief, para. 7.36.
[836] Prosecution Response Brief, para. 7.37, citing Trial Judgement, paras 887-890.
[837] *Serushago* Appeal Judgement, para. 30; *see* also *Jokić* Appeal Judgement, para. 38; *Dragan Nikolić* Appeal Judgement, para. 69; *Tadić* Sentencing Appeal Judgement, para. 21.
[838] Trial Judgement, para. 889.
[839] Trial Judgement, paras 887-890.
[840] Trial Judgement, para. 890.

I. Whether the Trial Chamber erred when it relied exclusively on the principles of deterrence and retribution

400. The Appellant asserts that the Trial Chamber relied on the principles of retribution and deterrence at the expense of other important sentencing factors, including rehabilitation, reintegration into society, proportionality and consistency,[841] which should have been applied to ensure that the severity of the sentence fit not only the gravity of the crime, but the individual level of culpability and participation.[842] The Appellant asserts that "[i]mposing the maximum sanction on an individual who never had the propensity, before or after, to act in a criminal manner unjustifiably and without reason extinguishes the fundamental societal goal of sentencing, namely the rehabilitation of the individual defendant."[843]

401. The Prosecution asserts that reliance on retribution and deterrence is consistent with the jurisprudence of the Tribunal and the ICTR,[844] that there was no requirement that the Trial Chamber make specific reference to rehabilitation in the Trial Judgement[845] and that the jurisprudence of the Tribunal indicates that rehabilitation cannot play a predominant role.[846]

402. The Appeals Chamber notes that the Trial Chamber first emphasised that "[t]he individual guilt of an accused limits the range of the sentence" and then stated that "[o]ther goals and functions can only influence the range within the limits defined by the individual guilt".[847] It then considered "retribution" and "deterrence" as "general factors to be taken into account when imposing sentence".[848] The Trial Chamber did consider some elements of rehabilitation, such as the Appellant's personal and individual situation, in determining his sentence.[849] The Trial Chamber found that, given the serious nature of the crimes, those factors did not carry enough weight to alter the sentence.[850] It also considered the principles of equality before the law,[851] re-integration as part of deterrence,[852] and proportionality.[853] The Appeals Chamber notes that the jurisprudence of the

[841] Stakić Appeal Brief, paras 493-494.
[842] Stakić Appeal Brief, para. 495.
[843] Stakić Appeal Brief, para. 442.
[844] Prosecution Response Brief, para. 7.11.
[845] Prosecution Response Brief, para. 7.19.
[846] Prosecution Response Brief, para. 7.19, citing *Čelebići* Appeal Judgement para. 806.
[847] Trial Judgement, para. 899.
[848] Trial Judgement, para. 900, referring to *Aleksovski* Appeal Judgement, para. 185 and *Čelebići* Appeal Judgement, para. 806.
[849] Trial Judgement, paras 925-927.
[850] Trial Judgement, para. 924 : "The Trial Chamber finds that the mitigating circumstances do not carry enough weight to alter substantially the deserved sentence". *See* also para. 926: "This factor [personality of the Accused] will not be given undue weight given the severity of the crimes".
[851] Trial Judgement, para. 901.
[852] Trial Judgement, para. 902.
[853] Trial Judgement, para. 903.

Tribunal[854] and the ICTR[855] consistently points out that the two main purposes of sentencing are deterrence and retribution. Other factors, such as rehabilitation, should be considered but should not be given undue weight.[856] The Appeals Chamber therefore finds that the approach of the Trial Chamber is consistent with the jurisprudence of the Tribunal and the ICTR. As a result, the Trial Chamber did not commit a discernible error, and the argument of the Appellant is dismissed.

J. Whether the Trial Chamber failed to give adequate weight to evidence of mitigating circumstances

403. The Appellant argues that the Trial Chamber erred in failing to give adequate weight to mitigating factors. According to the Appellant, the Trial Chamber considered four specific mitigating factors but failed to give any weight to them in sentencing: the Appellant's consent to the appointment of a new Judge on 1 October 2002; the Appellant's behaviour towards certain witnesses; his personal situation including young age[857] and family concerns; and his personality.[858] The Appellant asserts that the Trial Chamber failed to consider other relevant mitigating factors: prior good character, no criminal record, good character after the alleged events and demeanour in detention.[859]

404. The Prosecution responds that the Trial Chamber did consider the first three mitigating factors listed by the Appellant but concluded that they did not carry enough weight to alter the sentence.[860] Concerning the personality and family situation of the Appellant, the Prosecution indicates that the Trial Chamber concluded that this factor should not be given undue weight in light of the severity of the crimes.[861] Regarding the Appellant's demeanour while in detention, the Prosecution argues that this was taken into consideration.[862] Concerning the absence of a criminal record and good character after the alleged events, the Prosecution asserts that the Appellant failed to produce any evidence in support of such a claim[863] and that the Trial Chamber considered all evidence in favour of his good personality.[864]

405. The Appeals Chamber notes that while Rule 101(B)(ii) of the Rules requires the Trial Chamber to take into account the mitigating factors when determining the sentence, the weight to

[854] *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806; *Furundžija* Trial Judgement, para. 288; *Tadić* Sentencing Judgement, paras 7-9; *Kupreškić* Trial Judgement, para. 848.
[855] *Kambanda* Trial Judgement, para. 28; *Rutaganda* Trial Judgement, para. 456.
[856] *Čelebići* Appeal Judgement, para. 806
[857] Stakić Appeal Brief, para. 501; AT. 353.
[858] Stakić Appeal Brief, paras 500-501.
[859] Stakić Appeal Brief, para. 502.
[860] Prosecution Response Brief, para. 7.40.
[861] Prosecution Response Brief, para. 7.40, citing Trial Judgement, para. 926.
[862] Prosecution Response Brief, para. 7.42, citing Trial Judgement, para. 922.
[863] Prosecution Response Brief, para. 7.42.

be attached to these factors is discretionary.[865] The Appeals Chamber finds that the above-mentioned four factors were explicitly considered by the Trial Chamber.[866] With regard to the personality of the Appellant the Trial Chamber found that this could be of limited weight given the severity of the crimes.[867] Similarly, with regard to the three other factors raised, the Trial Chamber found that they did not carry enough weight to alter substantially the deserved sentence.[868] The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error in exercising its discretion by attributing little weight to these factors.

406. The Appellant's second argument relates to the Trial Chamber's alleged failure to consider other mitigating factors. Contrary to the Appellant's contention, the Trial Chamber did take account of the Appellant's behaviour while in custody: "[t]he Trial Chamber … takes note of Dr. Stakić's correct behaviour during the trial and in the Untied Nations Detention Unit."[869] However, the Trial Chamber did not attribute much weight to this factor and the Appellant has failed to show that this amounted to a discernible error. Concerning other potential mitigating factors, the Appeals Chamber notes that the burden of proof is on the Appellant to show that they exist.[870] The Appellant has failed to do this with respect to his prior good character, lack of criminal record and good character after the alleged events. In any case, given the gravity of the crimes for which the Appellant was convicted, it is unlikely that evidence of good character prior to or following the events in question would have a significant impact on the sentence.

407. Finally, the Appellant argues that the imposition of a life sentence demonstrates that the Trial Chamber failed to properly evaluate the weight of all the mitigating factors. In *Musema*, the ICTR Appeals Chamber indicated that even if mitigation is found, a Trial Chamber can still impose a life sentence if the gravity of the offence requires the imposition of the maximum sentence.[871] Further, in the *Niyitegeka* Appeal Judgement, the ICTR Appeals Chamber indicated that there was no automatic reduction in a sentence as a result of mitigating factors, as the Trial Chamber need only to consider the mitigating factors in arriving at the final determination of the sentence.[872] As a result, the Appeals Chamber cannot conclude, based solely on the fact that a life sentence was imposed as the Appellant suggests, that the Trial Chamber failed to consider the mitigating factors. The Trial Chamber did consider the relevant mitigating factors, and the Appellant has not

[864] Prosecution Response Brief, para. 7.43.
[865] *Naletеilić and Martinović* Trial Judgement, para. 742.
[866] Trial Judgement, paras 920-927.
[867] Trial Judgement, para. 926.
[868] Trial Judgement, para. 924.
[869] Trial Judgement, para. 922.
[870] *Kunarac* Trial Judgement, para. 847.
[871] *Musema* Appeal Judgement, para. 396.
[872] *Niyitegeka* Appeal Judgement, para. 267.

demonstrated that in weighing these factors the Trial Chamber committed a discernible error warranting the imposition of a lesser sentence. Accordingly, this sub-ground of appeal is dismissed.

K. Aggravating factors

408. The Appellant asserts that all of the six aggravating factors considered by the Trial Chamber are subsumed in the conviction[873] and that the Trial Chamber erred as a matter of law and abused its discretion in considering them to be aggravating factors.[874] The submissions of the Appellant in relation to each of these six aggravating factors are addressed in turn.

1. The Appellant's superior position

409. The Appellant alleges that including his superior position as an aggravating factor violates the principles of "duplicity and multiplicity".[875] He contends that it was an error to consider his superior position in sentencing when the finding of guilt resulted from the position he held.[876] The Appellant claims that the reasoning of the Trial Chamber is ambiguous and fails to properly distinguish his "individual criminal culpability from that of his purported superior/command criminal culpability."[877]

410. The Prosecution maintains that the Tribunal jurisprudence[878] has shown that when liability is proven under Article 7(1) of the Statute, the superior position of an accused, in the sense of Article 7(3) of the Statute, can constitute an aggravating factor.[879] The Appellant replies by citing the dissenting opinion of Judge Nieto-Navia in the *Galić* Trial Judgement[880] in support of the notion that superior position should not be used as an aggravating factor.[881]

411. In considering the superior position in connection with Article 7(1), the Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal that superior position itself does not constitute an aggravating factor. Rather it is the abuse of such position which may be considered an aggravating factor.[882] The Appeals Chamber understands the Trial Chamber in the present case to

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[873] AT. 337.
[874] Stakić Appeal Brief, para. 508; AT. 337, 349.
[875] Stakić Appeal Brief, para. 513; AT. 351.
[876] Stakić Appeal Brief, para. 512; *see* AT. 351.
[877] Stakić Appeal Brief, para. 514.
[878] *Čelebići* Appeal Judgement, para. 745; *Kupreškić* Appeal Judgement, para. 451; *Krnojelac* Trial Judgement, paras 173, 496.
[879] Prosecution Response Brief, para. 7.45.
[880] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, Trial Judgement, 5 December 2003, para. 121.
[881] Stakić Reply Brief, para. 135.
[882] *Kayishema and Ruzindana* Appeal Judgement, paras 358–359; *Babić* Judgement on Sentencing Appeal, para. 80; *Kamuhanda* Appeal Judgement, para. 347; *see Aleksovski* Appeal Judgement, para. 183; *Ntakirutimana* Appeal Judgement, para. 563, *Krstić* Trial Judgement, para. 709.

have applied this law correctly as the Appellant did indeed abuse his superior position to commit the crimes. Furthermore when determining for sentencing purposes the gravity of the offence, the Trial Chamber considered the Appellant's role in the crimes but did not directly rely on the position he held. It referred indirectly to that position in describing the Appellant's involvement in the crimes, but it never suggested in the course of its discussion that the crime was graver simply because the Appellant was in a position of authority. As such the Trial Chamber did not engage in double-counting. For the foregoing reasons, the Appeals Chamber concludes that the Trial Chamber did not err in the exercise of its discretion in accepting the Appellant's abuse of his position of authority as an aggravating circumstance. This sub-ground of appeal is therefore dismissed.

2. Whether planning and ordering the crime of deportation is an aggravating factor

412. The Appellant contends that the inclusion of deportation as an aggravating factor violates the principles of duplicity and multiplicity, because the Trial Chamber found him guilty of deportation under Count 6 (Persecutions) as incorporating specifically the crime of deportation alleged under Count 7 of the Indictment.[883]

413. According to the jurisprudence of this Tribunal, elements which are required to prove one of the underlying charges cannot also be seen as aggravating factors when determining the sentence.[884] The Trial Chamber found that the Appellant committed the crime of deportation as a co-perpetrator and considered the Appellant's planning and ordering of deportation as an aggravating factor.[885] Likewise, the Appeals Chamber has found the Appellant responsible for committing the crime of deportation via the first category of joint criminal enterprise but not for ordering and planning it. The Appellant's role in the planning and ordering of deportation is not an element required to prove the commission of deportation. Yet, it may be taken into account as an aggravating factor because of the contribution that planning and ordering make to the commission of a crime. It furthermore may bear on the moral culpability of the perpetrator. The Appeals Chamber finds that the Trial Chamber did not commit a discernible error in considering the planning and ordering of the deportation as an aggravating factor. This sub-ground of appeal is therefore dismissed.

3. The Appellant's professional background

414. The Appellant contends that the Trial Chamber erred in concluding that his professional background as a physician was an aggravating factor.[886] The Appellant submits that the Trial

[883] Stakić Appeal Brief, para. 517.
[884] *Blaškić* Appeal Judgement, para. 693; *Vasiljević* Appeal Judgement, para. 173; *Deronjić* Appeal Judgement, para. 106.
[885] Trial Judgement, para. 914.
[886] Stakić Appeal Brief, para. 519; AT. 349-350.

Chamber erroneously relied on the ICTR cases of *Ntakirutimana*[887] and *Kayishema and Ruzindana*[888] for the proposition that the professional background of an accused may constitute an aggravating factor. The Appellant avers that this was an error because the ICTR cases cited involved specific individual criminal acts perpetrated by the defendants, whereas he was convicted only because of the formal position he held.[889] The Appellant distinguishes the instant case from those cases by the absence of genocide.[890] Further, the Appellant argues that if his professional background was to be used as an aggravating factor, then he should have been notified so that he could have presented evidence that would have shown that he treated persons without regard to their ethnicity.[891]

415. The Prosecution maintains that one's professional background is a proper factor to be considered.[892] The Prosecution argues that various judgements have found that being a medical doctor can be considered as an aggravating factor for crimes against persons because these crimes constitute a betrayal of the ethical duty of a doctor to save people.[893] Further, the Prosecution maintains that there is no duty on the Chambers or the Prosecution to inform an accused about the factors that might be considered in sentencing, and it has not been shown how submitting evidence with respect to whether the Appellant treated persons without regard to their ethnicity would have affected the use of this factor.[894] The Prosecution also argues that the Trial Chamber was explicit in attaching little weight to this aggravating factor[895] and would likely have imposed the same sentence on the Appellant had the professional background not been considered.[896]

416. For the conclusion that the Appellant's medical background could be cited as an aggravating factor, the Trial Chamber relied on what the Trial Chambers respectively held in the *Kayishema and Ruzindana* and *Ntakirutimana* Trial Judgements.[897] The Appeals Chamber does not, however, find that the two ICTR cases are persuasive precedents for the present case. In the *Kayishema and Ruzindana* Trial Judgement, the Trial Chamber simply stated that as a medical doctor Kayishema

[887] *Ntakirutimana* Trial Judgement.
[888] *Kayishema and Ruzindana* Trial Judgement.
[889] Stakić Appeal Brief, para. 520; Trial Judgement, para. 915.
[890] AT. 349.
[891] Stakić Appeal Brief, para. 521.
[892] Prosecution Response Brief, para. 7.48.
[893] Prosecution Response Brief, para. 7.48, referring to *Simić et al.* Trial Judgement, para. 1084; *Kayishema and Ruzindana* Trial Judgement, para. 26; *Ntakirutimana* Trial Judgement, para. 910.
[894] Prosecution Response Brief, para. 7.49.
[895] Trial Judgement, para. 915.
[896] Prosecution Response Brief, para. 7.49.
[897] Trial Judgement, para. 915.

owed a duty to the community and that this constituted an aggravating factor[898] but did not give any explanation as to the legal basis for its conclusion. The Trial Chamber in *Ntakirutimana* held that:

> the Chamber notes that Gérard Ntakirutimana acknowledges that he departed the hospital leaving the Tutsi patients behind. He explained that the gendarmes had directed him to leave because of increasing lack of security. The Chamber is aware that the security situation was difficult and that, for instance, Oscar Giordano left a few days earlier. However, in the Chamber's view it is difficult to imagine why the Accused was at particular risk, compared with the remaining persons. According to his own explanation, he did not return to the hospital to inquire as to the condition of patients and staff. The overall situation leaves the Chamber with the impression that the Accused simply abandoned the Tutsi patients. This behaviour is not in conformity with the general picture painted by the Defence of the Accused as a medical doctor who cared for his patients.[899]

This statement of the Trial Chamber as to the duty of a medical doctor appears to have been made in a context which is completely different from that of the case before this Appeals Chamber. Thus, while in that context the conclusion of the Trial Chamber may well be persuasive, the same is not true when the same reasoning is transplanted in a completely different context such as the case of the Appellant. Caution is needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different. The Appeals Chamber considers that these statements by themselves provide too tenuous a basis for holding that the previous background of the Accused, and the ethical duties stemming from it, are an aggravating factor in international criminal law. While the Trial Chamber has discretion in determining factors in aggravation, the Trial Chamber must provide convincing reasons for its choice of factors. As the basis on which the Trial Chamber found the existence of this aggravating factor is rather tenuous, the Appeals Chamber finds that the Trial Chamber committed a discernible error in identifying the professional background of the Appellant as an aggravating factor. This error impacted on the Trial Chamber's determination of the sentence and therefore the Appeals Chamber will take it into account when revising the Appellant's sentence.

4. Whether the Appellant was unwilling to help individuals in need

417. The Appellant submits that the Trial Chamber erred when it found[900] that he was unwilling to assist certain individuals who approached him in time of need. The Appellant claims that contrary to the finding of the Trial Chamber he was unable and not unwilling to help individuals in need. As an example of his inability to help, the Appellant submits that he was unable to help his own family members. In the alternative, the Appellant argues that he was not unwilling to help but that he was truly unaware of the circumstances in the Municipality of Prijedor.[901] The Appellant

[898] *Kayishema and Ruzindana* Trial Judgement, para. 26.
[899] *Ntakirutimana* Trial Judgement, para. 153.
[900] Trial Judgement, para. 916.
[901] Stakić Appeal Brief, para. 446.

asserts that the testimony of Witness Z illustrates how he was uninformed and confused as to why so many people were seeking to leave the municipality.[902]

418. The Prosecution maintains that a discernible error has not been shown and that dissatisfaction with the findings at trial or reliance on the evidence of one witness and not others does not constitute an error of fact.[903] The Appellant replies that the evidence presented does not lead to a reasonable inference that the Appellant was unwilling to help others[904] and that the Prosecution incorrectly presupposes that the Appellant had any power to assist others or that he had the duty to do so.[905]

419. The Appeals Chamber notes that the Trial Chamber relied on three witnesses' testimonies to find that the Appellant was unwilling to help civilians. First, the Trial Chamber found that Dr. Minka Čehajić, the wife of Professor Muhamed Čehajić, attempted to contact the Appellant twice in an effort to discover the whereabouts of her husband.[906] The Trial Chamber held that "the Appellant knew about these attempts by Dr. Čehajić"[907] but did not help her. Second, the Trial Chamber found that Witness Z turned to the Appellant for assistance in leaving the municipality of Prijedor and that the Appellant told her to go to SUP like everybody else.[908] Third, the Trial Chamber found that the Appellant refused to help Ivo Atlija leave the Municipality of Prijedor "because of accusations he faced of 'ethnic cleansing'".[909]

420. The Appeals Chamber agrees with the Trial Chamber that the findings relating to Dr. Čehajić, Witness Z and Ivo Atlija demonstrate that the Appellant was unwilling to help when he could have done so and considers that the inference the Trial Chamber drew was the only reasonable one given the context (a campaign of ethnic cleansing was unfolding) in which these requests for help were made, the role of the Appellant, his participation in the joint criminal enterprise and the fact that the people seeking help were non-Serbs. For these reasons and considering that the Appellant's argument that he was unable to help his family is of limited weight in this context, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in finding that the Appellant was unwilling to help individuals in need notwithstanding the fact that he had the power to do so. This sub-ground of appeal is accordingly dismissed.

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[902] Stakić Appeal Brief, para. 448.
[903] Prosecution Response Brief, paras 7.25, 7.50.
[904] Stakić Reply Brief, paras 144-145.
[905] Stakić Reply Brief, para. 146.
[906] Trial Judgement, para. 916.
[907] Trial Judgement, para. 916.
[908] Trial Judgement, para. 916.
[909] Trial Judgement, para. 916.

5. "Long phase of preparation and planning"

421. The Appellant argues that the Trial Chamber erred as a matter of law and abused its discretion in concluding that a "long phase of preparation and planning" was an aggravating factor.[910] The Appellant asserts that in considering the long phase of planning and preparation, the Trial Chamber ignored its own finding that "only those circumstances directly related to the commission of the offence charged may be seen as aggravating."[911]

422. The Prosecution responds that there was no error in deeming planning and preparation to be an aggravating factor.[912] The Prosecution submits that acts such as planning and preparation that are intrinsically linked to a crime are directly related to the crime.[913] The Prosecution maintains that the Tribunal has found both premeditation and planning to be aggravating factors.[914] In addition, the Prosecution disputes the claim that the planning and preparation was part of the *actus reus* of the Appellant's crimes. It believes that the *actus reus* of the crimes was carried out by the direct perpetrators and imputed to the Appellant in his role as an indirect co-perpetrator.[915]

423. The Appeals Chamber does not dispute that, as noted by the Prosecution, a long phase of planning and preparation can be an aggravating factor. Although the Trial Judgement is not clear in this regard, the Appeals Chamber notes that this long phase of planning and preparation appears to have ended with the take-over of Prijedor (30 April 1992).[916] This phase, therefore, occurred before the relevant period of the Indictment (beginning on 30 April 1992). It is true that, as a matter of principle, there is no requirement that the Prosecution plead aggravating factors in an indictment.[917] It is also true that the Trial Chamber may use events concerning the "long phase of planning and preparation" as a part of its effort of explaining the events described in the Indictment. However, what the Appeals Chamber considers unfair is the use, in aggravation, of findings concerning events that are temporally outside the scope of the Indictment, without providing a reasoned opinion as to why doing so would be appropriate in the circumstances of the case. For this reason, the Appeals Chamber finds that the Trial Chamber committed a discernible error. As this error impacted on the Trial Chamber's determination of the sentence, the Appeals Chamber will take it into account when revising the Appellant's sentence. This sub-ground of appeal is accordingly upheld.

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[910] Stakić Appeal Brief, para. 525.
[911] Stakić Appeal Brief, para. 527, citing Trial Judgement para. 911.
[912] Prosecution Response Brief, para. 7.51.
[913] Prosecution Response Brief, para. 7.52.
[914] Prosecution Response Brief, para. 7.52. Regarding premeditation, *see Krstić* Trial Judgement para. 711; *Čelebići* Trial Judgement para. 1261; Regarding planning, *see Kupreškić* Trial Judgement para. 862.
[915] Prosecution Response Brief, para. 7.52.
[916] *See* Trial Judgement, paras 337-346.
[917] *Kupreškić* Appeal Judgement, para. 376.

6. "White collar crimes"

424. The Appellant alleges that the use of "white collar crimes"[918] as an aggravating factor is another example of "multiplicity". He submits that he was found guilty because of his position in Prijedor Municipality and that this position was also used to increase the sentence for the same crime.[919] Further the Appellant argues that the reasoning behind the Trial Chamber's use of this factor is both ambiguous and legally and factually flawed[920] and that standards should not be varied depending on whether the crime is a blue collar or a white collar crime.[921] As a result, the Appellant submits that the use of "white collar crime" as an aggravating factor was an abuse of the Trial Chamber's discretion.[922]

425. The Prosecution responds that aggravation on the basis of "white collar crime" is appropriate in this case.[923] The crimes committed by the person at the top of the political or military hierarchy can have far more serious consequences on a larger scale than those committed by lower level perpetrators.[924] The Prosecution submits that in this case, the Appellant performed a vital role in the persecutory campaign which would not have been achieved without the contribution of leading politicians such as him.[925] As a result, the aggravating consideration is justified.[926]

426. Contrary to what the Parties suggest, the Appeals Chamber does not consider that the reference to "white collar crimes" can be interpreted as an indication that the Trial Chamber really meant that the crimes committed by the Appellant were "white collar crimes" in the technical sense of the term and that this characteristic constituted *per se* an additional aggravating factor. Although the Trial Judgement is not particularly clear on this point, the Appeals Chamber understands the reference to "white collar crimes" as being part of the effort of the Trial Chamber to explain why it considered that the role of the Appellant in the commission of the crime was particularly serious. For this reason, the Appeals Chamber finds that the Trial Chamber did not commit a discernible error in this regard.

[918] Trial Judgement, para. 918.
[919] Stakić Appeal Brief, para. 530.
[920] Stakić Appeal Brief, para. 531.
[921] AT. 351.
[922] Stakić Appeal Brief, para. 532.
[923] Prosecution Response Brief, para. 7.53.
[924] Prosecution Response Brief, para. 7.53.
[925] Prosecution Response Brief, para. 7.53.
[926] Prosecution Response Brief, para. 7.53.

L. Alleged failure to provide material concerning co-perpetrators

427. An issue was raised in the Appellant's Reply Brief concerning an alleged failure to disclose Rule 68 materials related to alleged co-perpetrators.[927] As it was decided that this is not a permitted ground of appeal pursuant to the decision of the Appeals Chamber on 20 July 2004,[928] the Appeals Chamber declines to consider it further at this time.

M. Conclusion

428. The Appeals Chamber has considered the errors made by the Trial Chamber and comes to the conclusion that their impact on the sentence has to be regarded as very limited. It takes note, however, that one of the errors concerns the sentence itself. In view of the fact that the imposition of a fixed term sentence must be revised, the Appeals Chamber finds that an appropriate sentence, properly reflecting both the criminality of the Appellant and the substance of the sentence imposed by the Trial Chamber, is 40 years' imprisonment.

[927] Stakić Reply Brief paras 63-65, 148.
[928] Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response, para. 9.

XII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 4, 5 and 6 of October 2005;

SITTING in open session;

SETS ASIDE, *proprio motu*, the finding that the Appellant was responsible as a co-perpetrator and **FINDS** the Appellant responsible as a participant in a joint criminal enterprise, pursuant to Article 7(1) of the Statute;

ALLOWS, Judge Güney dissenting, the Prosecution's fourth ground of appeal, **FINDS** both that cumulative convictions for Murder as a Crime against Humanity **(COUNT 3)** and Persecutions as a Crime against Humanity **(COUNT 6)** are permissible, and that cumulative convictions for Deportation as a Crime against Humanity **(COUNT 7)** and Persecutions as a Crime against Humanity **(COUNT 6)** are permissible**, RESOLVES** that the Trial Chamber incorrectly failed to enter a conviction against the Appellant for Deportation, but **FINDS**, *proprio motu*, that a conviction for Murder as a Crime against Humanity **(COUNT 3)** is impermissibly cumulative with the Appellant's conviction for Extermination as a Crime against Humanity **(COUNT 4)**;

DISMISSES the Prosecution's appeal in all other respects;

ALLOWS in part, Judge Shahabuddeen dissenting, the Appellant's fourth ground of appeal, particularly as it concerns the Trial Chamber's interpretation of the requirements for deportation, and **VACATES**, Judge Shahabuddeen dissenting, the findings of legal responsibility for certain acts of deportation specified in the judgement;

ALLOWS, in part, the Appellant's sixth ground of appeal concerning sentencing;

DISMISSES the Appellant's appeal in all other respects;

AFFIRMS the Appellant's acquittal for Genocide **(COUNT 1)**;

AFFIRMS the Appellant's acquittal for Complicity in Genocide **(COUNT 2)**;

AFFIRMS, Judge Güney dissenting, the Appellant's conviction for Extermination, a Crime against Humanity **(COUNT 4)**;

AFFIRMS the Appellant's conviction for Murder as a Violation of the Laws or Customs of War **(COUNT 5)**;

AFFIRMS the Appellant's conviction for Persecutions, a Crime against Humanity **(COUNT 6)**;

RESOLVES, Judge Güney dissenting, that the Trial Chamber incorrectly found the Appellant not guilty for Other Inhumane Acts (Forcible Transfer), a Crime against Humanity **(COUNT 8)**;

IMPOSES a global sentence of 40 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention;

SETS ASIDE the Disposition of the Trial Chamber insofar as it imposed an obligation on the Host State to review the Appellant's sentence after a specified time had elapsed;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Judge Fausto Pocar Presiding	Judge Mohamed Shahabuddeen	Judge Mehmet Güney
Judge Andrésia Vaz		Judge Theodor Meron

Judge Mohamed Shahabuddeen appends a partly dissenting opinion.

Judge Mehmet Güney appends a dissenting opinion.

Judge Andrésia Vaz and Judge Theodor Meron append a joint separate opinion.

Dated this 22nd day of March 2006,
At The Hague
The Netherlands

[Seal of the International Tribunal]

XIII. PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I regret that I am not able to agree with some of the holdings of the Appeals Chamber. Subject thereto, I support the conclusion to which the Appeals Chamber has come. I state below the matters on which I disagree and the reasons for my disagreement, but, before doing so, I desire to record my understanding of the judgement of the Appeals Chamber on one point. The disposition section of the judgement "resolves" that the Trial Chamber erred in entering certain acquittals, but it does not substitute convictions for the acquittals. I do not read the latter circumstance as suggesting that the Appeals Chamber does not have the power to make such convictions. In my view, the Appeals Chamber has merely declined in its discretion to exercise the power in this case. As Judge Vaz and Judge Meron note in their separate opinion, this power has in fact been exercised by the ICTY and ICTR Appeals Chambers.

A. Whether the Appeals Chamber, where it corrects a legal standard, may determine whether it is itself convinced beyond reasonable doubt as to the factual finding of the Trial Chamber

2. I have a reservation on the holding in paragraph 9 of today's judgement that, where the Appeals Chamber corrects a legal error in the Trial Chamber's findings, it "applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding [of the Trial Chamber] challenged by the Defence before that finding is confirmed on appeal."[929]

3. The starting point of any inquiry into the correctness of a factual finding by the trial court has to be the appellate duty of deference to such a factual finding. Accordingly, where the Appeals Chamber is considering an appellant's challenge to a factual finding which has been made by the Trial Chamber, it has to ask whether any reasonable tribunal of fact could have made that factual finding. Only if the answer is in the negative does the Appeals Chamber set aside the factual finding made by the Trial Chamber; otherwise, it affirms the finding.

4. The Appeals Chamber's approach to the Trial Chamber's factual findings remains deferential even in the event that the Appeals Chamber finds legal error. The mere circumstance that the Appeals Chamber corrects the legal standard applied by the Trial Chamber to its factual finding does not suffice to vacate the Trial Chamber's factual finding (for example, that the accused held a gun). The Trial Chamber's factual finding remains, unless it is set aside in the manner aforesaid; the correct legal standard must be applied to the Trial Chamber's factual finding. If it is

[929] *See also* Judgement of the Appeals Chamber, para. 312.

contended that there should be a different factual finding, it has to be shown that no reasonable tribunal of fact could have failed to make that factual finding.

5. I have not managed to free myself from doubt as to the correctness of statements by the Appeals Chamber to the effect that it has a right of independent determination of the meaning of evidence as if it had the advantages of a Trial Chamber sitting at first instance.[930] If the Appeals Chamber comes to a factual finding which differs from that of the Trial Chamber, it has to be borne in mind that, as often noted in the jurisprudence of the Tribunal, two reasonable people can come to equally reasonable but opposed meanings of the same set of facts. Where the meaning of facts is concerned, I would doubt that the corrective authority of the Appeals Chamber implies that its assessment must necessarily prevail.

6. The point has also been made by Judge Weinberg de Roca that the Appeals Chamber cannot truly determine "whether it is itself convinced beyond reasonable doubt as to the factual finding" of the Trial Chamber unless it actually examines the entire trial record in the way that a Trial Chamber would.[931] That task is as physically impossible for the Appeals Chamber as it is legally misconceived. But that does not mean that the Appeals Chamber only has a duty to examine particular parts of the record to which the parties attract its attention before "it is itself convinced beyond reasonable doubt as to the factual finding of the Trial Chamber". What the impossibility points to is that the Appeals Chamber does not have to undertake the task which gives rise to the impossibility: instead, it should act on a principle which avoids that task.

7. I do not pursue the matter because of regard for precedent, including decisions of the Appeals Chamber acting by majority. But I enter a reservation on the point.

B. Whether groups protected against genocide may be defined negatively

8. The Appeals Chamber has expressed the view that it is not possible to define a group protected against genocide in a negative manner. That was in response to a prosecution argument "that the Trial Chamber committed an error of law when … it declined to define the targeted group as all the non-Serbs in the Prijedor Municipality and instead required the Prosecution to establish

[930] *Kvočka*, Case No. IT-98-301/1-A, 28 February 2005, pp. 250 ff. The case related to additional evidence, which is not involved here, but the majority principle remains the same in that it looks to the Appeals Chamber determining "whether it is itself convinced beyond reasonable doubt as to the factual findings [of the Trial Chamber] challenged by the Defence before that finding is confirmed on Appeal".

[931] Partial Dissenting Opinion of Judge Weinberg de Roca in *Blaškić*, IT-95-14-A, 29 July 2004, pp. 261 *et seq*; Separate Opinion of Judge Weinberg de Roca in *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, pp. 301 *et seq*; and Separate Opinion of Judge Weinberg de Roca in *Kvočka et al.*, IT-98-30/1-A, 28 February 2005, pp. 245 *et seq*.

genocide separately with respect to both Bosnian Croats and Bosnian Muslims".[932] I agree with the prosecution.

9. The requirement specified by the Trial Chamber would oblige the prosecution to establish all the elements of the crime of genocide in respect of Bosnian Croats and then to establish all those elements in respect of Bosnian Muslims, as if there were two distinct prosecutions. If the prosecution was right, it would be required to establish all those elements once only, this being in respect of "all the non-Serbs" in the Municipality considered as by themselves a group; in other words, individual or component groups would be assembled under one catch-all group.

10. The Appeals Chamber observes that, "pointing to the words 'as such' in the Genocide Convention, [experts] have reiterated that genocide focuses on destruction of groups, not individuals".[933] But nothing in the prosecution's position is at variance with that well-known proposition. The expression "as such" emphasises that the destruction has to be not merely of the "individuals" composing the "group" but of the "group, as such". But the expression "as such" cannot be fairly stretched to define the specific ingredients of a "group" within the meaning of the Genocide Convention; it leaves that to be determined by other considerations.

11. If the argument for the prosecution depended on the determination (as to whether there is a group) being made *only* on the basis of the subjective appreciation of the perpetrator, then I would not agree with it. But that is not how I read the argument for the prosecution, which, closely examined, incorporates both subjective and objective considerations. Although I recognise that the prosecution has emphasised the perception of the perpetrator, it would not be correct to interpret that emphasis as intended to be exclusive. Members of a targeted group may well be, say, Croatians, but they may also see themselves as members of a wider group of non-Serbs in the area who are targeted primarily because they are non-Serbs; that may also be how others (including the perpetrators) see the situation. Also, that may be a permanent, on-going feature. In that case, the existence of a "non-Serb" group is an objective fact to be determined on the evidence as to whether or not there was such a group.

12. I cannot think of anything which necessarily prevents several different victim groups from being defined as collectively belonging to a "group" *other than that* of the perpetrator. It is true, as the majority points out, that the drafting history of the Genocide Convention reflects a focus on the genocidal campaigns against specific groups which took place in Europe during the Second World War. But that need not prevent a more general approach from being taken to the matter; even the

[932] Judgement of the Appeals Chamber, para. 16.
[933] Judgement of the Appeals Chamber, para. 24 (footnote omitted).

genocidal campaigns of the Second World War were not understood exclusively through the lens of the "positive" approach.[934] In the Nuremberg Proceedings the prosecution (speaking through Sir Hartley Shawcross) said:

> Such were the plans for the Soviet Union, for Poland and for Czechoslovakia. Genocide was not restricted to extermination of the Jewish people or of the gipsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway. The technique varied from nation to nation, from people to people. The long-term aim was the same in all cases.
>
> The methods followed a similar pattern: first a deliberate programme of murder, of outright annihilation. This was the method applied to the Polish intelligentsia, to gipsies and to the Jews.[935]

13. The point thus made is reflected in paragraph 96 of the Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992) of 6 October 1992. There the Commission said:

> If there are several or more than one victim groups, and each group as such is protected, it may be within the spirit and purpose of the [Genocide] Convention to consider all the victim groups as a larger entity. The case being, for example, that there is evidence that group A wants to destroy in whole or in part groups B, C and D, or rather everyone who does not belong to the national, ethnic, racial or religious group A. In a sense, group A has defined a pluralistic non-A group using national, ethnic, racial and religious criteria for the definition. It seems relevant to analyse the fate of the non-A group along similar lines as if the non-A group had been homogenous. This is important if, for example, group B and to a lesser degree group C have provided the non-A group with all its leaders. Group D, on the other hand, has a more marginal role in the non-A group community because of its small numbers or other reasons. Genocide, "an odious scourge" which the Convention intends "to liberate mankind from" (preamble), would as a legal concept be a weak or even useless instrument if the overall circumstances of mixed groups were not covered. The core of this reasoning is that in one-against-every-one else cases the question of a significant number or a significant section of the group must be answered with reference to all the target groups as a larger whole.[936]

So, the Commission of Experts started off by accepting that a smaller victim group could be a protected group; but it accepted that as a matter of fact and not of legal necessity to prove that each of those groups was a protected group.

14. It is true that, as the Appeals Chamber observes, the Report of the Commission is addressing a situation in which "each individual group which makes up the aggregate group is itself a positively defined target group within the terms of the Convention".[937] But this does not mean, as the Appeals Chamber seems to think, that the Commission was suggesting a necessity for the Trial Chamber first to find that, in law, the component groups themselves constitute protected groups. The question is whether the prosecution must prove that the appellant sought to destroy each

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[934] *Cf.* Bettina Arnold, "Justifying Genocide", in Alexander L. Hinton (ed.), *Annihilating Difference: The Anthropology of Genocide* (University of California Press, 2002), pp. 97-102, discussing the notion of Aryan purity and supremacy and the accompanying desire to exterminate all non-Aryans.
[935] *The Trial of German Major War Criminals* (London, 1948), Part 19, pp. 449-450, emphasis added.
[936] S/1994/674 – 27 May 1994, para. 96.
[937] Judgement of the Appeals Chamber, para. 27.

component group individually, or whether it would be enough to prove that he sought to destroy them collectively because they were not Serbs in the area concerned. The Report takes the latter view; I consider that it does so correctly.

15. In *Jelisić*,[938] decided over six years ago, the Trial Chamber said (footnotes omitted):

> A group may be stigmatised in this manner by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group. The Trial Chamber concurs with the opinion already expressed by the Commission of Experts[939] and deems that it is consonant with the object and the purpose of the Convention to consider that its provisions also protect groups defined by exclusion where they have been stigmatised by the perpetrators of the act in this way.

That holding was not challenged on appeal.[940] Pronouncements by other Trial Chambers are not clear on the precise point, but, at any rate, they do not support the view that a negative definition is not possible. This is with the exception of *Brdanin*,[941] which was subsequent to the Trial Chamber's holding in this case. As the Appeals Chamber recognises,[942] in both that case and in this, the deciding Trial Chamber gave no reasons for the holding which it made. For its part, the Appeals Chamber considers that the "question whether the group targeted for genocide can be defined negatively is one of first impression for the Appeals Chamber".[943]

16. The divergence in approaches may make a practical difference in some cases. If the prosecution were required to proceed against each component group separately, it would fail to prove its case if it did not prove a required ingredient in the case of a component group (for example, that those destroyed formed a significant element of the component group or part of the component group). Yet the same deficiency would not prove crucial if the prosecution were allowed to collect component groups in one compendious group and to proceed against the latter as the relevant group. This is so because, if the compendious group answers to the prescribed criteria of what is a group, the ingredients of the crime would have to be proved in relation to the compendious group as the relevant group, and not in relation to each component group separately considered. Therefore, what may be a deficiency in a prosecution concerning a component group may not necessarily be a deficiency in a prosecution concerning the compendious group.

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[938] IT-95-10-T, 14 December 1999, para. 71.
[939] Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), UN Doc, S/1994/674. p. 25, para. 96.
[940] IT-95-10-A, 5 July 2001.
[941] IT-99-36-T, 1 September 2004, para. 685.
[942] Judgement of the Appeals Chamber, para. 19.
[943] Judgement of the Appeals Chamber, para. 19.

17. Victims may belong to different component groups. However, it would be natural for the perpetrators to say, if that is their subjective perception, that such component groups have the common characteristic of belonging to a larger "group" defined as being *other than* the group of the perpetrators; the victims themselves may share that view. In a given area, one group – group A – may benightedly imagine that it has the right to destroy all other groups, and these other groups may see themselves as forming one threatened group. Rather than proving the elements of a case of genocide in respect of each of a number of targeted groups one by one – several of them may be involved, some big, some small – it may be both natural and unobjectionable to do so once and for all in respect of all non-A's, considered as by themselves a group defined with reference to group A. I agree with the Commission of Experts that such an approach is consistent with the purpose of the Genocide Convention; in some cases it may in fact be essential to the realisation of that purpose.

18. The Commission's proposal is within the principles of customary international law; it does not expand customary international law. For the foregoing reasons, I consider that the view to the contrary expressed by the Appeals Chamber is not correct The Appeals Chamber held, in effect, that, under the law, "non-Serbs" in the area concerned could not be a "group" within the meaning of the Genocide Convention; there was therefore no need to consider whether there could in fact be such a "group". With respect, I consider that to be a mistaken view.

C. Whether a forcible displacement across a front line is a deportation and, if so, whether that applies to a forcible displacement across a constantly changing front line

1. Preliminary

19. I respectfully dissent from the holding of the Appeals Chamber that there was no deportation in this case except where there was a border crossing. Explaining the basis of its decision, the Appeals Chamber says that "the crime of deportation requires the displacement of individuals across a border".[944] I do not entirely agree with that proposition, but will at this stage note that the Appeals Chamber seems to lay some store in speaking of a "border" in an open-ended way. That approach may have some merit, but, in the result, it is not clear whether the holding that there was no deportation in this case is based on the proposition that a front line cannot be a border, or whether it is based on the proposition that a front line can be a border with the exception of a constantly changing front line. My own impression is that the first interpretation accords with the central thesis of the Appeals Chamber. But I do not take my impression to the point of excluding

[944] Judgement of the Appeals Chamber, para. 300.

the second interpretation. I had better endeavour to take account of both possible readings, recognising that any lack of clarity will complicate analysis.

20. The opinion of the Appeals Chamber commands attention. Learned texts have been called in support. It is my misfortune that I am not persuaded. The jurisprudence relating to the Second World War, subsequent conventions and institutional studies on the subject, on which the Appeals Chamber relies, are not sufficiently explicit. This is largely recognised by the statement of the Appeals Chamber itself that "neither the Statute nor the other instruments referred to … provide a clear definition of deportation".[945] There is no binding pronouncement by any body of authority to the effect favoured by the majority, and I am unfortunately not able to agree with the inferences drawn by the majority from those authorities that do exist. For the reasons given below, I agree with the conclusion reached by the Trial Chamber.

2. The framework of this opinion

21. I propose to show (i) that customary international law did not confine "deportation" to the crossing of a border – rather, the crossing of a front line was enough, whether or not it was a border; (ii) that, even if customary international law always used the term "deportation" in relation to the crossing of a border, the term was reasonably capable of applying to a front line; (iii) that in any event the question is how the Security Council used the term "deportation" in article 5(d) of the Statute; (iv) that there can be a deportation even across a constantly changing front line; (v) that this view does not conflict with the principle *nullum crimen sine lege*; and (vi) that it accords with the substance of customary international law.

3. Customary international law did not confine "deportation" to the crossing of a border

22. The different derivations[946] of the terms of the Statute create uncertainty as to the meaning of "deportation"; there is the question whether it is used in the same sense in both article 2(g) and article 5(d) of the Statute. The uncertainty is resolved in this case if the Appeals Chamber is right in its view that "the crime of deportation requires the displacement of individuals across a border".[947] On that approach, the Appeals Chamber comes to the conclusion that it is not possible to prosecute for a "deportation" under article 5(d) where there is a crossing of a front line such as that in this case; such a front line, it says, is not a border. I read its judgement as a whole to mean that

[945] Judgement of the Appeals Chamber, para. 276.
[946] For source material of relevant terms in the Statute, see article 6(b) and (c) of the Charter of the International Military Tribunal, article II(1)(b) and (c) of Control Council Law No. 10, article 50 of Geneva Convention I, article 51 of Geneva Convention II, article 130 of Geneva Convention III, and articles 49 and 147 of Geneva Convention 1V.
[947] Judgement of the Appeals Chamber, paragraph 300.

"transfer" is more appropriate in such a case and may ground a prosecution for "other inhumane acts" under article 5(i).

23. However, customary international law has not taken the position that deportation cannot refer to the crossing of any front line. In *Cyprus v. Turkey,* the European Commission of Human Rights used the term "deportation" to describe the forcible displacement of Greek Cypriots from the territory controlled by Turkish Cypriots "across the demarcation line" separating it from the south of Cyprus.[948] It may be said that what was involved there was a *de facto* boundary. It seems to me, however, that the Commission would not have spoken differently if the demarcation line existed on the first day of the occupation and the displacement was made on that day. Turkey landed troops in Cyprus on 20 July 1974; the application was presented to the Commission on 19 September 1974 – two months later. So there was scarcely time for any front line, whenever established between those dates, to evolve into a "*de facto* boundary". The demarcation line was not a border; it was a front line.[949]

24. Note has to be taken of what the International Law Commission said in its 1991 report. There, the Commission expressed the view that "[d]eportation, already included in the 1954 draft Code, implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State."[950] The Appeals Chamber relies on the Commission's view,[951] but the Commission itself cites no supporting authority for the distinction which it makes between what, for the sake of simplicity, may be called internal forcible displacement and what may be called external forcible displacement.

25. I doubt that the International Law Commission intended its statement to be interpreted literally; it was simply making a general remark on the usual situations in which the terms would apply. In particular, I do not believe that the Commission meant that "deportation" is in any imaginable context restricted to expulsion from national territory. The Commission was defining crimes concerning "systematic or mass violations of human rights" (akin to "crimes against humanity"[952]) to include "deportation or forcible transfer of population"; by contrast, article 5(d) of the Statute of the ICTY defines crimes against humanity to include "deportation", nothing being

[948] European Human Rights Reports, Vol. 4 (1982), 482 at 520. The demarcation line was in the nature of a front line. Ibid., paras. 14 and 17.
[949] Ibid.
[950] Report of the International Law Commission on the work of its forty-third session, General Assembly, Official Records, Forty-sixth Session, Supplement No. 10 (A/46/10), p. 268, para. 11, repeated in substance in Report of the International Law Commission, General Assembly, Official Records, Fifty-first Session, No. 10 (A/51/10), p. 100, referring to the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, article 18, para. 13 of the Commentary.
[951] Judgement of the Appeals Chamber, para. 295.

said of "forcible transfer of population". On the language which it was considering, the Commission had to allocate the field of operation of each of the terms "deportation" and "forcible transfer" as they appeared in the combined expression before the Commission; it does not follow that the field which the Commission allocated to the operation of the term "deportation" as used in that combined expression has to apply to "deportation" as used alone in article 5(d) of the Statute. What happened was that the collocation of words in which the term occurred in the provision before the Commission deprived it in that provision of what I consider to be its natural capacity to extend to a front line. That collocation not being present in article 5(d) of the Statute (which speaks only of "deportation"), the term retains here its ordinary meaning as capable of extending to a front line. The immediate verbal contexts are materially different; that is enough, in my view, to override the usual proposition that the same meaning has to be given to a term wherever it occurs in a statute – a proposition which in any event is hedged around with qualifications.

26. No dependable guidance can be had from article 49 of the Fourth Geneva Convention. The first paragraph of that article reads: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". That provision only illustrates that "deportation" encompasses the crossing of a border; it does not stipulate that "deportation" may not also be applied to the crossing of another kind of boundary.

27. Referring to article 17 of Protocol II, the Appeals Chamber writes:

> Article 17 of Additional Protocol II dealing with non-international armed conflicts provides in the relevant part that "[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict." While Article 17 does not expressly address deportation or forcible transfer, this provision draws a careful distinction between displacement within the territory in which a person lives and compelled movement to another territory.[953]

With respect, the comment of the Appeals Chamber on the quoted passage is not readily appreciated. The question to be answered is whether deportation applies *only* to the crossing of a border. Article 17 takes no view on the matter. As noted by the Appeals Chamber, the provision does not address the definition of either "deportation" or "forcible transfer". It does not even specify what is meant by "their own territory"; the injunction which it lays down could equally apply to a forcible displacement from territory controlled by one army to territory controlled by an opposing army, both territories being in the same state.

[952] This is the title used in the corresponding provisions of draft article 18 of the 1996 ILC Report. See the 1996 Report, *supra,* p. 93.
[953] Judgement of the Appeals Chamber, para. 294.

28. Nor do I see that Rule 129 of the Rules published by the ICRC in 2005[954] and reproduced in paragraph 296 of the judgement of the Appeals Chamber assists in the determination of what customary international law provided at the time of the offence, or how the Security Council used the term "deportation" in article 5(d) of the Statute. Indeed, the Appeals Chamber concedes that the Rule "says little about what type of borders satisfy [the] requirement" for forcible displacement across a border.[955]

29. The language of deportation, in the sense of a crossing of a border of the state, was used in several cases connected with the Second World War. That was natural in the circumstances of that supremely international armed conflict. Nevertheless, there was an observable tendency to speak interchangeably of "deportation", "transfer", "evacuation" and "expulsion".[956] It does not appear that there was occasion for the courts to focus on any precise distinction between deportation and transfer or to speak of the former alone in respect of external forcible displacement and of the latter alone in respect of internal forcible displacement. In *Greiser*,[957] "deportation" was used in the indictment in circumstances in which it could be argued, on the opposing thesis, that what was involved was a "transfer". The case arose out of World War II and was decided by the Supreme National Tribunal of Poland in 1946. It related to the forcible displacement of civilians from one place to another within the same state. True, there was no crossing of a front line, but neither was there a crossing of a border; yet the term "deporting" was used. The reason is that there was a demarcation line which could not be transgressed.

30. There are provisions which seemingly use the term "deportation" to include an internal transfer. Thus, section 6(4) of Australia's War Crimes Act, as amended in 1945, provides that "the deportation of a person to, or the internment of a person in, a death camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious [war] crime".[958] See likewise article 3(2)(d-e) of Bangladesh's 1973 International Crimes (Tribunal) Act.[959] These texts (and there may be other similar texts in the international community)

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[954] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge, 2005), Vol. 1, p. 457.
[955] Judgement of the Appeals Chamber, para. 297.
[956] *See*, *Trial of German Major War Criminals* (New York, 2001), *Judgment*, pp. 93, 99, 129, and other cases of the period.
[957] Supreme National Tribunal of Poland, *Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission* (New York, 1977),Vol. XIII, p. 70, Case No. 74. At p. 72, there is a reference to para. (c)(iv)(3) of the indictment, which charged that the accused participated in "deporting [people] to the area of the so-called 'General Government'", i.e., from one area of Poland to another area in the same country. The accused was found guilty; see p. 104.
[958] Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge, 2005), Vol.II, part 2, p. 2917, para. 67.
[959] Ibid., para. 71, p. 2917.

show that "deportation" can occur if the victim, though always within the state, is placed behind demarcation lines which preclude his exit or seriously impair it.

31. Account must also be taken of authorities mentioned in the judgement of the Trial Chamber which go to establish that customary international law does know of deportation both in the sense of a forcible displacement within the territory of the state and in the sense of a forcible displacement across a border.[960]

32. It is accepted that in the case of several texts "deportation" is used in relation to forcible displacement across a border. It is also recognised that strict uniformity is not necessary for the maturing of a proposition into customary international law. But to say that "deportation" has been used in several cases in relation to the crossing of a border is not the same as saying that it can *only* be so used. On the available material, my view is that customary international law includes no rule which precludes the use of "deportation" in relation to the crossing of a front line even if it has not become a border. Hints and allusions must be separated from a categorical proposition to the effect that the term cannot be so used. It is excessive to say that such a proposition formed part of customary international law. A conclusion which is based on the view that such a proposition formed part of customary international law is not supportable.

4. Even if customary international law always used the term "deportation" in relation to the crossing of a border, the term was reasonably capable of applying to a front line

33. If customary international law always used the term "deportation" in relation to the crossing of a border, the real reason was, not the fact that there was a border, but that there was a coercive demarcation line represented by the border. A front line also represents a coercive demarcation line. Thus, even if "deportation" was never concretely applied to a forcible displacement across a front line, the law applicable to deportation across a border was always reasonably capable of applying to such displacement.

34. That view has to be considered in the light of the holding by the Appeals Chamber that the Trial Chamber's position expands customary international law. The Tribunal does not of course have power to do that. Speaking of jurisdictional instruments, Judge Gros pointed out that "the rule is that interpretation cannot extend the jurisdiction which has been recognised".[961] In my opinion, that view applies generally: interpretation cannot camouflage expansion.

[960] Judgement of the Trial Chamber, IT-97-24-T, 31 July 2003, footnotes 1344 and 1353.
[961] *Fisheries Jurisdiction Case (U.K. v. Iceland), I.C.J.Reports 1974*, p. 127, para. 2.

35. But it is necessary to stress that, although the Tribunal cannot expand customary international law, it has an undoubted duty to interpret a principle established by that law. That duty is inescapable in a judicial forum called upon to apply a law: to apply is to interpret. Speaking of treaties, Waldock observed that "'interpretation' and 'application' of treaties are closely inter-linked …".[962] Putting it both more positively and more generally, Judge Jessup later pointed out that "[a]ny court's application of a rule of law to a particular case, involves an interpretation of the rule."[963] The duty is of general currency; that is obvious. It is that duty which no doubt led to the interpretation now given by the majority of the principle of deportation as not extending to the front line crossing in this case. I do not share that interpretation, but that interpretation and the opposite interpretation of the Trial Chamber both flow from a duty to interpret the scope of the existing law.

36. Further, it is accepted that in interpreting the law a chamber may "clarify" the law. In the *Tadić* decision on jurisdiction,[964] "the Appeals Chamber unanimously held that some customary rules of international law criminalized certain categories of conduct in *internal* armed conflict …". The author of that statement added that it "is well known that until that decision many commentators, States as well as ICRC held the view that violations of the humanitarian law of internal armed conflict did not amount to war crimes proper, for such crimes could only be perpetrated within the context of an international armed conflict".[965] The learned author, who was the Presiding Judge in the case, recognized that that was "[p]erhaps an instance of expansive interpretation"; but the holding has stood, although it is obvious that what was involved was a major matter indeed.

37. In *Krstić,*[966] the Appeals Chamber[967] held that the Tribunal was competent to order a prospective witness "to attend at a location in Bosnia and Herzegovina, and at a time, to be nominated by the Krstić defence after consultation with the prosecution (and, if need be, with the Victims and Witnesses Section) to be interviewed there by the Krstić defence".[968] The prospective witness, after being interviewed out of court, might eventually not be required to come to court at all, but obviously, for any violation of the order to attend the interview, he would face criminal sanctions. So the decision "created" an offence. There was no trace of the existence in customary

[962] YBILC 1964, II, p. 9, *Third Report on the Law of Treaties* by Sir Humphrey Waldock, Special Rapporteur.
[963] *Barcelona Traction, I.C.J.Reports 1970*, separate opinion of Judge Jessup, p. 166, para.12.
[964] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[965] Antonio Cassese, *International Criminal Law* (Oxford, 2003), pp. 152-153.
[966] IT-98-33-A, 1 July 2003.
[967] Meron, President, Judges Pocar, Hunt and Güney; Judge Shahabuddeen dissenting.
[968] *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 29. It may be noted that, in *Stakić*, IT-97-24-A, 20 September 2005, the Appeals Chamber unanimously observed "that it is not the role of the Appeals Chamber to either provide 'authorization' to contact a witness, nor to provide the means to facilitate that contact".

international law of a rule authorising such a decision; indeed, the Appeals Chamber did not cite the existence of a similar rule in any place, let alone any state. One way of looking at it would be to say that the rule underlying the decision was competently made by the Appeals Chamber in exercise of its power to "clarify" the existing principle of customary international law that its proceedings had to be "fair", including the principle of equality of arms, and that in this way the new rule always formed part of customary international law.

38. Also, the Appeals Chamber has in several cases recognised the authority of the Tribunal to punish criminal contempt, which, as it first held in *Tadić*, is an inherent judicial power.[969] The Appeals Chamber acknowledged in that case that customary international law established no such criminal offence, and hence inferred the Tribunal's power to punish contempt from the judicial authority conferred by the Statute to try cases.[970] The decision "created" an offence in the context of contempt. That and other cases suggest that the power to clarify the law may be used so long as the "essence" of what is done can be found in existing law.

39. In appreciating the "essence" of a clarification, the question to be attended to is not whether a particular set of circumstances was ever concretely recognized by the existing law, but whether those circumstances reasonably fall within the scope of the existing law. This was the underlying approach of the Appeals Chamber to the issue of legality which was raised in *Čelebići*.[971] More explicitly, the Appeals Chamber unanimously held in *Hadžihasanović* that "where a principle can be shown to have been … established [as customary international law] it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle".[972] In *Karemera,*[973] referring to that proposition, Trial Chamber III of the ICTR considered "that this is a well-established approach in international law". In other words, the question is not whether the law, as it stands, was ever applied concretely to a particular set of circumstances, but whether the law, as it stands, was reasonably capable of applying to those circumstances.

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[969] *Prosecutor v. Tadić*, Case No. IT-94-1A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Tadić* Contempt Decision"), paras. 13-29.
[970] *Tadić* Contempt Decison, para. 14.
[971] IT-96-21-A, 20 February 2001, para. 179.
[972] *Prosecutor v. Hadžihasanović,* IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12. On the particular point, the decision was unanimous, although on some matters there were dissenting opinions, including one from me. For interesting comments on those opinions in an editorial article contributed to an international law journal by a learned member of the majority, who was also the President of the Tribunal and the Presiding Judge in the case, see Theodor Meron, "Editorial Comment: Revival of Customary Humanitarian Law", 99 *AJIL* 817 at 825-826 (2005). See also some observations of Judge Petrén in *Judicial Settlement of International Disputes* (Max Planck Institute, New York, 1974), p. 78.
[973] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, para. 37.

40. In this matter, I gather that the approach of the majority has been to consider whether customary international law ever applied the concept of deportation in a concrete case to the crossing of a front line such as that in this case, as distinguished from the crossing of a border. It would have been useful to focus on the question whether customary international law included a principle which was reasonably capable as it stood of applying that concept to the crossing of such a front line, even if the concept had never been so applied in a concrete case. In my view, that question has to be answered in the affirmative.

5. Even if customary international law confines the use of the term "deportation" to the crossing of a border, the question in this case is the different one of determining in what sense the Security Council used that term in article 5(d) of the Statute

(a) The critical question

41. It seems that the Appeals Chamber accepts that customary international law proscribes the forcible displacement of civilians across a front line, in circumstances not permitted by international law, as a punishable crime. This view can be extracted from various statements in the judgement of the Appeals Chamber. In paragraph 302 of the judgement, the Appeals Chamber states:

> … the application of the correct definition of deportation would not leave individuals without the protection of the law. Individuals who are displaced within the boundaries of the State or across *de facto* borders not within the definition of deportation, remain protected by the law, albeit not under the protections afforded by the offence of deportation. Punishment for such forcible transfers may be assured by the adoption of proper pleading practices in the Prosecution's indictments – it need not challenge existing concepts of international law.

In paragraph 317 of its judgement, the Appeals Chamber adds (footnotes omitted):

> In the instant case, the Prosecution charged forcible transfer (in Count 8 of the Indictment) as the act underlying Article 5(i). Forcible transfer has been defined in the jurisprudence of the Tribunal as the forcible displacement of persons which may take place within national boundaries. The *mens rea* does not require the intent to transfer permanently. … The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege.*

42. The concern of the Appeals Chamber was not with the criminality of the act of forcibly displacing civilians across a front line, but with the mode of prosecution; in particular, under what name was the act to be prosecuted? Implicitly, the Appeals Chamber accepts that the Security Council intended in the Statute to make such an act subject to prosecution. But if, because there is no crossing of a border, it cannot be prosecuted as a "deportation", how is it to be prosecuted? As I apprehend it, the solution adopted by the Appeals Chamber is to say that, in such a case, the Security Council intended the forcible displacement to be regarded as a "forcible transfer" and, on this basis, to be prosecuted as "other inhumane acts" under article 5(i). With much respect, that

looks roundabout.

43. The substantive issue having been determined by the Appeals Chamber when it accepted – as in my view, it did – that customary international law proscribes the forcible displacement of civilians across a front line as a punishable crime, the critical question which remains is whether the Security Council intended, in the Statute, to refer to that crime as a "deportation" or as "other inhumane acts". Customary international law having been already applied to the substantive question whether there is a crime, the remaining issue is whether, as a matter of statutory interpretation, the Statute used the term "deportation" to refer to that crime. It seems to me that that question is to be answered by reference to the "ordinary meaning" rule accepted by the jurisprudence of the two Tribunals.[974] To this I now turn.

(b) The term "deportation", in its ordinary meaning, is capable of extending to the forcible displacement of civilians across a front line.

44. There are dictionaries which define "deportation" to mean forcible displacement across a border.[975] And, to be sure, there are cases which illustrate that meaning. But cases illustrative of the use of a term, though valuable, do not necessarily limit the application of the term. Thus, a crossing of a border occurs in the "deportation" of aliens, and that is the term which is primarily used in that context.[976] But a crossing of a border is intrinsic to such an operation. That instance does not show that it is inadmissible to use "deportation" in other cases where the situation is different.

45. A larger meaning can be justified. In *Halsbury's Laws of England* the term is defined to mean "the process whereby the competent authorities require a person to leave and prohibit him from returning to a territory."[977] Though one recognizes that deportation includes a border crossing, nothing is said in that passage of a restriction to such a crossing in all cases. That passage does not come from a text permitting the argument that "territory" is synonymous with "state"; it is a general statement. The possibility is opened up of the term, ordinarily understood, being given a wider meaning.

46. My understanding of the literature (including references given in the foregoing analysis) is that what the term "deportation" indicates is that there is some kind of demarcation line or barrier which, if crossed, effectively prevents or at least seriously inhibits the return of the forcibly

[974] See, for example, *Akayesu* Appeal Judgement, paras. 478-479.
[975] See *Black's Law Dictionary* (Minnesota, 1990), p. 438, defining deportation as "[b]anishment to a foreign country".
[976] See, for example, *Oppenheim's International Law*, Vol. I, Parts 2 to 4 (Essex, 1992), p. 946, stating: "Deportation is primarily a means of removing an alien *from* the state which is deporting him, rather than *to* any particular other state". The stress here is on the word "alien".
[977] *Halsbury's Laws of England*, Vol. 18, 4th ed., (London, 1977), para. 201. The prohibition against returning of course lasts during the life of the deportation; if the deportation order was revoked, there would be nothing to prevent a return.

displaced population to its accustomed area of residence. The forcible crossing of a border is a deportation but only in the sense that the border represents such a demarcation line or barrier; deportation is exemplified by the case of a crossing of a border, but it is not restricted to that case. It can include the crossing of a coercive demarcation line within the territory of a single state. It is, for example, normal to speak of "deportation" where there is a forcible displacement across a coercive demarcation line within a large state, such as a state of a multi-territorial character.[978] A front line can be such a demarcation or barrier.

47. In common understanding there naturally exists a deportation whenever, within the same state, a party in control of a territory forcibly displaces civilians across a front line to territory controlled by an opposing party; nor do I see any evidence that customary international law has altered that. I hold the view that, in ordinary acceptation, "deportation" includes forcible displacement across a front line. The next question is whether, in the Statute, the Security Council used the term in that way.

(c) The Security Council's emphasis on the need to stop ethnic cleansing in all its forms

48. The Report of the Secretary-General leading to the establishment of the Tribunal was expressly approved by the Security Council,[979] which, at the same time, also adopted the Statute in the unchanged words of a draft annexed to the Report. The Report emphasizes the need to stop ethnic cleansing in all its forms, as does the resolution of the Security Council adopting the Statute.[980]

49. Ethnic cleansing can involve the forcible displacement of civilians either across a border or across a front line. The desire of the Security Council to stop ethnic cleansing in whichever of these two ways it occurs is in harmony with the reference in the chapeau of article 5 of the Statute to crimes against humanity "when committed in armed conflict, whether international or internal in character …" The last part of this reference is consistent with the view that all the elements of any crime against humanity stipulated in that provision *can* be committed entirely within the confines of a state. This means that all the elements of the stipulated crime of "deportation" can be committed wholly within a state – as is in fact possible in the case of the other eight crimes stipulated in article 5. It follows that, in the view of the Security Council, "deportation" need not be restricted to a crossing of a border between states; it extends to the crossing of a front line in the same state.

[978] As happened in the Roman Empire, victims being deported, *inter alia,* to islands near the Italian shore: there was a *deportatio* in such cases. See Adolf Berger, *Encyclopedic Dictionary of Roman Law* (1953), p. 432, quoted in *Black's Law Dictionary*, 8th ed.(Minnesota, 2004), p. 471.
[979] See first operative paragraph of Resolution 827 (1993), S/RES/827 (1993) 25 May 1993.
[980] See paras. 6, 9, 10, 11 and 48 of the Report of the Secretary-General, S/25704, 3 May 1993, and the third preambular paragraph of resolution 827 (1993), to which the Trial Chamber referred in paragraph 676 of its judgement.

(d) The general purpose of the Security Council

50. A pause may be taken to consider the extent, if any, to which the purpose which the Security Council had in mind may be taken into account. The general position is of course that the Tribunal "acts only on the basis of law … A Court functioning as a court of law can act in no other way".[981] "Ethnic cleansing" refers to a policy. This is not a crime in its own right under customary international law, but the general purpose which it represents can help to draw inferences as to the existence of elements of crimes referred to in the Statute. It is not correct to proceed on the basis that such limited use amounts to the use of policy as a self-sufficient ground of judicial action.[982]

51. In my view, the *purpose* represented by "ethnic cleansing" can also be used as an aid to resolve disputed points of interpretation of the Statute. Under contemporary ideas of a purposive interpretation, a court, in a proper case, can resolve issues of interpretation by taking into account, not merely the "mischief" which the statute sought to remedy, but the need to promote the purpose which the statute sought to accomplish. It is superficial to suppose that an interpretation made in that way is based solely on policy. Such an interpretation is of particular use in resolving ambiguities.

52. In the present case, there is an ambiguity concerning the meaning of the reference to "deportation" in article 5(d): Does the reference apply only to a crossing of a border? Or, does it apply also to a crossing of a front line? The interpretation to be chosen is that which promotes the purpose which can be judicially seen to be driving the provision, i.e., the need to put down ethnic cleansing in whichever way it occurs. In my view, only the broader interpretation accomplishes that purpose.

53. That purpose would be fulfilled on the interpretation that the reference in article 5(d) to "deportation" applies to the crossing of a border as well as to the crossing of a front line separating an area of a state under the control of a party from an area of the same state under the control of an opposing party. That purpose would not be fulfilled if the reference applied only to the crossing of a border.

[981] *Namibia, I.C.J. Reports 1971*, p. 23, para. 29. And see Judge Cassese's separate and dissenting opinion in *Erdemović*, IT-96-22-A, 7 October 1997, para. 11(ii).
[982] See Robert Yewdall Jennings in *Judicial Settlement of International Disputes* (Max Planck Institute, New York, 1974), p. 37, to the effect that, while policy is inadmissible, a judge "must have an eye to policy considerations".

(e) A front line crossing cannot be satisfactorily prosecuted as "other inhumane acts"

54. As appears from the above, the Appeals Chamber accepts that a forcible displacement of civilians across a front line is a punishable crime at customary international law; it also accepts, if only implicitly, that the Statute intended to authorise prosecutions for that crime. But if the case cannot be prosecuted as a deportation under article 5(d), how is it to be prosecuted?

55. The judgement of the Appeals Chamber is not precise on these matters, but, as I understand it, the answer which the Appeals Chamber would give is that the act amounts to a "forcible transfer" and that, on that basis, it should be prosecuted under article 5(i) relating to "other inhumane acts"; that, at any rate, would appear to be the only remaining possibility of prosecution. Thus, argues the Appeals Chamber, such a displacement would not be left out of the international criminal process if, there being no crossing of a border, it could not be prosecuted as an act of "deportation" under article 5(d).[983] There is much in that view; but does it suffer from possible weaknesses? The danger lies in assuming that there could be no reasonable objection to a prosecution under article 5(i), or in assuming that a prosecution thereunder will in all material respects be equivalent to a prosecution under article 5(d). The danger is illustrated thus:

56. First, ethnic cleansing in an armed conflict can involve the forcible displacement of civilians either across a border or across a front line. The Security Council intended both to be prosecuted. It might also be thought that the Security Council logically intended both to be prosecuted with equal efficiency and therefore in accordance with the same machinery. If the Security Council intended that one was to be prosecuted as a "deportation" under article 5(d), it would be odd if it intended that the other was to be prosecuted as a "forcible transfer" amounting to "other inhumane acts" under article 5(i), for both relate to forcible displacement in the nature of "ethnic cleansing" about which the Security Council was manifestly and equally concerned.

57. Second, as has been repeatedly pointed out,[984] the reference in article 5(i) of the Statute to "other inhumane acts" is of a residual character. It does not mention "forcible transfer"; this term would have to be read into that reference. It would not accord with the emphasis placed by the Security Council on the need to stop all forms of ethnic cleansing for cases which involved a border crossing to be dealt with under the explicit reference to "deportation" in article 5(d), while cases which involved a front line crossing had to be regarded as a "forcible transfer" and, as such, sneaked in under the residual reference to "other inhumane acts" in article 5(i).

[983] Judgement of the Appeals Chamber, para. 317.
[984] See, for example, Judgement of the Appeals Chamber, para. 315.

58. Third, if the idea of forcible displacement across a front line is brought within the meaning of "other inhumane acts" as referred to in article 5(i), it is only brought in on a subsidiary aspect. The mischief addressed by article 5(d), relating to "deportation", is the forcible movement of civilians, considered as a "movement".[985] By contrast, under article 5(i) the accused is not being punished for a forcible movement *simpliciter*; he is being punished for the *inhumanity* of a particular forcible movement. The two things may be related but are not necessarily the same.

59. Fourth, to establish the inhumanity of "other inhumane acts" there has to be proof that "the act or omission caused serious mental or physical suffering or that it constituted a serious attack on human dignity".[986] It is at least possible that proof of the requisite *seriousness* cannot automatically be made in every case of forcible displacement of civilians across a front line. In a given case, the defence will be entitled to submit that, although there is proof of forcible displacement across a front line, there is no proof of seriousness; there will be an expectation that in some situations that submission can succeed. If it can not succeed in any case, this conflicts with the requirement that there has to be poof of seriousness in every case in which the charge is for "other inhumane acts".

60. Fifth, if a forcible displacement across a front line can always be prosecuted as "other inhumane acts" under article 5(i), it will be difficult to explain why a forcible displacement across a border cannot also be regarded as "other inhumane acts" and prosecuted under that provision. But, if it was the intention to provide for the prosecution of a forcible displacement across a border under both article 5(d) and article 5(i), there would be an imbalance in the prosecution procedures, for it would be only possible to prosecute for a forcible displacement across a front line under paragraph (i). There being an observable disequilibrium in available remedies for what in substance is the same thing, namely, forcible displacement of civilians in pursuit of ethnic cleansing, the consequence is a partial nullification of the presumed intention of the Security Council to provide an equal remedial regime for an act which was of obvious concern to the Council in whichever way it was done.

61. These matters may at least provide reasonable grounds for argument against any prosecution for a forcible displacement across a front line which is instituted under article 5(i) relating to "other inhumane acts". This has to be taken into account in considering that, while there were cases of ethnic cleansing which involved a cross-border movement, other cases – almost certainly the majority – involved a cross-front line movement. From the foregoing, it appears that the latter could

[985] "Movement" is the term used in the title of article 17 of Protocol II, reading "Prohibition of forced movement of civilians".
[986] *Vasiljević* Appeal Judgement, para. 165(ii); *see also* Judgement of the Appeals Chamber, paras. 362, 366.

not be prosecuted with the same efficiency under article 5(i) relating to "other inhumane acts" as cases of "deportation" under article 5(d).

62. It may be argued that the Appeals Chamber does not say that one case may be prosecuted with the same efficiency as the other, so that criticisms on that score are beside the point. But then, if that is not being said, what is being said? Nothing suggests that the Security Council intended to provide for unequal approaches to the two forms of ethnic cleansing. In my opinion, the consequences of the view that "deportation" does not extend to a forcible displacement of civilians across a front line are so unsatisfactory as to caution against adopting that view.

6. If "deportation" includes forcible displacement across a front line, it was permissible for the Trial Chamber to speak of "constantly changing frontlines"

63. The Trial Chamber understood the term "deportation" as it is used in article 5(d) of the Statute

> to encompass forced population displacements both across internationally recognized borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognized. The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law, from an area in which they are lawfully present to an area under the control of another party.[987]

The Trial Chamber's reference to "*de facto* boundaries, such as constantly changing frontlines," has led, predictably, to some shaking of heads.

64. However, if it is accepted that there could be a deportation across a front line even if it is not a border, there is nothing improbable in the language used by the Trial Chamber. Most front lines constantly change. Therefore, if front lines which constantly change are excepted from the starting acceptance that there could be a deportation across a front line, the exception becomes the rule and the rule becomes the exception: there is little left in the starting acceptance that there could be a deportation across a front line. The oddness of this consequence forces the following reflection.

65. However much, or however frequently, front lines may change, the change is not relevant to the obvious criminality of conducting a forcible displacement of civilians across the front line as it stands at any one time. The front line may change the next minute, but there could have been a completed act of forcible displacement before the change. In *Turkey v. Cyprus*[988], I cannot see that the conclusion of the European Commission of Human Rights would have been different if the front line was a constantly changing front line: what was important was the fact of forcibly displacing

[987] Paragraph 679 of the Trial Judgement in *Stakić*, IT-97-24-T of 31 July 2003.
[988] European Human Rights Reports, Vol. 4 (1982), 482 at 520.

civilians across a front line as it existed for the time being. It was that which the European Commission of Human Rights regarded as a deportation. What the law condemns is the forcible displacement of civilians without just cause in international law across the front line as it stands for the time being. That is clearly a crime whenever it takes place; it is a necessary incident of deportation and shares the criminality of the latter under customary international law.

7. The view that deportation applies to a front line does not conflict with the principle of *nullum crimen sine lege*.

66. At all times material to this case customary international law regarded forcible displacement of civilians across a front line in circumstances not permitted by international law as a punishable crime. As argued above, that front line included a constantly changing front line. In substance, the crime always existed; all that the Security Council was doing in the Statute was to vest the Tribunal with jurisdiction over the crime. The principle *nullum crimen sine lege* relates to the existence of the crime. As to jurisdiction over the crime, it makes no difference that the Security Council provided for the crime to be prosecuted under a particular name so long as it is clear (as in my view, it is clear) that the intention was to prosecute for that crime: that is a matter of nomenclature.

67. The principle *nullum crimen sine lege* protects persons who reasonably believed that their conduct was *lawful* from retroactive criminalization of their conduct. It does not protect persons who knew that they were committing a crime from being convicted of that crime under a subsequent formulation. In paragraph 179 of the *Čelebići* Appeal Judgement, the Appeals Chamber cited with approval the following statement by the Trial Chamber in that case:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.

68. I do not accept the Appeals Chamber's view "that the Trial Chamber's finding … in fact expands criminal responsibility by giving greater scope to the crime of deportation than exists under customary international law, and thus violates the principle of *nullum crimen sine lege*".[989] The Appeals Chamber was referring to the crossing of a constantly changing front line. I have sought to show that the crossing of such a front line could always ground a crime of deportation at customary international law even if no concrete case could be shown. This results from an interpretation of

[989] Judgement of the Appeals Chamber, para. 302.

customary international law. As an interpretation of customary international law is not an extension of that law but a statement of what that law has always meant, no question arises of any violation of the principle *nullum crimen sine lege.*[990]

8. The view that "deportation" applies in relation to a front line accurately reflects the substance of customary international law.

69. It is important to bear in mind what is the real issue in this case. The Appeals Chamber accepts that customary international law regards forcible displacement across a front line as a punishable crime and that this was so at all times material to this case. That is the substance of the matter. The question is whether there was anything in customary international law which prevented the lawgiver, when granting jurisdiction to the Tribunal over that crime, from referring to it as a "deportation", compelling the lawgiver to refer to it as something else, probably as "other inhumane acts". With respect, the idea that there is such a compulsion puts a premium on labels, something not favoured by international law. Even more than domestic law, international law is concerned with substance;[991] it is not willing to be mesmerised by sacramental words.[992]

70. When one speaks of deportation across a border, what is involved is a "forced displacement" of civilians; but that also happens in the case of a "forced displacement" of civilians across a front line separating an area of a state under the control of one party from an area of the same state under the control of an opposing party. To the victim, the consequences of either act are not distinguishable. To him, the legally recognized lines on a map mean no more than a front line enforced at the point of a gun. This corresponds also to the attitude of the perpetrators; these, when they expel civilians across a front line, mean to jettison those civilians, to end the exercise by them of rights of citizenship in the territory from which they come, and in general to terminate public responsibility for them in that territory. Such a forcible displacement cannot reasonably be described as a "transfer". A power that expels civilians across a front line into an area controlled by another power is not just transferring the victims from one place to another: it is getting rid of them.

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[990] For an interesting general discussion of legality and the evolution of the law, see Antonio Cassese, *International Criminal Law* (Oxford, 2003), pp.139-153.

[991] "International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law", separate opinion of Vice-President Wellington Koo, *Barcelona Traction, ICJ Reports 1964*, 6 at 62-3; the examination of cases must not become "a sort of ritual, totally unjustified in the general conception of international law, which is not formalistic", separate opinion of Judge Gros, *Nuclear Tests, ICJ Reports 1974,* 253 at 278.

[992] "[L]e droit international … ne comporte pas le formalisme du droit romain. Il ne prescrit pas des paroles sacramentelles …" (argument of M. Politis, *Mavrommatis Concessions, P.C.I.J., Series C, No. 5 - I,* p. 50); and *Norwegian Loans, Pleadings,* Vol. 1, p. 382, Réplique du gouvernement de la République Française. See also the approach taken in *Aegean Sea Continental Shelf Case (Greece v. Turkey), I.C.J.Reports 1978,* p. 3 at para. 96, where the court distinguished "the question of form" from "the nature of the act or transaction".

The distinction strongly suggests that forcible displacement across a front line falls into the category of "deportation" rather than "transfer".

71. It bears noting that the mission of the Tribunal is different from that of an international civil judicial body. The Trial Chamber was not called upon to determine what in law was the boundary between states for the purpose of settling a dispute between those states as to the course of the boundary; it was concerned with ascertaining facts on the ground at a particular point of time and with giving effect to them for the purpose of determining the criminal responsibility of an individual. This purpose is essential to the role of a criminal tribunal, which is better equipped to determine whether a given act on a given day had the effect of moving people across front lines that existed on that day rather than to determine whether the crossing related to any boundary which existed over time. The legal implications of the latter exercise are not involved in the former.

9. Conclusions on deportation

72. I reach three conclusions. First, it is not entirely correct to say, as the Appeals Chamber says, that, under customary international law, "the crime of deportation requires the displacement of individuals across a border";[993] under customary international law, the concept of deportation can apply in relation to the crossing of a front line even if the front line is not a border. Second, even if existing materials always used the term "deportation" in relation to the crossing of a border, the term was reasonably capable of applying in relation to the crossing of a front line, inclusive of a constantly changing front line. Third, even if customary international law rigidly confined the use of the term "deportation" to the crossing of a border, it still recognized the crossing of a front line as a crime and it was open to the Security Council to provide in the Statute for the prosecution of this crime as a "deportation".

73. Nothing needs to be added in respect of the first two points. In relation to the third point, it may be emphasised that the question is one of statutory interpretation. As a matter of statutory interpretation, it is clear that the Security Council intended the term "deportation" to encompass forcible displacement across a front line. In particular, there was nothing in customary international law which forbade the Security Council from using the term "deportation" to cover a case of forcible displacement across a front line. For the reasons given, that term was more satisfactory than "other inhumane acts" and was in fact the term which the Security Council used to refer to the crime of forcible displacement, whether it occurred across a border or across a front line.

[993] Judgement of the Appeals Chamber, para. 300.

74. In judging the issue raised in this case, it is useful to bear this in mind. One state partially invades another. The armed forces of the two states establish a front line somewhere in the invaded state. The invading state displaces civilians of the invaded portion of the invaded state by forcibly sending them across the front line. *Turkey v. Cyprus*[994] suggests that that is an act of "deportation". If that is right, the position cannot be different if the front line was established by opposing forces of the same state. The development which has led to the extension of the leading principles of international humanitarian law to internal armed conflicts also requires that reasonable scope be given to the operation of those principles in such conflicts. It cannot be that a forcible displacement by an invading state across a front line is a deportation when a similar displacement by an internal party is not.

75. One would have thought that the thing uppermost in the mind of the Security Council was the phenomenon of a party to an armed conflict expelling civilians across a front line. It is primarily that which the Security Council intended to stop by providing for prosecutions of "deportation". It is puzzling to say that forcible displacement may be prosecuted as a "deportation" if, as in a minority of cases, it involves passage across a border, but that it can only be prosecuted by the uncertain procedure relating to "inhumane acts" if, as in the majority of cases, it involves passage across a front line. The distinction is artificial.

76. I regret that I am not able to support the position taken by the Appeals Chamber on deportation.

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

Mohamed Shahabuddeen

Dated this 22 March 2006
At The Hague
The Netherlands

[Seal of the International Tribunal]

[994] European Human Rights Reports, Vol. 4 (1982), 482 at 520. The demarcation line was in the nature of a front line. Ibid., paras. 14 and 17.

XIV. OPINION DISSIDENTE DU JUGE GÜNEY SUR LE CUMUL DE DECLARATIONS DE CULPABILITE

1. Dans l'affaire *Kordić et Čerkez*, je m'étais clairement prononcé, avec le Juge Schomburg, contre le renversement de jurisprudence opéré à la majorité des juges de la Chambre d'appel sur la question du cumul de déclarations de culpabilité prononcées pour persécutions constitutives de crime contre l'humanité – crime sanctionné en vertu de l'article 5 du Statut – et pour emprisonnement, assassinats et autres actes inhumains prononcés sur la base du même article à raison des mêmes faits[995]. Dans la présente affaire, la majorité de la Chambre d'appel fait sien le raisonnement adopté par majorité dans l'Arrêt *Kordić et Čerkez* pour conclure que la Chambre de première instance a versé dans l'erreur en déclarant qu'il n'était pas possible, sur la base de l'article 5 du Statut et à raison des mêmes faits, de déclarer un accusé coupable d'assassinat et d'expulsion d'une part et de persécutions d'autre part[996]. Il est également précisé qu'un accusé peut être déclaré coupable, à raison des mêmes faits et en vertu de l'article 5 du Statut, à la fois d'extermination et de persécutions, mais aussi d'autres actes inhumains (transfert forcé) et de persécutions[997]. Je ne peux souscrire aux conclusions de la majorité de la Chambre d'appel en cette matière et souhaite à nouveau exprimer mon désaccord avec le raisonnement emprunté pour y parvenir.

2. Comme j'en faisais état dans l'opinion dissidente conjointe attachée à l'Arrêt *Kordić et Čerkez*[998], je suis d'avis que le crime de persécutions doit être perçu comme une coquille vide, sorte de catégorie supplétive destinée à couvrir tout type d'acte sous-jacent. Ce n'est qu'en qualifiant l'acte sous-jacent constituant la persécution que le crime sanctionné à l'article 5(h) du Statut prend corps. Sans l'acte sous-jacent, la coquille que constitue la disposition relative aux persécutions demeure vide.

3. Il me paraît dès lors vain d'appliquer une lecture rigide et purement théorique de la notion d'« élément nettement distinct » qui est au cœur de la jurisprudence du Tribunal en matière de cumul de déclarations de culpabilité quand il s'agit de comparer crime de persécutions et d'autres crimes contre l'humanité[999]. Je crois en effet que dans le cas de figure spécifique où une Chambre doit examiner la question du cumul de déclarations de culpabilité prononcées à raison des mêmes

[995] Voir Arrêt *Kordić et Čerkez*, par. 1039 à 1041.
[996] Arrêt, par. 359, 360.
[997] Arrêt, par. 362, 364.
[998] Arrêt *Kordić et Čerkez*, Annexe XIII : « *Joint Dissenting Opinion of Judge Schomburg and Judge Güney on cumulative convictions* ».
[999] Je me réfère ici au test développé dans l'Arrêt *Čelebiči* selon lequel un cumul de déclarations de culpabilité n'est possible, à raison d'un même fait et sur la base de différentes dispositions du Statut, que si chacune des dispositions comporte un élément nettement distinct qui fait défaut dans l'autre. Selon cette jurisprudence, un élément est nettement distinct s'il exige la preuve d'un fait que n'exigent pas les autres : Arrêt *Čelebiči*, par. 400 et s.

faits pour persécutions et pour d'autres crimes contre l'humanité, cette dernière ne peut, si elle veut rendre compte le plus pleinement et le plus justement possible du comportement criminel de l'accusé, se contenter de comparer les éléments constitutifs des crimes en question mais doit étendre son examen aux actes sous-jacents au crime de persécutions sans lesquels point n'est de crime.

4. S'agissant du crime d'assassinat sanctionné à l'article 5(a) du Statut et du crime de persécutions sanctionné à l'article 5(h), il est vrai que si la comparaison s'arrêtait à la lettre des deux dispositions, on pourrait considérer au premier abord que les deux crimes possèdent chacun des éléments distincts : tandis que l'assassinat consiste en un acte ou une omission entraînant le décès de la victime commis dans l'intention de tuer la victime ou de porter des atteintes graves à son intégrité physique, la persécution consiste en un acte ou une omission commis délibérément avec l'intention d'exercer une discrimination pour des raisons politiques, raciales et religieuses qui introduit une discrimination de fait, et qui dénie ou bafoue un droit fondamental reconnu par le droit international coutumier ou conventionnel. Pour autant, ces dispositions ne sont pas à mon sens nettement distinctes l'une de l'autre dès lors que l'on ne peut considérer le crime de persécutions sans l'acte sous-jacent qui lui donne corps. En comparant le crime de persécutions dans son entièreté – acte sous-jacent y compris, en l'espèce l'acte d'assassinat – avec le crime d'assassinat au sens de l'article 5(a) du Statut, on réalise que seul un élément nettement distinct sépare les deux crimes : l'élément discriminatoire requis pour le crime de persécutions. Dans l'un et l'autre cas, il a été commis un acte ou une omission entraînant le décès de la victime commis dans l'intention de la tuer ou de porter des atteintes graves à son intégrité physique.

5. Partant, confrontée à la question du cumul de déclarations de culpabilité pour persécutions et pour assassinat constitutifs de crime contre l'humanité à raison des mêmes faits, une chambre ne devrait se fonder pour déclarer l'accusé coupable que sur la disposition la plus spécifique, à savoir le crime de persécutions pour assassinat. Le même raisonnement s'applique selon moi aux crimes d'expulsion, d'autres actes inhumains et d'extermination dont il est question dans le cas d'espèce, mais aussi aux autres crimes contre l'humanité qui pourraient constituer les actes sous-jacents au crime de persécutions.

6. Comme le Juge Schomburg et moi-même le rappelions dans notre opinion dissidente, cette approche a longtemps été celle de la Chambre d'appel dans les affaires où ce problème spécifique de cumul s'est posé[1000]. Il ne me paraît pas exister, aujourd'hui plus qu'hier, de raisons impérieuses

[1000] Jugement *Krnojelac*, par. 438, 503 et 534, endossé dans l'Arrêt *Krnojelac* (voir par. 41 et Dispositif), se prononçant sur la cumul de déclarations de culpabilité pour persécutions, emprisonnement et actes inhumains ; Arrêt *Vasiljević*, par. 146, 147 et Dispositif, se prononçant sur le cumul de déclarations de culpabilité pour persécutions, assassinat et actes inhumains. Le paragraphe 146 se lit comme suit :

qui commandent de s'écarter d'une approche endossée sans ambiguïté par la Chambre d'appel pour lui substituer une interprétation du test *Čelebiči* que je considère erronée[1001].

Fait en anglais et français, la version en français faisant foi.

Le 22 mars 2006, à La Haye, Pays-Bas

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Mehmet Güney

[Seal of the International Tribunal]

> « Pour ce qui est des autres accusations portées sur la base de l'article 5 du Statut, la Chambre de première instance a estimé que les persécutions sanctionnées par l'article 5 h) du Statut (chef 3) exigent des éléments nettement distincts, à savoir un acte et une intention discriminatoires, et qu'elles sont plus spécifiques que l'assassinat, assimilable à un crime contre l'humanité tombant sous le coup de l'article 5 a) (chef 4), et que les actes inhumains, constitutifs de crimes contre l'humanité sanctionnés par l'article 5 i) (chef 6). Appliquant à l'espèce la jurisprudence relative au cumul des déclarations de culpabilité, la Chambre d'appel déclare l'Appelant coupable de meurtre en application de l'article 3 du Statut (chef 5) et de persécutions en application de l'article 5 h) du Statut (chef 3).»

Arrêt *Krstić*, par. 232 :

> « Lorsque l'accusation de persécutions est fondée sur des assassinats ou des actes inhumains et qu'elle est établie, l'Accusation n'a besoin de prouver aucun autre fait pour avoir l'assurance que l'accusé sera également déclaré coupable d'assassinats ou d'actes inhumains. Prouver que l'accusé s'est livré à des persécutions, en commettant des assassinats ou des actes inhumains, implique *nécessairement* de rapporter la preuve des assassinats ou des actes inhumains en se fondant sur l'article 5. Les persécutions englobent donc ces deux infractions. »

Cette jurisprudence a été suivie par les Chambres de première instance dans les affaires *Naletilić et Martinović*, *Simić et consorts* et *Brdanin*.

[1001] Je relève que, curieusement et sans s'en expliquer, la majorité de la Chambre d'appel ne prononce pas les condamnations correspondant à ses conclusions sur le cumul de déclarations de culpabilité, à savoir celles relatives aux crimes d'expulsion et d'autres actes inhumains constitutifs de crimes contre l'humanité, et au crime de persécutions à raison des actes inhumains de transfert forcé et d'extermination. Pour les crimes d'expulsion (Chef 7) et d'autres actes inhumains (transfert forcé) (Chef 8), la majorité de la Chambre d'appel se contente en effet de déterminer dans le dispositif que c'est à tort que la Chambre de première instance a refusé de déclarer Milomir Stakić coupable de ces crimes. S'agissant du crime de persécutions à raison des actes d'extermination et de transfert forcé, la majorité se contente de confirmer la condamnation prononcée par la Chambre de première instance pour persécutions, la cantonnant ainsi aux qualifications d'assassinats, de tortures, de violences physiques, de viols et violences sexuelles, d'humiliation et dégradation constantes, de destruction, d'endommagement délibéré et pillage d'habitations et de locaux commerciaux et destruction ou d'endommagement délibéré d'édifices religieux et culturels et d'expulsion (*Voir* Jugement de première instance, par. 882). Les considérations de la majorité des juges de la Chambre d'appel sur la question du cumul de déclarations de culpabilité en vertu de l'article 5 du Statut pour persécutions et autres crimes à raison des mêmes faits n'ayant finalement pas entraîné l'introduction de nouvelles condamnations en appel – aussi curieux que cela puisse me paraître –, j'ai pu rejoindre les autres juges de la Chambre d'appel pour ce qui est la détermination de la peine.

XV. JOINT SEPARATE OPINION OF JUDGES VAZ AND MERON

We agree with the outcome of today's Judgement but append this separate opinion in order to explain our understanding of the Judgement's disposition section – an understanding in accordance with that of Judge Shahabuddeen.[1002] The disposition section, which "resolves" that the Trial Chamber erred in failing to convict the Appellant on certain charges but which does not formally enter new convictions thereon, should not be read to suggest that the Appeals Chamber lacks the power to enter a new conviction.[1003] The Appeals Chamber has merely declined, in the exercise of its discretion, to enter new convictions in this case.

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

Andrésia Vaz	Theodor Meron
Judge	Judge

Dated this 22nd day of March 2006
At The Hague
The Netherlands

[Seal of the International Tribunal]

[1002] *See* Partly Dissenting Opinion of Judge Shahabuddeen, para. 1.
[1003] *See* Article 25 of the Statute. In the *Tadić* Appeal Judgement, the *Kupreškić* Appeal Judgement, and the *Krnojelac* Appeal Judgement, this Tribunal's Appeals Chamber entered new convictions. Similarly, in both the *Semanza* and *Rutaganda* Appeal Judgements, the ICTR Appeals Chamber entered new convictions.

XVI. ANNEX A: PROCEDURAL BACKGROUND

1. History of Trial Proceedings

1. An initial indictment was filed against the Appellant on 13 March 1997 and was amended three times.[1004] The final version of the indictment (the Fourth Amended Indictment) was filed on 11 April 2002.[1005]

2. The Appellant was arrested in Belgrade on 23 March 2001 and was transferred to the United Nations Detention Unit the same day.[1006] At his initial appearance on 28 March 2001, the Appellant pleaded not guilty to genocide, and subsequently, to all charges.[1007] The Appellant's trial began on 16 April 2002, with the Trial Chamber consisting of Judges Wolfgang Schomburg (presiding), Volodymyr Vassylenko and Judge Mohamed Fassi Fihri.[1008]

3. The Trial Judgement was issued on 31 July 2003. The Trial Chamber found the Appellant not guilty of the crimes of genocide (Count 1), complicity in genocide (Count 2) and other inhumane acts (forcible transfer) as a crime against humanity (Count 8).[1009] The Trial Chamber found the Appellant guilty of extermination as a crime against humanity (Count 4), murder as a violation of the laws and customs of war (Count 5), and persecutions as a crime against humanity (Count 6), the latter conviction incorporating the crimes of murder as a crime against humanity (Count 3) and deportation as a crime against humanity (Count 7).[1010] The Appellant was sentenced to life imprisonment.[1011]

2. Filing of notices of appeal

4. Pursuant to Rule 127 of the Rules, the Appellant sought an extension of time in which to file a notice of appeal.[1012] In response, the Prosecution argued that the Appellant's motion should be dismissed.[1013] On 15 August 2003 the Pre-Appeal Judge, Judge Theodor Meron rendered a decision disallowing an extension of time to the Appellant for the filing of his notice of appeal.[1014]

[1004] Trial Judgement, paras 941-957.
[1005] Trial Judgement, para. 956.
[1006] Trial Judgement, para. 944.
[1007] Trial Judgement, para. 945.
[1008] Trial judgement, paras 964, 976.
[1009] Trial Judgement, Disposition.
[1010] Trial Judgement, Disposition.
[1011] Trial Judgement, Disposition.
[1012] Defendant, Milomir Stakić's Motion to Enlarge Time for Filing of the Notice of Appeal, filed 11 August 2003.
[1013] Prosecution Response to Motion for Extension of Time in which to File Notice of Appeal, filed 13 August 2003.
[1014] Decision on Motion for Extension of Time, issued 15 August 2003.

5. The Appellant filed a notice of appeal on 1 September 2003.[1015] He appealed on the grounds that the Trial Chamber allegedly: erred in law and fact by allowing an expansion of the Indictment; erred in law and fact during the course of the trial proceedings; erred in fact leading to a miscarriage of justice; erred in law and fact in the application of Article 5 of the Statute; erred in law and fact in the application of Article 3 of the Statute; erred in law and fact on the issue of sentencing; and erred in law and fact regarding cumulative convictions.

6. The Prosecution also filed its notice of appeal on 1 September 2003.[1016] It appealed on the grounds that the Trial Chamber allegedly: erred in law in finding that the Appellant did not have the requisite intent for genocide under Article 4 of the Statute; erred in law and/or fact in its consideration of Article 4(3)(c) of the Statute; erred in law in its conclusion that the Bosnian Croats did not form a group or part of a group targeted for genocide under Article 4 of the Statute; and erred of law in failing to cumulatively convict the Appellant on Counts 3 (murder as a crime against humanity) and 7 (deportation as a crime against humanity).

3. Composition of the Appeals Chamber

7. By order issued on 14 August 2003, the then President of the Tribunal, Judge Theodor Meron, designated the following Judges to form the Appeals Chamber in these proceedings: Judge Theodor Meron, Presiding; Judge Fausto Pocar; Judge Mohamed Shahabuddeen; Judge Mehmet Güney; and Judge Inés Mónica Weinberg de Roca.[1017] Judge Theodor Meron also designated himself as the Pre-Appeal Judge to this Appeal.

8. In the Order Replacing a Judge in a Case before the Appeals Chamber, dated 15 July 2005, Judge Theodor Meron, acting as President of the Tribunal, assigned Judge Andrésia Vaz to replace Judge Inés Mónica Weinberg de Roca in the case, and ordered the reconstitution of the Appeals Chamber hearing the case accordingly.[1018]

9. Following the appointment of Judge Fausto Pocar as President of the Tribunal on 17 November 2005, Judge Pocar, replaced Judge Meron as the Presiding Judge in this appeal pursuant to Article 14(2) of the Statute.

[1015] Appellant, Milomir Stakić's Notice of Appeal, filed 1 September 2003.
[1016] Prosecution's Notice of Appeal, filed 1 September 2003.
[1017] Order Assigning Judges to a Case before the Appeals Chamber and Appointing a Pre-Appeal Judge, issued 14 August 2003.
[1018] Order replacing a Judge in case before the Appeals Chamber, signed and filed 15 July 2005.

4. Filing of the appeal briefs

(a) Stakić Appeal

10. Pursuant to Rule 127 of the Rules, the Appellant sought an extension of time in which to file his brief in support of his appeal.[1019] The Prosecution responded to the Appellant's request for an extension of time on 23 October 2003.[1020] The Pre-Appeal Judge, Judge Theodor Meron, issued a decision granting an extension of time to the Appellant to file his brief in support of his appeal from 17 November 2003 to 6 January 2004.[1021]

11. On 17 December 2003 the Appellant sought a further extension of time in which to file his brief in support of his appeal.[1022] The Appellant was granted a further extension of time to file his brief in support of his appeal in a Decision issued on 19 December 2003.[1023]

12. The Appellant filed a brief in support of his appeal[1024] and a supporting book of authorities[1025] on 3 February 2004. However, on 11 February 2002 the Prosecution filed an urgent motion which alleged that the references in the Appellant's brief in support of his appeal were imprecise and therefore contravened the Tribunal's "Practice Direction on Formal Requirements for Appeals from Judgement" (IT/201).[1026] The Appellant disputed the Prosecution's allegations of imprecise referencing.[1027] In a decision issued on 23 February 2004, the Pre-Appeal Judge upheld the Prosecution motion and allowed the Appellant to re-file the brief with precise referencing but without adding new arguments on or before 8 March 2004.[1028] The Pre-Appeal Judge also allowed the Prosecution 30 days from the date of the re-filing of the Appellant's brief to file its response.[1029] Consequently, the Appellant re-filed his brief in support of his appeal on 9 March 2004 ("Stakić Appeal Brief").[1030]

[1019] Appellant, Milomir Stakić's Motion for Enlargement of Time to file Appellant's Brief in Support of his Appeal, signed 13 October 2003, filed 14 October 2003.
[1020] Prosecution's Response to "Appellant, Milomir Stakić's Motion for Enlargement of Time to file Appellant's Brief in Support of his Appeal", signed and filed 23 October 2003.
[1021] Decision on Motion for Extension of Time, issued 31 October 2003.
[1022] Appellant, Milomir Stakić's Motion for Enlargement of Time to file Appellant's Brief in Support of his Appeal, signed and filed 17 December 2003.
[1023] Decision on Second Motion for Extension of Time to file Appellant's Brief, issued 19 December 2003.
[1024] Stakić's Appellant's Brief (partly confidential), signed 1 February 2004, filed 3 February 2004.
[1025] Book of Authorities for the Defense Appellant's Brief, signed 1 February 2004, filed 3 February 2004.
[1026] Prosecution's Urgent Motion Regarding Defects in Milomir Stakić's Brief on Appeal of 1 February 2004, filed 11 February 2004 (confidential).
[1027] Appellant, Milomir Stakić's Motion to Enlarge Time for filing of Copies of Documentary Evidence Attached to his Motion for Admission of Additional Evidence Pursuant to Rule 115, signed 17 February 2004, filed 18 February 2004.
[1028] Decision on Prosecution's Urgent Motion Regarding Defects in Milomir Stakić's Brief on Appeal, issued 23 February 2004.
[1029] Decision on Prosecution's Urgent Motion Regarding Defects in Milomir Stakić's Brief on Appeal, issued 23 February 2004.
[1030] Stakić's re-filed Appellant's Brief, signed 8 March 2004, filed 9 March 2004 (confidential).

13. In relation to its response to the Appellant's re-filed brief in support of his notice of appeal, the Prosecution filed a motion for an extension of the page limit from 100 to 139 pages[1031] which was granted by a decision of the Pre-Appeal Judge issued on 5 April 2004.[1032] The Prosecution filed its response to the Appellant's re-filed brief in support of his notice of appeal on 8 April 2004 ("Prosecution Response Brief")[1033] and a supporting book of authority.[1034] The Prosecution filed a corrigendum to the book of authorities on 16 April 2004[1035] and to the response on 29 April 2004.[1036]

14. In a motion filed on 20 April 2004, the Appellant requested an extension of time to file a reply brief to the Prosecution Response until 20 May 2004.[1037] The motion was granted in a decision issued on 26 April 2004.[1038] Accordingly, the Appellant filed a brief in reply on 20 May 2004 ("Stakić Reply Brief").[1039]

15. On 8 June 2004, the Prosecution filed a motion alleging that the Appellant raised a new ground of appeal in the Stakić Reply Brief, relating to the non-disclosure of Rule 68 material concerning the Appellant's alleged co-perpetrators, and seeking leave to respond to another matter clarified by the Appellant in the Stakić Reply Brief.[1040] In a Decision issued on 20 July 2004, Judge Meron granted the Prosecution's motion in relation to both issues.[1041] Consequently, the Prosecution filed an addendum to the Prosecution's Response Brief on 22 July 2004,[1042] and the Appellant filed a reply to this addendum on 2 August 2004.[1043]

[1031] Urgent Motion for Extension of Page Limit, signed and filed 5 April 2004.
[1032] Decision on Prosecution's Urgent Motion for Extension of Page Limit, issued 5 April 2004.
[1033] Prosecution's Response Brief, signed and filed 8 April 2004 (confidential).
[1034] Book of Authorities for the Prosecution's Response Brief, signed and filed 8 April 2004.
[1035] Corrigendum to Book of Authorities for the Prosecution's Response Brief, signed and filed 16 April 2004.
[1036] Corrigendum to the Prosecution's Response Brief, signed and filed 29 April 2004.
[1037] Appellant, Milomir Stakić's Urgent Motion to Enlarge Time for filing of a Reply Brief in Support of his Appeal, signed 19 April 2004, filed 20 April 2004.
[1038] Decision on the Defense Motion for Extension of Time, issued 26 April 2004.
[1039] Milomir Stakić's Brief in Reply, signed and filed 20 May 2004.
[1040] Prosecution's Motion to Disallow a New Ground of Appeal in "Milomir Stakić's Brief in Reply" and to File a Further Response to the Brief in Reply, signed and issued 8 June 2004. *See* also in relation to this motion: Milomir Stakić's Appellant's Response in Opposition to the Prosecution's Motion to Disallow a New Ground of Appeal, signed 5 July 2004, filed 6 July 2004; Milomir Stakić's Appellant's Motion to Leave to file his Response in Opposition to the Prosecution's Motion to Disallow a New Ground of Appeal, instanter, signed 5 July 2004, filed 6 July 2004; Prosecution's Response to Stakić's Motion for Leave to file a Response to the Prosecution's Motion to Disallow a New Ground of Appeal and Prosecution's Reply in Relation to Motion to Disallow a New Ground of Appeal, signed and filed 9 July 2004.
[1041] Decision on Prosecution's Motion to Disallow a Ground of Appeal and to file a Further Response, issued 20 July 2004.
[1042] Addendum to the Prosecution's Response Brief, signed and filed 22 July 2004.
[1043] Milomir Stakić's Brief in Reply to the Prosecution's Addendum to its Response, signed 30 July 2004, issued 2 August 2004. ("Stakić Additional Reply Brief").

16. In its Decision of 21 June 2005,[1044] the Appeals Chamber ordered the Appellant to re-file a public version of his Appellant's Brief, and the Prosecution a public version of its Response thereto, since the Parties had only filed confidential versions of these briefs. On 7 July 2005, the Appellant filed his Re-filed Appellant's Brief in Support of his Notice of Appeal.[1045] On 13 July 2005, the Prosecution filed a public redacted version of its Response Brief.[1046]

17. In an order on the filing of the public version of Appellant's brief, dated 19 July 2005,[1047] the Appeals Chamber considered that the Appellant's Re-filed Appellant's Brief still contained confidential information, and ordered the Appellant to file a public version of the Appellant's Brief by 26 July 2005. On 20 July 2005, the Appellant again filed his Re-filed Appellant's Brief in Support of his Notice of Appeal.[1048]

(b) The Prosecution Appeal

18. The Prosecution filed its appeal brief ("Prosecution Appeal Brief"[1049]) and supporting book of authorities[1050] on 17 November 2003. The Appellant filed his response brief on 30 December 2003.[1051] In a motion pursuant to Rule 117 of the Rules and filed on 7 January 2004, the Prosecution sought an extension of time in which to file its reply brief, and permission to extend the pages of the reply brief.[1052] The Pre-Appeal Judge granted both of the Prosecution's requests and required the Prosecution to file its reply brief by 19 January 2004, and stipulated that it be no more than 40 pages in length.[1053] The Prosecution filed its brief in reply on 19 January 2004 ("Prosecution Reply Brief").[1054]

5. Motions pursuant to Rule 115 of the Rules

19. On 3 February 2004 the Appellant filed a motion to admit additional evidence before the Appeals Chamber pursuant to Rule 115 of the Rules.[1055] On 6 February 2004, the Appellant filed a

[1044] Status Conference, Tuesday 21 June 2005, (T. 31-32) (Open Session).
[1045] Milomir Stakić's Re-filed Appellant's Brief in Support of his Notice of Appeal (in accordance with the Appeals Chamber's Decisions of 23 February 2004 and 22 June 2005) (Public Redacted Version), filed 7 July 2005.
[1046] Prosecution's Response Brief (Public Redacted version), dated 13 July 2005.
[1047] Order on the Filing of the Public Version of Appellant's Brief, 19 July 2005.
[1048] Milomir Stakić's Re-filed Appellant's Brief in Support of his Notice of Appeal (in accordance with the Appeals Chamber's Decisions of 23 February 2004 and 22 June 2005) (Public Redacted Version), filed 20 July 2005.
[1049] The Prosecution's Appeal Brief, signed and filed 17 November 2003.
[1050] Book of Authorities for the Prosecution's Appeal Brief, signed and filed 17 November 2003.
[1051] Milomir Stakić's response to the Prosecution's Appeal Brief, signed and filed 30 December 2003.
[1052] Prosecution Motion for Extension of Time to file Reply Brief and for Extension of Pages, signed and filed 19 January 2004.
[1053] Decision on Prosecution Motion for Extension of Time to file Reply Brief and for Extension of Pages, signed and filed 12 January 2004.
[1054] The Prosecution's Brief in Reply, signed and filed 19 January 2004.
[1055] Stakić's Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115, filed 3 February 2004 (confidential).

motion to extend the time for filing of the documentary evidence in Annex 2 of his motion for admission of evidence pursuant to Rule 115.[1056] In a decision issued on 10 February 2004, the Pre-Appeal Judge granted the Appellant's motion to extend the time for the admission of Annex 2 documents to no later than (1) on or before the 7th day following the receipt of all English translations of the documents by the Appellant's counsel, or (2) 16 April 2004.[1057] The Appellant filed Annex 1 to his motion to admit additional evidence on 5 April 2004[1058] and Annexes 3 and 4 on 7 April 2004.[1059]

20. On 14 April 2004 the Prosecution filed an urgent motion to request an extension of time in which to file a response to the Appellant's motion under Rule 115.[1060] In a decision issued on 16 April 2004, the Pre-Appeal Judge held that good cause had been shown by the Prosecution and allowed the Prosecution to file a response on or before 3 June 2004.[1061] On 25 April 2004 the Prosecution filed a motion to extend the page limit of its response to the Appellant's motion.[1062] On 29 April 2004 the Prosecution filed a motion to strike out certain documents filed by the Appellant in relation to his Rule 115 motion[1063] and filed a corrigendum to its motion to strike out the documents on 10 May 2004.[1064]

21. On 27 May 2004 the Pre-Appeal Judge handed down his decision on the two motions filed by the Prosecution, wherein he dismissed the Prosecution's motion to strike out the documents filed by the Appellant before it handed down its decision on this issue, but allowed an extension of time to the Prosecution to file a response to the Appellant's Rule 115 motion.[1065] On 3 June 2004 the Prosecution filed a response to the Appellant's motion to admit additional evidence pursuant to

[1056] Stakić's Motion to Enlarge Time for Filing of Copies of Documentary Evidence Attached to his Motion for Admission of Additional Evidence Pursuant to Rule 115 (confidential).
[1057] Decision on Milomir Stakić's Motion to Enlarge Time for Filing of Copies of Documentary Evidence Attached to his Motion for Admission of Additional Evidence Pursuant to Rule 115, issued 10 February 2004.
[1058] Annex 1 to "Milomir Stakić's Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115", signed and filed 5 April 2004.
[1059] Annex 3 and Annex 4 to "Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115, signed and filed 7 April 2004.
[1060] Prosecution's Urgent Motion for Extension of Time Limit, filed 14 April 2004 (confidential).
[1061] Decision on Prosecution Urgent Motion for Extension of Time to file Response to Motion under Rule 115, issued 16 April 2004.
[1062] Extremely Urgent Motion for Extension of Page Limit, signed and filed 25 April 2004.
[1063] Prosecution Motion to Strike Out Documents from Appellant's Rule 115 Motion, signed and filed 29 April 2004.
[1064] Corrigendum to "Prosecution's Motion to Strike Out Documents from Appellant's Rule 115 Motion", signed and filed 10 May 2004.
[1065] Decision on Prosecution's Motions for Extension of Page Limit and to Strike Out Documents from Appellant's Rule 115 Motion, issued 27 May 2004.

Rule 115.[1066] On 25 January 2005 a confidential decision was issued on the Appellant's Rule 115 motion admitting statements previously rendered to the Prosecution by Witness BT106.[1067]

22. On 27 July 2005, the Prosecution filed a confidential motion requesting clarification of the Appeals Chamber's confidential decision on Stakić's Rule 115 motion to admit additional evidence on appeal.[1068] On 6 September 2005, the Appeals Chamber ordered the Appellant to file a notice by 8 September 2005, indicating whether it intended to call Witness BT106 as a witness at the hearing.[1069] On 9 September 2005, the Appellant filed his submission pursuant to the Appeals Chamber's order issued on 6 September 2005,[1070] following which the Prosecution filed its request for leave to file a response/reply.[1071] In an Order of 14 September 2005, the Appeals Chamber ordered the Prosecution to file its submission as requested by 15 September 2005,[1072] and the Prosecution complied.[1073]

23. In a decision issued on 20 September 2005 the Appeals Chamber summoned Witness BT106 as a witness *proprio motu* and ordered that Witness BT106 be present at the hearing on 4 October 2005.[1074] On 26 September 2005, the Appeals Chamber filed a Scheduling Order informing Witness BT106 and the parties that the examination of the witness would be on the content and background of the Admitted Statements, and scheduling the hearings for 4, 5 and 6 October 2005.[1075] The same day, the Appeals Chamber issued an order for the preparation of the hearings on appeal by which it invited the Parties to, *inter alia*, further develop their submission on the issues set out therein.[1076]

[1066] Prosecution's Response to Stakić's Motion to Admit Additional Evidence, filed 3 June 2004 (confidential).
[1067] Confidential Decision on Stakić's Rule 115 Motion to Admit Additional Evidence on Appeal, issued 25 January 2005 (confidential).
[1068] Prosecution's Motion to Clarify Confidential Decision on Stakić's Rule 115 Motion to Admit Additional Evidence on Appeal, 27 July 2005.
[1069] Order Concerning Witness BT106, 6 September 2005.
[1070] Milomir Stakić's Submission Relative to Witness BT106, Pursuant to the Appeals Chamber's Order of 6 September 2005, 9 September 2005.
[1071] Prosecution's Request for Leave to file a Reply or Response to Milomir Stakić's Submission Relative to Witness BT106, 12 September 2005.
[1072] Order on Prosecution's Request to file a Response, 14 September 2005.
[1073] Prosecution's Response to Milomir Stakić's Submission Relative to Witness BT106, 15 September 2005. (*See* also Attachment to Prosecution's response to Milomir Stakić's submission relative to witness BT106, 15 September 2005 (confidential).
[1074] Decision to summon a witness *proprio motu*, 20 September 2005. *See* also Transfer Order Pursuant to Rule 90*bis*, 26 September 2005 (confidential).
[1075] Scheduling Order, 26 September 2005.
[1076] Order for the Preparation of the Appeal Hearing, 26 September 2005.

6. Other motions relating to evidence

24. On 13 November 2003 the Prosecution filed a motion for the variation of protective measures for disclosure.[1077] On 26 November 2003 the Appeals Chamber issued a Decision on "Prosecution's Motion for Variation of Protective Measures for Disclosure in the case of *Prosecutor v. Milomir Stakić* (IT-97-24-A)".

7. Hearings

25. Pursuant to the Scheduling Order of 26 August 2005, the hearings on the merits of the appeal took place between 4 and 6 October 2005. Witness BT106 was heard on 4 October 2005.

8. Status conferences

26. Status Conferences were held in accordance with Rule 65*bis* of the Rules on: 18 December 2003[1078]; 5 April 2004[1079]; 27 July 2004[1080]; 2 November 2004; 23 February 2005; 21 June 2005; and 27 January 2006.

[1077] Prosecution's Motion for Variation of Protective Measures for Disclosure, filed 13 November 2003 (confidential *ex-parte*).
[1078] *See* also Prosecution's status report, signed and filed 17 December 2003.
[1079] *See* also Prosecution's status report, signed and filed 27 July 2004.
[1080] *See* also Prosecution's status report, signed and filed 1 April 2004.

XVII. ANNEX B: GLOSSARY

A. List of Tribunal and Other Decisions

1. Tribunal

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BABIĆ

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, ("*Babić* Judgement on Sentencing Appeal").

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRĐANIN

Prosecutor v. Radoslav Brđanin Case No. IT-99-36-T, Decision on Motion for Acquittal pursuant to Rule 98*bis*, 28 November 2003 ("*Brđanin* Rule *98bis* Decision").

Prosecutor v. Radoslav Brđanin Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 ("*Brđanin* Decision on Interlocutory Appeal").

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement").

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

DERONJIĆ

Prosecutor v. Miroslav Deronjić, Case No: IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, ("*Deronjić* Appeal Judgement").

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").

HADŽIHASANOVIĆ

Prosecutor v. Enver Hadžihasanović, Mehmet Alagić and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović* Appeal Decision on Jurisdiction").

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-T, Judgement, 14 December 1999 ("*Jelisić* Trial Judgement").

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ

Prosecutor v.Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Appeal Judgement").

KORDIĆ AND ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić* Trial Judgement").

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement").

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement").

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement").

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement").

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac* Appeal Judgement").

KUPREŠKIĆ

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić* Trial Judgement").

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement").

KVOČKA

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement").

Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement").

NALETILIĆ AND MARTINOVIĆ

Prosecutor v. Mladen Naletilić and Vinko Martinović, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić and Martinović* Trial Judgement")

D. NIKOLIĆ

Prosecutor v. Dragan Nikolić a/k/a Jenki, Case No. IT-94-2, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995 ("*Nikolić* Rule 61 Decision").

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgement, 18 December 2003

("*Dragan Nikolić* Sentencing Judgement").

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Appeal Judgement").

OJDANIĆ

Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on *Dragoljub Ojdanić*'s Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Ojdanić* Decision on Jurisdiction").

ORIĆ

Prosecutor v. Naser Orić, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005 ("*Orić* Decision on Length of Defence Case").

B. SIMIĆ

Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Trial Judgement").

M. SIMIĆ

Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, Sentencing Judgement, 17 October 2002 ("*Simić* Sentencing Judgement").

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Decision on Request for Approval of Defence Experts, 8 October 2002 ("Decision on Request for Approval of Defence Experts").

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Decision on Rule 98*bis* Motion for Judgement of Acquittal, 31 October 2002 ("Rule 98*bis* Decision").

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement , 31 July 2003 ("Trial Judgement").

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response, 20 July 2004 ("Decision on Prosecution's Motion to Disallow a Ground of Appeal and to File a Further Response").

TADIĆ

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-AR-72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on Jurisdiction").

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997 ("*Tadić* Trial Judgement").

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement").

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T*bis*-R117, Sentencing Judgement, 11 November 1999 ("*Tadić* Sentencing Judgement").

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Sentencing Appeal Judgement").

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgement, 29 November 2002 ("*Vasiljević* Trial Judgement").

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement").

2. ICTR

AKAYESU

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement").

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement").

BAGILISHEMA

Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement ").

KAJELIJELI

Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 ("*Kajelijeli* Trial Judgement").

Juvénal Kajelijeli v. Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

KAMBANDA

Prosecutor v. Kambanda, Case No ICTR-97-23-S, Judgement and Sentence, 4 September 1998 ("*Kambanda* Trial Judgement").

Jean Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement").

KAMUHANDA

Jean de Dieu Kamuhanda v. Prosecutor, Case No. ICTR-95-54A-A, Appeal Judgement, 19 September 2005 ("*Kamuhanda* Appeal Judgement").

KAYISHEMA AND RUZINDANA

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement").

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement").

MUSEMA

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement").

Alfred Musema v. Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement").

NDINDABAHIZI

Prosecutor v. Emmanuel Ndindabahizi, Case No. ICTR-2001-71-I, Judgement and Sentence, 15 July 2004 ("*Ndindabahizi* Trial Judgement").

NIYITEGEKA

Eliezer Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement ").

NTAKIRUTIMANA

Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence, 21 February 2003 ("*Ntakirutimana* Trial Judgement").

Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement").

RUTAGANDA

Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement").

Georges Anderson Nderubunwe Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 ("*Semanza* Trial Judgement").

Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SERUSHAGO

Prosecutor v. Omar Serushago, Case No. ICTR-98-39-S, Sentencing Judgement, 5 February 1999 ("*Serushago* Sentencing Judgement").

Omar Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgment, 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

3. Decisions Related to Crimes Committed During World War II

Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946 (London: His Majesty's Stationary Office, 1946) (Reprinted Buffalo, New York: William S. Hein & Co., Inc., 2001). Defendant *Fritzsche* pp. 127-128 ("*Fritzsche*, IMT Judgement"). Defendant *Sauckel* pp. 114-116 ("*Sauckel*, IMT Judgement").

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"*High Command* Judgement",Vol. X1, pp. 462-698
"*Justice* Judgement", Vol. III, pp. 954-1202
"*Krupp* Judgement", Vol. IX, Part II, pp. 1327-1484
"*Medical* Judgement", Vol. II, pp. 171-301
"*Milch* Judgement", Vol. II, pp. 773-879
"*Ministries* Judgement", Vol. XIV, pp. 308-871

4. Other Decisions

(a) Domestic Cases

Blockburger v. United States, 284 U.S. 299, (1932).

B. List of Other Legal Authorities

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Henckaerts, J-M., "Deportation and Transfer of Civilians in Time of War", *Vanderbilt Journal of*

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Lemkin, R., *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944). ("Raphaël Lemkin, Axis Rule in Occupied Europe, (1944) ")

Pictet, J. S. (Ed.)., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) ("*ICRC Commentary (GC IV)*").

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Planzer, A., *Le Crime du Génocide* (St. Gallen: F. Schwald AG, 1956).

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2. Dictionaries

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Whitaker Report on Genocide, UN ESCOR, 38th Session., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985) ("Whitaker Report").

UN Official Records of the General Assembly, Sixth Committee, Summary Records of Meetings on the Genocide Convention, 21 Sept – 10 December 1948, 72nd Meeting, pp. 81-97.

C. List of Abbreviations, Acronyms and Short References

According to Rule 2(B) of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609
Appellant	Dr. Milomir Stakić
ARK	Autonomous Region of Bosanska Krajina
AT	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
B/C/S	The Bosnian/Croatian/Serbian languages
D	Designates "Defence" for the purpose of identifying exhibits
Defence	The Appellant and/or the Appellant's counsel at the trial stage
ECMM	European Community Monitoring Mission
ECOSOC	United Nations Economic and Social Council
Ex.	Exhibit
General Assembly Resolution 96(I)	G.A. Res. 96(I). UN GAOR. 1st Session, (1946)
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135

Geneva Convention IV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
Genocide Convention	Convention of the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, 78 U.N.T.S. 277
ICCPR	International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, entry into force on 23 March 1976; 999 U.N.T.S. 171
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
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, also "Tribunal"
ILC	International Law Commission
1991 ILC Draft Code	The International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind, provisionally adopted by the Commission at its forty-third session (1991) (A/46/10)
1996 ILC Draft Code	The International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the Commission at its forty-eighth session (1996) (A/48/10)
IMT	The Nuremberg International Military Tribunal for the just and prompt trial and punishment of the major war criminals of the European Axis, established on 8 August 1945
IMT Judgment	Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946
Indictment	*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Fourth Amended Indictment, filed 11 April 2002 (dated 10 April 2002)

JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
Nuremberg Charter	Charter of the IMT, annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis ("London Agreement") of 8 August 1945, 82 U.N.T.S. 279
OTP	*See* Prosecution
Prosecution	The Office of the Prosecutor
Prosecution Appeal Brief	The Prosecution's Appeal Brief, filed on 17 November 2003
Prosecution Final Trial Brief	Prosecution's Final Pre-Trial Brief (Revised April 2002), filed on 5 April 2002
Prosecution Response Brief (Confidential)	Prosecution's Response Brief (confidential), filed 8 April 2004
Prosecution Response Brief	Prosecution's Response Brief (public redacted version), filed 13 July 2005
Prosecution Reply Brief	The Prosecution's Brief in Reply, filed 19 January 2004
Prosecution Final Trial Brief (Confidential)	*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Final Trial Brief (Confidential), filed 5 May 2003
Report of the ILC on its 43rd Sess.	Report of the International Law Commission on the Work of its Forty-Third Session, Yearbook of the International Law Commission (1991)
Report of the ILC on its 48th Sess.	Report of the International Law Commission on the Work of its Forty-Eight Session, 6 May-26 July 1996 (A/51/10)
Rome Statute	Statute of the International Criminal Court, of 17 July 1998, UN Doc. A/CONF.183/9
Rules	Rules of Procedure and Evidence of the ICTY
SDS	Serbian Democratic Party
SFRY	Former: Socialist Federal Republic of Yugoslavia
SJB	Public Security Station
Stakić Additional Reply Brief	Milomir Stakić's Brief in Reply to the Prosecution's Addendum to its Response, filed 2 August 2004 (dated 30 July 2004)

Stakić Appeal Brief (confidential)	Milomir Stakić's Re-Filed Appellant's Brief In Support of his Notice of Appeal (In accordance with the Appeals Chamber's Decision of 23 February 2004) (confidential), signed 8 March 2004 and filed 9 March 2004
Stakić Appeal Brief	Milomir Stakić's Re-Filed Appellant's Brief In Support of his Notice of Appeal (In accordance with the Appeals Chamber's Decision of 23 February 2004 and 22 June 2005, filed 20 July 2005
Stakić Defence	Counsel for Milomir Stakić (*See* also Defence)
Stakić Reply Brief	Milomir Stakić's Brief in Reply, filed 20 May 2004
Stakić Response Brief	Milomir Stakić's Response to the Prosecution's Appeal Brief, filed 30 December 2003 (dated 27 December 2003)
Statute	Statute of the International Tribunal for the former Yugoslavia established by Security Council Resolution 827 (1993)
SUP	Secretariat of the Interior
T	Transcript page from hearings at trial in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections to or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
TO	Territorial Defence Forces
Tokyo Charter	Charter of the International Military Tribunal for the Far East of 19 January 1946, 4 Bevans 20 (as amended, 26 April 1946, 4 Bevans 27)
Trial Judgement	*Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement , 31 July 2003
Tribunal	*See* ICTY
UN	United Nations
VRS	Army of Serbian Republic