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-94-1-T

Date: 7 May 1997

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Ninian Stephen
Judge Lal Chand Vohrah

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

Opinion and Judgment of: **7 May 1997**

PROSECUTOR

v.

DU[KO TADI] a/k/a/ "DULE"

OPINION AND JUDGMENT

The Office of the Prosecutor:

Mr. Grant Niemann **Ms. Brenda Hollis** **Mr. Alan Tieger**
Mr. William Fenrick **Mr. Michael Keegan**

Counsel for the Accused:

Mr. Michaïl Wladimiroff **Mr. Steven Kay** **Mr. Milan Vujin**
Mr. Alphons Orie **Ms. Sylvia de Bertodano** **Mr. Nikola Kosti}**

I. INTRODUCTION

A. The International Tribunal

1. This Opinion and Judgment is rendered by Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") following the indictment and trial of Du{ko Tadi}, a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes. It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations. The international military tribunals at Nürnberg and Tokyo, its predecessors, were multinational in nature, representing only part of the world community.

2. The International Tribunal was established by the Security Council of the United Nations in 1993, pursuant to resolution 808 of 22 February 1993 and resolution 827 of 25 May 1993[1]. The Security Council, having found that the widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including the practice of "ethnic cleansing", constituted a threat to international peace and security, exercised its powers under Chapter VII of the Charter of the United Nations to establish the International Tribunal, determining that the creation of such a tribunal would contribute to the restoration and maintenance of peace. As such, the International Tribunal is a subsidiary organ of the Security Council and all Member States are required to cooperate fully with it and to comply with requests for assistance or with orders issued by it.

3. The International Tribunal is governed by its Statute ("Statute"), adopted by the Security Council following a report by the Secretary-General of the United Nations presented on 3 May 1993 ("*Report of the Secretary-General*")[2]. Its 11 Judges are drawn from States

[1] U.N. Doc. S/RES/808(1993); U.N. Doc. S/RES/827 (1993).
[2] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704 ("*Report of the Secretary-General*").

around the world. The proceedings are governed not only by the Statute but also by Rules of Procedure and Evidence ("Rules") adopted by the Judges in February 1994, as amended[3]. The International Tribunal is not subject to the national laws of any jurisdiction and has been granted both primacy and concurrent jurisdiction with the courts of States.

4. The Statute grants competence to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Subject-matter jurisdiction is stated in Articles 2 to 5 of the Statute to consist of the power to prosecute persons responsible for grave breaches of the Geneva Conventions of 12 August 1949[4] (collectively the "Geneva Conventions") (Article 2), to prosecute persons violating the laws or customs of war (Article 3), to prosecute persons committing genocide, as defined in the Statute (Article 4), and to prosecute persons responsible for crimes against humanity when committed in armed conflict (Article 5), which are beyond any doubt part of customary international law.

5. Under the Statute the Prosecutor, an independent organ of the International Tribunal, is responsible for the investigation and prosecution of persons responsible for such offences. Upon determination that a prima facie case exists against a suspect, the Prosecutor may prepare an indictment, which is to contain a concise statement of the facts and the crime or crimes with which the accused is charged, and submit that indictment to a Judge of a Trial Chamber for review and confirmation.

B. Procedural Background

6. Du{ko Tadi} was arrested in February 1994 in Germany, where he was then living, on suspicion of having committed offences at the Omarska camp in the former Yugoslavia in

[3] IT/32/Rev. 10.

[4] The Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 U.N.T.S. 970 ("Geneva Convention I"); the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 75 U.N.T.S. 971 ("Geneva Convention II"); the Geneva Convention relative to the treatment of Prisoners of War, 12 Aug. 1949, 75 U.N.T.S. 972 ("Geneva Convention III"); the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 973 ("Geneva Convention IV").

June 1992, including torture and aiding and abetting the commission of genocide, which constitute crimes under German law.

7. Proceedings at the International Tribunal involving Du{ko Tadi}, all of which have been held at the seat of the International Tribunal in The Hague, Netherlands, commenced on 12 October 1994 when the Prosecutor of the International Tribunal, at that time Richard J. Goldstone, filed an application under Rule 9 of the Rules, seeking a formal request to the Federal Republic of Germany, pursuant to Rule 10, for deferral by the German courts to the competence of the International Tribunal. These provisions allow the International Tribunal to exercise its primacy jurisdiction in connection with proceedings already instituted in a State in cases where, *inter alia,* what is in issue is closely related to, or otherwise involves significant factual or legal questions which may have implications for investigations or prosecutions before the International Tribunal.

8. A public hearing on the deferral application was held on 8 November 1994, before Trial Chamber I, with Judge Adolphus Karibi-Whyte (Nigeria) presiding, sitting with Judge Elizabeth Odio Benito (Costa Rica) and Judge Claude Jorda (France). At that hearing, counsel for the Federal Republic of Germany and counsel for Du{ko Tadi} appeared as *amici curiae*. The Federal Republic of Yugoslavia (Serbia and Montenegro) was also invited to appear as *amicus curiae* but declined to do so. Trial Chamber I found that both sets of investigations involved the same crimes and that, in addition, the International Tribunal would not be acting in the proper interests of justice if some of the alleged co-offenders of these serious violations of international humanitarian law were to be judged in national courts and others by the International Tribunal. Accordingly, a Formal Request for Deferral addressed to the Federal Republic of Germany was issued that day[5].

9. The Indictment by the Prosecutor against Du{ko Tadi} ("the accused") and a co-accused, Goran Borovnica, charging them with a total of 132 counts involving grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity was confirmed by Judge Karibi-Whyte in February 1995 (subsequently twice amended but referred to throughout as "the Indictment") and arrest warrants were issued. The accused was charged with individual counts of persecution, inhuman treatment, cruel treatment, rape, wilful killing, murder, torture, wilfully causing great suffering or serious

injury to body and health, and inhumane acts alleged to have been committed at the Omarska, Keraterm and Trnopolje camps and at other locations in op{tina Prijedor in the Republic of Bosnia and Herzegovina. The accused was transferred to the International Tribunal on 24 April 1995, after the Federal Republic of Germany enacted the necessary implementing legislation for his surrender, and thereafter was detained in the United Nations detention unit in The Hague.

10. The initial appearance of the accused under Rule 62 of the Rules took place on 26 April 1995, before Trial Chamber II, then comprised of Judge Gabrielle Kirk McDonald (U.S.A.), presiding, Judge Jules Deschênes (Canada) and Judge Lal Chand Vohrah (Malaysia). The Prosecution team was led by Mr. Grant Niemann from Australia, with Mr. William Fenrick from Canada, and Ms. Brenda Hollis and Mr. Alan Tieger, both from the U.S.A., and assisted by the case manager, Ms. Ann Sutherland, also from Australia. The accused was represented by Mr. Michaïl Wladimiroff, a member of the Dutch bar, assisted by Mr. Milan Vujin, a member of the bar of the Federal Republic of Yugoslavia (Serbia and Montenegro). Mr. Wladimiroff was assigned as counsel to the accused by the Registrar of the International Tribunal, with his fees paid by the International Tribunal, on the grounds of indigency pursuant to the Directive of the International Tribunal on the Assignment of Counsel[6]. At that hearing, the Prosecution indicated its desire to proceed against the accused in the absence of the co-accused, Goran Borovnica. The accused entered a plea of not guilty to all counts of the Indictment and was remanded in detention pending trial. The proceedings were broadcast live pursuant to an Order of the Trial Chamber (a practice which has since been followed for all public sessions), with simultaneous interpretation in English, French and the language of the accused.

11. On 11 May 1995 a preliminary status conference was held, in open session and in the presence of the accused, to discuss procedural and other matters relating to the case. By this time the Prosecution team had been enlarged to include Mr. Michael Keegan from the U.S.A., while Mr. Krstan Simi}, also a member of the bar of the Federal Republic of Yugoslavia (Serbia and Montenegro), assisted the Defence. On 18 May 1995 the Prosecution filed a motion for protective measures seeking a variety of protective measures for a total of seven witnesses. The Defence responded on 2 June 1995, opposing the granting of the majority of

[5] Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. I, 8 Nov. 1994.
[6] IT/73/Rev. 3.

these measures on the ground that they infringed upon the right of the accused to a fair and public hearing. Thereafter, pursuant to leave granted, an *amicus curiae* brief was filed by Christine Chinkin, Professor of International Law, and a joint *amicus curiae* brief was submitted by Rhonda Copeland, Professor of Law, Jennifer M. Green, attorney, Felice Gaer and Sara Hossain, barrister, on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, Center for Constitutional Rights, International Women's Human Rights Law Clinic of the City University of New York, Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services. These were the first *amicus curiae* briefs to be submitted to the International Tribunal. The motion was heard in closed session on 21 June 1995 before Judge McDonald and Judge Vohrah, sitting with Judge Ninian Stephen (Australia), Judge Deschênes having withdrawn at his own request. Thereafter, Trial Chamber II remained as thus constituted throughout preliminary proceedings and the trial. Following the hearing, an Order was issued on 23 June 1995 requiring the parties to file additional factual information concerning prior media contact by the witnesses for whom protective measures were sought. When the Prosecution responded to this request, it also amended the relief it was seeking in respect of certain witnesses and withdrew its request for relief in respect of one witness.

12. On 10 August 1995 the Trial Chamber issued its Decision on this motion. The request for confidentiality (non-disclosure of names and identities to the public) and related orders for six witnesses was granted unanimously, while the request for anonymity (non-disclosure of such information to the accused) was granted by majority in respect of four witnesses, Judge Stephen dissenting in part[7].

13. Meanwhile, on 23 June 1995, the Defence filed motions on the form of the Indictment, *non bis in idem* and jurisdiction and sought, and was granted, a 14-day extension of time in which to file a motion to exclude evidence obtained from the accused while detained in Germany. The Trial Chamber set the date of 25 July 1995 to hear the motion challenging jurisdiction and adjourned the hearing of all other preliminary motions until after the motion on jurisdiction had been finally resolved. On 14 July 1995, the Trial Chamber granted leave to the Government of the United States of America to file an *amicus curiae* brief on this issue.

14. The Defence motion on jurisdiction was heard in public session on 25 and 26 July 1995. Mr. Alphons Orie, also a member of the Dutch bar, had meanwhile joined the Defence team and was subsequently formally appointed as co-counsel. The Defence raised three principal arguments, disputing the legality of the establishment of the International Tribunal by the Security Council, challenging the primacy jurisdiction with which the International Tribunal is endowed and challenging the subject-matter jurisdiction.

15. On 10 August 1995 the Trial Chamber rendered its Decision on the Defence Motion on Jurisdiction, unanimously dismissing the challenge to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute and decided that the dispute as to the establishment of the International Tribunal raised a non-justiciable issue and that the International Tribunal was not competent to review the decision of the Security Council[8]. The Defence filed a notice of interlocutory appeal against this Decision on 14 August 1995, a schedule for filing of briefs was issued by the Appeals Chamber and the hearing was set down for 7 September 1995. Prior to the hearing, the non-governmental organization, Juristes sans Frontières, sought and was granted leave to file a written brief as *amicus curiae* in the appeal.

16. On 7 and 8 September 1995 the interlocutory appeal was heard by the Appeals Chamber composed of the President of the International Tribunal, Judge Antonio Cassese (Italy), presiding, and Judge Haopei Li (China), Judge Jules Deschênes (Canada), Judge Georges Abi-Saab (Egypt) and Judge Rustam S. Sidhwa (Pakistan). The Prosecutor of the International Tribunal argued the appeal, assisted by the trial attorneys. The Defence team remained as it had been before the Trial Chamber. On 2 October 1995 the Appeals Chamber issued its Decision on the appeal[9] (*"Appeals Chamber Decision"*). The Appeals Chamber unanimously upheld the Trial Chamber on the challenge to primacy and, with Judge Sidhwa dissenting, held that the International Tribunal had subject-matter jurisdiction. However, the Appeals Chamber, with Judge Li dissenting, decided that the International Tribunal was empowered to pronounce upon the legality of its establishment by the Security Council and dismissed that challenge.

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[7] Decision on the Prosecutor's Motion requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 10 Aug. 1995.
[8] Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 10 Aug. 1995.

17. On 1 August 1995 the Prosecution sought leave to amend the Indictment by the addition of new charges and at the same time requested protective measures for the principal witness involved. As the procedure for an amendment of the Indictment in this way was not specifically provided for in the Rules, the Prosecution sought the guidance of the Trial Chamber as to whether the new material should be submitted for review to the Trial Chamber or to the confirming Judge. On 8 August 1995 the Trial Chamber directed the Prosecution to submit its motion for leave to amend the Indictment to the confirming Judge, Judge Karibi-Whyte, who confirmed the new charges on 1 September 1995. At the same time the Prosecution reorganized the charges in the Indictment, to reduce the total number of counts to 36. The Prosecution motion for protective measures for the principal witness whose testimony supported the additional charges in the Indictment, Witness L, was heard in closed session on 25 October 1995; further filings were sought and subsequently made in respect of the effect upon any protective measures of the prior conviction of Witness L for serious crimes by the courts of the Republic of Bosnia and Herzegovina and, on 14 November 1995, a Decision granting protective measures to that witness was handed down[10].

18. The Defence filed a motion on the form of the Indictment on 4 September 1995, together with a second motion to suppress the production of evidence obtained from the accused and a second motion on the principle of *non bis in idem*, but on 28 September 1995 withdrew the two motions to suppress the production of evidence. On 14 November 1995 the Trial Chamber handed down its Decisions on the principle of *non bis in idem* and on the form of the Indictment (*"Decision on the Form of the Indictment")*[11]. The motion on *non bis in idem* was dismissed in full but the *Decision on the Form of the Indictment* upheld the motion in as far as it related to paragraph 4 of the Indictment and the Prosecution was granted 30 days in which to amend that paragraph, which it did by withdrawing the two counts based on deportation.

[9] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadi}*, Case No. IT-94-1, A.C., 2 Oct. 1995 ("*Appeals Chamber Decision"*).
[10] Decision on the Prosecutor's Motion requesting Protective Measures for Witness L, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 14 Nov. 1995.
[11] Decision on the Defence Motion on the Principle of *Non-bis-in-idem*, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 14 Nov. 1995; Decision on the Defence Motion on the Form of the Indictment, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 14 Nov. 1995.

19. Meanwhile, in October 1995, the Trial Chamber had written to the parties, setting out a number of points which it wished the parties to consider before the trial commenced. This being the first full trial conducted by the International Tribunal, and in view of the fact that counsel came from a variety of national jurisdictions, the Trial Chamber sought to involve the parties in discussion of the practical and procedural aspects of the trial. Accordingly, a closed-session status conference was held on 23 October 1995 at which a wide range of issues was discussed, including discovery, translation of documents, use of courtroom technology for display of exhibits, questions of identification, the status of the co-accused, Goran Borovnica, the need for pre-trial briefs and the issues they should address, financial arrangements for Defence counsel, cooperation of State authorities with both the Defence and the Prosecution, practical arrangements for protected witnesses within the courtroom and the implications of live broadcasting of the proceedings for these witnesses.

20. The next day, 24 October 1995, at a public sitting of the Trial Chamber, the accused entered an appearance to the additional charges and pleaded not guilty. The Prosecution also sought a separate trial of the accused from his co-accused, Goran Borovnica, and this was granted unopposed. A number of the procedural issues which had been raised in the closed-session status conference of the day before were then discussed in open session. These included a proposed date of 6 May 1996 for commencement of the trial, the Defence having sought an additional period of approximately six months to prepare its case in view of the difficulties it was experiencing in arranging access to the area and to witnesses.

21. On 1 November 1995 the Prosecution filed a motion seeking delayed release of the televised broadcast of proceedings so as to protect witnesses from inadvertent disclosure of protected identity and on 15 November 1995, after hearing argument, the Trial Chamber ordered that release of the broadcast should be delayed for 30 minutes to allow time for any inadvertent disclosure to be deleted from the recording, subject however to the availability of funds to purchase the necessary technical equipment to effect that delay[12]. It was further ordered that the written transcript of witness testimony heard in closed session would also be released to the public after redaction where necessary. A further status conference was held on 14 November 1995 at which the parties discussed their readiness for trial and related

[12] Decision on the Prosecutor's Motion requesting Delayed Release of Recordings of the Proceedings, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 15 Nov. 1995.

issues. In the same month Mr. Simi} left the Defence team and, in December 1995, Mr. Nikola Kosti} was given a power of attorney to represent the accused.

22. Following a recess over the Christmas period, a further status conference was held on 16 January 1996. The Defence described the difficulties it was experiencing in the conduct of its investigations both within the region of the former Yugoslavia and elsewhere, even after the successful conclusion of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement"), and the need for a further visit to the region to complete its enquiries. Another status conference was held on 13 February 1996, after both parties had visited the region, at which arrangements for trial were discussed in detail. Following that status conference, the Trial Chamber issued an Order setting dates for the filing of pre-trial briefs and formally setting down the trial for 7 May 1995 with additional status conferences scheduled for April and immediately prior to commencement of the trial.

23. Orders were issued in March and April 1996 for the filing of notices of expert witnesses. An additional status conference was held on 15 March 1996 to resolve certain unforeseen problems and the issue of giving evidence via video-conference link was discussed. On 20 March 1995 the Defence filed a formal motion on the giving of evidence by video-conference link, which issue, together with the issue of prior disclosure of Defence witness statements, was discussed in more detail at the final closed-session status conference on 9 April 1996. The Defence team was joined at this status conference and thereafter by Mr. Steven Kay and Ms. Sylvia de Bertodano, both from the London bar, acting as consultants, pursuant to the arrangements made by the Registry for provision of assigned counsel. On 10 April 1996 the Defence filed a motion for severance of the Indictment to provide for separate trials in respect of the incidents alleged to have taken place at the Omarska camp from the other charges. The Defence also filed a notice of alibi pursuant to Rule 67 on that day, together with a motion to prevent the contamination of witnesses' testimony. An application by Courtroom Television Network for leave to appear as *amicus curiae* on this issue was denied. The Prosecution pre-trial brief was filed on that day, the Defence having a further two weeks in which to respond with their pre-trial brief. On 12 April 1996 the Prosecution filed a motion to compel disclosure of statements of Defence witnesses, to which the Defence responded on 16 April 1996.

24. Another status conference was held on 18 April 1996 at which a number of issues involving expert witnesses were discussed. On the same day, the Defence filed a motion to summon and protect Defence witnesses, listing 28 witnesses for whom some form of protective measures were sought, including safe conduct (limited immunity from prosecution), the giving of evidence via video-conference link and confidentiality for certain witnesses. The next day, the Prosecution filed a motion for protective measures for an additional witness. The Defence pre-trial brief was filed on 23 April 1996 and the Prosecution responded to that on 26 April 1996.

25. The Defence notice of alibi was amended on 2 May 1996. On 3 May 1996 the final pre-trial status conference and a hearing on motions were held in public, with a portion relating to a request for protective measures for a witness being held in closed session. The Defence motion for witness protection, including the video-conference link and safe conduct, and the Prosecution motion for disclosure of Defence witness statements were discussed. The Trial Chamber made a number of rulings for the conduct of the trial, including one that it would not be appropriate for the Trial Chamber to find the accused guilty of any crime unless specifically charged in the Indictment. It requested the parties to address the character of the conflict during the trial and to present evidence both on this issue and as to whether the crimes charged were committed within the context of an armed conflict. It was confirmed that Mr. Vujin and Mr. Kosti} were no longer counsel of record for the Defence.

26. The Trial Chamber entered its Decision on the Defence motion to prevent the contamination of testimony on the same day, denying the relief sought[13]. As part of its disposal of the motion, the Trial Chamber issued a notice to be given to each witness, reminding the witnesses not to discuss the proceedings with anyone other than the lawyers involved and to avoid following media coverage of the trial, and also pointing out the penalties for false testimony before the International Tribunal. The Defence motion on severance of the Indictment was denied and the Trial Chamber declined to determine pre-trial, and formulate for the parties, the elements of the offences, as had been sought by the Prosecution and supported by the Defence, instructing the parties instead that these matters could be dealt with in their opening statements. The Trial Chamber's Decision denying the

[13] Decision on the Defence Motion to Prevent the Contamination of Testimony, *Prosecutor v. Tadi},* Case No. IT-94-1, T.Ch. II, 3 May 1996.

Prosecution motion to compel disclosure of Defence witness statements was issued on 7 May 1996, immediately prior to commencement of the trial[14].

27. The trial of the accused commenced on 7 May 1996. In addition to the Judges of the Trial Chamber, the Registrar of the International Tribunal, Mrs. Dorothee de Sampayo Garrido-Nijgh, and the Deputy Registrar, Mr. Dominique Marro, were in attendance, together with the Senior Legal Officer to the Chamber, Mrs. Yvonne Featherstone, and the court deputy, Mr. Roeland Bos. After dealing with some preliminary matters, including the public announcement of the decisions issued by the Trial Chamber over the past few days, the Trial Chamber denied a renewed application by the Prosecution for a determination and formulation by the Trial Chamber of the elements of each of the offences charged. The Trial Chamber then considered a motion from the Prosecution further to amend the Indictment to withdraw Counts 2, 3 and 4, which related to charges of forcible sexual intercourse. The application was unopposed by the Defence and was agreed to by the Trial Chamber and subsequently confirmed by formal order[15].

28. Mr. Niemann opened for the Prosecution, followed by Mr. Wladimiroff for the Defence, after which the first Prosecution expert witness was called to the stand in the afternoon. The presentation of the Prosecution case-in-chief continued for 47 sitting days and concluded on 15 August 1996, having been interrupted occasionally for short periods to enable both Trial Chambers to conduct proceedings in other cases in the sole courtroom available to the International Tribunal. During this period 76 witnesses gave evidence and 346 Prosecution exhibits were admitted, including video tapes of the region and a model of the Omarska camp, together with a further 40 exhibits from the Defence. All of the courtroom participants, including the accused, were able to view exhibits such as maps and videos on the courtroom monitor, or to select the broadcast image or a simultaneous written transcript. Most of the witnesses gave evidence in their native language which was then interpreted into the two working languages of the International Tribunal. It is on this interpretation that the transcript of the proceedings is based and on which the Trial Chamber, of necessity, must rely.

[14] Decision on the Prosecution Motion to compel Disclosure of Statements taken by the Defence of Witnesses who will Testify, *Prosecutor v. Tadi}*, Case No. IT -94-1, T.Ch. II, 7 May 1996.

29. A Decision on the two Defence motions for protective measures for its witnesses was issued on 25 June 1996, providing for the issue of summonses for 24 Defence witnesses, approving the giving of evidence via video-conference link from Banja Luka in the Republic of Bosnia and Herzegovina for seven witnesses, subject to the necessary equipment and facilities being made available to the International Tribunal, and granting confidentiality to five Defence witnesses and safe conduct to a further four witnesses[16]. The Decision granted leave to the Defence to file supplementary affidavits and to amend its motion to request safe conduct instead of orders permitting testimony by video-conference link in respect of certain witnesses, which the Defence duly filed on 30 July 1996. A separate Decision was entered by the Trial Chamber on these amended requests on 16 August 1996, providing for the summoning of a further eight Defence witnesses, granting permission for video-conference link testimony to an additional six witnesses, granting confidentiality in respect of another five Defence witnesses and giving safe conduct to seven other Defence witnesses[17].

30. Applications for protective measures for additional witnesses continued to be made by both parties throughout the proceedings. Orders for the shielding of witnesses from public view and for electronic distortion of the broadcast image of the witness were issued in respect of a further eight witnesses. In some cases, the decision was granted orally and the evidence heard prior to entry of a formal decision. The evidence of 17 witnesses, both Prosecution and Defence, was heard in closed session but in full view of the accused and counsel pursuant to specific orders. Of the four witnesses granted anonymity, two were not called to give evidence and one testified in open session without any protective measures. The remaining witness, Witness H, was also heard in closed session and was shielded from the view of the accused but not from Defence counsel. The written transcript of the testimony of all of these protected witnesses has subsequently been released by order of the Trial Chamber, after review by the party presenting the witness and by the Victims and Witnesses Unit of the International Tribunal and redaction of any material disclosing identity.

31. A third motion to protect Defence witnesses was filed on 12 September 1996 and a Decision issued on 20 September 1996 adding 14 witnesses to the list of those to be

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[15] Decision on the Prosecution Motion to Withdraw Counts 2 through 4 of the Indictment Without Prejudice, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 25 Jun. 1996.

[16] Decision on the Defence Motions to Summon and Protect Defence Witnesses and on the Giving of Evidence via Video-link, *Prosecutor v. Tadi}*, Case No. IT -94-1, T.Ch. II, 25 Jun 1996.

summoned; permitting the giving of evidence via video-conference link for two more Defence witnesses; granting confidentiality for another two witnesses, and granting safe conduct to three additional witnesses[18]. A fourth motion was granted by a Decision of 11 October 1996, permitting two more Defence witnesses to give evidence via video-conference link and granting confidentiality to one of these witnesses[19]. On 17 October 1996 the Trial Chamber approved the giving of evidence via video-conference link to another Defence witness[20] and, on the following day, granted confidentiality to one final Defence witness[21].

32. Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 and continued for eight weeks until 30 October 1996. Forty witnesses were presented and 75 exhibits admitted (both Defence and Prosecution), including video tapes. In the week of 15 to 18 October 1996 a temporary video-conferencing link was established between the courtroom in The Hague and Banja Luka. A total of 11 Defence witnesses testified using this link, which permitted the Judges and other courtroom participants to follow the evidence of the witnesses, to observe their demeanour and to question them as to their testimony. The giving of testimony in the former Yugoslavia was overseen by the Deputy Registrar as Presiding Officer and both the Prosecution and the Defence had observers at the location throughout the testimony. Questioning-in-chief and cross-examination was conducted by counsel from the courtroom in The Hague.

33. During the Defence case, one of the Prosecution witnesses, Witness L, who had testified to events in the Trnopolje camp, was recalled for further cross-examination by the Defence. A number of Defence witnesses were then heard in closed session in relation to the truthfulness of Witness L's testimony. As a result of such testimony, the Prosecution initiated certain enquiries which culminated on 25 October 1996 in the Prosecution inviting the Trial Chamber to disregard the testimony of Witness L and to revoke the protective measures granted for him. The Prosecution acknowledged that, as a consequence, the accused had no

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[17] Decision on the Defence Motion to Protect Defence Witnesses, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 16 Aug. 1996.

[18] Decision on the Third Confidential Motion to Protect Defence Witnesses, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 20 Sept. 1996.

[19] Decision on Fourth Confidential Motion to Protect Defence Witnesses, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 11 Oct. 1996.

[20] Decision on the Defence Motion requesting Video-link for Defence Witness Jelena Gaji}, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 17 Oct. 1996.

[21] Decision on the Defence Motion requesting Facial Distortion of Broadcast Image and Protective Measures for Defence Witness D, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 18 Oct. 1996.

case to answer in respect of most of the allegations in subparagraph 4.3 of the Indictment. The circumstances surrounding Witness L's testimony are now the subject of an investigation by the Prosecutor ordered by the Trial Chamber on 10 December 1996 for false testimony under Rule 91[22]. The accused himself testified under solemn declaration over a period of three days from 25 to 29 October 1996.

34. On 6 and 7 November 1996 the Prosecution presented 10 witnesses in rebuttal, including one witness who was granted confidentiality by the Trial Chamber by oral decision on 7 November 1996. The Defence did not submit any evidence in rejoinder after the completion of the Prosecution rebuttal. Closing arguments were heard from 25 to 28 November 1996, supported by post-trial filings by each party. The matter was taken by the Trial Chamber under advisement and judgment was reserved to a later date.

35. In addition to the motions already referred to, a number of others were filed during the trial, including a Prosecution motion to submit material relevant to the testimony of one of its witnesses, a motion from the Defence to exclude hearsay, a motion by the Defence to dismiss the charges at the close of the Prosecution case and a motion by the Prosecution seeking production of Defence witness statements after the witness had testified. The Defence motion to exclude hearsay was denied unanimously[23], with Judge Stephen issuing a separate opinion. The Defence motion to dismiss the charges[24] and the Prosecution motion for production of witness statements[25] were both denied. All three Judges issued separate opinions on the issue of production of witness statements, with Judge McDonald dissenting from the majority. An application for leave to appear as *amicus curiae* by Milan Bulaji} on the issue of the historical and political context of the events in the region was submitted to the Trial Chamber on 13 November 1996 and rejected on 25 November 1996 on the basis that granting the request at this stage of the proceedings would not assist the Trial Chamber in the proper determination of the case. A number of these motions and the Decisions rendered are discussed in more detail in Section V of this Opinion and Judgment.

[22] Order for the Prosecution to Investigate the False Testimony of Dragan Opaci}, *Prosecutor v. Tadi},* Case No. IT-94-1, T.Ch.II, 10 Dec. 1996.
[23] Decision on Defence Motion on Hearsay, *Prosecutor v. Tadi}*, Case No. IT-94-1, T.Ch. II, 5 Aug. 1996.
[24] Decision on Defence Motion to Dismiss Charges, *Prosecutor v. Tadi},*, Case No. IT-94-1, T.Ch. II, 13 Sep. 1996.
[25] Decision on the Prosecution Motion for Production of Defence Witness Statements, *Prosecutor v. Tadi},* Case No. IT-94-1, T.Ch. II, 27 Nov. 1996.

C. The Indictment

36. The Indictment against Du{ko Tadi} was issued by the Prosecutor of the International Tribunal in February 1995 and confirmed on 13 February 1995. It has been amended twice since then, in September and December 1995, and three of its counts were withdrawn at trial. The Indictment (as finally amended) is set out in full in Annex A to this Opinion and Judgment.

37. The charges in the Indictment are divided by paragraphs, with paragraphs 1 to 3 setting out the background and general context of the allegations. The counts in paragraph 5 were withdrawn at trial. In all cases, the accused is charged with individual criminal responsibility pursuant to Article 7, paragraph 1, of the Statute.

38. Paragraph 4 of the Indictment refers to a number of varied and separate incidents which are alleged to constitute persecution. It charges that the accused participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of Muslims and Croats in the Omarska, Keraterm and Trnopolje camps, and the deportation and expulsion by force or threat of force of the majority of Muslim and Croat residents from op{tina Prijedor. The accused is charged with participating in killings, torture, sexual assaults and other physical and psychological abuse of Muslims and Croats both within the camps and outside.

39. In subparagraph 4.1 the accused is charged with committing various acts including the killing and beating of a number of the seized persons; the killing of an elderly man and woman near the cemetery in the area of "old" Kozarac; ordering four men from a marching column and shooting and killing them, as charged in paragraph 11 of the Indictment; the killing of five men and the beating and seizure of others in the villages of Jaski}i and Sivci, as charged in paragraph 12 of the Indictment; the beatings of at least two former policemen in Kozarac; and the beating of a number of Muslim males who had been seized and detained at the Prijedor military barracks.

40. Subparagraph 4.2 charges the accused with participation in the killing, torture, sexual assault and beating of many detainees at the Omarska camp, including, *inter alia*, those charged in paragraphs 5 to 10 of the Indictment; and the beating of detainees and looting of their personal property and valuables of detainees at the Keraterm camp, including a mass beating of detainees from Kozarac.

41. Subparagraph 4.3 (insofar as the Prosecution asserts that there is a case to answer) alleges that the accused physically participated and assisted in the transfer to and unlawful confinement in the Trnopolje camp of non-Serb persons from the Kozarac area.

42. Subparagraph 4.4 charges the accused with participation in the seizure, selection and transportation of individuals for detention in the camps, alleging that the accused was aware at the time that the majority of detainees who survived detention would be deported.

43. Subparagraph 4.5 alleges that the accused was aware of the widespread nature of the plunder and destruction of personal and real property from non-Serbs and was physically involved and participated in that plunder and destruction, including the plunder of homes in Kozarac and the looting of valuables from non-Serbs both as they were seized and upon their arrival at the camps and detention centres.

44. By his participation in these acts, the accused is charged with persecution on political, racial and/or religious grounds, a crime against humanity under Article 5 (h) of the Statute.

45. Paragraph 6 relates to the beating of numerous prisoners and an incident of sexual mutilation at the Omarska camp, which took place in the large hangar building. A number of prisoners were severely beaten, including Emir Karaba{i}, Jasmin Hrni}, Enver Ali}, Fikret Haramba{i} and Emir Beganovi}. Fikret Haramba{i} was sexually mutilated. It is charged that all but Emir Beganovi} died as a result of these assaults. The accused is alleged to have been an active participant and is charged with wilful killing, a grave breach recognized by Article 2 of the Statute; murder, as a violation of the laws or customs of war recognized by Article 3 of the Statute; murder, as a crime against humanity recognized by Article 5(a) of the Statute; torture or inhuman treatment, a grave breach under Article 2(b) of the Statute; wilfully causing grave suffering or serious injury to body and health, a grave breach under Article 2(c) of the Statute; cruel treatment, a violation of the laws or customs of war under

Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

46. Paragraph 7 deals with an incident which is said to have occurred in the "white house", a small building at the Omarska camp, where on or about 10 July 1992 a group of Serbs beat [evik Sivac, threw him onto the floor of a room and left him there, where he died. It is alleged that the accused participated in this beating and he is charged with wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; cruel treatment constituting a violation of the laws or customs of war under Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

47. Paragraph 8 deals with an incident outside the white house in late July 1992 when a group of Serbs from outside the camp, which is said to have included the accused, kicked and beat Hajika Elezovi}, Salih Elezovi}, Sejad Sivac and others so severely that only Hajika Elezovi} survived. Again, the accused is charged with wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; cruel treatment, constituting a violation of the laws or customs of war under Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

48. The white house was also the setting for the incidents in paragraph 9 of the Indictment. A number of prisoners were forced to drink water from puddles on the ground. As they did so, a group of Serbs from outside the camp are said to have jumped on their backs and beaten them until they were unable to move. The victims were then loaded into a wheelbarrow and removed. The Prosecution alleges that not only did the accused participate in this incident but that he discharged the contents of a fire extinguisher into the mouth of one of the victims as he was being wheeled away. The accused is charged with wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; cruel treatment, constituting a violation of the laws or customs of war under Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

49. Paragraph 10 of the Indictment relates to another beating in the white house, said to have taken place on or about 8 July 1992, when, after a number of prisoners had been called out individually from rooms in the white house and beaten, Hase Ici} was called out and

beaten and kicked until he was unconscious. For his alleged participation in this incident, the accused is charged with wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; cruel treatment, constituting a violation of the laws or customs of war under Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

50. Paragraph 11 relates to the attack on Kozarac. It charges that, about 27 May 1992, Serb forces seized the majority of Bosnian Muslim and Bosnian Croat people of the Kozarac area. As they were marched in columns to assembly points for transfer to camps the accused is said to have ordered Ekrem Karaba{i}, Ismet Karaba{i}, Seido Karaba{i} and Re|o Fori} from the column and to have shot and killed them. In respect of this incident the accused is charged with wilful killing, a grave breach recognized by Article 2(a) of the Statute; murder, as a violation of the laws or customs of war recognized by Article 3 of the Statute; murder, as a crime against humanity recognized by Article 5(a) of the Statute; or, alternatively, with wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; or inhumane acts, a crime against humanity recognized by Article 5(i) of the Statute.

51. The final paragraph of the Indictment, paragraph 12, relates to an incident in the villages of Jaski}i and Sivci, on or about 14 June 1992. Armed Serbs entered the area and went from house to house, calling out residents and separating the men from the women and children, during which Sakib Elka{evi}, Osme Elka{evi}, Alija Javor, Abaz Jaski} and Nijaz Jaski} were killed in front of their homes; Meho Kenjar, Adam Jakupovi}, Salko Jaski}, Ismet Jaski}, Beido Bali}, [efik Bali}, Nijas Elka{evi} and Ilijas Elka{evi} were beaten and then taken away. The Prosecution alleges that the accused was one of those responsible for these killings and beatings and he is charged with wilful killing, a grave breach recognized by Article 2(a) of the Statute; murder, as a violation of the laws or customs of war, recognized by Article 3 of the Statute; murder, as a crime against humanity recognized by Article 5(a) of the Statute; wilfully causing great suffering or serious injury to body or health, a grave breach under Article 2(c) of the Statute; cruel treatment, being a violation of the laws or customs of war recognized by Article 3 of the Statute; and inhumane acts, a crime against humanity under Article 5(i) of the Statute.

52. The findings of the Trial Chamber in relation to these charges are set out in the following sections of the Opinion and Judgment.

II. BACKGROUND AND PRELIMINARY FACTUAL FINDINGS

A. The Context of the Conflict

53. In order to place in context the evidence relating to the counts of the Indictment, especially Count 1, persecution, it is necessary to say something in a preliminary way about the relevant historical, geographic, administrative and military setting about which evidence was received.

54. Expert witnesses called both by the Prosecution and by the Defence testified in regard to the historical and geographic background and such evidence was seldom in conflict; in those rare cases where there has been some conflict the Trial Chamber has sought to resolve it by adopting appropriately neutral language. It is exclusively upon the evidence presented before this Trial Chamber that this background relies, and no reference has been made to other sources or to material not led in evidence. A map of Bosnia and Herzegovina (Prosecution Exhibit 181), which forms part of the Dayton Peace Agreement, is attached to this Opinion and Judgment as Annex B.

1. Historical and Geographic Background

55. The area with which this trial is primarily concerned is north-western Bosnia and Herzegovina; more specifically, op{tina (district) Prijedor, which includes the town of Prijedor and the town of Kozarac some 10 kilometres to its east.

56. For centuries the population of Bosnia and Herzegovina, more so than any other republic of the former Yugoslavia, has been multi-ethnic. For more than 400 years Bosnia and Herzegovina was part of the Ottoman Empire. Its western and northern borders formed the boundary with the Austro-Hungarian Empire or its predecessors; a military frontier along that boundary was established as early as the sixteenth century to protect the Hapsburg lands from the Ottoman Turks. The presence of this old military frontier is said to account for the presence there of much of its present-day Serb population, encouraged centuries ago to move into and settle on the frontier, forming there a loyal population base as a potential border

defence force. The large Muslim population of Bosnia and Herzegovina owes its religion and culture, and hence its identity, to the long Turkish occupation, during which time many Slavs adopted the Islamic faith. The third ethnic population living in Bosnia and Herzegovina, also sizeable, are the Croats, living principally in the south-west adjacent to Croatia's Dalmatian coast. Since all three population groups are Slav it is, no doubt, inaccurate to speak of three different ethnic groups; however, this appears to be accepted common usage.

57. Each of these peoples has had, in medieval times, its era of empire and greatness. For Serbs the heroic but unsuccessful resistance of the Serb nation to Turkish invasion, culminating in their defeat in the battle of Kosovo, remains an emotional event, symbolic of Serb courage. Nationalistic Serbs and Croats in particular each rely on long-past days of empire in support of their claims, necessarily conflicting, to a Greater Serbia and a Greater Croatia. For each, Bosnia and Herzegovina is of particular interest, containing as it does substantial Serb and Croat populations as well as an even larger Muslim population but having no single ethnic group as a majority of the population; as of 1991, some 44 percent of Bosnians were Muslim, 31 percent Serb and 17 percent Croat.

58. Until 1878 Bosnia and Herzegovina remained under Ottoman rule. In that year, the Austro-Hungarian Empire occupied Bosnia and Herzegovina and began to administer it. Then, in 1908, it formally annexed Bosnia and Herzegovina. Immediately after the First World War, and as part of the breakup of the Hapsburg empire, the Kingdom of Serbs, Croats and Slovenes was created out of the union of the Kingdom of Serbia, which in the nineteenth century had already achieved hard-won independence from Turkey, with Montenegro, which had also been an independent principality, Croatia, Slovenia, and Bosnia and Herzegovina. In 1929 that Kingdom changed its name to the Kingdom of Yugoslavia, that is, the Kingdom of the southern Slavs. For many centuries Roman Catholicism had predominated in the northern and western sectors whereas Orthodox Christianity and Islam prevailed in its southern and eastern sectors under the rule of the Ottoman Empire. This same general religious division persisted into this century and indeed still persists.

59. The concept of a state of the south Slavs, who shared a common language and common ethnic origins, had evolved in the minds of Croatian intellectuals during the nineteenth century side by side with the growth amongst Serbs of the concept of a Greater Serbia. With the disintegration of the Ottoman and Austro-Hungarian Empires after the First

World War, these two disparate concepts, coupled with the status of Serbia as one of the Allied powers, led to the creation of the postwar state of Yugoslavia. It was, however, an uneasy marriage of two ill-matched concepts and in the interwar years the nation experienced acute tensions of an ethno-national character.

60. Until the Second World War and the invasion of the Kingdom by Italy and Germany in 1941, Yugoslavia, with its capital in Belgrade, underwent internal administrative boundary changes but its external boundaries remained unaltered. Then, during the time of Axis occupation, a portion of the territory of the state was annexed by Italy and two other areas were transferred to Bulgarian and Hungarian control respectively. Much of what remained became the formally independent but in fact Axis puppet state of Croatia, extending far beyond previous, and subsequent, Croatian boundaries and divided between Italian and German zones; a much reduced Serbia became a so-called German protectorate.

61. Although this wartime situation was short-lived, lasting only from 1941 to 1945, it left bitter memories, not least in Bosnia and Herzegovina, large parts of which, including op{tina Prijedor, were included in the puppet state of Croatia. The Second World War was for Yugoslavia a tragic time, marked by harsh repression, great hardship and the brutal treatment of minorities. It was a time of prolonged armed conflict, in part the product of civil war, in part a struggle against foreign invasion and subsequent occupation. Three distinct Yugoslav forces each fought one another: the Usta{a forces of the strongly nationalist Croatian State, supported by the Axis powers, the Chetniks, who were Serb nationalist and monarchist forces, and the Partisans, a largely communist and Serb group. At the same time the latter two opposed the German and Italian armies of occupation. The Partisans, under Josip Broz, later better known as Marshal Tito, did so consistently and with ultimate success, whereas the Chetniks' role in this opposition to the invaders still remains a matter of great controversy. Although none of these three forces was predominantly Muslim, Muslims were to be found in the ranks of both the Usta{a and the Partisans.

62. Many of these hard-fought and bloody conflicts took place in Bosnia and Herzegovina and many of the outrages against civilians, especially though by no means exclusively by Usta{a forces against ethnic Serbs, also took place there, particularly in the border area between Croatia and Bosnia and Herzegovina, where the Partisans were especially active and which is the very area in which Prijedor lies. A minister of the wartime Croatian puppet government had promised to kill a third of the Serbs in its territory, deport a third and by

force convert the remaining third to Catholicism. Another urged the cleansing of all of the greatly enlarged Croatia of "Serbian dirt". Wholesale massacres of Serbs ensued; in six months of 1941 the Usta{a may have killed well over a quarter of a million Serbs, although the exact number is a subject of much controversy. Bulgarian and Hungarian occupying forces in other parts of Yugoslavia also engaged in massacres of Serbs and in ethnic cleansing. However, other ethnic groups also suffered in Prijedor, the Partisans killing many prominent Muslims and Croats in 1942 and again, in nearby Kozarac, in 1945.

63. The subsequent revenge of the Serbs for Usta{a atrocities was especially felt by the Croatian puppet army which, following its surrender to the Allies at war's end, was handed over to Marshal Tito's victorious Partisans who immediately began the execution of up to 100,000 Croat soldiers, often in the most summary way.

64. This is the legacy with which the population of Bosnia and Herzegovina has had to live. Yet in the postwar years until about 1991 and, despite past horrors or perhaps having learned better from them, the multi-ethnic population of Bosnia and Herzegovina apparently lived happily enough together. However, at least in op{tina Prijedor, particularly in rural areas, the three populations, Serbs, Croats and Muslims, tended to live separately so that in very many villages one or another nationality so predominated that they were generally regarded as Serb or Croat or Muslim villages. Many witnesses speak of good intercommunal relations, of friendships across ethnic and coincident religious divides, of intermarriages and of generally harmonious relations. It is only subsequent events that may suggest that beneath that apparent harmony always lay buried bitter discord, which skilful propaganda readily brought to the surface, with terrible results.

65. The years from 1945 to 1990 had no tales of ethnic atrocities to tell. Marshal Tito and his communist regime took stern measures to suppress and keep suppressed all nationalist tendencies. Under its Constitution of 1946, the country was to be composed of six Republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro and two autonomous regions, Vojvodina and Kosovo, these two being closely associated with Serbia. The peoples of the Republics other than Bosnia and Herzegovina were regarded as distinct nations of federal Yugoslavia. The situation of Bosnia and Herzegovina was unique; although it was one of the six Republics, it, unlike the others, possessed no one single majority ethnic

grouping and thus there was no recognition of a distinct Bosnian nation. However, by 1974 the Muslims were considered to be one of the nations or peoples of federal Yugoslavia.

66. Throughout the years of Marshal Tito's communist Yugoslavia, religious observance was discouraged with the result that, by the 1980s, in Bosnia and Herzegovina churchgoing and attendance at the mosque was very much in decline. Divisive nationalism and open advocacy of national ethnic identity were also severely discouraged; nevertheless the population remained very conscious of so-called ethnic identity, as Serb, Croat or Muslim.

67. Historically the territorial division between Roman Catholic and Orthodox branches of the Christian faith had run through the territory of Yugoslavia for many centuries. When the Ottoman empire, not stopping at the conquest of Constantinople, extended throughout much of the Balkans, the fluctuating boundary between Catholic Christianity and Islam, which also sheltered a numerous Christian Orthodox population, was usually to be found passing through or near Bosnia. Today, in Bosnia and Herzegovina, whether practising or non-practising, the great majority of Serbs remain Orthodox Christian and the Croats Roman Catholic, while the title Muslim speaks for itself. This difference of religion (and to a degree of custom and culture) apart, all three groups are, and often pride themselves in being, Slav and, with minor regional differences and distinct regional accents, speak much the same language, often intermarry and frequently bear surnames common to all three groups. The first names of Muslims are, however, often very distinctive.

68. Initially Marshal Tito's Yugoslavia had a close relationship with the Soviet Union, its Constitution framed on the Soviet model. Hence postwar Yugoslavia was at first a highly centralist State, with substantial power exercised federally from Belgrade. Then, in the 1960s and on into the 1970s, there was a trend towards devolution of power to the governments of the Republics, a trend enhanced by a new Constitution adopted in 1974 and which continued on into the 1980s. Were these newly-empowered governments also to encourage, or in some cases merely to rekindle, strongly nationalist and ethnocentric beliefs and to adopt policies to give effect to such beliefs, the scene would clearly be set for conflict. This is what in fact occurred. In 1990 multi-party elections were for the first time held in the separate Socialist Republics of Yugoslavia which led to strongly nationalist parties being elected, heralding the breakup of the federation and seen by nationalists in both Croatia and Serbia as opening the way to expansion of their territories.

69. In the mid to late 1980s, the Republic of Serbia had already begun measures to deprive Yugoslavia's two autonomous provinces, Vojvodina and Kosovo, of their separate identity and effectively to incorporate them into the Republic. This it achieved in substance in 1990, thereby ending what Serbs regarded as a discriminatory feature of the federation, that the one entire nation of Serbs, consisting of Serbia and the two provinces, was, alone of the Republics, denied a single, united identity. Some Serbs had long dreamed of a Greater Serbia, a nation which would include within its borders all ethnic Serbs. The effective extension of Belgrade's direct rule over the two provinces was a step in this direction and one that was implemented despite the fact that in Kosovo ethnic Albanians had come to far outnumber Serbs. Kosovo is part of the homeland of the Serbs of past centuries, the battle of Kosovo was fought there, and the province has particular significance for present-day Serbs who regarded its autonomy as a province to be especially hurtful, depriving Serbia of coherent statehood and of control over what it considered to be ancestral Serbian territory.

2. The Disintegration of the Socialist Federal Republic of Yugoslavia

70. What developed into the total disintegration of Yugoslavia as Marshal Tito knew it perhaps began, to the extent that gradual political processes have a definite beginning, in the late 1980s. It was preceded by grave financial problems leading to a protracted economic crisis. Yugoslavia had long pursued its own unique system of socialist self-management which set it apart from the rest of the communist world. During the 1980s this system came to be widely regarded as responsible for the country's economic woes. Towards the end of the 1980s, what had begun as an economic crisis developed into a major political one. Yugoslavia's one-party state, with all political power in the hands of the League of Communists, was increasingly regarded as outmoded. At the same time Eastern European communism was everywhere in decline.

71. Accordingly, in 1988 a sweeping reform of the political and constitutional scene occurred. The whole structure of socialist self-management, entrenched as it had been in the federal Constitution, was abolished, the many constitutional references to the working class as the political actors and possessors of political power were removed and the leading political role of the League of Communists was brought to an end. Nationalism took the place in the

Republics of the country's own brand of communism but with very many of the former communist leaders still in positions of power.

72. In 1988 and 1989 events in both Serbia and Slovenia suggested impending threats to the unity of the federation. Serbian action to end the autonomy of the province of Kosovo was carried out with a degree of ruthlessness that alarmed many non-Serbs, who saw it as symptomatic of what they might themselves experience in the future at the hands of Serbia. In 1989 at the fourteenth Congress of the League of Communists, Serbian delegates had also sought to alter to the advantage of more populous Republics such as Serbia a fundamental feature of the Constitution, that of the voting equality of Republics, substituting for it the one person one vote principle. This caused the resignation of the Slovenian leadership from the League and a walkout from the Congress of the representatives of Croatia and of Bosnia and Herzegovina. It was in that year, the 600th anniversary of the battle of Kosovo, that many Serb gatherings were held in celebration of that battle, all of which sought to foster Serb nationalism. For Serbs their fourteenth century struggle against the Turkish foe, unaided by other Balkan peoples, serves as a rallying cry for a Greater Serbia. Slobodan Milo{evi}, already a powerful political figure in Serbia as a party chief, spoke at a mass rally at the site of the battlefield itself. He spoke as the protector and patron of Serbs throughout Yugoslavia and declared that he would not allow anyone to beat the Serb people. This greatly enhanced his role as the charismatic leader of the Serb people in each of the Republics, after which he rapidly rose in power.

73. In Slovenia in the 1980s there had been a growing sense of nationalism, of Slovenia for the Slovenes, and with it growing hostility towards those Yugoslavs who were not ethnic Slovenes. It would seem that the Slovenes were the first ethnic group to determine that they no longer wanted to be part of the federal Yugoslavia. Perhaps in part as a reaction to what was occurring in Serbia, the Slovene leadership adopted a nationalistic political platform of their own and in 1989 formally amended the Republic's Constitution to empower the Slovene Assembly to take measures to protect the Republic's status and rights from violation by organs of the federation. This amendment was declared unconstitutional by Yugoslavia's constitutional court but in December 1989 Slovenia chose to ignore the decision of the court. In the following 18 months other Republics increasingly ignored federal authority. Then, in December 1990, a plebiscite was held in Slovenia, resulting in an overwhelming majority vote for independence from Yugoslavia.

74. In Croatia the elections of 1990 produced a strongly nationalistic government led by Franjo Tu|man who, upon assuming power, amended the Republic's Constitution to recreate Croatia as the national state of the Croatian nation, with citizens of other ethnic groups as minorities, not having the status of nations. Franjo Tu|man declared that in Croatia, the Croats alone were sovereign. A plebiscite in Croatia in May 1991 produced an overwhelming majority for independence.

75. Just before the holding of the Croatian plebiscite, Serbia and Montenegro, aided by the votes of the two formerly autonomous provinces now controlled by Serbia, blocked for a time the customary rotation of the collective presidency of the federation, preventing the appointment of a Croat whose turn it was, according to convention, to be president of the federation. This caused intense disquiet in other Republics.

76. There had already been growing intercommunal tension within Croatia in 1990, spreading into parts of Bosnia and Herzegovina, and troops of the Yugoslav national army, the Yugoslav People's Army ("JNA"), controlled from the federal capital of Belgrade, had been deployed in affected areas, ostensibly so as to maintain order. A consequence was that along the Bosnian border, in strongly Serb areas, local Serbs began to declare autonomous regions within Croatia; one in Krajina, another further to the east in Eastern Slavonia, thereby effectively excluding Croatian influence and control from those regions.

77. On 25 June 1991 Slovenia and Croatia declared their independence from the Socialist Federal Republic of Yugoslavia. Their independence, ultimately recognized by the European Community on 15 January 1992, was challenged militarily by the JNA. Meanwhile the two autonomous Serb regions within Croatia had proclaimed themselves to be the Republic of Serbian Krajina on 19 December 1991.

78. In Bosnia and Herzegovina, the Parliament declared the sovereignty of the Republic on 15 October 1991, whereupon the Serb deputies of that Parliament proclaimed a separate Assembly of the Serb Nation on 24 October 1991. In March 1992 Bosnia and Herzegovina declared its independence following a referendum in February sponsored by the Bosnian Muslims with some support from Bosnian Croats; the holding of the referendum had been opposed by Bosnian Serbs, who very largely abstained from voting. The European

Community and the United States of America recognized the independence of the Republic of Bosnia and Herzegovina in April 1992. Meanwhile the Republic of the Serbian People of Bosnia and Herzegovina was declared on 9 January 1992, to come into force upon any international recognition of the Republic of Bosnia and Herzegovina. That entity later became the *Republika Srpska*.

79. Macedonia had likewise declared its independence in September 1991. Serbia and Montenegro meanwhile continued to support the concept of a federal state, no longer under its old name but to be called the Federal Republic of Yugoslavia and wholly Serb dominated, consisting only of Serbia and Montenegro; it was formally established in April 1992. This completed the dissolution of the former Socialist Federal Republic of Yugoslavia. What had in effect taken the place of state socialism in Yugoslavia were the separate nationalisms of each of the Republics of the former Yugoslavia other than Bosnia and Herzegovina, which alone possessed no single national majority.

3. Bosnia and Herzegovina

80. This being the political situation reached by mid-1992 it is now necessary to look back to 1990, 1991 and early 1992 and specifically to events in or particularly affecting Bosnia and Herzegovina during those years. The Indictment relates to events in 1992 which can only be understood in the light of events in Bosnia and Herzegovina and indeed elsewhere in Yugoslavia in the two preceding years.

81. In 1990 the first free, multi-party elections were held in Bosnia and Herzegovina, for both op{tina assemblies and for the Republican Legislature. A number of recently formed political parties contested the poll. Of these parties the most prominent were the Muslim Party of Democratic Action ("SDA"), the Serb Democratic Party ("SDS") and the Croat Democratic Union ("HDZ"). Some of the other parties were the successors to or reformed versions of the now dissolved Communist party. In both ballots, for op{tina Prijedor and for the Republican Assembly, the SDA party gained a narrow margin over the SDS. The outcome of the elections was, in effect, little more than a reflection of an ethnic census of the population, each ethnic group voting for its own nationalist party.

82. In the Republican Assembly, cooperation between the Muslim and Serbian political parties proved increasingly difficult as time went by. What was initially a coalition government of the Republic broke down in October 1991 and failed completely in January 1992.

83. The disintegration of multi-ethnic federal Yugoslavia was thus swiftly followed by the disintegration of multi-ethnic Bosnia and Herzegovina and the prospect of war in Bosnia and Herzegovina increased. Both Bosnian Serbs and Croats made it apparent that they would have recourse to armed conflict rather than accept minority membership of a Muslim-dominated State. Further, its large Serbian minority retained vivid memories, albeit now some 50 years old, of their wartime suffering at Croat hands. Among much other suffering, many Serbs, including the accused's mother, had been forcibly deported by the Usta{a to a concentration camp at Jasenovac where many died and all were ill-treated. The premier of Serbia, Slobodan Milo{evi}, had for some years not only exercised a high degree of personal power in Serbia but had also established a very effective control of the Serbian media and it, together with the media in Serb-dominated areas of Bosnia and Herzegovina, was very effectively directed towards stirring up Serb nationalist feelings and converting an apparently friendly atmosphere as between Muslims, Croats and Serbs in Bosnia and Herzegovina into one of fear, distrust and mutual hostility. Communism had formerly preserved the unity of the federation; with the decay of Yugoslav communism and the substitution for it of distinct nationalisms, Bosnia and Herzegovina, which possessed no single ethnic majority, had, as a single entity, nothing to put in its place. Politics began to divide along the lines of ethno-national communities.

84. The objective of Serbia, the JNA and Serb-dominated political parties, primarily the SDS, at this stage was to create a Serb-dominated western extension of Serbia, taking in Serb-dominated portions of Croatia and portions, too, of Bosnia and Herzegovina. This would then, together with Serbia, its two autonomous provinces and Montenegro, form a new and smaller Yugoslavia with a substantially Serb population. However, among obstacles in the way were the very large Muslim and Croat populations native to and living in Bosnia and Herzegovina. To deal with that problem the practice of ethnic cleansing was adopted. This was no new concept. As mentioned earlier, it was familiar to the Croat wartime regime and to many Serb writers who had long envisaged the redistribution of populations, by force if necessary, in the course of achieving a Greater Serbia. This concept was espoused by

Slobodan Milo{evi}, with ethnic Serbs widely adopting it throughout the former Yugoslavia, including Serb political leaders in Bosnia and Herzegovina and in Croatia. In addition to the concept of a Greater Serbia, there was also a concept on the part of Croats of the creation of a Greater Croatia that would include all Croats living in the territory of the former Yugoslavia.

4. Greater Serbia

85. The concept of a Greater Serbia has a long history. It emerged at the forefront of political consciousness in close to its modern-day form as early as 150 years ago and gained momentum between the two World Wars. Kept in check during the years of Marshal Tito's rule, it became very active after his death. Greater Serbia involved two distinct aspects: first, the incorporation of the two autonomous provinces of Vojvodina and Kosovo into Serbia, already referred to; and secondly, the extension of the enlarged Serbia, together with Montenegro, into those portions of Croatia and Bosnia and Herzegovina containing substantial Serb populations.

86. Associated with the first of these aspects was the Serbian opposition to the equal representation federally of each of the Republics, regardless of population size. This, together with the existence of the two autonomous provinces, was the subject of much agitation and received strong support in the second half of the 1980s from the Serbian Academy of Arts and Sciences in its widely distributed but not officially published memorandum urging major constitutional change. As mentioned above, the two provinces were effectively incorporated into Serbia in 1990 but the move to achieve federal representation by population rather than by Republics, with a resulting increased power for Serbia, was not achieved before the breakup of the federation.

87. The second aspect of a Greater Serbia was strongly pursued in the late 1980s and on into the 1990s, much encouraged by nationalist writings of earlier days, some of which advocated a Serbian state extending throughout Bosnia and Herzegovina and including the Dalmatian coast and parts of Croatia north of the River Sava. It was promoted actively by Serb propaganda, a key element of the campaign; by recalling the atrocities of the Croat Usta{a in the Second World War its proponents sought to arouse the fears of Serbs everywhere and in the end to have them seek protection within a Greater Serbia.

88. The propaganda campaign that accompanied this movement began as early as 1989, with the celebration of the 600th anniversary of the Battle of Kosovo. During this celebration, the Serb-controlled media declared that Serbs had been let down by others in the area when the Ottoman Turks invaded. Through public speeches and the media, Serbian political leaders emphasised a glorious past, and informed their audiences that if Serbs did not join together they would be again subject to attack by "Usta{a", a term used to inspire fear in Serbs. The danger of a "fundamentalist, politicised" Muslim community was also represented as a threat. After the disintegration of the former Yugoslavia began, the theme of the Serb-dominated media was that "if for any one reason Serbs would become a minority population . . . their whole existence could be very perilous and endangered . . . [and therefore] they had no choice but a full-scale war against everyone else, or to be subjected to the old type concentration camp, the symbol being Jasenovac".

89. In the early 1990s there were rallies that advocated and promoted the idea, with Serbian leaders in attendance. In 1992 Radoslav Br|anin, President of the Crisis Staff of the Serb Autonomous Region of the Banja Luka area, declared that 2 percent was the upper tolerable limit on the presence of all non-Serbs in this region. Radoslav Br|anin advocated three stages of ridding the area of non-Serbs: (1) creating impossible conditions that would have the effect of encouraging them to leave of their own accord, involving pressure and terror tactics; (2) deportation and banishment; and (3) liquidating those remaining who would not fit into his concept for the region.

90. The propaganda continued throughout the war in Croatia and Slovenia, which was fought primarily by the JNA on the one side and those seeking independence on the other. Colonel Vukeli}, the Assistant for Ethics of the Commander of the 5th Corps of the 1st Military District of the JNA in 1991 and 1992, a Bosnian Serb responsible for moral and ethical preparation of military units and for maintaining relations with the media, political bodies and socio-political organizations, made many declarations against Muslim and Croat populations. He characterized Croats and Muslims as the enemies of Serbs and proclaimed that the Serbs in Bosnia and Herzegovina were in danger and needed to be protected, a need which should inspire Serb members of the JNA to join the struggle to save the Serbs from genocide.

91. Over time, the propaganda escalated in intensity and began repeatedly to accuse non-Serbs of being extremists plotting genocide against the Serbs. Periodicals from Belgrade featured stories on the remote history of Serbs intended to inspire nationalistic feelings. Slobodan Kuruzovi}, Commander of the Territorial Defence ("TO") of Prijedor, who became the head of the local newspaper *Kozarski Vjesnik* and the commander of the Trnopolje camp, stated that the "interests of Serbian people in Republika Srpska will be the main guidelines for my editorial policies". In articles, announcements, television programmes and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat and must arm themselves and that the Croats and Muslims were preparing a plan of genocide against them. Broadcasts from Belgrade caused fear among non-Serbs because only the Serb nation was presented positively, and it was represented that the JNA supported the Serbs. The theme that, for the Serbs, the Second World War had not ended was expressed on television and radio by Vojislav [e{elj, @eljko Ra`njatovi}, otherwise known as "Arkan", and other Serb politicians and leaders.

92. By the spring of 1992 only Serb-controlled television channels and programmes were available in many parts of Bosnia and Herzegovina. This was achieved by the take-over of television transmitters throughout the Serb-controlled areas, including the transmitter on Kozara Mountain which was taken over by the Wolves, a paramilitary unit acting in full cooperation with both military and political leaders. In consequence, by the spring of 1992 residents in Prijedor and elsewhere in eastern Bosnia and Herzegovina were no longer able to receive television from Sarajevo or from Zagreb but only from Belgrade or Novi Sad in Serbia, and Pale or Banja Luka in Bosnia and Herzegovina, all of which broadcast anti-Muslim and anti-Croat propaganda.

93. In op{tina Prijedor, during the days following the take-over of the town of Prijedor by JNA forces on 30 April 1992, as discussed below, Serb nationalist propaganda intensified. The "need for the awakening of the Serb people" was stressed and derogatory remarks against non-Serbs increased. Muslim leaders who attempted to speak on the radio were barred while SDS leaders had free access to it. Even more open propaganda against Muslims and Croats began in earnest after an incident in the Hambarine region on 22 May 1992, discussed below. Examples include statements that a Croat doctor castrated newborn Serb boys and was performing sterilization surgery on Serb women and that a Muslim doctor intentionally administered the wrong drug in an attempt to kill his Serb colleague.

94. This propaganda campaign continued on into 1993. For example, on 6 August 1993 an article in *Kozarski Vjesnik*, under the headline "Preventing a Repetition of the Serbian Massacre of 1941", extensively quoted Simo Mi{kovi}, the SDS chairman, as saying:

> 'The Serbian people had instinctively sensed the danger posed by the SDA and HDZ and have formed Republika Srpska in time . . . . Two years ago the Serbian people sensed instinctively that once again they were faced with the danger of the same villains who in 1941 started the extermination process of the Serbian people and therefore formed their own party. On 2nd August 1991 we in the District of Prijedor have formed the SDS . . . . Prior to that we tried hard to reach an agreement with the Muslim and Croatian party regarding our continued coexistence. Although they agreed to it in words they continued to arm themselves in order to destroy us. The SDS leadership saw what they were planning and started to arm their own people in order to prevent the tragedy of 1941 . . . . Quickly we formed our army and our police forces and on 30 April 1992 without a single shot being fired and without a single casualty, we established our authority in Prijedor which we were able to maintain [until] now and we have to consolidate it through a democratic process.' (Prosecution Exhibit 100.)

The article also stated that Simo Mi{kovi} then mentioned a woman who had to watch her children "being slaughtered by the Usta{a butchers" and continued in editorial fashion:

> There were thousands of such and similar cases in the Bosanska Krajina and this must never be allowed to happen again. SDS had prevented this happening in Prijedor in May last year when SDA and HDZ hatched a devilish plan of retribution against the Serbs in Prijedor.

95. Another article quoted Milomir Staki}, chair of the Serbian Municipal Assembly of Prijedor, who claimed that questioning conducted at the camps where Muslims who had been rounded up were imprisoned showed that the Muslims were determined to carry out a detailed plan for the liquidation of the Serbian population of Prijedor. Similarly, Simo Drlja~a, the Chief of Police of Prijedor, stated that he had proof that 1,500 Muslims and Croats participated in the genocide of the Serb people and that "instead of receiving their just punishment, the white world mighty men forced us to release them all from Manjaca [a Serb prison camp]". (Prosecution Exhibit 92.)

96. The witness Edward Vulliamy summed up the propaganda campaign, stating that the message from the government in Belgrade was relentless and was very "cogent and potent. It was a message of urgency, a threat to your people, to your nation, a call to arms, and, yes, a sort of an instruction to go to war for your people. . . . It pushed and pushed. It was rather

like a sort of hammer bashing on peoples' heads I suppose." Edward Vulliamy, a journalist for the Guardian Newspaper, London, travelled to the areas in conflict in Bosnia and Herzegovina during 1992. Although Roy Gutman, author of the Pulitzer Prize book entitled *A Witness to Genocide*, was the first to discover the Omarska camp through interviews with people who had been detained there, Edward Vulliamy was with the first group of outside journalists actually to enter the camp. The media attention generated by Roy Gutman, Edward Vulliamy and others regarding Omarska ultimately led to the closure of the camp.

5. Formation of Serb Autonomous Regions

97. The Greater Serbia theory was put into practice after the 1990 elections and before the beginning of the war. In April 1991 several communities joined a Serbian association of municipalities. These structures were formed in areas predominantly inhabited by Bosnian Serbs, generally by vote of the predominantly Bosnian Serb Local Assemblies. At first, this association was a form of economic and cultural cooperation without administrative power. However, separate police forces and separate Assemblies rapidly developed. In September 1991 it was announced that several Serb Autonomous Regions in Bosnia and Herzegovina had been proclaimed, including Krajina, Romanjija and Stara Herzegovina, with the aim of separating from the Republican government agencies in Sarajevo and creating a Greater Serbia.

98. Bosanski Krajina, as the Serb Autonomous Region of Krajina was initially called, consisted of the Banja Luka region and surrounding municipalities where the Serbs constituted a clear majority. Several of the municipalities that the SDS leadership had planned on joining the autonomous region, including Prijedor, did not in fact join it in 1991. This left Prijedor virtually isolated, surrounded by other municipalities which had joined the association.

99. In November 1991 the SDS sponsored, organized and conducted a plebiscite primarily for the Bosnian Serb population. Voters were given different ballots depending upon whether they were Serb or non-Serb. The difference between the two ballots was significant: for Bosnian Serbs, the ballot asked: "Are you in favour of the decision reached by the Assembly of the Serbian People in Bosnia and Herzegovina on 24 October 1991 whereby the Serbian

people shall remain in the common State of Yugoslavia which would include Serbia, Montenegro, Serb Autonomous Region Krajina, Serb Autonomous Region Slavonija, Baranja, Western Srem along with all others willing to remain in such a State?" while the question for non-Serbs was: "Are you in favour of Bosnia and Herzegovina remaining a republic with equal status in a common State of Yugoslavia with all the other republics which also declare themselves willing to do so?" (Prosecution Exhibit 97.) The great majority who did vote were Serbs; those Serbs who did not being branded as traitors. Most non-Serbs regarded the plebiscite as directed only to Serbs.

100. The outcome of the plebiscite purported to be 100 percent in favour. The SDS leadership used this outcome as a basis on which to develop the separate Serb political structure. The plebiscite was cited as justification for all subsequent moves such as the ultimate walk-out of the SDS representatives from the Bosnia and Herzegovina Assembly, the various negotiations conducted at the federal and international levels and the proclamation, on 9 January 1992, of the Republic of the Serbian People of Bosnia and Herzegovina. It was "used as a pretext, as an excuse, explanation, for everything that they did".

101. Also on the basis of the plebiscite, the SDS and military forces in each region including the JNA, paramilitary organizations, local TO units, and special police units, began to establish physical and political control over certain municipalities where it had not already gained control by virtue of the elections. In these regions, which included op{tina Prijedor, the SDS representatives in public office in some cases established parallel municipal governments and separate police forces. Physical control was asserted by positioning military units, tanks and heavy artillery around the municipalities and setting up checkpoints to control the movement of non-Serbs.

102. In March 1992 the Assembly of Serbian People of Bosnia and Herzegovina promulgated the Constitution of the Serb Republic of Bosnia and Herzegovina and proclaimed itself a distinct republic. This Assembly session was transmitted live on television, as were the final declarations. In the course of the session, Radoslav Br|anin, a member of the Serb Republic parliament, said: "At long last I have lived to see Bosnian Krajina become western Serbia"; and Radislav Vuki}, President of the Municipal Committee of the SDS in Banja Luka, declared: "Now the Turks will shake with fear from us", "Turks" being a derogatory reference to Bosnian Muslims.

6. Formation of Crisis Staffs

103. Crisis Staffs were formed in the Serb Autonomous Regions to assume government functions and carry out general municipal management. Members of the Crisis Staffs included SDS leaders, the JNA Commander for the area, Serb police officials, and the Serb TO Commander. For example, Lieutenant-General Momir Tali}, Commander of the 5th Corps (which became the 1st Krajina Corps), was a member of the Crisis Staff in Banja Luka ("ARK Crisis Staff"), thus demonstrating the relationship between the political and military branches of the Bosnian-Serb-run government. The ARK Crisis Staff, which had jurisdiction over op{tina Prijedor, was established in April or May 1992 as an organ of the Autonomous Region of Krajina, the statute of which provided for the creation of Crisis Staffs in the case of war or immediate danger of war. In early May, after the official decision on its establishment was taken by the Executive Council of Krajina, the ARK Crisis Staff took over all powers of the government and other agencies. It was the highest-level decision-maker in the Autonomous Region of Krajina and its decisions had to be implemented throughout the Autonomous Region of Krajina by means of municipal Crisis Staffs. The municipal Crisis Staffs had to report to the ARK Crisis Staff daily regarding the steps taken to implement the decisions of the Main Board located in Banja Luka.

7. The Role of the JNA

(a) The JNA in disintegrating Yugoslavia

104. The JNA has been described as taking part in attacks on Croatia and on Bosnia and Herzegovina. In the course of this Opinion and Judgment there will be other references to the JNA as acting as a hostile force so far as Bosnian Muslims were concerned. The relationship between the JNA and the armed forces of *Republika Srpska* will be examined in Section VI.B of this Opinion and Judgment. However, at the risk of some subsequent repetition, some explanation is called for as to how the JNA, as the national army of Yugoslavia, and what had been a truly multi-ethnic national army, could become the instrument of the policy of the Federal Republic of Yugoslavia (Serbia and Montenegro). It is perhaps best expressed, if not explained, by General Veljko Kadijevi}, in the early 1990s the Yugoslav Federal Secretary for

Defence, who in 1993 published his own description of the disintegration of Yugoslavia in his book *My view of the break-up: an Army without a State*. (Prosecution Exhibit 30.) Of the JNA he writes that by 1991 it was no longer an army with a cohesive state to defend; the state which it was its duty to defend was disintegrating and just as its ranks were now substantially filled with ethnic Serbs, so its task in the immediate future would be to regroup its forces and equipment, scattered throughout the former Yugoslavia including the seceding Republics, back into what was left of the nation and then to concentrate upon the protection and defence of those ethnic Serbs who in the course of this disintegration found themselves outside Serbia and Montenegro. This, it was envisaged, would lead ultimately to the creation of a new, substantially Serb, Yugoslavia with its core in Serbia and Montenegro but including also parts of Bosnia and Herzegovina and Croatia, principally but not exclusively those parts presently having a majority Serb population.

105. Until the late 1980s the armed forces of Yugoslavia were typical of many national defence forces, unexceptional in composition or character save, perhaps, that they had a specific constitutional role under the 1974 Constitution not only to protect against external threat but also to protect the sovereignty, territorial integrity and social system established by that Constitution. The JNA had also a right of representation, equal to that of an autonomous province, on the central committee of the League of Communists of Yugoslavia, then the key body within the governing system of the Socialist Federal Republic of Yugoslavia. The totality of Yugoslav armed forces included the regular army, navy and air force, collectively known as the JNA, consisting of an officer corps, non-commissioned officers and conscripts, together with a reserve force, and, as well as and distinct from the JNA, the TOs. Whereas the JNA was an entirely federal force, with its headquarters in Belgrade, there was a distinct TO in each Republic, funded by that Republic and under the control of the Minister of Defence of that Republic. The JNA was a powerful national army, equipped with all the conventional weapons and equipment that modern European armies possess; the TOs, on the other hand, were equipped with essentially infantry weapons; rifles, light machine-guns, some small calibre artillery, mortars, anti-personnel mines and the like; they had no tanks and their transport would vary depending on the adequacy of a particular Republic's funding of its TO and on how much each received by way of JNA cast-offs.

106. In July 1991, on instructions from headquarters in Belgrade, the JNA seized from the Republic's Secretariat for Defence in Bosnia and Herzegovina and from municipalities all the documentation relating to conscription including all the registers of conscripts. In

consequence, thereafter the conscription process was exclusively in the hands of the JNA and no longer in those of the Republic's Ministry for Defence. This done, it was ensured that only ethnic Serbs were recruited into the armed forces. Then in the second half of 1991 military units were formed in Serb-populated villages in Bosnia and Herzegovina and supplied with weapons and with uniforms. Bosnia and Herzegovina was a vital base for JNA operations in Croatia in the second half of 1991 and Bosnian Serbs were an important source of manpower both for the JNA and for the TO. Those TO units in predominantly Muslim and Croat areas of Bosnia and Herzegovina were at the same time largely disbanded by the JNA. General Kadijevi} in his book describes how "naturally we used the territorial defence (the TO) of Serb regions in Croatia and Bosnia and Herzegovina in tandem with the JNA" to paralyse territorial defence where it might provide a basis for creating the armies of secessionist republics.

107. The TO of Bosnia and Herzegovina had in any event been to a degree neutralised by the action taken by the JNA to disarm it. Traditionally all TO weapons were stored locally, within each municipality, but in late 1991 and early 1992 the JNA removed all local stocks of weapons from TO control, at least in Muslim-populated areas. This left those local TO units virtually disarmed whereas units which were drawn from Serb-populated areas, and only those, were substantially re-equipped.

(b) The transformation of the JNA

108. A particular point had long been made, enshrined in Yugoslavia's Constitution, of ensuring that the JNA, at conscript level, should accurately reflect the overall Yugoslav population mix. However, at officer level, Serbs (including Montenegrans) had traditionally been over represented; some 60 percent of career officers were ethnic Serbs whereas Serbs formed only 34 to 36 percent of the total Yugoslav population. In the early 1990s this predominance of Serb officers swiftly increased so that very soon very few non-Serb officers remained in the JNA.

109. The change that overtook the JNA in the early 1990s is best illustrated by the change in the ethnic mix of conscripts between pre-June 1991 and early 1992. During that time, the Serb component rose from just over 35 to some 90 percent. Similarly, whereas in an army in which Serbs had formerly made up some 40 percent of the total of officers and other ranks, by early 1992 that percentage had risen to some 90 percent. These increases were in large

measure attributable to the departure from the federation of both Slovenia and Croatia and, in the case of Bosnia and Herzegovina, to the substantial failure of non-Serbs to perform their compulsory military service or respond to mobilization calls. However, other factors were also in operation. Several witnesses, non-Serbs, have told of being discriminated against and being encouraged or indeed obliged to leave the JNA during 1991; they were no longer regarded as reliable members of an army that was ceasing to be Yugoslav and was becoming an instrument of Serb nationalist policy. By 1992 many senior officers of the JNA, rejecting this transformation of the force in which they had long served, left the service or were retired. From this and other causes, including transfer to other armed forces, the number of officers of the rank of General in the JNA fell from 150 in mid-1991 to only 28 after March 1992.

110. One consequence of all this was that the JNA experienced a shortage of manpower, especially when it came to play the role of an occupying force in hostile territory, as was the case in Croatia and, during 1992, in non-Serb parts of Bosnia and Herzegovina. In consequence, increasing reliance was placed on Serbian paramilitary forces, recruited in Serbia and Montenegro and much employed in control of non-Serb communities in Bosnia and Herzegovina. Membership in them was attractive to those Serbs who wished to aid the Serb cause in Croatia and Bosnia and Herzegovina but who regarded the JNA as retaining to a degree a Yugoslav, as distinct from Serb, character and accordingly as being insufficiently single-minded in the Serb cause. These paramilitary forces operated in conjunction with the JNA and were used as infantry shock troops to make up for declining numbers in the regular army. They included @eljko Ra`njatovi}'s Serbian Volunteer Guard (later known as "Arkan's Tigers") and Vojislav [e{elj's Chetniks, both of which came to be particularly feared by the Muslim population for their brutality and indiscipline. The JNA and in particular its air force arm actively cooperated with and assisted these paramilitary units during 1991 and 1992 in operations in Croatia and Bosnia and Herzegovina and liberally supplied them with arms and equipment.

111. With the secession of Slovenia and Croatia in June 1991 and the subsequent disintegration, republic by republic, of the federation, the way seemed to nationalists open for both a Greater Serbia and a Greater Croatia. Slovenia, containing very few Serbs and playing no part in the history and traditions of the Serb nation, was allowed to secede with relatively little intervention from Belgrade. The JNA was mainly intent on securing the successful withdrawal of JNA units and equipment once it became clear that Slovenia, having retained substantial supplies of arms and equipment for its TO units, would not readily succumb to

such JNA forces as Belgrade was prepared to venture in an effort to retain it within the federation.

112. It was a different story with Croatia; it too had retained for its own TO substantial weaponry but Croatia, unlike Slovenia, had a large Serb population and what were regarded as Serb lands, which were not to be allowed to remain unchallenged within the boundaries of the now independent Republic of Croatia. War ensued between the JNA and the Croatian Serbs on the one hand and, on the other, the forces that the Croatian government could rally. The outcome of the initial phase of that conflict was substantial success for the Serbs. By the end of 1991 those portions of the old Republic of Croatia in which large numbers of Serbs lived had been occupied by the JNA, including, of course, the two self-declared autonomous Serb territories. The JNA, although by now a substantially Serbian and Montenegran force, had its constitutional function of ensuring the integrity of the federation and its attack on Croatia could be represented in that light.

(c) The division of the JNA

113. With the secession of the non-Serb Republics and the recognition by Serbia and Montenegro that the Socialist Federal Republic of Yugoslavia no longer existed, the JNA could no longer function as a national army. At a meeting of Ministers for Foreign Affairs of the European Community on 6 October 1991 alarm had been expressed at the reports that the JNA had "shown itself to be no longer a neutral and disciplined institution" (Prosecution Exhibit 48). Yet it remained in substantial force in Bosnia and Herzegovina, despite the secession of that Republic. This posed a problem: how was the JNA to be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. On 15 May 1992 the Security Council, by resolution 752[26], demanded that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately and that those units either be withdrawn, be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed.

[26] U.N. Doc. S/RES/752 (1992).

114. The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina. What was to become the army of *Republika Srpska* within Bosnia and Herzegovina and to be known as the VRS would be officered by former JNA officers. This new army thus inherited both officers and men from the JNA and also substantial arms and equipment, including over 300 tanks, 800 armoured personnel carriers and over 800 pieces of heavy artillery. The remainder of the former JNA was to become the army of the new Federal Republic of Yugoslavia (Serbia and Montenegro) and was to be known as the VJ.

115. The formal withdrawal of the JNA from Bosnia and Herzegovina took place on 19 May 1992; the VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 and did not return to Serbia. This was so whether or not they were in fact in origin Bosnian Serbs. This applied also to most other officers and non-commissioned officers. Although then formally members of the VRS rather than of the former JNA, they continued to receive their salaries from the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the pensions of those who in due course retired were paid by that Government. At a briefing of officers concerned with logistics, General \ orde \ uki}, then of the VRS but who had, until 18 May 1992, been Chief of Staff of the Technical Administration of the JNA in Belgrade, announced that all the active duty members of the VRS would continue to be paid by the federal government in Belgrade, which would continue to finance the VRS, as it had the JNA, with the same numerical strengths of officers as were registered on 19 May 1992. The weapons and equipment with which the new VRS was armed were those that the units had had when part of the JNA. After 18 May 1992 supplies for the armed forces in Bosnia and Herzegovina continued to come from Serbia.

116. General Kadijevi}, writing of the role of the JNA in Bosnia and Herzegovina, recounts how "the units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment" and adds that "first the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to

liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina by political means . . . ." (Prosecution Exhibit 30.)

117. It is noteworthy that in his report of 3 December 1992 the Secretary-General of the United Nations referred to what had occurred regarding the JNA and its purported withdrawal from Bosnia and Herzegovina and concluded that: "Though JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'."[27]

118. Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ, cooperated with the VRS in Bosnia and Herzegovina. In particular VJ air crew and aircraft remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993. The former Commander of the 2nd Military District of the JNA, based in Sarajevo, General Ratko Mladi}, became the Commander of the VRS following the announced withdrawal of the JNA from Bosnia and Herzegovina.

119. In the early months of 1992, after hostilities against the Mostar area of Bosnia and Herzegovina in 1991, the JNA undertook a number of attacks against other areas of Bosnia and Herzegovina. Throughout April 1992 these attacks resulted in the capture of a number of cities and towns. The Podgrica Corps of what had been the JNA and was now the VJ remained in Bosnia and Herzegovina for much of 1992 and, under the command of General Momcilo Perisi}, was involved in the killing of Muslims and Croats in the Mostar region. That Corps, from Montenegro, remained in Bosnia and Herzegovina throughout the summer and autumn of 1992 as late as September of that year. General Perisi} later became Commander-in-Chief of the VJ.

120. The Banja Luka Corps, the 5th Corps of the old JNA, became part of the VRS in Bosnia and Herzegovina, and was named the 1st Krajina Corps, but retained the same Commander, Lieutenant-General Tali}. Excluding the Rear Base troops, it numbered some 100,000 men, expanded from a peacetime strength of 4,500 men. It relied for logistics, as it

[27] Report of the Secretary-General concerning the situation in Bosnia and Herzegovina, U.N. Doc. A/47/747.

had when a Corps of the JNA, on the Rear Service Base at Banja Luka commanded, as in the days of the JNA, by the same Commander, Colonel Osman Selak, who gave evidence before the Trial Chamber. Units of this Corps took part in the attack on the town of Kozarac on 24 May 1992. These units were all supplied with food and ammunition by that Rear Service Base, the same logistics base from which the Corps had been supplied when part of the JNA.

121. Shortly before the attack on Kozarac, in a declaration of 12 May 1992, the Committee of Senior Officials of the Conference for Security and Cooperation in Europe declared that the aggression against Bosnia and Herzegovina continued with a "relentless attack on Sarajevo and continuous fighting elsewhere with the use of air force and heavy weaponry by the JNA" (Prosecution Exhibit 77) and concluded that this clearly established violations of commitments by the authorities in Serbia and by the JNA.

8. Military Action

122. The formation of Serb Autonomous Regions and all that followed was only possible because of the military power of Serbia. The conflict between Serbia and Croatia played a significant part in the division of Bosnia and Herzegovina along ethnic lines, paving the way for all the events that were to occur later. That conflict, taking formal shape following the declaration of independence by Croatia in June 1991, served greatly to exacerbate the tension between Bosnia and Herzegovina's three ethnic groups, with Bosnian Serbs and Croats sympathetic to their warring fellow nationals across the border and with very many Bosnian Muslims entirely unsympathetic to what they saw as an aggressive Serbian invasion of Croatia, in which the JNA supported the Croatian Serbs. The Muslim-dominated government of Bosnia and Herzegovina instructed the Bosnian population not to comply with the JNA's mobilization order, regarding the war as an act of aggression by Serbia in which Bosnia and Herzegovina wanted no part. In consequence, whereas many Bosnian Serbs responded to the mobilization, very few Bosnian Muslims or Bosnian Croats did so. It will be noted later how, combined with similar incidents elsewhere, this resulted in the JNA, which had in the 1980s been a truly national, federal army, rapidly becoming one that was almost exclusively Serb at all levels.

123. By its incursion into Croatia, the JNA, which the Government of the Republic of Croatia declared in October 1991 to be an invading force, intended to safeguard the integrity of the Serb people by protecting Serbs in predominantly Serb areas of Croatia and, if possible, by defeating Croatia in the field and toppling the Croatian government. That second objective proved beyond its capability although it did succeed in supporting the autonomous Serb regions within Croatia and in extracting the bulk of its weapons and troops from the now independent Croatia. The Government of the Republic of Bosnia and Herzegovina thus found itself in 1991 with Serb-dominated regions on its western and northern borders in what had hitherto been Croatian territory and with large, heavily-armed JNA forces stationed in Bosnia and Herzegovina itself.

124. The entry of large JNA forces into Bosnia and Herzegovina retiring from Croatia brought with it an atmosphere of high tension. By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. The Government of the Republic of Bosnia and Herzegovina, still nominally representative of its three ethnic groups and which had not yet declared itself independent, faced two major problems, that of independence and that of defence, involving control over the mobilization and operations of the armed forces. In April 1992 with independence came the setting up of its own defence staff and in July it officially established its own army. The SDS disassociated itself from the legislature and government of the independent Republic of Bosnia and Herzegovina and formed the independent Serb government of *Republika Srpska*.

125. One immediate consequence which occurred before the announced withdrawal of the JNA on 19 May 1992 was the Serb assumption of exclusive administrative power in Serb-dominated areas. Moreover, between March and May 1992, there were several attacks and take-overs by the JNA of areas that constituted main entry points into Bosnia or were situated on major logistics or communications lines such as those in Bosanski Brod, Derventa and Bijeljina, Kupres, Fo~a and Avornik, Vi{egrad, Bosanski [amac, Vlasencia, Br~ko and Prijedor. The first attack was in Bosanski Brod on 27 March 1992. At the same time, there were clashes at Derventa. On 2 April 1992 there was an incident at Bijeljina and around this time also at Kupres. These were immediately prior to the recognition of Bosnia and Herzegovina's independence on 7 April 1992 by the European Community, with a retroactive

date of 6 March 1992. In Bosanski [amac, the 4th Detachment of the JNA entered the town, cut off telephones and fired shots in the town. There was some non-Serb resistance quickly squelched by the arrival of JNA tanks and armoured cars. On 22 April 1992 conflict began in Vlasencia with a police vehicle driving through the streets announcing through a loudspeaker that all armaments were to be surrendered. All vital functions of the town were taken over by JNA forces, including the town hall, bank, post office, police and courthouse, and there were present very many uniformed men as well as some local Serbs with arms. On 29 April 1992 there was a bloodless take-over of the town of Prijedor, as noted elsewhere, and on 30 April 1992 two bridges were blown up by Serb forces in Br~ko. On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS.

126. In general, the military take-overs involved shelling, sniping and the rounding up of non-Serbs in the area. These tactics often resulted in civilian deaths and the flight of non-Serbs. Remaining non-Serbs were then forced to meet in assembly areas in towns for expulsion from the area. Large numbers of non-Serbs were imprisoned, beaten and forced to sing Chetnik songs and their valuables seized. This was accompanied by widespread destruction of personal and real property.

B. Op{tina Prijedor

1. The Importance of Op{tina Prijedor

127. Op{tina Prijedor was significant to the Serbs because of its location as part of the land corridor that linked the Serb-dominated area in the Croatian Krajina to the west with Serbia and Montenegro to the east and south. The importance of the area is reflected in the testimony of Colonel Selak, a Muslim who, until July 1992, was a Colonel in the JNA. On 18 May 1992 he attended a briefing with Lieutenant-General Tali}, Commander of the 5th Corps. At that briefing the ARK Crisis Staff requested a corridor for road transport from Banja Luka in the direction of Serbia, which was said to be essential for supplying units of the VRS as it was the only land connection between western Bosnia and Serbia. It was needed in particular for bringing in *matériel*, including armaments, from Serbia.

2. Op{tina Prijedor before the Take-over

128. Before the take-over op{tina Prijedor was ethnically a relatively mixed area, although the composition of the population had exhibited a slight but significant change in the 10 years from 1981 to 1991. According to the 1981 census there were 5 percent more Serbs than Muslims, whereas in 1991 the ratio was reversed so that Muslims were the majority in the op{tina; out of a total population of 112,000, 49,700 (44%) were Muslims and about 40,000 (42.5%) Serbs, with the remainder made up of Croats (5.6%), Yugoslavs (5.7%) and aliens (2.2%). Thus Muslims constituted the largest ethnic group in the op{tina, whereas most of the op{tinas surrounding Prijedor had a majority Serb population.

129. Prior to the outbreak of war the various ethnic groups in the op{tina lived harmoniously together, with only limited signs of division. There was significant intermarriage and friendship across ethnic lines. One witness described relations in the town of Prijedor as a symbol of "the brotherhood unity of the former Yugoslavia at large, because when compared with other towns in Bosnia and Herzegovina, there were no major inter-ethnic conflicts". In the outlying areas, however, where groups were occasionally more isolated and homogenous, some remnants of disdain for other ethnic groups survived.

3. Background to the Take-over of Op{tina Prijedor

130. Such tension as existed was exacerbated by the use of propaganda and political manoeuvres; the twin tools advocated by Slobodan Milo{evi} to shift the balance of power in the former Yugoslavia to Serbia. Evidence of the use of propaganda in op{tina Prijedor has already been touched upon but it is worth recounting the testimony of Muharem Nezirevi}, former Editor-in-Chief of Radio Prijedor and a Muslim. He testified that two journalists from Radio Prijedor, who went to cover the war without his approval, were collected in an armoured car and returned from the front in uniform. According to Muharem Nezirevi} their reports were not objective, describing the Croats as "Usta{a" who had threatened to make a wreath from the fingers of Serbian children. The journalists nevertheless succeeded in getting their reports published. He further testified that almost all of the employees at the radio station were Serbs who eventually began to ignore his orders so that the only control he had, as long as he remained in charge, was to limit their air time. Such propaganda became

increasingly effective as individuals living in op{tina Prijedor were, by the spring of 1992, no longer able to receive television broadcasts from Sarajevo and only received broadcasts from Belgrade, Novi Sad, Banja Luka and Pale. As discussed above, such propaganda had a polarising effect throughout the former Yugoslavia and op{tina Prijedor was no exception. It was against this background that the political parties in op{tina Prijedor, as in the rest of Yugoslavia, were founded and continued to operate.

131. According to Mirsad Mujadzi}, President of the Municipal Committee of the SDA of Prijedor from its founding in August 1990, several attempts at cooperation with other parties were made in the period leading up to the 18 November 1990 elections for the Prijedor Municipal Assembly. To that end one joint rally was held but the local SDS leadership was severely criticised for its participation, effectively curtailing further such cooperation. The SDA also proposed a joint poster for the elections with the message: "We lived and we will continue to live together", the intention of which was to convey that harmonious inter-ethnic relations under the new democracy were possible. It featured the Serb symbol in between the Croat and Muslim symbols. The HDZ responded favourably, putting the poster up in Croat-dominated areas. The SDS, while accepting the placard verbally, refused to post it in Serb areas. In ethnically mixed communities, the Muslims posted the placard only to have it torn down by Serb activists. As discussed above, the SDS did not conceal its support for Slobodan Milo{evi}'s policies as the elections drew near, including the singing of nationalist Serb songs at meetings and spreading propaganda which promoted hatred of non-Serbs. The SDA cautioned the leadership of the SDS both officially and informally about this conduct but was told that these actions were not official policy but were the acts of a few irresponsible individuals. As the elections drew nearer, the Serb propaganda grew more aggressive.

132. The Prijedor Municipal Assembly, for which elections were held in November 1990, comprised a total of 90 seats, with op{tina Prijedor divided into five electoral units. Each party had a total of 90 candidates on the ballot. In the outcome the SDA won 30 seats, the SDS 28, the HDZ 2 and 30 seats went to other parties: the so-called opposition parties, namely the Social Democratic, the Liberal Alliance, and the Reformist parties. The SDA as the winning party had the first right to elect people for key government positions and to form a government on the op{tina level. In this regard a decision had been made at the Republic level among the leaders of the SDA, HDZ, and SDS to exclude the opposition parties in the formation of the government. Thus, according to the SDA, if the election results were

followed it would be entitled to 50 percent of the appointed positions with the SDS and HDZ entitled to the remaining 50 percent. The SDS, however, insisted upon 50 percent of the seats for itself. Negotiations were conducted, including an impromptu meeting between Sr|o Srdi}, the President of the Prijedor Municipal SDS Committee, Radovan Karad`i}, President of the SDS, and Mirsad Mujad`i}, the President of the Municipal Committee of the SDA of Prijedor. Radovan Karad`i} encouraged the local SDS to reach an understanding and the parties eventually agreed that the SDS would receive 50 percent and the SDA would give the HDZ a certain proportion out of its 50 percent. That agreement was implemented at the Municipal Assembly of Prijedor in January 1991. Velibor Ostoji}, then acting Minister for Information in the Government of the Republic of Bosnia and Herzegovina and one of Radovan Karad`i}'s confidants, was present at that session to help mediate the agreement.

133. Once implemented, difficulties arose between the SDA and the SDS over the allocation of important government posts, although it was agreed that both the Mayor of Prijedor and the Chief of Police would be from the SDA. There were six additional important posts in the police, which were taken by Serbs. Arguments for ethnic balance in these positions, as well as in other positions in publicly-owned and private companies and institutions were rejected, with the SDS consistently supporting its candidates and protecting the then current situation in which about 90 percent of the positions in financial institutions and social and public enterprises were held by Serbs.

4. Prelude to the Take-over of Op{tina Prijedor

134. In furtherance of the creation of a Greater Serbia, the theory of which had began to assume reality after the 1990 elections, the SDS rapidly began to establish separate governmental structures. In Prijedor the SDS surreptitiously established a separate Serbian Assembly at the direction of the Central SDS, the first Chairman of which was the Deputy Mayor of the official Municipal Assembly, as well as a separate police force and security unit which were closely linked to Serbian officials outside the op{tina. This occurred about six months before the take-over of the town of Prijedor and their existence was kept secret from non-Serbs. Planning for the take-over, which included the establishment of a Serbian Secretariat of Internal Affairs ("SUP"), took place at the Prijedor military barracks and all of the Serb employees of the legitimate Prijedor SUP participated. Included in this preparation

was the unauthorized return of illegal weapons confiscated from Serbs and the aiding of the Serb military in circumventing control over admittance to the Prijedor barracks.

135. The link between these separate Serbian government structures in Prijedor and those outside of Prijedor became evident when the Serbian Assembly in Prijedor joined the Autonomous Region of Krajina, part of *Republika Srpska* which the SDS considered to be part of the future "new Yugoslavia". The Serb leadership later acknowledged that the take-over had been planned in advance and was part of a coordinated effort. The Chief of Police, in an interview given to the newspaper *Kozarski Vjesnik* approximately one year later, stated that the police worked "hand in hand" with the military and the politicians and that he took instructions from the police headquarters in Banja Luka and from the Ministry of Interior of the *Republika Srpska*, it being a coordinated effort between politicians, police and military authorities. (Prosecution Exhibit 92.)

136. On the political front, the last meeting of the Prijedor Municipal Assembly prior to the take-over was very contentious. The SDS wanted to remain with Serbia as part of Yugoslavia, emphasising that all Serbs should remain in one state. Because of this disagreement with the non-Serbs, who wanted to withdraw from the federation, the SDS proposed a division of op{tina Prijedor. It asserted that 70 percent of the territory was Serb and published a map dividing the op{tina between Serbs and Muslims. The Muslim community was allocated the outlying villages and the part of the town of Prijedor inhabited predominantly by Muslims, whereas the central part of the town of Prijedor, including all the institutions and almost all industry, was reserved for the Serbs. The Muslim community objected, with the local SDA President suggesting that certain areas, including the town of Prijedor, remain neutral, emphasising that the actual implementation of such a division would, in any event, be quite difficult because of the extensive intermingling of the various ethnic groups.

5. The Take-over of the Town of Prijedor

137. On 30 April 1992 the SDS conducted a bloodless take-over of the town of Prijedor with the aid of the military and police forces. The actual take-over was conducted in the early hours of the morning when armed Serbs took up positions at checkpoints all over Prijedor,

with soldiers and snipers on the roofs of the main buildings. Military posts were visible all over the city and the Serbian flag with four Cyrillic S's was flown from the City Hall. JNA soldiers, wearing a variety of uniforms, occupied all of the prominent institutions such as the radio station, medical centre and bank. They entered buildings, declared that they had taken power and announced their decision to rename op{tina Prijedor "Srpska op{tina Prijedor". Muharem Nezirevi}, the Editor-in-Chief of Radio Prijedor at the time, was summoned to the radio station in the early morning of 30 April 1992. When he arrived, the radio station was surrounded by soldiers. Milomir Staki}, who before the take-over had been Vice Chairman of the Municipal Assembly and afterwards became the Chairman of the Serb Municipal Assembly, explained on the radio what had happened and the SDS's intentions with regard to op{tina Prijedor.

138. The pretext for the take-over was the transmission on 29 April 1992 by the Belgrade television station of a facsimile to the effect that the leader of the Bosnia and Herzegovina TO had instructed the local TOs to attack and obstruct the JNA during its withdrawal from the Republic, although the authorities in Sarajevo immediately declared that the facsimile was false and publicly denounced it. Despite this pretence of spontaneity, the de facto Serbian authorities of Prijedor, including Milomir Staki}, clearly stated that the take-over was not a spontaneous reaction to the facsimile, rather it was the final stage of a long-standing plan.

6. Prijedor after the Take-over: the Formation of the Crisis Staff

139. A local Crisis Staff was established ("Prijedor Crisis Staff") which implemented a number of decisions made by the ARK Crisis Staff. In addition to restrictions on the lives of non-Serbs, discussed below, control was immediately taken of the two local media sources: Radio Prijedor and the newspaper *Kozarski Vjesnik*, and thereafter their principal function became the dissemination of propaganda. It also controlled mobilization and by mid-May 1992 nearly all Serbs had been mobilized either into the standing army, the army reserves or the police force. Calls were also made at that time for the surrender of weapons which, although addressed to the population at large, were only enforced in respect to Muslims and Croats, most of whom complied out of fear of punishment. At the same time the mobilization of Serbs allowed for the distribution of weapons to the Serb population.

7. The Incident at Hambarine and the Start of the Attack on the Outlying Areas

140. As a result of the increased tensions between the various ethnic communities, checkpoints were established and run by the different groups. One Muslim checkpoint was located at Hambarine and it was an incident that occurred there on 22 May 1992 that provided a pretext for the attack by Serb forces on that outlying area. A car driven by a Croat and containing four uniformed Serbs, possibly members of a paramilitary unit, was stopped at that checkpoint, at which point the passengers were ordered to give up their weapons. Apparently they refused and a shooting incident occurred, as a result of which two Serbs and one Muslim died. Following the incident the Prijedor Crisis Staff issued an ultimatum on Radio Prijedor for the residents of Hambarine and the surrounding villages to surrender to the Prijedor authorities the men who had manned the checkpoint as well as all weapons. The ultimatum warned that failure to do so by noon the following day would result in an attack on Hambarine. The Hambarine authorities decided not to comply with the terms of the ultimatum and, following its expiration, Hambarine was attacked. After several hours of shelling by artillery, armed Serb forces entered the area supported by tanks and other weaponry and after a brief period of intermittent fighting local leaders collected and surrendered most of the weapons.

141. By this time many of the inhabitants had already fled to other Muslim or Croat-dominated areas, heading north to other villages or south to a forested area which was also shelled. A number of the residents eventually returned to Hambarine, by then under Serb control, although only temporarily because on 20 July 1992 the last major cleansing in the op{tina occurred with the removal of approximately 20,000 non-Serbs in Hambarine and nearby Ljubija.

8. The Attack on the Kozarac Area

142. After the take-over of Prijedor tension developed between the new Serb authorities and Kozarac, which contained a large concentration of the Muslim population of op{tina Prijedor. Approximately 27,000 non-Serb individuals lived in the larger Kozarac area and of the 4,000 inhabitants of Kozarac town, 90 percent were Muslim. As a result of this tension ethnically mixed checkpoints were supplemented with, and eventually replaced by, Serb

checkpoints which were erected in various locations throughout the Kozarac area, as well as unofficial guard posts established by armed Muslim citizens.

143. Negotiations were conducted between a delegation of Kozarac citizens and the Prijedor Crisis Staff but to little avail. On 22 May 1992 telephone lines were disconnected and a blockade of Kozarac was instituted, rendering movement into and out of Kozarac extremely difficult. An ultimatum was addressed to the TO in Kozarac, requiring the Kozarac TO and police to pledge their loyalty and recognize their subordination to the new authorities in Srpska op{tina Prijedor, as well as to surrender all weapons. Rumours spread of a Serb exodus from Kozarac. Around 2 p.m. on 24 May 1992, after the expiration of the ultimatum at noon and an announcement on Radio Prijedor, Kozarac was attacked. The attack began with heavy shelling, followed by the advance of tanks and infantry. After the shelling the Serb infantry entered Kozarac, and began setting houses on fire one after another. It was reported that by 28 May 1992 Kozarac was about 50 percent destroyed, with the remaining damage occurring in the period between June and August 1992. As with other predominantly Muslim areas, soldiers looted and plundered after the town had been cleansed of its inhabitants until Kozarac was, as several witnesses described it, "lifeless".

144. In the attack on Kozarac care was taken to try to avoid damage to Serb property. Azra Bla`evi} testified that after an agreement was reached allowing people to leave Kozarac on 26 May 1992 the only Serb woman who had remained behind at the hospital was ordered by soldiers affiliated with the Serb forces to indicate which apartment was hers so that it would not be harmed. Evidence was also presented of the use of the inscription "Serb house, do not touch" on Serb property and, unlike the mosque, the Serbian Orthodox church survived the attack and subsequent destruction. Similarly, Serb-dominated villages such as Rajkovi}i and Podgra|e were either not shelled at all or only shelled accidentally. On 26 May 1992 an agreement was reached allowing people to surrender and leave the town.

145. On 27 May 1992 senior military officers met to be briefed on the attack on Kozarac. Lieutenant-General Tali}, as Commander of the Banja Luka Corps, the 5th Corps of the old JNA, was informed that 800 people had been killed in the attack on Kozarac and an additional 1,200 had been captured; casualties on the part of the units of the Corps were four soldiers killed and fifteen injured. In command of the 343rd Mechanised Brigade, the unit extensively involved in that attack (and which later became the 43rd Brigade), was Colonel Vladimir

Arsi} and in direct control of the attack was Major Radmilo Zeljaja, both former JNA officers. That attack on Kozarac, in common with all active combat activities, would necessarily have had to be approved, in accordance with military command procedures, by the Corps Commander, Lieutenant-General Tali}, who alone could order the commitment of units to combat.

146. During the attack the civilian population had sought shelter in various locations and, as the Serb infantry entered Kozarac, requiring people to leave their shelters, long columns of civilians were formed and taken to locations where they were gathered and separated. Unlike Hambarine, the non-Serb population was not permitted to return to Kozarac after the attack and, subject to some exceptions, the men were taken either to the Keraterm or Omarska camps and the women and elderly to the Trnopolje camp. By the end of the summer the area was desolate, with many of the buildings which had survived the attack undamaged subsequently being looted and destroyed. Eventually the few Serb inhabitants returned and Serbs displaced from other areas moved into Kozarac. Today both op{tina Prijedor and the town of Kozarac are overwhelmingly Serb; their political leaders and police authorities are Serb.

9. The Treatment of Non-Serbs

147. Immediately upon its formation, the ARK Crisis Staff began to make decisions about the treatment of non-Serbs. The President of the ARK Crisis Staff, Radoslav Br|anin, held extreme views with regard to Greater Serbia and the acceptability of other nationalities living within that territory. His position, which was continually repeated in the media, was that the largest percentage of non-Serbs acceptable in the territory designated as Greater Serbia was 2 percent. In order to secure this percentage he advocated on Radio Banja Luka a direct struggle, including the killing of non-Serbs. Similarly Radislav Vuki}, President of the Municipal SDS Committee in Banja Luka and President of the Regional Board of the SDS, as well as an elected member of the SDS Main Board of Bosnia and Herzegovina, was also an extremist, presenting through the media his decision not to allow any non-Serb women to give birth at Banja Luka Hospital. He also asserted that all mixed marriage couples should be divorced or that all mixed marriages should be annulled and that children of mixed marriages "were good only for making soap." The position expressed by these two prominent Serb leaders, once thought of as extreme, had, by 1992, become the predominant views of the SDS

leadership, acceptance of which was a prerequisite for advancement within the SDS. Individuals outside of the SDS who did not agree with the increasingly extreme position of the SDS leadership were subjected to pressures of various kinds, including dismissal from work, threats, beatings and the planting of explosives in their homes or under their cars. Politicians both within the SDS and from other parties who disagreed with this policy were threatened with injury or death and many of them left the area as a result. After a number of peace rallies throughout the city of Banja Luka, eventually halted by means of a blockade utilising checkpoints manned by the Serbian Defence Force, a paramilitary unit, and the subsequent manning of these checkpoints by members of the reserve police forces, all open dissent to SDS policies was silenced by spring 1992. The media focused only on SDS policy and reports from Belgrade became more prominent, including the presentation of extremist views and the promotion of the concept of a Greater Serbia.

148. In accordance with this policy the ARK Crisis Staff began to implement extreme restrictions on the movement and lives of non-Serbs. These decisions were binding throughout the territory of the Autonomous Region of Krajina, including op{tina Prijedor, and the ARK Crisis Staff carried out checks to ensure that its decisions were being implemented by the municipal Crisis Staffs, or other appropriate bodies. By May 1992 non-Serbs living within the territory of the Autonomous Region of Krajina faced an extremely difficult situation. As with Serbs who had not responded to their call for mobilization, freedom of movement was restricted and a curfew was established. Measures directed specifically at non-Serbs included dismissal from work, prohibition on the opening and running of private businesses and attacks on certain buildings, as well as the loss of social and health insurance as a consequence of their unemployment. Only those loyal to *Republika Srpska* were entitled to fill positions of authority and loyalty was defined in June 1992 as acceptance of the SDS as the "only true representative of the Serb people". Additionally, terror tactics were common, such as the use of the "red kombi", a large red van with a crew of eight members of the reserve police force, dressed in their police uniforms, who drove around Banja Luka asking for the identity papers of citizens. Those arrested, predominantly Muslims and Croats, were taken not to jail but to a building designated specifically for beatings. The red kombi, which operated from May until the end of 1992, became a symbol of fear.

149. The difficulties suffered by the non-Serb population of the Autonomous Region of Krajina have been well documented. A Report of the International Committee of the Red Cross ("ICRC") found that the minority civilian population of the Banja Luka area was

repeatedly beaten, threatened and robbed. Non-Serb cultural and religious symbols throughout the region were targeted for destruction and, as an additional means for minimising the non-Serb population of the area, a state agency was created to facilitate the exchange of the non-Serb population for Serbs.

150. Upon its formation in May 1992 the Prijedor Crisis Staff implemented these restrictive measures against non-Serbs, who were fired from their jobs, refused necessary documentation and whose children were barred from attending primary and secondary schools. Non-Serbs no longer qualified for leadership positions and were eventually forced to leave almost all positions. Accusations and propaganda against Muslims and Croats, including ethnic insults, were heard on the radio and all travel outside of the općina for non-Serbs was prevented. The movement of non-Serbs within the općina was also obstructed, control being implemented by means of a curfew and by checkpoints where identifications were checked and if the holder was not a Serb, permission to pass could easily be denied. The control over movement extended as far as private residences through the use of registers in which Muslims and Croats had to record the movements of individuals within apartment buildings and daily searches were conducted in almost every apartment inhabited by Muslims and Croats. Additional restrictions included the blocking of telephone lines and the partial shut-down of electricity for non-Serbs. Throughout the općina mosques and other religious institutions were targeted for destruction and the property of Muslims and Croats, worth billions of dinar, was taken.

151. After an unsuccessful attempt to regain control of the town of Prijedor on 30 May 1992 by a small group of poorly armed non-Serbs, non-Serbs in Prijedor were ordered to use sheets of white material to mark their homes and indicate that they surrendered. Ultimately they were divided into two groups: one which consisted of men aged between 12 to 15 or 60 to 65, and one of women, children and elderly men. Generally the men were taken to the Keraterm and Omarska camps and the women to the Trnopolje camp. Additionally, the old part of the town of Prijedor known as Stari Grad, inhabited mostly by Muslims, was destroyed. After the cleansing of Prijedor any remaining non-Serbs were required to wear white armbands to distinguish themselves. Non-Serbs lived in fear as former friends reported them to the authorities and the disappearance of non-Serbs became an everyday experience. For those held at camps in the area, the overwhelming majority of whom were non-Serbs, the situation was horrendous, with, as described below, brutal beatings, rapes and torture commonplace and the conditions of life appalling.

152. Whereas before the conflict op{tina Prijedor contained approximately 50,000 Muslims and 6,000 Croats, only approximately 6,000 Muslims and 3,000 Croats remained after the cleansing and they endured very harsh conditions. They were required to perform dangerous and difficult work, had difficulties buying food, were harassed, and killings occurred on a continual basis. As late as 1994 the ICRC reported the confirmed deaths of nine Muslim civilians in two days in op{tina Prijedor. As a result of these difficulties the United Nations High Commissioner for Refugees and the ICRC asked the Bosnian Serb authorities for permission to evacuate all remaining non-Serbs from op{tina Prijedor and, when refused, they decided to increase their monitoring of the treatment of minorities in Prijedor.

153. This atmosphere of discrimination and hostility against non-Serbs created by the Serb leadership throughout the region was well known in Kozarac. After the take-over of the town of Prijedor and before the attack on Kozarac, continuous references were made by Serbs on the police radio about destroying mosques and everything that belonged to the "balijas", a derogatory term for Muslims, as well as the need to destroy the "balijas" themselves.

10. Camps

154. After the take-over of Prijedor and the outlying areas, the Serb forces confined thousands of Muslim and Croat civilians in the Omarska, Keraterm and Trnopolje camps. The establishment of these camps was part of the Greater Serbia plan to expel non-Serbs from op{tina Prijedor. Generally the camps were established and run either at the direction of, or in cooperation with, the Crisis Staffs, the armed forces and the police. During confinement, both male and female prisoners were subjected to severe mistreatment, which included beatings, sexual assaults, torture and executions. They were also subjected to degrading psychological abuse, by being forced to spit on the Muslim flag, sing Serbian nationalist songs or to give the Serbian three-fingered salute. Prisoners were guarded by soldiers, police forces, local Serb military or TO units, or a combination thereof, who were dressed in uniforms and generally had automatic rifles and other weapons on their person. They cursed the prisoners, referring to them as "balijas" or "Usta{a", as already mentioned. Members of paramilitary organizations and local Serbs were routinely allowed to enter the camps to abuse, beat and kill prisoners.

155. Perhaps the most notorious of the camps, where the most horrific conditions existed, was the Omarska camp. It was located at the former Ljubija iron-ore mine, situated some two kilometres to the south of Omarska village. The camp was in operation from 25 May 1992 until late August 1992 when the prisoners were transferred to Trnopolje and other camps. Omarska held as many as 3,000 prisoners at one time, primarily men, but also had at least 36 to 38 women. With little exception, all were Muslims or Croats. The only Serb prisoners sighted by any of the witnesses were said to have been there because they were on the side of the Muslims. The commander of the camp was @eljko Meaki}. The camp consisted of two large buildings, the hangar and the administrative building, and two smaller buildings, known as the "white house" and the "red house". Two photographs of a model of the Omarska camp (Prosecution Exhibit 130) are included in the Opinion and Judgment as Annex C.

156. The hangar was a large oblong structure, running north-south, along the eastern side of which were a number of roller doors leading into a large area extending the length of the building with the ground floor designed for the maintenance of heavy trucks and machinery used in the iron-ore mine. The western side of the hangar consisted of two floors of rooms, over 40 in all, extending over the whole north-south length of the building and occupying rather less than one half of the entire width of the hangar. Access to these rooms could be gained either from a door on the western side or, internally, from the large truck maintenance area described above. The bulk of the prisoners were housed in this building. To the north of the hangar and separated from it by an open concreted area, known as the "pista", was the administration building, where prisoners ate and some were housed, with rooms upstairs where they were interrogated. The white house was reserved for especially brutal treatment of selected prisoners. The other small building, the red house, was also a place to which prisoners were taken for severe beatings, and from which most often they did not leave alive. The administration building was in part two-storied, the single-storied western portion containing a kitchen and eating area. There were two small garages forming part of the extreme northern end of the building. To the west of the hangar building was a grassed area on the western side of which lay the white house, a small rectangular single-storied building, having a central corridor with two rooms on each side and one small room at its end, not wider than the corridor itself. The small red house was on the same side as the white house, and across from the end of the hangar building.

157. The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent.

158. When prisoners arrived by bus at Omarska, they were usually searched, their belongings taken from them, and then beaten and kicked as they stood, legs apart and arms upstretched, against the eastern wall of the administration building. The new arrivals were then sent either to stay outside on the pista or to rooms in the hangar or in the small garages in the office blocks or, if so selected, to the white house.

159. Prisoners were held in large numbers in very confined spaces, with little room either to sit or to lie down to sleep. Sometimes 200 persons were held in a room of 40 square metres; and 300 prisoners were confined in one small room. Others spent the time crowded together in the lavatories. There, as well, however, prisoners were packed one on top of the other and often they had to lie in the midst of excrement. The doors of the overcrowded garage were often kept closed even in the heat of the summer. As many as 600 prisoners were made to sit or lie prone outdoors on the pista, some staying there continuously regardless of the weather for many days and nights on end, and occasionally for as long as a month, with machine-guns trained on them.

160. Only one meal a day was provided at Omarska for prisoners, consisting of a plate of watery potato soup and a small slice of bread or just rotten beans, and the suffering from hunger was acute. The prisoners were fed in batches of about 30 at a time and had to run to and from their daily meal, often being beaten by guards as they came and went. They were then allowed only a minute or two in which to eat. When they first arrived at the camp, some prisoners did not, however, receive either food or water for several days. Many of those confined in the white house received no food at all during their time there. Some prisoners, particularly those already badly injured by beatings in the camp, often chose to miss their daily meal for fear of further beatings on the way to, or return from, the meal. Some prisoners lost 20 to 30 kilogrammes in body-weight during their time at Omarska, others considerably more.

161. Drinking water at Omarska was often denied to the prisoners for long periods and was, in any event, unsuitable for human consumption, causing sickness. There was very little in

the way of lavatories; prisoners had to wait hours before being allowed to use them, and sometimes risked being beaten if they asked to use them. Prisoners were often forced to excrete and urinate in their rooms. There were no effective washing facilities, and men and their clothes quickly became filthy and skin diseases were prevalent, as were acute cases of diarrhoea and dysentery.

162. The crowded rooms were stifling in the summer heat and often guards refused to open windows in rooms crowded to overflowing or demanded the handing over of any possessions prisoners had managed to retain as the price of an open window or a plastic jar of water.

163. Prisoners were called out for interrogation, usually some days after their arrival, and would be taken by a guard to the first floor of the administration building; guards would beat and kick them as they went. Some prisoners were very severely beaten during interrogation, a guard standing behind the prisoner, hitting and kicking him, often knocking him off the chair in which he sat; there were instances where prisoners knocked to the floor would be trodden and jumped on by guards and severely injured; all of this while the interrogator looked on. Treatment varied from prisoner to prisoner and seemed to depend rather more on the brutality of the individual interrogator and guards than on the behaviour of the particular prisoner. Prisoners, after their interrogation, were often made to sign false statements regarding their involvement in acts against Serbs.

164. The calling-out of prisoners was not only for the purposes of interrogation. In the evening, groups from outside the camp would appear, would call out particular prisoners from their rooms and attack them with a variety of sticks, iron bars or lengths of heavy electric cable. Sometimes these weapons would have nails embedded in them so as to pierce the skin. On occasions knives would be used to slash a prisoner's body. The prisoners as a whole feared groups of men from outside the camp even more than they did the regular camp guards. These groups appeared to be allowed free access to the camp and their visits greatly increased the atmosphere of terror which prevailed in the camp. Frequently prisoners who were called out failed to return and witnesses who were their close relatives gave evidence that they had never been seen since, and were assumed to have been murdered.

165. Women who were held at Omarska were routinely called out of their rooms at night and raped. One witness testified that she was taken out five times and raped and after each rape she was beaten.

166. The white house was a place of particular horror. One room in it was reserved for brutal assaults on prisoners, who were often stripped, beaten and kicked and otherwise abused. Many died as a result of these repeated assaults on them. Prisoners who were forced to clean up after these beatings reported finding blood, teeth and skin of victims on the floor. Dead bodies of prisoners, lying in heaps on the grass near the white house, were a not infrequent sight. Those bodies would be thrown out of the white house and later loaded into trucks and removed from the camp.

167. The red house was another small building where prisoners were taken to be beaten and killed. When prisoners were required to clean the red house, they often found hair, clothes, blood, footwear and empty pistol cartridges. They also loaded onto trucks bodies of prisoners who had been beaten and killed in the red house.

168. The Keraterm camp, located on the eastern outskirts of Prijedor, was previously used as a ceramic tile factory. It began operating on 25 May 1992 and held up to 1,500 prisoners crowded into a number of large rooms or halls. A photograph of the Keraterm camp (Prosecution Exhibit 201) is included in the Opinion and Judgment as Annex D.

169. Conditions in Keraterm were atrocious; prisoners were crowded into its rooms, as many as 570 in one room, with barely space to lie down on the concrete floors. The rooms were unlit and without windows and were in the summer intensely hot, with no ventilation. Prisoners were kept locked in these rooms for days on end, crowded together. Initially one lavatory was available for all but it became blocked and barrels were supplied instead which leaked, the stench being overpowering. There were no washing facilities.

170. Food consisted of a daily plate of watery soup and a scrap of bread and the suffering from hunger was acute. Beatings were very frequent, prisoners being called out, attacked with bars and batons and made to beat each other. There was much calling-out and beating of prisoners at night and those who returned were bloody and bruised all over; some died of their injuries. Some who were called out never returned, and prisoners assumed that they had died as a result of the beatings. Dysentery was rife and there was no medical care for illness or for

the injuries inflicted by beatings. Interrogations were conducted, accompanied by beatings. Some prisoners were questioned about money and taken to their homes and made to search for money, to be handed over to the guards if found.

171. There was testimony received of a mass execution of prisoners believed to have come from Hambarine. One night prisoners heard bursts of machine-gun-fire, followed by individual shots. Witness Q testified that the following morning they were called out to load over 150 bodies onto a large truck and trailer which then left the camp with blood dripping from it. Machine-gun-fire was repeated the following night with, according to evidence, over 50 bodies taken away the following morning. Two fire trucks arrived later and hosed down the area to wash away the blood. It seems that the shooting took place through the closed doors of the room in which those prisoners were confined; those doors had large bullet holes pierced through them. Another account by a witness speaks of a total of about 250 people being killed in this way.

172. The Trnopolje camp was located near the Kozarac station, on the Prijedor-Banja Luka railway line. The camp held thousands of prisoners, most of whom were older men and women and children. Armed soldiers guarded the camp. The commander of the camp was Slobodan Kuruzovi}.

173. The camp consisted of a two-storied former school building and what had been a municipal centre and attached theatre, known as the "dom". An area of the camp was surrounded by barbed wire. Two photographs of the Trnopolje camp showing the school building (Prosecution Exhibit 277) and the dom (Prosecution Exhibit 303) are included in the Opinion and Judgment as Annex E.

174. A small first-aid centre was manned by a prisoner-doctor and some male first-aid attendants. No food was supplied by the camp authorities at Trnopolje. Because there was no food, in the beginning people ate what they brought with them and after that they lived on the aid of such members of the local population as were able to get through to bring them food. Later on, when the population surrounding the camp was expelled, prisoners often left the camp to look for food in gardens and abandoned houses in the surrounding area. This was dangerous, however, because often soldiers were there, looting the homes and the prisoners feared that if they encountered them they would be attacked. In later days, some food was provided by the local Red Cross.

175. At Trnopolje there was no regular regime of interrogations or beatings, as in the other camps, but beatings and killings did occur. One witness, Sulejman Be{i}, testified to having seen dead people wrapped in paper and wired together, their tongues pulled out and, on a later occasion, having seen the slaughtered bodies of young girls and old men in the theatre. Because this camp housed the largest number of women and girls, there were more rapes at this camp than at any other. Girls between the ages of 16 and 19 were at the greatest risk. During evenings, groups of soldiers would enter the camp, take out their victims from the dom building and rape them. Another prisoner, Vasif Guti}, who had medical training, was assigned to work in the medical unit at Trnopolje and testified to the extensive rapes that occurred at the camp. He often counselled and treated victims of rape, the youngest girl being 12 years of age. In addition, there were women who were subjected to gang rapes; one witness testified that a 19-year-old woman was raped by seven men and suffered terrible pains and came to the clinic for treatment for haemorrhaging. He stated:

> The very act of rape, in my opinion - I spoke to these people, I observed their reactions - it had a terrible effect on them. They could, perhaps, explain it to themselves when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it in some way, but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear, horrible.

176. Trnopolje was, at times at least, an open prison but it was dangerous for inmates to be found outside, where they might be attacked by hostile groups in the neighbourhood, and this, in effect, amounted to imprisonment in the camp. In the beginning, the Serb soldiers informed the inmates that they were being held there for their own protection against Muslim extremists. However, the camp actually proved to be rather a point where the civilian population, men, women and children, would be gathered, collected and then deported to other parts of Bosnia or elsewhere.

177. Because of the lack of food and the insanitary conditions at the camp, the majority of inmates, one estimate is as high as 95 percent, suffered from dysentery. There was no running water at all, and only limited lavatory facilities. There was almost no water to drink, as only one pump existed for the whole camp. Lice and scabies were also rampant. At one time the

buildings at Trnopolje proved insufficient to house all the inmates, many of whom were forced to camp outdoors in the grounds in makeshift shelters of plastic sheeting and the like.

178. On or about 1 October 1992 people were deported from this camp upon signing an agreement to relinquish all of their material goods. Thus the Trnopolje camp was the culmination of the campaign of ethnic cleansing since those Muslims and Croats who were not killed at the Omarska or Keraterm camps were, from Trnopolje, deported from Bosnia and Herzegovina.

179. The defence being by way of alibi, and the accused's case being that he had never been in either the Omarska or Keraterm camps, there was little Defence evidence called relating to conditions at these camps and cross-examination concentrated upon such evidence as in any way sought to associate the accused with these camps rather than with the conditions in the camps, although where any conflicts appeared to exist within the body of Prosecution evidence regarding conditions, that was, of course, addressed in cross-examination. Witness A, called by the Defence, testified very generally that the conditions at Omarska were not abhorrent. Most witnesses for the Defence stated they had no knowledge of the existence of the camps, or if they did, they referred to them as "collection centres".

C. The Accused

180. The accused, Du{ko Tadi}, was born on 1 October 1955 and grew up in Kozarac, living most of the time in the family home in the centre of the town. He came from a very prominent family of Serb ethnicity in Kozarac; his father was a decorated Second World War hero and well respected throughout the community. During the Second World War, his mother had been confined to the Jasenovac prison camp which was operated by Croats. Each of the accused's three elder brothers were well-known karate experts. The accused himself is an accomplished karate expert, having won numerous trophies. In 1979 the accused unofficially married Mira Tadi}, who is from the neighbouring hamlet of Vidovi}i, with whom he has two daughters. Their marriage was made official at some point after April 1981. Although the couple has been officially divorced for several years, ostensibly because Mira Tadi} could more easily find a job outside of the former Yugoslavia if she were single, they still consider themselves a married couple.

181. Towards the end of 1990 or in the beginning of 1991 the accused opened a café in Kozarac, the Nipon café, attached to the family home on Mar{ala Tita Street in the centre of town. At first it was a popular bar visited by Muslims and Serbs alike from Kozarac and the surrounding area. Ninety percent of the inhabitants of Kozarac were Muslims prior to the conflict and the accused testified that most of his friends were Muslim.

182. Despite these friendships, the evidence demonstrates that the accused supported the Greater Serbia cause and all it involved, although he denies being a nationalist. He joined the SDS in 1990, after he says he received a threatening letter from the "young Muslims of SDA Kozarac". Testimony was received that some members of the community felt that the letter had, in fact, been written by the accused himself or his wife. Witness Q, who is a Muslim, testified that with his growing nationalism more and more nationalistic Serbs began to frequent the accused's café and it began to be a gathering place for Serbs from outside the area. Sometimes as many as 30 Serbs dressed in the "Duke" or "Vojvode" coats, which were symbols of Serb nationalism, met there and sang Chetnik songs and used ethnic epithets, saying "we are going to kill all of the balijas, fuck the balijas's mother" and used the three-finger Serbian salute. This witness testified that many of the Serbs wore a "kokarda", a type of Serbian badge, and were armed, and stated that the accused appeared to be the leader of the group. As these incidents increased, Witness Q stopped frequenting the café.

183. Witnesses testifying before the Trial Chamber noted the accused's acceptance of nationalistic ideas. For example, Sofia Tadi}, the ex-wife of the accused's brother Mladen, testified that at a certain point the accused began to express nationalistic ideas. She stated that the accused said that Slobodan Milo{evi} was the "only real man, the only real politician" among the political leaders and that the accused stated during his wife's pregnancy that if the child were a boy they would name it Slobodan after him. She testified that the accused stated that Serbs should go to Kosovo in order to repress the Albanians there. She also testified that the Tadi} family became more active in the Orthodox Christian church in Kozarac, and that the accused once commented, as Muslims were passing: "Look at the balijas going to their mosque."

184. These views of the accused were also described by Witness AA, who testified to a heated political argument at the Deluxe café, owned by [efik Sivac, when the accused said in

an angry voice that Greater Serbia would be theirs and there would be no place for Muslims there.

185. The accused himself acknowledges that several Serbs and Muslims began to boycott his café in the belief that he wanted to "disturb relations between ethnic groups" in a document he wrote on 8 August 1993 entitled "My Work Report in 1990 - 1993", which was received into evidence during the trial (Prosecution Exhibit 344). This work report, which described his activities during that period, indicates that copies of it were to be provided to the President of the Republika Srpska Assembly, the Representative of the Prijedor Municipal Assembly, the Chief of the Public Security Station Banja Luka, the President of the Bosnia and Herzegovina SDS party, the Human Rights Commission KEBS Belgrade, and the media in Yugoslavia and *Republika Srpska*. The accused testified, however, that he delivered one copy to the town hall in Prijedor and sent one to the Main Board of the SDS party.

186. The accused's involvement in nationalistic politics was also made apparent by other testimony. In November 1991 the SDS leadership requested that the accused and his wife organize in the Kozarac area the SDS plebiscite discussed above. The accused wrote in his work report: "Since Muslims constituted 95% of the population in Kozarac and Vidovi}i and since central power, in Prijedor, was in the hands of the SDA party, there was a certain amount of risk involved in organizing the plebiscite voting in a public place." He recorded that when the plans for the plebiscite were made known, he was labelled a "Serb nationalist". The implication from the accused's testimony is that he was responsible only for the polling place in Vidovi}i, a small hamlet of seven Serb homes. The report of the results of the voting, however, clearly shows otherwise since 141 people voted, only 11 of whom were non-Serbs. Witness P stated that the responsibility for conducting the plebiscite would have been given only to a person who was a loyal, reliable and committed member of the SDS political party, especially since the Kozarac area had greater significance as an area where Serbs did not constitute a majority. Moreover, the fact that he was willing to take the risk involved in organizing the vote in a public place also shows the dedication of the accused to the SDS and its platform.

187. After the take-over of Prijedor and before the attack on Kozarac, a group of citizens in Kozarac was organized to negotiate with the Prijedor officials to avert a take-over of Kozarac.

The accused was asked to join this group because he was a Serb and they needed bipartisan support. The accused mentions this in his work report, where he stated:

> I notified the party's (SDS) President Mi{kovi} about this task. When I explained to him the nature of my visit, he asked me to come to the municipality offices an hour before the meeting. There, during this conference with him and President Staki}, we agreed that I should speak up at the gathering and say openly and without restraint about all that was negative and causing friction between ethnic groups. I did that, as the minutes of that meeting show.

In support of this, Kemal Susi} testified that the accused told him that he would talk to Serb leaders regarding the meeting. However, at trial the accused denied having this earlier meeting. After the meeting with the Prijedor authorities, Kemal Susi} testified that the accused told him: "Kemal, Kozarac will be shelled."

188. After the ethnic cleansing of Kozarac had been accomplished, the accused became the political leader of Kozarac. On 15 August 1992 he was elected President of the Local Board of the SDS and was appointed as Acting Secretary of the Local Commune. He was subsequently elected Secretary of the Local Commune on 9 September 1992 and this decision was formally implemented on 9 November 1992. He became its representative to the Prijedor Municipal Assembly, which entrusted him with the task of re-establishing civilian control in Kozarac and he was in charge of population resettlement there. Witness P testified that such positions would not have been given to someone who had not been completely loyal to the Serb cause. While he was President of Kozarac's SDS Party, all of the activities of the Local Board were coordinated with the President of the SDS party in Prijedor, Simo Mi{kovi}.

189. Beginning in August 1992, the accused advocated a "cleansing/securing effort" in an effort to rebuild the centre of Kozarac. In his work report he stated: "Most Serbs expressed their wish to engage immediately in securing all property, disregarding who its previous owner had been, and to restore the centre of the town". To his consternation, authorities in Prijedor allowed an influx of refugees to places outside of the town, while the centre of Kozarac was avoided. Additionally, the accused criticised the SDS in an open meeting regarding the looting and destruction of the centre of the town where his home and café were located but was standing undamaged, an inscription stating "Serb house, do not touch", affixed to it. A schism developed between the accused and the authorities in Prijedor and the

accused was evicted from the apartment in Prijedor which he had been given by the Prijedor Crisis Staff.

190. Although the Prosecution contends and the accused denies that the accused was mobilized for active duty during the general mobilization in the Autonomous Region of Krajina on 4 May 1992, the Trial Chamber finds that there is insufficient evidence to reach this conclusion. The certificate for the issuance of a weapon to the accused, issued by the Banja Luka TO, reflects a date of "4/5/92" in type (Prosecution Exhibit 148). The name, however, was hand-written and possibly was filled in at a later date, as was claimed by the accused. Both parties agree, however, that the accused began service as a reserve traffic police officer at the Orlovci checkpoint on 16 June 1992. The assignment records received in evidence indicate that he was assigned to that position until 1 August 1992 and was thereafter assigned duties as a reserve policeman in Prijedor to 8 September 1992. For part of this time, beginning 15 August 1992, the accused was also working for the Kozarac Local Commune. On 9 September 1992 he was transferred from the Prijedor police station to the Kozarac police station, where he continued until 19 November 1992. As of that date, he ceased working as a reserve police officer and the Kozarac Local Commune served as his primary employment to the end of the year.

191. Between March and June 1993 the military attempted several times to enlist forcibly the accused for military service. He was arrested and threatened with arrest several times by the military police but the accused testified that he was released upon showing them a document which he says protected him from military service. On 9 or 10 June 1993 he was mobilized and posted to the war zone near Grada~ac, from where he escaped the following day. Over the next two months, the accused went into hiding in an attempt to escape further mobilization. He was arrested several times during the ensuing months but always managed to escape.

192. In his work report, the accused asserts that "after all I have done since 1990, only wishing to contribute to the creation of our common country even when it implied risking my life and my family safety, after all I have done as activist and a representative to the Prijedor Municipal Assembly. Tragedy befell us all and injustice which I am convinced will once come out." In August 1993 the accused resigned from his position of representative to the Prijedor Municipal Assembly and the Office of the Secretary to the Srpski Kozarac Local

Commune. He travelled to Nürnberg, then to Munich, where he stayed with his brother Mladen who operated a club there. He was reunited with his wife who had been staying in Germany with Mladen's ex-wife, Sofia Tadi}, and they moved into a room in part of Mladen's club, where they lived until 12 February 1994, when the accused was arrested by the German police. On 24 April 1995 the accused was transferred to the International Tribunal in The Hague.

III. FACTUAL FINDINGS

193. The Trial Chamber will now examine the factual evidence before it regarding the counts in the Indictment. Due to the cumulative nature of the persecution charges contained in Count 1, these will be left to the end of this section so as not to repeat the examination of this evidence. The Trial Chamber will consider the incidents in the following order: the incident of beatings and sexual mutilation as charged in paragraph 6 of the Indictment; the beating and abuse of Hase Ici} as charged in paragraph 10, which itself provides a chronological reference for the subsequent beating of [efik Sivac as charged in paragraph 7, which will follow next; the beatings of Hakija Elezovi}, Salih Elezovi}, Sejad Sivac and others as charged in paragraph 8; the abuse of unknown prisoners charged in paragraph 9; the incident of the calling-out and shooting of civilians in Kozarac charged in paragraph 11; the beatings, killings and seizures in Jaski}i and Sivci charged in paragraph 12; and, finally, the charges of persecution in paragraph 1.

A. Paragraph 6 of the Indictment

1. The Events Alleged

194. The five paragraphs of the Indictment which exclusively concern events in Omarska prison camp begin with paragraph 6. It reads as follows:

> During the period between 1 June and 31 July 1992, a group of Serbs, including Du{ko TADI], severely beat numerous prisoners, including Emir KARABA[I], Jasmin HRNI], Enver ALI], Fikret HARAMBA[I] and Emir BEGANOVI], in the large garage building or hangar of Omarska camp. The group forced two other prisoners, "G" and "H", to commit oral sexual acts on HARAMBA[I] and forced "G" to sexually mutilate him. KARABA[I], HRNI], ALI], and HARAMBA[I] died as a result of the assaults.

It is then alleged that by his participation in these acts the accused committed offences charged in seven counts.

195. Counts 5, 6 and 7 charge the accused by reason of his participation in the acts alleged in paragraph 6, with, respectively, a grave breach of the Geneva Conventions recognized by Article 2(a) (wilful killing) and Article 7, paragraph 1, of the Statute; with a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (murder) of the Geneva Conventions; and with a crime against humanity recognized by Article 5(a) (murder) and Article 7, paragraph 1, of the Statute. These three counts are thus concerned with the alleged deaths of Fikret Haramba{i}, Emir Karaba{i}, Jasmin Hrni} and Enver Ali} which it is said resulted from the assaults upon them described in paragraph 6.

196. Counts 8 and 9 charge the accused by reason of his participation in the acts alleged with grave breaches of the Geneva Conventions recognized by Articles 2(b) (torture or inhuman treatment) and 2(c) (wilfully causing great suffering or serious injury to body and health) and Article 7, paragraph 1, of the Statute. Count 10 then charges the accused with a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (cruel treatment) of the Geneva Conventions. Count 11 charges the accused with a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

197. There is a considerable body of evidence regarding these events from witnesses who were prisoners in the hangar building at the time, including one known as Witness H, who was forced to take an active part in the attack on the victim Fikret Haramba{i}. The Prosecution stated that it was unable to secure the presence of another former prisoner, known as G, to give evidence, he being the other forced participant in that attack.

198. From that body of evidence before the Trial Chamber it can be concluded that beatings of the five named prisoners and of Senad Muslimovi} did take place in the hangar, that G and Witness H were compelled to and did take part in the sexual assault on Fikret Haramba{i} as alleged and that G was compelled sexually to mutilate him by biting off one of his testicles. It can also be concluded from the evidence of Armin Kenjar, who wrote the date of the occurrence on the wall of his room, that all these events occurred on 18 June 1992. These eight victims were all Muslims. A photograph of the hangar (Prosecution Exhibit 267) and of the inscription on the wall (Prosecution Exhibit 259) are attached to the Opinion and Judgment in Annex F.

199. The evidence falls into four distinct groups.

200. Chronologically, the first concerns the severe beating of Emir Beganovi}, who was himself a witness. After the Serb assumption of power in Prijedor he had been arrested and taken to the Omarska prison camp where, after some 10 days outdoors on the pista and two days in the white house, he was placed in a room in the hangar. Apart from what he describes as routine beatings and maltreatment, he was three times beaten individually. The third of these occasions is that referred to in paragraph 6 of the Indictment. Emir Beganovi} was called out from an upstairs room in the hangar, made to go onto the hangar floor, being beaten as he went, and there for up to half an hour was kicked and beaten by a group of soldiers armed with metal rods and metal cables. Then he was suspended upside down from an overhead gantry for some minutes until his feet slid free and he fell to the floor; he was then beaten again and told to return to his room, where he fainted. As a result of this and his earlier beatings Emir Beganovi} suffered head fractures, a wasted hand which he cannot use, an injured spine and damage to one leg and to his kidneys.

201. The second body of evidence is that of Senad Muslimovi} concerning the beatings which he received. He had already been much beaten and on the same day as these other incidents he was called out of his room in the hangar, beaten as he went down the stairs to the hangar floor and met by a group who beat him severely, tied him to a large tyre bigger than himself and there beat and kicked him into unconsciousness. When he regained consciousness he was on his knees and a man was holding a knife to his throat and threatening to cut it but was told to "leave him for the end". That man then made to cut off his ear but instead stabbed him twice in his shoulder. He was then beaten again into unconsciousness and when he came to found himself hanging upside down suspended from the hangar roof, in which position he was again beaten and kicked until he fainted. When he came to again he was lying on the floor, was beaten again, fainted yet again, came to once more and this time found himself lying in an inspection pit let into the hangar floor. He was taken out of the pit and allowed to return to his room in the hangar. He had suffered knife wounds to his right shoulder, knife cuts along his arms and feet, bruising, head pains and a broken jaw.

202. The third body of evidence relates to the attack on Emir Karaba{i}, Jasmin Hrni} and Enver Ali}. These prisoners were called out by name from their rooms in the hangar building, Emir Karaba{i} first. Emir Karaba{i} came onto the hangar floor already covered in bruises from an earlier beating. Jasmin Hrni} was called out next and came out onto the hangar floor; he too had been badly beaten. He was followed by Enver Ali} who, having already been much beaten, only responded to the call when his father, Mehmed Ali}, a fellow prisoner, being forced to look for him, brought him out.

203. Many former prisoners gave evidence of these three men being called out and of sounds of beating and of cries of pain afterwards coming from the open area of the hangar. Emir Karaba{i} was seen there by Mehmed Ali}, who testified that he saw him sitting bleeding on a table having been slashed with knives and having water poured over him. A little later Witness H saw the body of Emir Karaba{i} lying on the hangar floor.

204. Jasmin Hrni} was seen by witnesses being struck as he entered the hangar floor. Later the prisoner Senad Muslimovi}, who had been beaten, had fainted and had then recovered consciousness, saw a fellow prisoner whom his attacker addressed as "Jasko", Jasmin Hrni}'s nickname, being slashed with a knife and having black liquid poured over him. Another witness, Halid Mujkanovi}, saw Jasmin Hrni} being beaten with an iron bar and falling to the floor. Both Emir Karaba{i} and Jasmin Hrni} were also seen being beaten on the hangar floor by the witness Armin Muj~i}.

205. There was no eyewitness to the mistreatment of Enver Ali} but Witness H, when selected at random, together with G, and ordered onto the hangar floor, after seeing the body of Emir Karaba{i}, saw the bodies of Jasmin Hrni} and Enver Ali} lying on the concrete floor beside a long inspection pit with oil and water in it let into the floor. He was ordered by a man in uniform to pick up Enver Ali}'s body but Enver Ali}, who proved to be still alive, resisted. Then the man put his foot on Jasmin Hrni}'s neck, turned Jasmin Hrni}'s head to and fro and ordered G and Witness H to take a foot each and pull the inert body of Jasmin Hrni} about the hangar floor. This they were made to repeat a number of times, being made to do press-ups in between. That concludes the evidence relating to Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, none of whom has been seen or heard of since.

206. The fourth and last body of evidence relating to this paragraph of the Indictment concerns Fikret Haramba{i} and chronologically follows immediately after the attacks on the above three victims. After G and Witness H had been forced to pull Jasmin Hrni}'s body about the hangar floor they were ordered to jump down into the inspection pit, then Fikret Haramba{i}, who was naked and bloody from beating, was made to jump into the pit with them and Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles. Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. All three were then made to get out of the pit onto the hangar floor and Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Haramba{i}'s mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Haramba{i}'s legs and, while the latter struggled, hit and bite his genitals. G then bit off one of Fikret Haramba{i}'s testicles and spat it out and was told he was free to leave. Witness H was ordered to drag Fikret Haramba{i} to a nearby table, where he then stood beside him and was then ordered to return to his room, which he did. Fikret Haramba{i} has not been seen or heard of since.

2. The Role, if any, of the Accused

207. As to the first of these four incidents, the attack upon Emir Beganovi}, it has already been sufficiently described. Knowledge of the role of the accused comes from the evidence of Emir Beganovi} himself. He says that he was called out by a man known to him as Dragan, who had previously beaten him and who began to beat him again, taking him onto the hangar floor where a group of men in a variety of military uniforms were waiting. They began to beat and kick him and he recognized the accused as one of that group who took an active part in hitting him. He was positive in his recognition of the accused whom he had known in the past, although he was no friend of his. The witness was already severely injured when he was called out, suffering, amongst other injuries, from wounds to his head which were roughly bandaged but he insists that he was quite capable of clear recognition of the accused.

208. The second of these incidents concerns Senad Muslimovi}. The attacks on him have already been described. He describes in his evidence the role of the accused whom he had not met previously but whom other prisoners in Omarska had pointed out to him as being Dule

Tadi}. As mentioned in detail later in this Opinion and Judgment, Senad Muslimovi} had, before giving his evidence, identified the accused in a photospread procedure and that identification has been accepted as reliable by the Trial Chamber. Senad Muslimovi} said in his evidence that during much of the attack on him he could not identify his attackers but was able to identify the accused as kicking him very severely when tied to the large tyre and as being the person who menaced him with a knife, threatened to cut his throat and to cut off his ear and who in fact did stab him twice in the shoulder.

209. Concerning the third of these incidents, in which Emir Karaba{i}, Jasmin Hrni} and Enver Ali} were the victims, the Prosecution tendered a large number of witnesses, Muslim prisoners in Omarska, most of whom knew the accused well from long prior acquaintance with him, sometimes from childhood, in the town of Kozarac.

210. Nine witnesses including Senad Muslimovi}, in addition to Emir Beganovi}, the subject of the first incident, speak of seeing the accused at the Omarska camp on the day of the calling-out and beating of the three prisoners, Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, an event which, as already mentioned, evidence places as taking place on 18 June 1992.

211. If the evidence of these nine witnesses is treated chronologically it involves the accused as being seen in the Omarska camp on that day by the following witnesses: by Mehmed Ali} on his way to and from lunch, the accused being outside the hangar on one side of the pista and wearing a camouflage uniform and then, later on the same day, when he had been ordered from his room in the hangar to go and find his son Enver Ali}, he again saw the accused, one of a group of three attacking Emir Karaba{i} on the hangar floor; by Armin Muj~i}, as the accused entered the hangar with a group wearing camouflage uniforms and who were not camp guards but came from outside the camp; by Armin Kenjar, the accused being on the floor of the hangar, wearing a camouflage uniform, some time before the calling-out of the victims; by Muharem Be{i}, the accused being actually engaged in calling out Jasmin Hrni}, telling him to come out or others in the room would be killed; by Ferid Muj~i}, who saw the accused in camouflage uniform standing behind a guard who had opened the door of his room in the hangar and was calling out Emir Karaba{i}; by Emsud Veli}, who also saw the accused momentarily in the doorway of his room when Jasmin Hrni} was called out, the accused wearing a camouflage uniform; by Halid Mujkanovi} at the time of the beating of the three, the accused standing on the floor of the hangar but not being involved in the

beating; by Elvir Grozdani} who, having seen the accused in the morning when he was accosted and briefly questioned by the accused on the floor of the hangar, the accused wearing camouflage uniform, saw the accused again, some time later and at a distance, while the accused was beating unidentified prisoners on the hangar floor; and by Senad Muslimovi}, when the accused together with others repeatedly assaulted him on the hangar floor and the accused threatened him with a knife and stabbed him.

212. It is necessary to examine more closely the evidence of these nine witnesses, taking each in turn in chronological order of sighting of the accused.

213. Mehmed Ali}, the father of the victim Enver Ali}, says that on the day of the calling-out and beating of the three he saw the accused some distance away across the pista sitting on a chair with guards around him while he, Mehmed Ali}, was running from the hangar to where the prisoners were fed. He was being made to hurry with his head bowed while guards watched and he was frightened that if he moved his head he would be beaten but he gave a glance "very quickly" and says that he recognized the accused, whom he already knew by sight. Later that day, when going to collect his son, he saw Emir Karaba{i} sitting on a table "his feet dangling and I saw he was bloody . . . I saw him being cut all over with a knife and there were three soldiers to the right of him". When asked if he made an effort to see who those soldiers were, he said that he could not see: "But I do know that Dule Tadi} was there and who else I do not know."

214. Armin Muj~i} placed the accused as being in the hangar when the three were called out and beaten. He knew the accused well. Suffering from dysentery, he was allowed to sit on a box on the hangar floor near the lavatory. When the guards warned him that "the coloured ones are coming", meaning the greatly feared visitors from outside wearing camouflage uniforms, he began to run in fear towards the door leading to the stairs and to his upstairs room. He glanced back to see if he was being overtaken by those arriving and saw, and in a brief glance recognized, the accused as one of a group in camouflage uniform, the accused wearing sunglasses and a cap with a white eagle, a Serbian emblem; he alone describes the accused in this way. He was not able, due to the crowd of prisoners, to make his way upstairs but watched part of what happened on the hangar floor from inside a glass door at the foot of the stairs. Soon afterwards Emir Karaba{i} and Jasmin Hrni} were called out and began to be beaten by the group that had arrived and later Enver Ali} was brought out.

The witness was still there downstairs when G and Witness H, who were near him, were ordered out to deal with their bodies.

215. Muharem Be{i} also knew the accused well. The victim Jasmin Hrni} was with him in the same room and when he did not respond to the calls for him the accused, whose voice he recognized, called through the closed door of the room for Jasmin Hrni} to come out, threatening to kill all in the room. At that Jasmin Hrni} stood up, opened the door for the first time and went out, whereupon the accused cursed and struck him. It was when Jasmin Hrni} opened the door that the witness saw the accused standing outside. He did not see any guard with him.

216. This evidence conflicts with the account of other witnesses; thus Armin Kenjar, who was in the same room, and who says that he had seen the accused earlier walking on the hangar floor, says that after Jasmin Hrni} was called for, initially and mistakenly as Asko Hrni}, the door was opened by an unidentified individual, not being the accused, to whom Hrni} said: "This is Jasmin Hrni} here, there is no Asko Hrni}", to which the man who opened the door said: "It is you we need". It also conflicts with that of Elvir Grozdani} who knew the accused well, had been outside on the hangar floor and was returning to his room when Jasmin Hrni} was called out through the open door of that room by a military policeman, not the accused. He saw Jasmin Hrni} come out and be asked by that military policeman: "Why didn't you respond right away?" to which Jasmin Hrni} replied: "I did not know that you were calling me out", whereupon the policeman slapped him. Elvir Grozdani} was obliged to walk past the two of them in order to get into the room; he does not remember any third person being present at the time.

217. The witness Halid Mujkanovi} saw Jasmin Hrni} pass on the outside of the glass door beside which he was sitting when Jasmin Hrni} finally responded to the call for him and described him as being escorted only by a guard, who hit Jasmin Hrni} as they passed the door. His evidence is to this extent therefore consistent with the account of Jasmin Hrni}'s calling-out as given by Armin Kenjar and Elvir Grozdani}, rather than with Muharem Be{i}'s version.

218. Only the evidence of Emsud Veli} about the calling-out of Jasmin Hrni} is at all in accord with that of Muharem Be{i} since he describes the accused at the door of Jasmin

Hrni}'s room. However, unlike Muharem Be{i}, he speaks of the accused, after a guard had opened the door, as standing in the open doorway for some time looking over the prisoners, of Jasmin Hrni}'s name then being called, to which Jasmin Hrni} did not respond, of the door then being partly closed and some short time later of Jasmin Hrni} being called again and this time making his way to the door which was then fully opened and through which the witness, while not sure, believes that he glimpsed the accused.

219. Armin Kenjar's sighting of the accused has already been mentioned; the accused was alone, was wearing a camouflage uniform and was walking from a door of the hangar towards him. As soon as the witness, who had been going towards the lavatory, saw him he turned and ran back to his room. As mentioned above, Armin Kenjar does not attribute the calling-out of Jasmin Hrni} to the accused.

220. Ferid Muj~i} was at the time housed in a room downstairs in the hangar building and describes how Emir Karaba{i} was taken out of that room by a guard, with the accused standing behind him. He gives a detailed account of what had been Emir Karaba{i}'s position in the room, sitting on a metal table to the left from the door next to the wall, and closer to the corner in the back of the room. He also describes Jasmin Hrni}'s position in that same room, sitting with Emir Karaba{i}, and how Jasmin Hrni} was subsequently called out. However, other witnesses describe the calling-out of Emir Karaba{i} quite differently. Hussein Hodzi}, a Prosecution witness but not one of these nine witnesses, describes Emir Karaba{i}, when he was called out, as being close to him in a room upstairs, not downstairs, which they shared, Emir Karaba{i} being "to the left, the third person from me" in that room whereas Jasmin Hrni} was in a room downstairs. The calling-out of Emir Karaba{i} was by someone shouting his name from downstairs, whereupon Emir Karaba{i}, according to this witness, crossed to a window that looked down onto the hangar floor, turned back with an expression of fear on his face and said: "Dule has arrived, I am finished", and then went downstairs in answer to the call for him. Other witnesses, Halid Mujkanovi} and Armin Kenjar, also speak of Emir Karaba{i} as housed upstairs and as being called out from there, wholly inconsistent with the evidence of Ferid Muj~i}.

221. Emsud Veli}'s evidence and its only partial agreement with that of Muharem Be{i} and its conflict with that of Armin Kenjar, Elvir Grozdani} and Halid Mujkanovi} has already been discussed.

222. Halid Mujkanovi}, after describing the calling-out of the three victims and of G and Witness H, speaks of seeing the accused, whom he knew well, on the floor of the hangar while prisoners were being beaten, first sitting on a tyre and later near one of the inspection pits with other soldiers, a group of some seven to ten soldiers. He himself was crouching beside a glass door at the foot of the stairs leading into the hangar floor with his hands over his face so that the guards would not think that he was watching what was happening. He nevertheless did see the beating of Jasmin Hrni} with an iron bar, already referred to, G emerging from the inspection pit covered in oil and a man being held down by the hands while G was ordered to bite the man's genitals, later he saw G with his mouth full and "all bloody with oil" and someone being made to eat a live pigeon. He also saw Jasmin Hrni} being beaten and falling, "as he fell he was showing no signs of life", and soldiers on the hangar floor were behaving as if they were supporting a team at a football match. He did not see the accused taking any active part in what happened on the hangar floor. However, one of the two occasions on which, while crouching beside the glass door, he saw the accused on the hangar floor was at the time of the incident involving G emerging from the inspection pit and having sexually to assault a man. Halid Mujkanovi} did not associate that assault with Fikret Haramba{i} but rather with one or other of the three earlier victims. However, it is clear that it was with Fikret Haramba{i} and he alone that G was concerned at the time of the inspection pit incident. Accordingly, this witness's sighting of the accused on the hangar floor on this occasion is evidence that the accused was there when Fikret Haramba{i} was attacked and sexually assaulted. In this witness's evidence there is some confusion as to the sequence of events. The pigeon episode, which he seems to place after G and Witness H had been on the hangar floor and in the inspection pit, appears in fact, according to Witness H's evidence, to have occurred before G and Witness H were called onto the floor; similarly, his account seems to place too late in sequence the beating of Jasmin Hrni} and his falling to the hangar floor.

223. Elvir Grozdani}'s evidence has already been discussed in part. He describes encountering the accused, whom he knew and with whom he had had an argument in Kozarac before the war, on the floor of the hangar on the morning of the attack on the three victims, when the accused questioned him and he successfully denied that he was Elvir Grozdani} from Kozarac. Then later that day he was with a guard, who was a close friend of his, on the hangar floor and as he walked from there to the lavatories he says that he saw the accused

some 20 or 30 metres away beating a prisoner. He hid in a cubicle of the lavatories for some time while hearing blows and screams and when his friend came and told him it was safe to leave he walked past two apparently dead bodies lying in the washroom which he could not identify. As he walked onto the hangar floor he recognized the accused, whose back was turned to him, some 20 metres away walking away from him out of the hangar with a bloody iron stick in his hand. It was then, as he walked towards his room along the hangar floor, that he saw Jasmin Hrni} being called out and passed him to enter the room from which Jasmin Hrni} had been called.

224. It seems clear that Jasmin Hrni} was called out after Emir Karaba{i} and before Enver Ali} and that the incident involving Fikret Haramba{i} and G and Witness H occurred later; also that, as mentioned below, Witness H saw the body of Emir Karaba{i} lying on the hangar floor. The chronology accordingly suggests that the two bodies which Elvir Grozdani} says he saw could not have been those of any of the three victims or of the victim Fikret Haramba{i}. This witness was cross-examined about a prior statement he had made to police in which he had named the accused but had not mentioned him as being seen beating anyone and in which he said that he thought the two bodies he saw in the washroom were those of Emir Karaba{i} and of Fikret Haramba{i}. In that statement he also spoke of recognising G in a television film and of being told by G of G's part in the attack upon the victim Fikret Haramba{i} and in it he gave a somewhat different description of his earlier encounter that morning with the accused to that which he gave in his evidence. The witness denied seeing such a film or speaking to G and attributed all errors and omissions in that prior statement to poor interpretation of his interview with police.

225. Senad Muslimovi} is a witness who, as already described, was much beaten during his time in Omarska. He saw the accused for the first time when, in the Omarska camp, other prisoners had pointed out to him a man whom they said was Dule Tadi}. Later, in the course of the violent attack on him described earlier and which occurred on the same afternoon as the other attacks dealt with in this paragraph of the Indictment, the witness, while on the hangar floor, heard another prisoner being addressed by an unseen questioner as Jasko and being asked what he had been doing at Benkovac. To that the prisoner replied: "I do not know, I have done nothing, Dule, cross my heart, I know nothing." The witness then saw that same prisoner being cut by the accused with a knife, "sliced as if once one slices chops", and having black liquid, probably oil, poured over him. At that point this witness then lost

consciousness. Not only was "Jasko" the prisoner Jasmin Hrni}'s nickname, but after the attack on Kozarac Jasmin Hrni} had been apprehended in the mountains at Benkovac. As previously mentioned, Senad Muslimovi} had identified the accused in a photospread procedure; also it had been with a knife that the accused had threatened Senad Muslimovi} and ultimately stabbed him in the shoulder.

226. This concludes the evidence of the nine witnesses who spoke of the accused being involved in the third incident, being the attacks upon Emir Karaba{i}, Jasmin Hrni} and Enver Ali}.

227. Witness H says that he did not see the accused, whom he knew well, in the Omarska camp either on the day of the attack or at all. He gave a comprehensive account of the calling-out of Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, of Jasmin Hrni}'s delay in responding to the call for him and of Enver Ali}'s father, Mehmed, being made to search for and bring out Enver Ali}. Witness H was sitting on the floor in the same room as Halid Mujkanovi} at the foot of the stairs leading from the upper storey of the hangar and close to the glass door leading onto the hangar floor. From this position he heard at close quarters the sound of the beatings and the cries of victims, his proximity to the glass door leading to the hangar floor being the reason why he and G were later called out, as the nearest available prisoners, to deal with the bodies of the three. He saw and described various men involved in the entire incident and gave a clear account, earlier described, of all that he was made to do on the hangar floor. However, he kept his gaze "mostly downwards" because of fear. On his return to his room after the incident with Fikret Haramba{i} he was asked by other prisoners whether the accused was involved in what had happened: "They asked me if it was Dule." He did not know why they should ask him specifically about the accused. This witness's evidence, although the only witness actively involved in the attack on the three victims and on Fikret Haramba{i}, cannot be treated as conclusive of the accused's absence from the events on the hangar floor since the witness, for good reasons of personal safety, did not take the opportunity to look around him when on the hangar floor and identify in detail those he could recognize.

228. The fourth incident concerns the attack upon Fikret Haramba{i} which has already been described in sufficient detail in referring to the evidence of Witness H. Except to the extent that witnesses speak of the accused being present on the hangar floor in the afternoon

of 18 June 1992, there is no evidence to connect the accused with this incident, of which Witness H is the only witness and who describes it in detail but whose evidence does not involve the accused in it.

3. The Case for the Defence

229. On the part of the accused his defence to the counts in paragraph 6 of the Indictment is exclusively by way of alibi. He says that he never visited the Omarska camp and that on 18 June 1992, when the three incidents occurred, he was living in Prijedor and working as a traffic policeman. However, as will be discussed in detail in the examination of the accused's alibi evidence, even for the period of the accused's employment as a traffic policeman at the Orlovci checkpoint it provides no conclusive alibi. Thus the Trial Chamber does not accept the accused's account of his whereabouts from 15 June to 17 June 1992. In any event on 18 June 1992 the accused's shift at the checkpoint did not begin until 9 p.m. and the evidence regarding the incidents referred to in this paragraph of the Indictment place them as occurring on the afternoon of 18 June; thus Senad Muslimovi} described the attack on him as occurring late in the afternoon, as did Emir Beganovi} who said that he was called out around 6 p.m. and that his beating lasted for between twenty minutes and half an hour. Armin Kenjar in his testimony placed the attack on Jasmin Hrni} and Emir Karaba{i} as having ended around 6 p.m. and Muharem Be{i} describes the arrival of the accused in the hangar as being between 4 p.m. and 5 p.m. Other witnesses simply describe the calling-out of the three victims as happening in the afternoon. Accordingly, for the incidents alleged in paragraph 6, the accused's checkpoint duty affords no alibi.

230. Not only does the accused's checkpoint duty provide no alibi for the afternoon of 18 June 1992 but his wife had left him to return by train to Banja Luka "sometime during the day" of 18 June and no other Defence witness could assign 18 June as a date when the accused was in his or her company. Accordingly, there remains only the accused's denial of ever having visited the Omarska camp, let alone having participated in the acts alleged against him.

4. Findings of Fact

231. The Defence has, in argument, submitted the Prosecution evidence under paragraph 6 to substantial criticism. It asserts that the evidence of Prosecution witnesses can be seen to be unreliable in their identification of the accused as being at all involved in those incidents and that his purported involvement is due both to their acceptance of a rumour that the accused was present in the camp on that day and to their subsequent reconstruction of events to fit that rumour. In particular it is said that the accused has been introduced into the evidence of these witnesses as a result of the incident of sexual assault upon Fikret Haramba{i} having achieved great notoriety. In consequence it came to be much talked about and, consciously or unconsciously, the truth has been distorted. This process of distortion may, it is said, have begun when G returned to his room from the hangar floor in a highly emotional state. By the time Witness H returned, there were those who already asked him whether the accused, naming him, was involved in the sexual mutilation, his denial of having seen the accused not being enough to stop a rumour that the accused had been involved; this, it is said, has tainted the witnesses' evidence.

232. Two specific points are made in support of this submission of general unreliability of the evidence, in addition to reliance on the several inconsistencies occurring in the various accounts given by the witnesses. The first of these points is the fact that it would seem, from several accounts of the calling-out from his room of Jasmin Hrnić, that he was called for as "Asko Hrnić". It is said that this clearly disassociates the accused, who knew Jasmin Hrnić well, from the calling-out since he would not conceivably have made such a mistake himself and would have promptly corrected it if he were present and it had been made by another. However, the evidence is that the nickname of Jasmin Hrnić was Jasko. The second point is the way in which a number of witnesses in their evidence assumed that the victims of the sexual attack were Emir Karaba{i}, Jasmin Hrnić and Enver Alić whereas in fact the evidence of Witness H makes it plain that it was only Fikret Haramba{i} who was thus attacked, Witness H and G being made the unwilling agents of that attack.

233. Apart from these two general points, the accounts of events by some Prosecution witnesses contain notable inconsistencies. Some of them have already been noted: the differing accounts of the calling-out of Jasmin Hrnić and whether the accused played any part in that episode; where Emir Karaba{i} was housed in the hangar building before being called out; inconsistency between the prior statements of some witnesses and their evidence as given before this Trial Chamber; perhaps most significant, and not strictly any inconsistency, is the

failure of Witness H to see the accused at all during his direct involvement with the three victims and with Fikret Haramba{i}, a matter on which, however, a brief comment has already been made. Some of these necessarily cast some doubt upon the accuracy of recollection of certain of the Prosecution witnesses, particularly regarding the precise sequence of events. This is, perhaps, not surprising having regard to the conditions to which prisoners were subjected in the Omarska camp: the fear in which prisoners constantly lived, the especially terrifying conditions existing on 18 June 1992 in the hangar building, the physical mistreatment and near-starvation to which they were subject and the lapse of time, involving gross disruption of their lives, since the events of which they speak.

234. Giving full weight to these Defence submissions there is nevertheless, opposed to the accused's denial of any part in these three incidents the subject of paragraph 6, much evidence from many witnesses of the accused having been seen by them in the Omarska camp on 18 June 1992 and on other occasions, evidence which the Trial Chamber accepts as truthful. Once it is accepted that the accused is untruthful in his denial of ever having visited Omarska, the Defence case is placed in jeopardy. However, it remains, as ever, for this Trial Chamber to determine whether, notwithstanding the criticism of the Prosecution evidence made by the Defence, it is satisfied beyond reasonable doubt of the guilt of the accused of each of the detailed acts alleged in paragraph 6.

235. This Trial Chamber is satisfied beyond reasonable doubt that the accused was one of a group of men who severely beat Emir Beganovi} and also Senad Muslimovi}. It accepts their evidence of having been brutally beaten and kicked on the hangar floor by that group and of their identification of the accused as taking an active part in that kicking and beating and, in the case of Senad Muslimovi}, of the accused threatening him with a knife and then stabbing him.

236. This Trial Chamber is further so satisfied from the evidence of Mehmed Ali}, Armin Muj~i}, Armin Kenjar, Halid Mujkanovi} and Senad Muslimovi} that the accused was present on the hangar floor when the three victims, Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, were called out and attacked. It is further so satisfied from the evidence of Senad Muslimovi} that the accused attacked Jasmin Hrni} with a knife on the hangar floor and severely cut him, from the evidence of Mehmed Ali} and Armin Muj~i} that the accused took part in the attack

upon and the beating of Emir Karaba{i}, and from that of Armin Mujci} that the accused took part in the beating of Jasmin Hrnic.

237. This Trial Chamber is satisfied beyond reasonable doubt from the evidence of Halid Mujkanovi} that the accused was present on the hangar floor on the occasion of the assault upon and sexual mutilation of Fikret Haramba{i} but is not satisfied that he took any active part in that assault and mutilation.

238. As to the alleged deaths of Fikret Haramba{i}, Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, there is much evidence of screams and cries of pain after all these latter three were called out onto the hangar floor. However, the Prosecution failed to elicit clear and definitive evidence from witnesses about the condition of the four prisoners after they had been assaulted, let alone that they died or that death resulted from the assault upon them. In the case of Enver Ali} there is no eyewitness testimony as to his beating, only evidence that later he was seen lying on the hangar floor and, when a witness tried to pick him up, he slipped from his grasp, was fighting back and was clearly alive. Of Fikret Haramba{i} the Trial Chamber knows that in the attack on him he suffered a severe injury, his testicle having been bitten off, but the sole witness to testify to his subsequent condition states only that, having dragged him to a table in the hangar and stood beside him, Fikret Haramba{i} then asked him for water. Of Emir Karaba{i}, a witness testified that he was beaten, but no evidence was offered about the details of that beating. Another witness saw him being cut and bloody, but only from a fleeting glance as a guard hurried him past, a knife at his throat. Another witness saw, as he entered the hangar, a pool of blood and then saw the body, as he characterized it, of Emir Karaba{i} on the floor but it is not clear whether Emir Karaba{i} was lying in that pool of blood or whether the witness first saw the blood and then moved on and saw Emir Karaba{i} on the floor; that witness was not asked whether or not Emir Karaba{i} was dead, and no further details regarding his condition were elicited. It was about the condition of Jasmin Hrni} after he was beaten that the Trial Chamber received the most evidence. He had been beaten with an iron bar, a black liquid had been poured over him, and he had been "sliced as if once one slices chops". Then, when lying on the hangar floor, Jasmin Hrni} "showed no signs of life", according to one witness. Another witness was asked directly by the Prosecution if Jasmin Hrni} was dead after the assault on him and answered "most likely"; a guard had put a foot on Jasmin Hrni}'s neck and turned his head backwards

and forwards and then ordered fellow prisoners to drag his body to and fro across the floor, which they did. That is all that is known of the condition of Jasmin Hrni} after the assault.

239. A witness spoke of subsequently hearing the sound of the engine of the truck that was used at the camp to bring in food and take away bodies and of then hearing a shot in the distance and stated that: "I believe one of them was alive, and therefore was finished up." Even assuming the witness to be correct in his assumption, there is neither evidence of who fired the shot nor which one, if any, of the four was shot. It is clear that none of the four prisoners returned to their room in the hangar and it may be that these prisoners are in fact dead but there is no conclusive evidence of that, although there was poignant testimony from Mehmed Ali}, the father of Enver Ali}, that: "Never again, from that day, never again", has he seen his son. Certainly it seemed to be the general practice at the camp to return to their rooms prisoners who had been beaten and survived and to remove from the camp the bodies of those who were dead or gave that appearance; none of the four prisoners have been seen again.

240. The Trial Chamber is cognisant of the fact that during the conflict there were widespread beatings and killings and indifferent, careless and even callous treatment of the dead. Dead prisoners were buried in makeshift graves and heaps of bodies were not infrequently to be seen in the grounds of the camps. Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof to death. However, there must be evidence to link injuries received to a resulting death. This the Prosecution has failed to do. Although the Defence has not raised this particular inadequacy of proof, it is incumbent upon the Trial Chamber to do so. When there is more than one conclusion reasonably open on the evidence, it is not for this Trial Chamber to draw the conclusion least favourable to the accused, which is what the Trial Chamber would be required to do in finding that any of the four prisoners died as a result of their injuries or, indeed, that they are in fact dead.

241. For these reasons the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt that any of these four prisoners died from injuries received in the assaults made on them in the hangar, as alleged in Counts 5, 6 and 7 contained in paragraph 6 of the Indictment.

242. The Trial Chamber finds beyond reasonable doubt, as charged in the Indictment, that the accused was part of the group that beat Emir Beganovi}, Senad Muslimovi}, Emir Karaba{ic and Jasmin Hrni}. The Trial Chamber finds beyond reasonable doubt that the accused was present when Enver Ali} was beaten and Fikret Haramba{i} attacked. The Trial Chamber is satisfied that these acts occurred within the context of the armed conflict; it will be necessary in the Legal Findings section of the Opinion and Judgment to consider the effect of Article 7, paragraph 1, of the Statute to determine whether the accused's culpability has been established beyond reasonable doubt.

243. In the case of the acts found to have been committed by the accused involving Emir Beganovi} and Senad Muslimovi}, they involved, because of their nature and consequences, and on any meaning of the words, acts that caused serious injury and great suffering to the victims and which are described in Counts 8, 9, 10 and 11 respectively as "torture or inhuman treatment", "wilfully causing great suffering or serious injury to body and health", "cruel treatment" and "inhumane acts". Likewise, in the cases of Fikret Haramba{i}, Emir Karaba{i}, Jasmin Hrni} and Enver Ali}, the acts which the accused committed or was otherwise associated with, because of their nature and consequences, involved inhuman treatment, wilfully causing great suffering or serious injury to body and health, cruel treatment and inhumane acts.

244. What remains for consideration, however, is whether the elements of "inhuman treatment', "wilfully causing great suffering or serious injury to body and health", "cruel treatment" and "inhumane acts" as charged in Counts 8, 9, 10 and 11 respectively, have been met. This will be considered in later paragraphs of this Opinion and Judgment when legal findings are made.

B. Paragraph 10 of the Indictment

1. The Events Alleged

245. This paragraph relates to an incident alleged to have taken place at the Omarska camp. It reads as follows:

> About 8 July 1992, in the building known as the "white house," a group of persons from outside the camp, including Du{ko TADI], called prisoners individually from one room in the "white house" to another, where they were beaten. After a number of prisoners were called out, Hase ICI] was taken into the room, where members of the group, including Du{ko TADI], beat and kicked him until he was unconscious.

It is then alleged that by his participation in these acts the accused committed offences charged in three counts.

246. Count 21 of the Indictment charges that by his participation in these acts the accused committed a grave breach recognized by Article 2(c) (wilfully causing great suffering or serious injury to body or health) and Article 7, paragraph 1, of the Statute. In Count 22 of the Indictment it is charged that by his participation in these acts the accused committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (cruel treatment) of the Geneva Conventions. In Count 23 of the Indictment it is charged that by his participation in these acts the accused committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

247. Hase Ici} and Armin Kenjar testified for the Prosecution regarding paragraph 10 of the Indictment.

248. On 14 June 1992 Hase Ici}, who is a Muslim, was taken by persons he identified as Serb forces from Trnopolje to the Keraterm camp. He remained there until 7 or 8 July 1992 when he was transferred to the Omarska camp. He arrived at Omarska with a group of about 40 to 50 Muslims and Croats, was taken off the bus and was sent to the white house. On the way, he and other prisoners were beaten as they were forced to run through a cordon of guards who were dressed in civilian clothes or police uniforms. That day he was taken for interrogation, a statement that he had given while at Keraterm was read to him, and he was asked if he had anything to add. He was returned to the white house the same day and was

placed in another room with other prisoners who were all ordered to lie on their stomachs with their arms stretched over their heads with three fingers together in the fashion that Serbs pray. If their fingers were not in the correct position, they were beaten by the guards with rifle butts as they shouted: "Be a great Serb, you Serb." The Serbs, as Hase Ici} describes them, slashed the prisoners' clothes and cut some of them, making crosses on their backs. Later that day, the commander of the shift, Mladjo Radi}, whose nickname was "Krkan", ordered the prisoners to sign their names on a sheet of paper and turn over any money, jewellery or valuables they had, saying that if the amount was enough, they would be spared further torture. The prisoners had no valuables because they had been taken from them at the Keraterm camp. Krkan took the list and later that evening, as Hase Ici} stated, a "group of Serbs from outside the camp" came to the white house. Hase Ici} heard prisoners in the adjacent room say: "Here, the executioners are coming." The group arrived in the evening at about 10 p.m. and set up lighting in the hallway. After the lighting system was set up, Krkan came to the door of Hase Ici}'s room and began calling prisoners out from the list in the order that their names appeared. Hase Ici} testified that prisoners were called out and taken to a small room at the end of the corridor and beaten. After 10 to 15 prisoners had been called out and beaten, the group took a break and went to an area in front of the white house and began drinking, making toasts and discussing what each would do next. Hase Ici} was finally called out and taken to that same small room at the end of the corridor. As he left, he saw two guards standing at the entrance to the white house. Hase Ici} was taken into the small room, which he described as the "beating room". He was told to greet the group of Serbs there by saying: "God be with you, heroes." A noose was put around his neck and it was pulled tight. Seconds later, one of the group struck a heavy blow on his back and he fell. He was then beaten with a whip made of cable, with iron balls, an iron rod, a wooden bat and rubber truncheons. The noose was repeatedly tightened and loosened as he was beaten, and he lost consciousness. When he regained consciousness in the morning, he was lying among battered prisoners in the room in which he had been placed upon his arrival. Guards entered the room, walking among the prisoners to see who among them were dead. One of them placed his foot on Hase Ici} and when he let out a cry of pain, the guard responded: "He's alive, but not for long." The prisoners who were dead were carried out of the white house by other prisoners.

249. Hase Ici} testified that he remained in the white house until 13 or 14 July 1992. During that period, he was not given anything to eat. While in the white house, more than 30 to 40 prisoners were killed each night. His ribs were broken as a result of the beating. He

described the white house as being "a very messy slaughterhouse, stench and blood, urine and beaten up people, blood sprayed on the walls, horror". At one point, the prisoners were taken out of the white house for a period of time because the guards could not tolerate the stench. While he was sitting in front of the white house, Hase Ici} observed naked prisoners falling down as they were being sprayed with hoses by the guards. A photograph of the model of the white house (Prosecution Exhibit 130) is included in the Opinion and Judgment as Annex G.

250. Armin Kenjar testified that he saw Hase I-i}, who is a relative of his, while he was sitting in front of the white house and he bribed a person he identified as a Serb official at the camp with a payment of 100 Swiss francs to move Hase Ici} to another part of the camp where he remained until he was released.

2. The Role, if any, of the Accused

251. After Hase Ici} heard prisoners in a room adjacent to his say: "Here, the executioners are coming", he saw the accused and a group of persons he identified as Serbs arrive and set up lighting in the hallway. Hase Ici} watched them as they set up this equipment. Hase Ici} had known the accused since his school days and also went to school and played soccer with one of the accused's brothers, Mladen. He recognized the accused together with other Serbs, including Simo Kevi}, from Orlovici, whom he knew from before the conflict. He also recognized one Banovi} and a man called Duca. Both were from Prijedor and the witness had seen them before in the Keraterm camp. Later, when the group began to talk among themselves, he heard the names Dule, Simo and the others already mentioned, as well as a person whom they referred to as Dragan Babi}.

252. Hase Ici} testified that when he was taken to the room at the end of the corridor in the white house, he stood face to face with the accused who was standing near Simo Kevi} and three other members of the group of Serbs. It was then that a noose was placed around his neck and he was beaten and kicked by the group until he lapsed into unconsciousness.

3. The Case for the Defence

253. The accused testified that he had never been at the Omarska camp and asserts by way of alibi that he was working at the Orlovci checkpoint at the times relevant to this paragraph. Further, the Defence contends that as a matter of law, the principle of *unus testis, nullus testis* prevents the Trial Chamber from reaching a finding of guilt based on the testimony of the single witness to these events. Finally, on cross-examination, the Defence challenged the credibility of Hase Ici}.

254. In its closing arguments, the Defence seemingly accepted that the events charged in paragraph 10 took place on 8 July 1992. Hase Ici} testified that the events happened on either 7 or 8 July 1992. The assignment records for the Orlovci checkpoint show that the accused was off duty on 7 July 1992 as of 7 a.m. and was not assigned again until 8 July. Hase Ici} testified that the events happened during the evening and, on cross-examination, confirming an earlier account of the events, he estimated the time to be around 10 p.m. On 8 July, according to the assignment records, the accused completed his duty at the Orlovci checkpoint at 7 p.m.

255. The Defence challenged the credibility of Hase Ici}. As will be discussed later in reference to paragraph 7, the Defence contended that a prior account of the events recorded by Hase Ici} on 12 February 1993 differed from his testimony at trial. The Defence argued that, although the discrepancy does not relate directly to paragraph 10, it does affect the overall credibility of this witness.

256. The final challenge made by the Defence in regard to the *unus testis, nullus testis* rule is a question of law. This principle still prevails in the civil law system, according to the Defence, and should be respected by the International Tribunal; therefore, because only one witness testified in support of paragraph 10, the accused cannot be found guilty. This principle is discussed elsewhere in this Opinion and Judgment but suffice it to say that the Trial Chamber does not accept this submission, which in effect asserts that corroboration is a prerequisite for acceptance of testimony.

4. Findings of Fact

257. The Trial Chamber finds that the assignment records for the Orlovci checkpoint do not provide the accused with an alibi for paragraph 10. Hase Ici} is very clear in his testimony that the beatings took place on the evening of his arrival at the Omarska camp, at around 10 p.m. The Defence does not dispute that these events occurred on either 7 or 8 July 1992. The assignment records reflect that on those nights the accused was off duty. On 7 July 1992 the accused was off duty after 7 a.m. and offered no testimony regarding his whereabouts. On 8 July 1992 the records reflect that he completed his assignment at 7 p.m. and he likewise offered no testimony regarding his whereabouts at the time these events occurred. Prijedor is about 20 kilometres from the Omarska camp. The travel time is 30 - 35 minutes by car.

258. Hase Ici} testified that he was standing face to face with the accused in the "beating room" at the end of the corridor of the notorious white house, just before a noose was put around his neck and the first blows hit him on the back. Hase Ici} knew the accused since childhood and had regularly seen him in Kozarac until just before the war and thus could not have been mistaken about his identity. The witness's description of the white house, its different rooms and their location correspond to that given by other witnesses whose testimony the Trial Chamber credits and is supported by the exhibits received into evidence.

259. Balancing the accused's denial of ever having been at Omarska with the overwhelming testimony of witnesses that has been offered to the contrary, the Trial Chamber cannot accept this denial. The Trial Chamber furthermore has observed the demeanour of Hase Ici} while he was testifying and concludes that he was credible and trustworthy. Although the Defence contended that there were important discrepancies between Hase Ici}'s testimony in court and an earlier account of the events made by the witness on 12 February 1993, his recollection of the events specifically forming the basis of paragraph 10 was not challenged. The Trial Chamber finds that the alleged discrepancies which relate to Hase Ici}'s testimony concerning paragraph 7 of the Indictment are not significant and do not affect his overall credibility.

260. The Defence's general allegation of bias on the part of all victims is not a basis for the rejection of Hase Ici}'s testimony. This issue is generally addressed elsewhere in the Opinion and Judgment. Although he was the only witness who testified in support of these charges, the quality of that testimony is sufficient to credit the allegations.

261. Having considered all the relevant probative evidence, the Trial Chamber finds beyond reasonable doubt that the accused was part of the group of Serbs who beat and kicked Hase Ici} until he was unconscious in the white house on or about 8 July 1992 and that these acts were committed in the context of the armed conflict. All that remains for consideration in relation to the beating of Hase Ici} is whether the elements of each of the crimes as charged in Counts 21, 22 and 23 of the Indictment are satisfied and, as stated previously, this will be considered in the Legal Findings section of the Opinion and Judgment.

C. Paragraph 7 of the Indictment

1. The Events Alleged

262. This paragraph concerns an incident alleged to have taken place at the Omarska camp. It reads as follows:

> Around July 10, 1992, in the building known as the "white house" in Omarska camp, a group of Serbs from outside the camp, including Du{ko TADI], severely beat [efik SIVAC, threw him onto the floor of a room and left him there, where he died.

It is then alleged that by his participation in these acts the accused committed offences charged in three counts.

263. Count 12 of the Indictment charges that by his participation in these acts the accused committed a grave breach recognized by Article 2(c) (wilfully causing great suffering or serious injury to body or health) and Article 7, paragraph 1, of the Statute. In Count 13 of the Indictment it is charged that by his participation in these acts the accused committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (cruel treatment) of the Geneva Conventions. In Count 14 of the Indictment it is charged that by his participation in these acts the accused committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

264. Hase Ici} and Husein Hodzi} testified for the Prosecution as to paragraph 7. According to Hase Ici} the events described in paragraph 7 took place on the evening after his

own beating on the day of his arrival at Omarska or on the evening following, which would have been 8 or 9 July, if Hase Ici} arrived on 7 July 1992, or 9 or 10 July if Hase Ici} arrived on 8 July 1992. That night, Hase Ici} heard the sound of beatings coming from in front of the white house. As he was lying on the floor of a room in the white house, on his back with his head and shoulders off the ground leaning against another prisoner, he heard people cursing as they approached his room. He recognized one of the voices. He then saw a person who was wearing a camouflage uniform, and another person, as they threw a badly beaten prisoner into the room. As the prisoner was thrown into the room, the person said: "You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb." The next morning, Hase Ici} recognized this prisoner as being [efik Sivac, a Muslim. When the commander of the guard shift, Krkan, later came into the room and asked for the names of the people who were either dead or could not move, Hase Ici} identified [efik Sivac.

265. Husein Hodzi} testified at trial that he was in a room from which [efik Sivac was called out for the last time. [efik Sivac had been beaten previously and when Husein Hodzi} saw the dead body of [efik Sivac later the next day, he stated that "it looked like anything but a body", his clothes were torn and the body was bloodied.

2. The Role, if any, of the Accused

266. Hase Ici} testified that it was the accused's voice that he recognized as people were approaching his room after he heard the sound of beatings coming from in front of the white house. He recognized the accused as being one of the persons who threw the badly beaten prisoner into his room. As the prisoner was thrown into his room, the accused said: "You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb."

267. Hase Ici} testified that he knew that the accused and [efik Sivac had been friends at one time but were not on good terms before the war began because [efik Sivac had thrown the accused out of his café. He did not otherwise state the basis for this opinion. However, direct testimony regarding the accused's relationship with [efik Sivac was given by Witness AA, who knew the accused well. Witness AA testified that [efik Sivac and the accused had a good relationship until shortly before the war, when they had an argument about politics in the Deluxe restaurant owned by [efik Sivac in Kozarac, during which Witness AA was

present. Witness AA testified that the accused had said that the area "would be a Greater Serbia, it would be theirs and that we, Muslims, will not be there, that there will be no place for them". [efik Sivac then told the accused to leave the restaurant. [efik Sivac and Mladen Tadi}, the accused's brother, were especially good friends and the accused's elder daughter had often visited [efik Sivac's daughter. Witness AA testified to have last seen [efik Sivac on the first day of the attack on Kozarac.

268. On cross-examination, the Defence challenged Hase Ici}'s credibility, pointing out that the written account that he had prepared regarding his experiences in the Omarska camp stated only that he had heard the accused; it made no reference to him seeing the accused, as he testified at trial. However, that account was not a formal statement by him. It had been prepared by him in February 1993 on the medical advice of a physician who considered that he should write down his experiences during the conflict since he lived in an area where there were very few people from the former Yugoslavia with whom he could talk about what he had experienced. The account was used by the Defence in its cross-examination but it was not offered as an exhibit.

3. The Case for the Defence

269. The accused testified, under solemn declaration, that he had never been at the Omarska camp. Further, the Defence offered as an alibi that at relevant times he was working as a traffic policeman at the Orlovci checkpoint and, during his time off, was in Prijedor, some 22 kilometres from the Omarska camp. Each of these two locations, the checkpoint and Prijedor, requires separate consideration so far as the accused's alibi is concerned and they will be extensively dealt with later in this Opinion and Judgment in considering the accused's alibi.

270. The Defence contends that the accused was mobilized on 16 June 1992, starting his work that day as a reserve policeman for the traffic police at the Orlovci checkpoint.

271. The daily logbook and duty lists show with respect to the Orlovci checkpoint that the accused was assigned to the Orlovci checkpoint on the following days relevant to these counts: on 7 July 1992, the accused was off duty from 7 a.m.; on 8 July the accused was

assigned duty from 7 a.m. to 7 p.m.; on 9 July the accused was assigned duty from 7p.m. until 7 a.m. on the following day; and on 10 July the accused was off duty all day from 8 a.m.

272. Testimony from Defence witnesses who spoke of the accused's presence at the Orlovci checkpoint will be described in that portion of this Opinion and Judgment devoted to a consideration of the accused's alibi.

273. The Defence further contends that, when off duty, he spent his time in Prijedor with his family or visiting friends. He stated he continued to live in Prijedor until the end of 1992. The testimony of other witnesses testifying on behalf of the Defence who stated they saw the accused in Prijedor and knew he was living there will be described in the course of examination of the accused's alibi.

4. Findings of Fact

274. The Indictment charges in paragraph 7 that the beating and death of [efik Sivac occurred "around 10 July 1992". In regard to these events, Hase Ici} testified that they happened on the evening following his own beating or the next evening. Hase I-i} testified that he arrived at the Omarska camp on 7 or 8July 1992 and hat the beating he received there in the white house and which is the subject of paragraph 10 occurred on the evening of his arrival there. Thus the events that the Trial Chamber is here considering occurred on the night of either 8, 9 or 10 July 1992. The exact time of the night when these events occurred has not been given, however, Hase Ici} testified that he was able to recognize the accused because of the lighting that was coming from the hallway; the same lighting that he described when he had been beaten a day or two earlier.

275. The Trial Chamber finds that Hase Ici}'s credibility is not affected by the minor discrepancies in the earlier account referred to above which he wrote himself in 1993 on medical advice. Having observed the demeanour of the witness while testifying, the Trial Chamber finds that Hase Ici} is credible and trustworthy.

276. The records of service at the Orlovci checkpoint earlier referred to show that the accused has no specific alibi for the late evening and night of 8 or 10 July 1992. As will be observed later in the Opinion and Judgment, the Defence evidence as to off-duty days does no more than establish that the accused was generally resident in Prijedor. However, many witnesses have testified to seeing him outside of Prijedor at places other than the Orlovci checkpoint and to having seen him at the Omarska camp in July 1992. Thus, as will be discussed hereafter, the Trial Chamber rejects the Defence contention that the accused was somehow rendered largely immobile because of the fact that he did not own a car.

277. If it should be that it was on the night of 9 July 1992, rather than on 8 or 10 July, that the relevant beating of [efik Sivac occurred, the records for the Orlovci checkpoint reflect that the accused was assigned duty there on 9 July from 7p.m. until 7a.m. the following day. Even if these records are accepted as accurately reflecting the shifts to which the accused was assigned, they can only establish the hours when the accused was meant to be on duty at the checkpoint; they do not of themselves establish his presence there throughout those hours.

278. The Trial Chamber bears in mind all that has been said and referred to in the later consideration of the accused's alibi. The Trial Chamber also contrasts the entirely general evidence of the accused and of Miroslav Brdar, his fellow traffic policeman, regarding the accused's constant presence at the checkpoint during duty hours with the very specific and precise evidence of Hase Ici}, in particular, his evidence both generally as to the events of the night when [efik Sivac was beaten and specifically as to the presence of the accused and what it was the accused said to the dying [efik Sivac as he threw him into Hase Ici}'s room. The Trial Chamber recalls, too, the evidence of Witness AA regarding the heated argument that the accused had with [efik Sivac when [efik Sivac had him leave his restaurant.

279. Having observed the demeanour of the witnesses while testifying and considering all the relevant probative evidence offered by both parties, the Trial Chamber finds beyond reasonable doubt that around 10 July 1992, as charged in the Indictment, [efik Sivac was beaten and that the accused was part of the group that threw [efik Sivac onto the floor of a room in the white house after he had been beaten and that [efik Sivac later died from these injuries. The Trial Chamber finds beyond reasonable doubt that these acts were committed in the context of the armed conflict. All that remains for consideration in relation to the beating of [efik Sivac is whether the elements of each of the crimes as charged in Counts 12, 13 and

14 of the Indictment are satisfied and, as stated previously, this will be considered in a later section of the Opinion and Judgment when legal findings are made.

280. There is no direct testimony that the accused was present during the beating of [efik Sivac. It will be necessary in the Legal Findings section of the Opinion and Judgment to consider the effect of Article 7, paragraph 1, of the Statute to determine whether the accused's culpability has been established beyond reasonable doubt.

D. Paragraph 8 of the Indictment

1. The Events Alleged

281. This paragraph concerns an incident alleged to have taken place at the Omarska camp. It reads as follows:

> Around late July, 1992, behind the building known as the "white house" in Omarska camp, a group of Serbs from outside the camp, including Du{ko TADI], severely beat and kicked Hakija ELEZOVI], Salih ELEZOVI], Sejad SIVAC and other prisoners. Hakija ELEZOVI] survived the beating. Salih ELEZOVI], Sejad SIVAC, and other prisoners were found dead in the same spot later that day.

It is then alleged that by his participation in these acts, the accused committed offences which are charged in three counts.

282. Counts 15, 16 and 17 of the Indictment charge the accused by reason of his participation in the acts described in it, respectively, with a grave breach of the Geneva Conventions recognized by Article 2(c) (wilfully causing great suffering or serious injury to body or health) and Article 7, paragraph 1, of the Statute; with a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (cruel treatment) of the Geneva Conventions; and with a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

283. The evidence supporting these counts consists of the testimony of two witnesses, Samir Hod`i} and Hakija Elezovi}, both Muslims. Samir Hod`i} was at the time a young man aged 21. While a prisoner in Omarska, to which he had been taken from his home in Trnopolje on 9 July 1992, he was placed in a small room in the white house crowded together with 26 others, with little ventilation. One of those others was Hakija Elezovi}. Samir Hod`i} was held in that small room for some days and was then moved to another room very shortly before being taken for interrogation. Before he was interrogated he had seen Hakija Elezovi} being taken out for interrogation, being returned and then being taken out of the white house a second time. The witness never saw Hakija Elezovi} again until they met in The Hague as witnesses.

284. Samir Hod`i} testified that when he was returning to the white house after interrogation in the administration building, he was spoken to by a guard, was then made to sit on the grass some 10 metres from a group of men in uniform and after a while, having been asked where he came from and having said that he came from Trnopolje, was taken around to a rear corner of the white house where he saw four bodies face down and stacked one on top of another. He was ordered to turn the four bodies over and did so, recognizing the men as Muslims known to him and from the Trnopolje area. They included Salih Elezovi} and Sejad Sivac, the former having a bullet or knife wound under his chin. He did not see the witness Hakija Elezovi}, Salih Elezovi}'s father, among those four bodies. He said that he saw nothing else at the rear of the white house and would have seen anything had there been anything there to see but later said that he did not look there, "not once did I look behind the white house". While standing beside the four bodies, and having himself no shoes, he took off the shoes from Salih Elezovi}'s feet and went back to his room in the white house.

285. Samir Hod`i} was finally taken from the Omarska camp to another camp in August 1992. Apart from an initial beating when he arrived in Omarska and the considerable suffering caused by the very cramped conditions in the small room in the white house, the witness was not otherwise mistreated in Omarska but suffered its very bad general conditions in common with other prisoners.

286. The evidence of the other witness, Hakija Elezovi}, a man in his early fifties, about what appears to be the same incident also begins with events on 9 July 1992. On that day he

and his son Samir were taken from their home near Trnopolje in an atmosphere of terror and violence, with individuals, including his son Samir, being taken out of a moving column of prisoners and shot where they stood as the column moved on. In all, the witness estimates that some 30 out of a column of about 300 were killed in this fashion on the way to the Trnopolje camp. When they reached Trnopolje they were taken in buses to the Keraterm camp, where the witness was held for some 10 days and severely beaten and kicked during interrogation, his ribs being broken so that he had difficulty in breathing. He was then taken to the Omarska camp where on arrival he was beaten again and sent to the white house. In the white house he was held in the same conditions in the same unventilated room as Samir Hod`i}.

287. While in Omarska he was assaulted; he was made to kneel and bark like a dog, a gun-barrel was pushed into his mouth and the front teeth of his bottom jaw were broken in the process. Then he was taken for interrogation and on the way was beaten and had his front upper teeth kicked out. After his first interrogation he was called back again an hour later, on the way was hit and knocked down and then, instead of a second interrogation, was sent back in the direction of the white house. However, instead of entering the white house he was taken behind it where he says that some 10 soldiers were beating some 50 to 60 prisoners amongst tall grass. There was already a heap of bodies there and he saw his son, Salih, being beaten. He began to be kicked and his son cried out: "Let my old man go", and the son was then struck with a pistol; then he himself was struck a very severe blow on the neck and fell unconscious. When he came to, there were very many dead lying there, including his son and the veterinarian Sejad Sivac and others he recognized and named, including one Zuhdija Turkanovi}, their bodies lying one on top of the other; he himself was lying near the bodies of his son and Sejad Sivac. The witness had a knife stab wound in his leg. Those who had been doing the beating had gone and prisoners, including Samir Hod`i} and an Albanian prisoner named Bati, were loading bodies onto a truck full of bodies. Bati told him to lie there and that they would take him back to the white house. Samir Hod`i} and Bati later did take Hakija Elezovi} back to the white house and put him in a room there. While Samir Hod`i}, who was barefooted, was loading his son Salih's body onto the truck, Hakija Elezovi} saw him take the shoes off the feet of his dead son and put them on. Samir Hod`i} spoke to him about taking his son's shoes and Hakija Elezovi} told him to take them.

288. Two days later Hakija Elezovi} was moved from the white house to the hangar and later to the Trnopolje camp from which he was ultimately taken by bus to Vla{i} Mountain and then made his way to Bosnian government territory. As a result of his beatings he now suffers from headaches, has kidney complaints and a bad arm.

289. The conflict between portions of these two accounts is apparent. According to Samir Hod`i}, he did not see Hakija Elezovi} lying near the rear of the white house, did not load bodies onto a truck, did not talk to Hakija Elezovi} about the shoes of the latter's son nor assist him to return to the white house. Instead, he says that he did not see Hakija Elezovi} again after the latter was taken out for questioning the second time. A further conflict concerns the prisoner Zuhdija Turkanovi}. After Hakija Elezovi} regained consciousness behind the white house he describes Zuhdija Turkanovi}'s body as lying near him with other dead bodies while Samir Hod`i} was loading bodies onto a truck. Samir Hod`i}, however, apart from denying being there at all at that time, says that when he re-entered the white house after turning over the four dead bodies, Zuhdija Turkanovi} was lying dying in the room to which he went. In a more detailed account of his friend Zuhdija Turkanovi}'s death in a prior statement which he had made, Samir Hod`i} places it as occurring as a result of injuries Zuhdija Turkanovi} received while being interrogated, this occurring before Samir Hod`i}'s own interrogation. Either version is in conflict with Hakija Elezovi}'s evidence that Zuhdija Turkanovi}'s body was lying near him at the back of the white house after he recovered consciousness and while Samir Hod`i} was loading bodies onto a truck. Before determining whose evidence, if either, to accept where there is conflict, it will be appropriate to examine the evidence of these two witnesses concerning the accused.

2. The Role, if any, of the Accused

290. Samir Hod`i}, although much younger than the accused, knew him as a casual acquaintance whose café in Kozarac he had visited. At Omarska he first saw the accused when he was on his way back to the white house after his interrogation. The accused was one of the group of men in front of whom he was ordered to sit. He recognized the accused, whom he could see clearly, as a member of that group. As he was taken around the white house to where the four bodies were lying he passed only some three metres from the accused. The accused was wearing a mainly brown military camouflage uniform. In cross-examination

the witness agreed that in a prior statement he had described the accused that day as having "light, shortly cut hair", and with some kind of infection, his face being red, and had said that he "did not have an opportunity to look at him or the guards from close quarters". The accused's hair is in fact black.

291. Hakija Elezovi} had known the accused since 1991 when someone pointed out the accused to him and he then linked the face, which was familiar to him, with the name of Dule Tadi}. He had been in his café in Kozarac once. His son, Salih, was a friend of the accused. When Hakija Elezovi} was taken to the Keraterm prison camp and interrogated there he saw the accused, who was acting as bodyguard for the interrogator, and who kicked him to the floor with a karate kick in the chest and then kicked him on the back and chest as he lay there.

292. He later saw the accused at Omarska when he was taken to the back of the white house after his interrogation. The accused said to him: "Now you have come to the right place", and kicked him in the stomach and beat him, and also struck his son with a pistol. The accused was wearing a military camouflage uniform, had a baton and along with the soldiers was beating prisoners.

293. In cross-examination when it was put to him that he had said in evidence that Du{ko Tadi} had beaten him when he was taken around the back of the white house, the witness replied: "In Keraterm, it was Du{ko who beat me, not in Omarska". However, he went on to say that the accused was with the group of people who were beating prisoners and he later again said that the accused beat him and his son, speaking of Omarska.

294. Neither of these two witnesses assigned a date to these events. However, a witness Ermin Strikovi}, who was a friend of Sejad Sivac, one of the victims whose dead bodies were seen by Samir Hod`i} beside a near corner of the white house, described the last calling-out of Sivac as occurring at 2.30 p.m. on 27 July 1992. That provides a date for these events.

3. The Case for the Defence

295. If these events occurred in the afternoon of 27 July 1992, as the evidence of Ermin Strikovi} states, the accused has no specific alibi. His checkpoint duty at Orlovci on

that day began at 7 p.m. and if the accused had transport available to him he would have had ample time during that day to travel to Omarska from Prijedor, carry out the acts alleged and return in time to take up his checkpoint duties.

4. Findings of Fact

296. If a choice has to be made between the evidence of Samir Hod`i} and that of Hakija Elezovi} where there is a conflict, the evidence of Samir Hod`i} is to be preferred. Hakija Elezovi} was a man in his fifties who had had his only two sons murdered in his presence and had himself been very badly beaten on several occasions and as a result was suffering severe injuries when he was taken behind the white house. There he was again assaulted and became unconscious. In giving his evidence he was occasionally, perhaps understandably, somewhat confused. Samir Hod`i}, on the other hand, a young man who had suffered relatively little by way of beatings and spoke of no resultant injuries, gave his evidence clearly and without hesitation. The fact that it emerged in cross-examination that in a prior statement he had misdescribed the colour of the hair of the man he identified as the accused does not affect the choice between his evidence and that of Hakija Elezovi} where they conflict, nor affect recognition of the accused, whom he knew from peacetime days in Kozarac.

297. If, then, the evidence of Samir Hod`i} is to be preferred to that of Hakija Elezovi} where they are in conflict, that conflict only occurs after Hakija Elezovi}, having been struck a severe blow on the neck and falling unconscious behind the white house, later regains consciousness there and gives his version of seeing the loading of dead bodies onto a truck and of his being helped back to the white house.

298. Disregarding that particular portion of the evidence of Hakija Elezovi}, he otherwise gives eyewitness evidence of the attack by the accused on his son and, of course, on himself. His son's dead body is later identified by Samir Hod`i} as being very close to the scene of that attack when, after encountering the accused and others in uniform sitting outside and to one side of the white house, he is taken by one of the uniformed men around the front of the white house to the other side where, at the rear, he is made to turn over four bodies, two of which he recognizes as those of Salih Elezovi} and Sejad Sivac.

299. It is neither charged, nor is there sufficient evidence, of the killing of anyone by the accused. There is evidence, however, of the beating and kicking of Hakija Elezovi} by the accused, of the beating by him of Salih Elezovi} and other prisoners, and of participation by the accused in events which culminated in the death of Salih Elezovi}.

300. The only evidence for the accused specifically relating to this paragraph consists of his denial of having ever visited the Omarska camp, implicit in it being, of course, a denial of any participation in the events alleged in paragraph 8.

301. A curious feature of the Prosecution evidence is that, whereas it is common ground as between the two witnesses that Samir Hod`i} did acquire Salih Elezovi}'s shoes from his dead body, they differ inexplicably in how this came about. One or the other is clearly mistaken but the inconsistency is, viewed most favourably to the accused, no more than an instance of a badly muddled recollection of certain events by one of the witnesses. It certainly supports neither a theory of outright fabrication of evidence by these witnesses nor of their joint reconstruction of events. When the emotional trauma suffered by Hakija Elezovi} due to the murder of his two sons and his own gross mistreatment is coupled with further mistreatment that day, culminating in unconsciousness, a muddled recollection of events occurring after regaining consciousness is perhaps not surprising.

302. This Trial Chamber concludes that it may accept the evidence of Hakija Elezovi} as to his own beating and kicking by the accused and as to the beating of his son Salih by the accused, all occurring before the witness was knocked unconscious. On that evidence, combined with Samir Hod`i}'s subsequent sighting of the accused by the white house and his recognition of the two bodies beside the white house, this Trial Chamber is satisfied beyond reasonable doubt of the severe beating and kicking of Hakija Elezovi} and of the beating of his son Salih Elezovi} and other prisoners by the accused as alleged and that these acts were committed in the context of the armed conflict.

303. Since this Trial Chamber is satisfied beyond reasonable doubt that the accused severely beat and kicked Hakija Elezovi} and severely beat Salih Elezovi} those acts involved, because of their nature and consequences and on any meaning of those words, acts described in Counts 15, 16 and 17 of the Indictment respectively as "wilfully causing great suffering or serious injury to body and health", "cruel treatment" and "inhumane acts".

304. All that remains for consideration in relation to the beating of Hakija Elezovi} and Salih Elezovi} is whether the elements of each of these crimes as charged in Counts 15, 16 and 17 of the Indictment are satisfied and, as stated previously, this will be considered in a later section of this Opinion and Judgment when legal findings are made.

E. Paragraph 9 of the Indictment

1. The Events Alleged

305. This paragraph contains three counts and concerns events alleged to have occurred at the Omarska camp. It reads as follows:

> Around the latter part of June or the first part of July, 1992, near the building known as the "white house," a group of Serbs from outside the camp, including Du{ko TADI], ordered prisoners, whose names are not known, to drink water like animals from puddles on the ground, jumped on their backs and beat them until they were unable to move. As the victims were removed in a wheelbarrow, TADI] discharged the contents of a fire extinguisher into the mouth of one of the victims.

It is then alleged that by his participation in these acts the accused committed offences charged in three counts.

306. Count 18 of the Indictment charges that by his participation in these acts the accused committed a grave breach recognized by Article 2(c) (wilfully causing great suffering or serious injury to body or health) and Article 7, paragraph 1, of the Statute. In Count 19 it is charged that by his participation in these acts the accused committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (cruel treatment) of the Geneva Conventions. In Count 20 it is charged that by his participation in these acts the accused committed a crime against humanity recognized by Article 5(i) (inhumane acts) and 7, paragraph 1, of the Statute.

307. The Prosecution called only one witness, Elvir Grozdani}, a Muslim, to testify to these events. While a prisoner at the Omarska camp Elvir Grozdani} was ordered to clean the

hangar along with another inmate. As he walked out of the building through the door facing the white house on his way to the garbage containers near the kitchen, he saw from a distance of between 30 to 40 metres fellow-inmates in front of the white house. A group of people, including two men he knew as Du{ko Kne`evi} and Jovi}, were physically abusing these inmates. In addition to repeatedly jumping upon the inmates, they poured water on the grass and forced the inmates to pick the wet grass with their teeth and "to munch it and grunt as pigs do". He continued to walk toward the garbage containers near the kitchen. On his way he saw a Muslim man from Prijedor named Amir pushing a wheelbarrow containing a man who had been beaten up. Elvir Grozdani} could not tell if this man was still alive. Behind Amir he saw another man carrying a fire extinguisher in his left hand, with the hose in his right hand. Upon reaching the containers to throw the garbage away, he saw the barrow stop not far from the containers and the man carrying the fire extinguisher push its hose into the mouth of the man in the barrow. After reaching the containers and witnessing these events he headed back towards the hangar. On his way he saw Du{ko Kne`evi} and Jovi} continuing to beat the assembled inmates.

308. Although not testifying in relation to the events alleged in paragraph 9, several other witnesses testified to being personally, or seeing others being, jumped upon, beaten and forced to imitate animals while at the Omarska camp. Uzeir Be{i} saw a person dressed in uniform kicking, beating and jumping upon prisoners and Hakija Elezovi} was beaten, forced to kneel down and bark like a dog. Emir Beganovi} was kicked while lying on his stomach and was forced to drink water from the ground like a dog. The testimony of these witnesses is relevant in determining whether the events alleged in paragraph 9 actually occurred.

2. The Role, if any, of the Accused

309. Elvir Grozdani} saw the accused on two separate days at the Omarska camp, one of which is relevant to the counts. On the day in question, he said, it was the accused who was walking behind Amir and who pushed the hose of the fire extinguisher into the mouth of the man in the barrow. He saw this from a distance of 50 metres and described the accused as having a beard and wearing a camouflage uniform. At this time he had known the accused for approximately 10 years, including a period in which he had received karate lessons from him

twice a week as a boy, in addition to having seen him in Kozarac two or three times a month. He testified that the accused had a distinctive walk.

3. The Case for the Defence

310. The Defence evidence, once again, consists of the accused's alibi together with his denial that he ever visited the Omarska camp. In support of this contention the Defence relied upon the accused often being seen at the checkpoint, the frequent spot checks conducted by his superior officer to ensure he was there and his lack of the right to use the police car for his own purposes. The Defence also contended that according to the Prosecution evidence the accused was not, at the time of the alleged offence, with the men who were allegedly beating inmates but was seen to be apart and separate from those men and closer to the administration building. As has been mentioned in relation to paragraph 6, Elvir Grozdani} had had an argument with the accused in Kozarac before the armed conflict and because of this the Defence questions the reliability of Elvir Grozdani}'s testimony. Additionally, the Defence challenges his testimony by pointing out that if the accused had been looking specifically for Elvir Grozdani}, as the witness claimed had happened on the previous occasion that he saw the accused at the Omarska camp, then he would have been in great danger if he ventured within sight of the accused. It also asserts that there is no evidence that the body in the barrow was alive or that the fire extinguisher was discharged as alleged in paragraph 9. As a matter of law, it asserts that the mere insertion of a fire extinguisher hose into the mouth of a corpse does not constitute any of the offences charged.

4. Findings of Fact

311. As stated elsewhere in this Opinion and Judgment, many other Prosecution witnesses gave evidence that they had seen the accused at the Omarska camp in late June or early July 1992 which thus has a bearing on the accused's alibi and denial that he was ever at the camp, namely Saud Hrni}, Hamdija Kahrimanovi}, Ziyad Jakupovi}, D`emal Deomi}, Kemal Su{i}, Kasim Mesi}, Witness R, Mehmedalija Huski}, Edin Mrkalj, Hasiba Haramba{i}, Emir Beganovi}, Senad Muslimovi}, Armin Kenjar, Mehmed Ali}, Halid Mujkanovi}, Muharem

Be{i}, Husein Hod`i}, Armin Muj~i}, Hase Ici}, Hakija Elezovi}, Samir Hod`i} and Emsud Veli}.

312. The Defence contention that the accused was never at the Omarska camp and that, in any event, at the relevant time his duties with the traffic police precluded him from having committed the acts alleged in paragraph 9 of the Indictment is rejected by the Trial Chamber. Numerous credible witnesses have testified that they saw the accused at the camp and, as discussed in the alibi section of the Opinion and Judgment, the accused's assignment to the Orlovci checkpoint would not preclude him from carrying out what the Prosecution described as his "higher duty" as a traffic policeman to implement ethnic cleansing to achieve a Greater Serbia.

313. Accordingly, the Trial Chamber rejects the accused's alibi and his assertion that he was never at the Omarska camp. Additionally, despite Elvir Grozdani} having had an argument with the accused over a traffic incident in Kozarac and having seen the events from a great distance, the Trial Chamber finds that the accused was present on that day walking behind the man in the barrow and finds that he pushed the fire extinguisher hose into that man's mouth. However, it is not satisfied that certain factual requirements implicit in paragraph 9 have been fulfilled by the testimony of this witness. The criminal acts attributed to the accused include two separate although closely linked events: first, the physical ill-treatment inflicted upon the assembled inmates near the white house and, second, the discharge of the contents of a fire extinguisher into the mouth of one of the victims.

314. With regard to the allegation that the accused was a member of the group of Serbs beating the prisoners and forcing them to drink water from the ground like animals, Elvir Grozdani} did not name the accused as one of the individuals inflicting the beatings nor even as part of the group. He first noticed the accused in a separate area of the camp and although he testified that the man in the wheelbarrow was a victim of the beating, there is no evidence that he saw this man being beaten or ill-treated by the group in front of the white house. Additionally, Elvir Grozdani} did not mention having seen the accused in the group of people who were beating the assembled inmates when he was returning to the hangar.

315. As to the allegation that the accused discharged the contents of a fire extinguisher into the mouth of the man in the barrow, two factual deficiencies in the Prosecution case have

been exposed. First, paragraph 9 specifically charges the accused with having actually discharged the contents of the fire extinguisher into the mouth of the man in the barrow. No evidence, however, has been furnished by the Prosecution of such discharge. Secondly, the Prosecution has failed to establish that the man was alive. When asked, Elvir Grozdani} specifically stated that he was not sure whether the man was alive or dead and there is no other evidence to suggest that there was any sign of life in him.

316. Accordingly, on the evidence as it stands, the Trial Chamber finds beyond reasonable doubt no more than that the accused was present at the Omarska camp that day, that he escorted a man in a barrow, that he inserted the hose of a fire extinguisher into that man's mouth and that the acts were committed in the context of an armed conflict. In the Legal Findings section of the Opinion and Judgment, the Trial Chamber will consider what offences, if any, have been committed.

F. Paragraph 11 of the Indictment

1. The Events Alleged

317. This paragraph concerns an incident alleged to have taken place at a junction on the main street of Kozarac. It reads as follows:

> About 27 May 1992, Serb forces seized the majority of Bosnian Muslim and Bosnian Croat people of the Kozarac area. As Muslims and Croats marched in columns to assembly points in Kozarac for transfer to camps, Serb forces, including Du{ko TADI] and Goran BOROVNICA, ordered Ekrem KARABA[I], Ismet KARABA[I], Seido KARABA[I] and RE\O FORI] from the column and shot and killed them.

It is then alleged that by his participation in these acts the accused committed offences charged in five counts.

318. Count 24 of the Indictment charges that by his participation in these acts the accused committed a grave breach as recognized by Article 2(a) (wilful killing) and Article 7, paragraph 1, of the Statute. In Count 25 it is charged that by his participation in these acts the accused committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (murder) of the Geneva Conventions. In Count 26 it is charged that by his participation in these acts the accused committed a crime against humanity recognized by Article 5(a) (murder) and Article 7, paragraph 1, of the Statute. Alternatively, in Count 27, it is charged that by his participation in these acts the accused committed a grave breach recognized by Article 2(c) (wilfully causing great suffering or serious injury to body or health) and Article 7, paragraph 1 of the Statute. Again, alternatively, in Count 28, it is charged that by his participation in these acts the accused committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

319. Three witnesses were called by the Prosecution to give evidence regarding this incident: Ferid Muj~i}, Salko Karaba{i} and Sulejman Be{i}. Additional witness testimony was offered by the Prosecution to establish the accused's presence in Kozarac on or about 27 May 1992.

320. All the three Prosecution witnesses, who are Muslims and who testified to the events alleged in paragraph 11, walked in a column of people from Vidovi}i to Kozarac on Wednesday 27 May 1992. The column consisted of unarmed men, women and children, the vast majority of whom were Muslims, and more people joined as they approached Kozarac. Once they arrived in Kozarac they were directed by Serb soldiers down the main street, Mar{ala Tita Street. There were military vehicles all around as well as soldiers. From their respective descriptions of the events that unfolded as they perceived them, their order of arrival at a kiosk at the corner of Mar{ala Tita Street and the road to Kalate, where the killings allegedly occurred, must have been as follows: first Salko Karaba{i}, second Ferid Muj~i}, and, finally, Sulejman Be{i}.

321. Salko Karaba{i} left Vidovi}i at approximately 11.45 a.m. and arrived at the main street in Kozarac between noon and 1 p.m. He walked with the column down this street, past the old school and a well and arrived at the kiosk. As he passed by the kiosk he saw that his

brother Ismet Karaba{i} and a man he knew, Re|o Fori}, had been taken out of the column and placed next to the kiosk. Then his brother Ekrem Karaba{i} was pulled out of the column and made to stand at the kiosk as a third person. When his son Seido Karaba{i} turned to look at Ekrem, Seido too was pulled out of the column and placed next to the kiosk with the others despite his father's efforts to hold on to him. After Seido a fifth man, Meho Muikan, was taken out of the column and the column continued to move on but was ordered to proceed slowly. As Salko Karaba{i} walked on he saw his brother Ismet standing with his hands against the kiosk but he did not say he heard any shots as he proceeded down Mar{ala Tita Street. Ismet Karaba{i}, Ekrem Karaba{i}, Re|o Fori} and Seido Karaba{i} have not been seen again since.

322. Ferid Muj~i}, the next witness to approach the kiosk, was near the end of the column and as he walked past the old school and was close to the well he saw five persons already standing by the kiosk with three men standing behind them. The five were Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i}, Re|o Fori} and a fifth person, whom he thinks was Fikret Ali}. They were spread-eagled against the wall of the kiosk. He knew all of them and had a good view of them. He saw one of the three men who were standing behind these persons hit Ekrem Karaba{i} somewhere in the back with his rifle butt. When the column stopped at the junction of the road leading to Kalate, he saw that "they were transferring people", so he lifted his daughter, whom he was carrying, to his shoulder, tried to cover his face with his coat collar and moved to the middle of the column to avoid being recognized. Although by lifting his daughter to his shoulder he partially obstructed his view of what was happening, he was able to see Seido Karaba{i}, Re|o Fori} and another person, whom he thought was Fikret Ali}, cross in front of the column to the other side of the road. He also did not say he heard any shots.

323. Sulejman Be{i}, the last of these three Prosecution witnesses to reach the kiosk, arrived there between 2.30 to 2.45 p.m. When the column stopped by the well, panic broke out and he saw people being taken out of the column and lined up against the kiosk. He stated that he knew those who were being taken out of the column: Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i} and Re|o Fori}. They were lined up spread-eagled against the wall of the kiosk and then searched. He saw this because the column had split in two and the part in which he was had come to a stop. In addition to the four, another man was pulled out of the column, searched and then passed to a policeman who put him against a different wall

"where the garden was". After that yet another young man, Zihad Majkovi}, was pulled out, asked questions about one Hasan Didin and returned to the column. Then his column started to move slowly and as he came to the middle of the intersection he looked towards his left and saw six other people standing up against the wall by the Kula (the old tower). Suddenly there were two bursts of very loud "fire" and he looked towards his right and saw those who had been lined up by the kiosk falling. One of them remained standing for several seconds. A policeman who was standing by the side of the road then ordered the column to move faster and thereafter Sulejman Be{i} did not see what happened behind him. He said that at the time of the firing he was about five metres away from the kiosk.

324. As to the testimony of Ferid Muj~i} and Sulejman Be{i}, a conflict is apparent. Ferid Muj~i} testified that he saw three of the men lined up by the kiosk, Seido Karaba{i}, Re|o Fori} and the man he thought was Fikret Ali}, being taken to the other side of the road whilst Sulejman Be{i} testified that, although he saw different men being taken across the road, he did see all the men lined up by the kiosk including Seido Karaba{i} and Re|o Fori} being shot. In clarification, the Prosecution asserts that the three men taken to the other side of the road must have been brought back. The Defence questions this speculative assertion as no evidence was presented to this effect. In addition, the Defence also questions the credibility of Sulejman Be{i}, the only one who alleges the killings, by referring to a previous statement made by him in which there was no mention of the accused being involved in killings. The Defence also asserts that Sulejman Be{i} was not truthful during cross-examination when he denied having had a conversation with Salko Karaba{i} just before the trial although the Trial Chamber had actually been informed by the Prosecution that there had been contact between the two. Further, the Defence argues that it would have been difficult for Sulejman Be{i} to have seen the persons being called out as well as being shot when he was the last of the three eyewitnesses in point of time to arrive at the scene. In reply, the Prosecution argues that Sulejman Be{i}, although behind Ferid Muj~i}, could have been looking forward and to the side and thereby seen the men being pulled out while Ferid Muj~i} did not see the men being called out but saw them later after they had already been pulled out and placed against the kiosk. The Defence also challenges Salko Karaba{i}'s evidence that he saw Ekrem Karaba{i} being taken out of the column because in an earlier statement he indicated that he had been told about what had happened to Ekrem Karaba{i} by one Ika Karaba{i}.

2. The Role, if any, of the Accused

325. All the Prosecution witnesses who testified to these events place the accused at the kiosk area and attribute to him an active role during the events that allegedly occurred.

326. According to Salko Karaba{i}, it was the accused who ordered Goran Borovnica to take his brother Ekrem Karaba{i} and son Seido Karaba{i} from the column and place them by the kiosk. At the time when Ekrem Karaba{i} and Seido Karaba{i} were taken out of the column, the accused was standing by the kiosk and Salko Karaba{i} passed within two-and-a-half to three metres from him. He also heard and recognized the accused's voice as he has known the accused since the latter was 15 years old. He was also a neighbour of the accused's parents-in-law in the village of Vidovi}i and had in fact sought refuge with them until 27 May 1992 when it was thought unsafe for them to harbour him any longer. When asked if he was certain it was the accused whom he saw in Kozarac on 27 May 1992 when Seido was taken out of line he replied that he was "thousand percent sure".

327. Ferid Muj~i}, who has known the accused most of his life, testified that in addition to the men lined up with their arms spread out against the kiosk he also recognized three other people in the immediate area, namely the accused, Goran Borovnica and Milo{ Gaji}. These were the three men standing behind the individuals lined up by the kiosk. The accused was standing approximately one to one-and-half metres behind Goran Borovnica, and behind the lined-up men. He saw Goran Borovnica act as if he were searching Ekrem Karaba{i} and then saw him hitting Ekrem Karaba{i} with his rifle somewhere in the back. When he first saw the accused that afternoon, he was next to the well and recognized the accused instantly and had a long enough view to see what was happening. Then, as he got closer to the kiosk, he saw the accused "very clearly as a person in front of me". The accused was standing by the well and facing the column and when Ferid Muj~i} was asked if he were sure it was the accused he saw on that day he replied that he was "completely" sure.

328. According to Sulejman Be{i}, it was the accused who gave orders to Goran Borovnica and called out the names of people to be pulled out of the column. Goran Borovnica had also pulled a man out of the column and passed him to a policeman who placed him against a different wall. After handing this man over to the policeman, Goran Borovnica walked back

to the accused who was then standing at what had become the front part of the column as a result of the column dividing. Suddenly he heard "one long and one shorter burst" of fire and he looked to the right in the direction of the kiosk and saw the men lined up there falling and the accused and Goran Borovnica standing one-and-a-half to two metres behind them with their weapons pointing at the men. Sulejman Be{i} did not see any other men with weapons in the vicinity at that moment. He said he had a good, unobstructed view of the accused who was not more than five metres away.

329. The Prosecution also produced testimony which, although not concerned specifically with the events alleged in paragraph 11, bears upon the whereabouts of the accused on 27 May 1992.

330. Nasiha Klipi}, who has known the accused almost her whole life and was married to a Muslim policeman, gave evidence that on 27 May 1992 she and her children joined a convoy of people who were moving towards Kozarac to surrender. They came to the intersection in Kozarac at about 2 p.m. and the column, from the intersection to the pastry shop, was about one or two kilometres long. There were soldiers, Serb policemen and tanks in the vicinity. Then they started towards Kozarusa in the direction of Prijedor. As they proceeded, she saw a Golf police car driven by Brane Bolta, a colleague of her policeman husband, moving in the opposite direction. The accused, wearing a camouflage uniform, was in the passenger seat and Goran Borovnica was also in the car. She saw the car for about one minute from a distance of less than one metre away and her view was unobstructed. About one to one-and-a-half hours later the convoy arrived at the tavern "Zikina" in Kozarusa. The column was being guarded by Serbs, a mixture of army and police personnel, who were "singling people out and killing them". When the convoy arrived at the Kozarusa bus station, right by the tavern, men aged 15 to 65 were separated from women and children and divided into three groups destined respectively for Omarska, Trnopolje and Keraterm, as she later discovered. She recognized several of the Serbs who were engaged in separating the people and these Serbs included the accused and Goran Borovnica. At that time she was about three to four metres away from the accused and nothing obstructed her view. She also heard the accused ask a policeman named Milo{ Preradovi} where the civilians should be taken.

331. Nihad Seferovi}, whose house was eight or nine houses away from the accused's and who has known the accused since childhood, gave evidence that he was in Kozarac on Sunday

(which must have been 24 May 1992) when the attack began. He immediately fled to the hills in Be{i}i but returned home in the evening to feed his birds and then went back to the hills. Approximately three days later, on the first day that people started to surrender (which must have been 27 May 1992), as he was returning home, he stopped at the orchard of a house across from the Serbian Orthodox church and saw about six Muslim policemen from Kozarac with their hands behind their necks standing in line in front of the church. He recognized four of these policemen and in front of them were the accused, Goran Borovnica, "Dule" and about 15 other Serb paramilitaries whom he did not recognize, the soldiers dressed in uniforms with weapons pointed at the Muslim policemen.

3. The Case for the Defence

332. The Defence contends that when the conflict in Kozarac began the accused had fled to Banja Luka and thus could not have been in Kozarac on 27 May 1992 to commit the crimes alleged in these four counts. In support of this contention several witnesses were called by the Defence and their testimony is dealt with in the section relating to the accused's defence of alibi. As to the accused's absence from the Kozarac area on that particular day, the Defence called four witnesses, identified as Witnesses U, V, W and A, who were in the area on that day, to testify; their testimony requires individual consideration.

333. Witness U, who has known the accused for about 30 years, was in the front part of the column moving into Kozarac on 27 May 1992 arriving at the triangle around 8.15 to 8.30 a.m. and waiting there for one-and-a-half to two hours. He never saw the accused in his movement through Kozarac and at no stage during his progress from Rajkovi}i to Trnopolje did he see the accused. It came out in cross-examination that Witness U now lives in a house belonging to a Muslim which was assigned to him by a commission on which the accused used to sit in his capacity as the Secretary of the Local Commune.

334. Witness V has known the accused since his early childhood. He was a serving soldier stationed in Kozarac from 27 May 1992 until the end of June 1992, patrolling along Mar{ala Tita Street "from the cross-roads with the new Banja Luka/Prijedor road, up Mar{ala Tita Street, as far as the Mutnik Mosque". Witness V confirmed that he saw civilians being pulled out of a column and executed. However, this was an incident separate and distinct from that

charged in this paragraph of the Indictment. Although he saw Goran Borovnica on Mar{ala Tita Street below the kiosk he at no point during his duties in Kozarac saw the accused.

335. Witness W, who was serving in the VRS when Kozarac was attacked, has known the accused for about 20 years and is related to the accused's wife. He was in Kozarac from 26 to 28 May 1992 and also saw the execution of a civilian in Kozarac during that time but did not see the accused during that period although during cross-examination he clarified that he was located in the northern part of Kozarac where he spent the night of 27 and 28 May 1992. It is to be noted that, during rebuttal, Prosecution witness Sakib Sivac testified that he once saw Witness W at the Keraterm camp calling people out and cursing the inmates' "balija mothers", remarking that "we can't live together anymore". Another Prosecution witness, Jusuf Arifagi}, testified that he had known Witness W almost his whole life and recalled an incident when Witness W threatened to throw a grenade in front of the house of a Muslim because his brother was a member of the TO. He also recalled another incident in Kozarac when Witness W, whilst drunk in a bar, threatened to set off a grenade and had to be taken away by the police but returned the next day drunk and armed and threatening to avenge himself for having been reported to the police the previous day. He also testified that he saw Witness W visit the Keraterm camp some time in June or the beginning of July.

336. Witness A, who knows the accused "very well", testified about his long wait on 27 May 1992 from about 9.30 a.m. until about 6 p.m. at restaurant "Ziko" located about two kilometres from the junction of Kozarac where the road from Trnopolje crosses the Prijedor to Banja Luka road. He said in all of that time he did not see the accused and that he would have noticed the accused if he had been there.

4. Findings of Fact

337. It is the evidence of the Defence that from 23 May to 16 June 1992, apart from the three trips in the early part of June, when the accused visited Kozarac twice first on 1 June and then again sometime between 8 and 10 June and when he visited Trnopolje between these two trips to Kozarac around 4 or 5 June, he was in Banja Luka all the time and could not have been in Kozarac on 27 May 1992 when the alleged killings took place in the afternoon at the kiosk at the intersection of Mar{ala Tita Street and the road leading to Kalate. This is the

effect of the evidence given by the accused, his wife Mira Tadi} and his brother Ljubomir Tadi} which is dealt with in the section dealing with the defence of alibi. The other Defence witnesses who happened to be at the scene on that day, namely Witnesses V and W, confirmed that killings were taking place on Mar{ala Tita Street although neither of them saw the accused there. Defence Witness U, who also testified to not having seen the accused on Mar{ala Tita Street, could not possibly have witnessed events which occurred in the afternoon when he was already at the bottom of the street on his way out of Kozarac between 8.30 to 9 a.m. Defence Witness A, who was also moving in a column down from the street next to the Orthodox church at the bottom of Mar{ala Tita Street between 8 and 8.30 a.m. before reaching the "Ziko" restaurant on that day, said that he did not see the accused at all but then he too certainly would not have been able to witness what happened at the kiosk that afternoon. The evidence of all or any one of these four Defence witnesses, who had passed through Mar{ala Tita Street, does not afford an alibi to the accused except to indicate that they did not happen to see the accused in Kozarac on that day while they were there.

338. This Trial Chamber accepts Nasiha Klipi} as a witness of truth and her evidence clearly shows that the accused was in the vicinity of Kozarac on the afternoon of 27 May 1992. It also accepts witness Nihad Seferovi} as a trustworthy witness. Both these witnesses have known the accused for a considerable period of time and although they did not see the events at the kiosk or the accused's participation therein, their evidence clearly indicates his presence in Kozarac on the day in question.

339. As to the accused's culpability, as stated earlier, it is clear that Salko Karaba{i} was the first in time to arrive at the intersection when he saw that his brother Ismet Karaba{i} and Re|o Fori} had already been singled out of the column and made to stand up against the kiosk. He then witnessed his other brother Ekrem Karaba{i}, his own son Seido Karaba{i} and Meho Muikan being taken out of the column by Goran Borovnica on the orders of the accused. Then the column was forced to march on and he saw and heard nothing of what happened at the kiosk afterwards. Ferid Muj~i}, who appears to be the next eyewitness in point of time, said he saw Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i}, Re|o Fori} and a fifth person at the scene, already singled out and lined up against the kiosk with the accused standing behind Goran Borovnica who was then standing near Ekrem Karaba{i}. He next saw Seido Karaba{i}, Re|o Fori} and the fifth person being taken across the road to the other side of the street and his portion of the column was forced to walk on. Sulejman Be{i},

who would appear to be the last of the eyewitnesses to come to the intersection, stated that when he reached the well just before the intersection his column was stopped and panic broke out and he witnessed Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i} and Re|o Fori} being taken out of the column. The sketch which he marked at trial showed that at that time he had not yet crossed the mouth of the intersection or reached the kiosk. Then his column started to move slowly and as he came to the middle of the intersection looking at the backs of the four individuals, he glanced to his left and saw another group of people, six in number, already lined up against a wall at the intersection towards Kula. Then "all of a sudden" he heard a burst of firing, "one long burst and one shorter burst", and upon looking towards his right he saw the people lined up falling, although one of them stood unsteadily for several seconds; behind them were the accused and Goran Borovnica with "their weapons pointing towards these people". Those shot, he said, were Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i} and Re|o Fori}. His column was then ordered to move faster.

340. In connection with the shooting and killing of these four men, the testimony of Sulejman Be{i} is crucial. For his account to be correct, that he saw these four men being called out and then later shot (by inference because he only heard the firing and saw the automatic rifles of the accused and Goran Borovnica pointing at their backs), he would have had to be ahead of Salko Karaba{i} and certainly ahead of Ferid Muj~i}, who was too far back to have seen any calling-out but saw five individuals, Ismet Karaba{i}, Ekrem Karaba{i}, Seido Karaba{i}, Re|o Fori} and a fifth person, already standing with their arms against the wall of the kiosk. Sulejman Be{i} describes the four as being called out at the same time whereas it is clear from Salko Karaba{i}'s evidence that there must have been a lapse of time between the two callings-out, i.e., the calling-out of Ismet Karaba{i} and Re|o Fori}, who had already been singled out, and the calling-out of Ekrem Karaba{i}, Seido Karaba{i} and Meho Muikan. If Sulejman Be{i}'s account is to be believed, that he saw the calling-out of the four persons, Ismet Karaba{i}, Seido Karaba{i}, Ekrem Karaba{i} and Re|o Fori} at the same time and the hearing of the shooting of these four persons later, he must have been far ahead of Salko Karaba{i} and Ferid Muj~i} to see the calling-out and yet far behind them in order to hear the shooting which Salko Karaba{i} and Ferid Muj~i} did not hear. Sulejman Be{i} certainly could not have been both close enough to the front of the column to see all the four individuals being called out and also far enough to the rear to witness the shooting which was apparently out of earshot of Salko Karaba{i} and Ferid Muj~i}, both of whom appeared credible and trustworthy. Sulejman Be{i}'s factual description of the pulling-out of the four

individuals and of the hearing of the gunfire does not at all accord with the accounts given by Salko Karaba{i} and Ferid Muj~i} and cannot be accepted.

341. For the reasons given above, the Trial Chamber is not satisfied beyond reasonable doubt that the shooting and killing by the accused of the individuals at the kiosk occurred as alleged or in fact that the shootings did take place although it is fully satisfied as to the accused's participation at the scene in the calling-out of people from the moving column and that this occurred in the context of the armed conflict. In the Legal Findings section of the Opinion and Judgment, the Trial Chamber will consider what offences, if any, have been committed.

G. Paragraph 12 of the Indictment

1. The Events Alleged

342. This paragraph concerns incidents alleged to have taken place in the two small villages of Jaski}i and Sivci. It reads as follows:

> About 14 June 1992, armed Serbs, including Du{ko TADI], entered the area of Jaski}i and Sivci in op{tina Prijedor and went from house to house calling out residents and separating men from the women and children. The armed Serbs killed Sakib ELKA[EVI], Osme ELKA[EVI], Alija JAVOR, Abaz JASKI] and Nijaz JASKI] in front of their homes. They also beat Meho KENJAR, Adam JAKUPOVI], Salko JASKI], Ismet JASKI], Beido BALI], [EFIK BALI], Nijas ELKA[EVI], and Ilijas ELKA[EVI] and then took them from the area to an unknown location.

It is then alleged that by his participation in these acts the accused committed offences charged in six counts.

343. Counts 29, 30 and 31 charge the accused by reason of his participation in the acts alleged in paragraph 12 with, respectively, a grave breach of the Geneva Conventions recognized by Article 2(a) (wilful killing) and Article 7, paragraph 1, of the Statute; with a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Article 3(1)(a) (murder) of the Geneva Conventions; and with a crime against humanity recognized by Article 5(a) (murder) and Article 7, paragraph 1, of the Statute. Counts 32, 33 and 34 respectively charge the accused, in the form already familiar from

earlier counts, with wilfully causing great suffering or serious injury to body or health, with cruel treatment and with inhumane acts.

344. There is considerable evidence regarding those events of 14 June 1992 coming from six witnesses, either surviving former residents of Jaski}i and Sivci or who had sought refuge there. From that evidence it is clearly established that on 14 June 1992 Serb armed forces hostile to the Muslim inhabitants of those two villages went from house to house calling out the men, beating them and removing them to prison camps. In Jaski}i, five men were killed.

345. After the attack on Kozarac, thousands of inhabitants of the area, almost all Muslim, fled to the countryside to the south, some seeking refuge in Jaski}i and Sivci. The residents of those two villages were ordered to surrender all weapons and movement within the villages was restricted. Thereafter Serb forces frequently came to the villages, sometimes in search of particular fugitives, and once requiring local men to collect corpses from a nearby village. Then, early in June, Sivci was shelled briefly by tanks and on or about 10 June 1992 some houses and barns were burned down with the livestock still in them. Frequently the sound of shots were heard at night and the villagers lived in fear, many sleeping in their clothes lest they be ordered to leave their homes without warning, as indeed happened later to the men of the villages.

346. On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village. The houses were searched one by one and all the men were ordered out onto the road that ran through the village. There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated. Their wallets, identification cards and any valuables they had on them were taken from them as they lay on the road. In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.

347. On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again.

Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.

348. The experience of the inhabitants of the smaller village of Jaski}i, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaski}i had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaski}i and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten. The village houses were searched to make sure that all men were accounted for. Then the men, other than three older men, were marched off in the direction of Kozarac and their families have never seen or heard of them again. When they had left, the women found the bodies of five men who had been shot, their corpses left to lie where they fell. Women and children were either initially ordered out with the men and then told to go back inside their houses or else were simply told to remain inside; in either case they were ordered not to look out to see what was happening to their menfolk.

349. Some of the distraught women in Jaski}i left with their children and fled from the village later on 14 June 1992. Others remained behind; one in particular stayed in Jaski}i until mid-July with her two young children until suddenly forced to leave by Serb soldiers on a few minutes notice. In the days after 14 June 1992 there were many visits to the village each day by Serb soldiers, who helped themselves to everything from tractors to liquor.

350. As soon as they dared to leave their houses, those who had remained after 14 June 1992, including two of the older men, sought to bury the bodies of the five men which had been left lying in the village. However, they faced threats, abuse and obstruction in doing so and were ultimately obliged to dig one common grave and bury the bodies there. At some subsequent date most, perhaps all, of the houses in Jaski}i were substantially destroyed, only burnt-out ruins remaining.

2. The Role, if any, of the Accused

351. The first of five witnesses who say they recognized the accused in these villages, Sakib Sivac, had known the accused since childhood, though as an acquaintance, rather than as a friend. On 14 June 1992, in Sivci, this witness had been made to leave his home and with other residents, hands behind his head, run down the village street, lie down, be beaten and kicked where he lay, get up and run again and so on, repeating this many times until he, with the others, reached a yard filled with some 300 prisoners, mainly Muslims, all of whom had been beaten. There they were questioned and threatened and, when the men of the village had been collected, were made to board buses. As Sakib Sivac approached a bus to board it, he recognized the accused standing on one side of its rear door and a man called Dragoje ^avi}, whom he knew better than he knew the accused, standing on the other side; he had to pass between them and, as he sought to talk to Dragoje ^avi}, the accused pushed him onto the bus. At that point he turned and looked the accused in the face. After boarding the crowded bus he was standing on the step and could still see the accused through the door of the bus, wearing a camouflage uniform and with a rifle, pistol and knife and perhaps handcuffs at his belt. The buses took the prisoners to the Keraterm camp.

352. Draguna Jaski} lived in Jaski}i with her husband. She had known the accused and members of his family by sight for many years. On 14 June 1992 gunfire was heard and then soldiers came to her house and ordered everyone out. One soldier searched the house and the women and children were then ordered to return to the house while the men had to go onto the village street, with hands behind their heads. As the witness began to go inside she saw the accused, 20 metres away, bearded and wearing a camouflage uniform, together with another soldier, driving men of the village down the street towards her house and hitting them with a stick, one of the villagers with blood covering his face.

353. The group had reached the part of the street in front of her house and were some 10 metres away when she finally went inside her house, where she and the other women and children were told to lie down on the floor. The witness later got up and looked through the window and saw the accused and others beating the men of her family as they lay on the street and pouring water over those who had fainted. She saw the accused strike her father with a stick behind the neck as he tried to stand up. Her son then pulled her down onto the floor. She got up again later, looked through the window and saw that all the men were now running down the road with the accused, whose face she could see, beating a man; she was then some 12 metres away from him.

354. Later, when the men from the village had been taken away, she went out onto the street and saw five bodies which she recognized as men from her village though not from her family. Only three older men were left alive in the village. Later that day she went to the Trnopolje camp and eventually in a convoy to Bosnian government territory. She has never seen the men of her family since then, although she has made efforts to trace them.

355. When in May 1995 she was shown a display of photographs by an investigator from the Office of the Prosecutor which included a photograph of the accused, she said at the time that she did not recognize anyone. However, she testified that she in fact recognized the accused but was afraid to say so. She was later questioned again by an investigator from the Office of the Prosecutor and said she did not identify the accused because she was not sure it was he. She said, however, in evidence that she was sure she saw the accused beating a man in the village.

356. Subha Muji} is the sister of the last witness. She knew the accused by sight but had never spoken to him. She lived in a village near Jaski}i and had fled from her own home to that of her sister when her own home was shelled and burnt down. She described the arrival of soldiers in Jaski}i on 14 June 1992, the ordering out of everyone in her sister's house, the separation of men and women and the beating of the men from her sister's house by the accused, whom she recognized. The accused was bearded, wearing a camouflage uniform. When she went back inside she saw the accused still continuing to beat the men with a rifle and to kick them. They were lying on the street while being beaten and the accused ordered water to be poured over them and they were then led off down the street.

357. Her sister Draguna Jaski} was with her inside when she saw this beating and said to her that the accused was killing all the men of the family. Later she went outside and saw bodies in the village. She has never again seen the men who were taken from her house, despite her efforts to find them.

358. Zemka [ahbaz lived in a nearby village and went with her son and daughter to stay with her relatives in Jaski}i when she felt threatened in her own village. She did not know the accused. On the day that soldiers came to Jaski}i she was living with her children in a house across the street from that of Draguna Jaski} and ran outside when she heard gunfire. She

saw from the steps leading up to the house a man in camouflage uniform leading another man, who came from Jaski}i, by the scruff of the neck; that man had a bleeding nose. With the man in camouflage uniform was another man with blond hair who had a stick in his hand. She also saw men and women outside Draguna Jaski}'s house lined up against a wall and a soldier with a gun there. The man in the camouflage uniform saw her, cursed and said that if the people in her house did not come out they would all be killed. He then fired his rifle in the air.

359. The witness re-entered her house and brought out those inside, being her 19-year-old son and a number of women. By that time the men from Draguna Jaski}'s house were all lying down in the street. The man in the camouflage uniform nodded to the blond man, who started beating the men lying down. Then he told the women to go inside and her son to come with him. However, the witness followed her son to the street whereupon the man in the camouflage uniform threatened her with his rifle and her daughters took her inside. Later she went outside, saw blood and water on the street and in all five dead bodies, the same bodies as those seen by the witness Draguna Jaski}. She has not heard from her son since the day he was taken away.

360. In May 1995 the witness was shown a book of photographs of men and from it selected the photograph of the accused whom she recognized as the man in the camouflage uniform referred to in her evidence. In cross-examination the witness recalled that the man in the camouflage uniform was wearing a hat with a wide brim, "more like a shield" from the sun than a hat. She said of him: "I do not remember a beard, absolutely."

361. Senija Elkasovi} lived in Jaski}i and knows the accused but only in passing, whereas she knows his wife well, having grown up in the same village. On 14 June 1992 when the soldiers came to Jaski}i they ordered her husband and the other men out of her house and told the women and children to remain inside and lie on the floor. One soldier entered the house. The witness glanced out of the window as she was going to lie down and saw the accused, wearing a camouflage uniform but with nothing on his head, in the yard of her house and was then again ordered by that soldier to lie down. She heard shouts from outside and shots and when the soldier left the house she looked out of the window and saw the soldiers and the men from her house moving down the street. Later she went outside and saw no one in the street; walking down the street she then saw two dead bodies with visible bullet wounds in the

head. She collapsed and her father-in-law came to her and helped her back to her house. Later again, she saw two more bodies in the garden of her house, both shot in the head. The bodies she saw and recognized were those whom other witnesses also recognized. The witness has not since heard anything of her husband or of her other male relatives taken from her house.

362. Sena Jaski} did not see the accused in Jaski}i but as the remaining Jaski}i witness her evidence can be conveniently described here. She lived in Jaski}i with her husband, a woodcutter. She did not know the accused. She described men in uniform entering Jaski}i on 14 June 1992 while she was in the summer kitchen of her house with her husband, her two daughters and three refugees from other villages, a man and two women. Gunfire was heard at about 3 p.m. and two soldiers abruptly came to the kitchen door, ordered her husband and the other man to go with them to the road and the women and children to remain seated. The soldiers took the men out and beat her husband, cursing him as a Muslim and asked if there were others in the house, to which her husband said there were not.

363. Later, when all was quiet, she went down the road and saw two dead men lying there, being Osme and Sakib Elka{evi}. She then returned home, packed a bag with clothes and fled the village with her children. She has never since seen either her husband or the other man who was taken from her house, despite looking everywhere for her husband, including consultation with international agencies.

3. The Case for the Defence

364. The relevant date being 14 June 1992, the accused's evidence is that he was living continuously in Banja Luka without leaving it after returning on the evening of 4 June 1992 from the second of two visits which he made to Kozarac to collect possessions from his house and café and before his departure for Prijedor early on the morning of 15 June 1992.

365. In the later description in this Opinion and Judgment of the accused's alibi the various witnesses who testified to his presence in Banja Luka are named and the nature of their testimony is referred to. His alibi does not deal specifically with 14 June 1992 and, as discussed later, is generally unspecific as to date in respect of this period.

4. Findings of Fact

366. As was pointed out by the Defence, the description given by each of these several witnesses of the clothing worn by the accused at the time is not consistent and the clothing of the soldiers who entered Jaski}i with the accused is described by some witnesses very differently from others and from the witness Sakib Sivac's description of those who entered Sivci. Also the photo-identification of the accused by Draguna Jaski} was unsatisfactory. However, it is to be noted that that photo-identification was also inappropriate and unnecessary when applied to Draguna Jaski}, who had known the accused by sight for many years past.

367. It is also true that the relatively minor role of the accused in Sivci, as described by the sole witness to the Serb entry into that village, contrasts with the important role he is said to have assumed in Jaski}i according to some witnesses and with his major role in Kozarac when he attempted to restore it to activity after the attack on it and its substantial destruction. However, these apparent contrasts may be explicable on any one of a number of grounds. They may, for example, be due to no more than the Sivci witness happening upon the accused at a particular moment when he seemed to be engaged in the function of supervising the loading of prisoners onto buses, this at a time when there was little else left to do.

368. There are, in relation to this paragraph, four witnesses who had known the accused by sight in the years before 1992 and who recognized him from that prior knowledge; there is also a fifth witness who did not previously know him but who made a positive photo-identification. Their evidence is answered only by the evidence of the accused that he was continuously in Banja Luka from late May until 15 June 1992, apart from three absences on dates other than 14 June 1992, and by the evidence of his wife and others, unspecific as to date, that he was resident in Banja Luka.

369. This Trial Chamber concludes that it is satisfied beyond reasonable doubt that the Prosecution witnesses did indeed see the accused in Sivci and Jaski}i on 14 June 1992, that he entered those two villages together with other armed men as alleged in paragraph 12 of the Indictment and in Sivci took part in the removal of separated men from that village to the

Keraterm camp and in Jaski}i took part in the calling-out of residents and the separation of men from women and children. It is further satisfied that the said group forcibly removed from the village of Jaski}i the following men: Beido Bali}, [efik Bali}, Munib Be{i}, Ilijas Elka{ovi}, Nijas Elka{ovi}, Hassan Jakupovi}, Ismet Jaski}, Salko Jaski}, Senad Majdanac, Alija Nureski, Iso Nureski, Mirsad Nureski, Jasmin [ahbaz and Fehim Turkanovi}, and that the accused participated in their removal and further that the accused beat Beido Bali}, [efik Bali}, Ismet Jaski}, and Salko Jaski}.

370. Of the killing of the five men in Jaski}i, the witnesses Draguna Jaski}, Zemka [ahbaz and Senija Elkasovi} saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone; Senija Elkasovi} saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away. Sena Jaski} saw two of the five dead bodies identified by the other three witnesses; the witness Subha Muji} also saw unidentified bodies in the village after the armed men had gone. That the armed men were violent is not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence.

371. The group of armed men were relatively few in number and the accused was one of them and took an active part in the rounding up of men in the village; some witnesses described him as giving orders to others but the evidence for this is not strong. It may, however, be of some significance that of the group only the accused was known to the witnesses; it would seem that he alone came from the locality and, rather than giving orders, he may have been acting as guide to the locality and as to who lived in the village.

372. The village of Jaski}i had been quiet before the armed men came; they arrived to the sound of gunfire, conducted with threats of death and great violence a search of the village, house by house, brutally beat the village men as they lay on the road and, when they left taking the village men with them, shots were heard and five dead men remained lying where they had been killed in the village.

373. This Trial Chamber is satisfied beyond reasonable doubt that the accused was a member of the group of armed men that entered the village of Jaski}i, searched it for men,

seized them, beat them, and then departed with them and that after their departure the five dead men named in the Indictment were found lying in the village and that these acts were committed in the context of an armed conflict. However, this Trial Chamber cannot, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of the five men or any of them. Save that four of them were shot in the head, nothing is known as to who shot them or in what circumstances. It is not irrelevant that their deaths occurred on the same day and at about the same time as a large force of Serb soldiers and tanks invaded the close-by and much larger village of Sivci, accompanied by much firing of weapons. Again it is not irrelevant that the much larger ethnic cleansing operation conducted that day in Sivci involved a very similar procedure but with no shooting of villagers. The bare possibility that the deaths of the Jaski}i villagers were the result of encountering a part of that large force would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths. The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.

374. The Trial Chamber is satisfied beyond reasonable doubt that the accused took an active part in the brutal and violent beating of four of those alleged in the Indictment to have been beaten as they lay on the road outside their houses: Beido Bali}, [efik Bali}, Ismet Jaski} and Salko Jaski}. There is no evidence of the beating of Ilijas Elkasovi} or Nijas Elkasovi}. All that remains for consideration in relation to the beating of those four is whether the elements of each of these crimes as charged in Counts 32, 33 and 34 of the Indictment are satisfied and, as previously stated, this will be considered in a later section of the Opinion and Judgment when legal findings are made. There is no evidence of the beating of the other four villagers said in the Indictment to have been beaten.

375. The Trial Chamber is also satisfied beyond reasonable doubt that the armed group, including the accused, forcibly removed from their families and homes the 14 men earlier referred to, to a location then unknown to them. Of these 14 the Indictment charges the accused in respect of only six of them, being Salko Jaski}, Ismet Jaski}, Beido Bali}, [efik

Bali}, Nijas Elka{ovi} and Ilijas Elka{ovi}. It also charges the accused in respect of Meho Kenjar and Adam Jakupovi} but no evidence was received with respect to these two men. Whether this forced removal involves any and if so which of the offences charged in these three counts will likewise be considered when legal findings are made.

376. In conclusion, three points should be noted. First, that although reference is made in paragraph 12 to the village of Sivci and evidence was given regarding the actions there of the Serb forces, including the accused, the only allegation appearing in the paragraph relevant to Sivci is the calling-out of residents and the separating of men from women and children. There is no allegation, although much evidence, of physical mistreatment of the people of that village. The evidence concerning the acts of the accused in Sivci is confined to his standing beside the door of a bus used to transport away the men of the village and pushing male villagers onto it after they had been called out and separated. In those circumstances, whether or not the act of calling-out residents and separating the men from others could itself constitute cruel treatment or inhumane acts, and whether any assistance given by the accused to others in relation to that act is direct or substantial, is considered when legal findings are made. Secondly, while there is evidence of the calling-out and separation in Jaski}i of Ilijas Elkasovi} and Nijas Elkasovi} from women and children, there is no evidence of any beating of either of them. Lastly, as mentioned above, there was no evidence led as to the two other persons, Meho Kenjar and Adam Jakupovi}, named in this paragraph of the Indictment.

H. Paragraph 4 of the Indictment

377. This paragraph concerns incidents alleged to have taken place at various locations in op{tina Prijedor. It reads as follows:

> Between about 23 May 1992 and about 31 December 1992, Du{ko TADI] participated with Serb forces in the attack, destruction and plunder of Bosnian Muslim and Croat residential areas, the seizure and imprisonment of thousands of Muslim and Croats under brutal conditions in camps located in Omarska, Keraterm and Trnopolje, and the deportation and/or expulsion of the majority of Muslim and Croat residents of op{tina Prijedor by force or threat of force. During this time, Serb forces, including Du{ko TADI], subjected Muslims and

> Croats inside and outside the camps to a campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse.

After this introductory paragraph follows several subparagraphs in which the specific acts alleged are detailed.

1. Subparagraph 4.1 of the Indictment

(a) The events alleged

378. This subparagraph concerns events alleged to have taken place during and subsequent to the attack on Kozarac and its outlying villages. It reads as follows:

> Between the dates of 24 to 27 May 1992, Serb forces attacked the village of Kozarac and other villages and hamlets in the surrounding area. Du{ko TADI] was actively involved in the attack. His participation included firing flares to illuminate the village at night for the artillery and tank guns as the village was being shelled, and physically assisting in the seizure, collection, segregation and forced transfer to detention centres of the majority of the non-Serb population of the area during those first days. Du{ko TADI] also took part in the killing and beating of a number of the seized persons, including: the killing of an elderly man and woman near the cemetery in the area of "old" Kozarac, the acts described in paragraphs 11 and 12 below, the beatings of at least two former policemen from Kozarac at a road junction in the village of Kozarac, and the beating of a number of Muslim males who had been seized and detained at the Prijedor military barracks.

379. Several witnesses testified to the acts alleged in subparagraph 4.1 and to the accused's role therein. There are essentially three aspects to this charge: the attack; the collection and forced transfer to detention camps; and the killings and beatings. Considerable evidence has been presented regarding the attack on Kozarac and the hamlets in the surrounding area. Many witnesses testified that the attack on Kozarac began with heavy shelling on 24 May 1992 after the expiration of an ultimatum demanding the surrender of weapons and a pledge of loyalty. Ample evidence was also presented that after the Muslims of Kozarac surrendered, beginning on 26 May 1992, long columns of civilians from the outlying areas, almost entirely non-Serb with the great majority consisting of Muslims, moved through the centre of Kozarac to collection centres where they were then separated and transferred to one of the three principal camps operating in the op{tina: Omarska, Keraterm or Trnopolje. Many Muslim witnesses also testified to the fact that killings and beatings occurred during this period. As such, the issue in this subparagraph is the alleged role of the accused in these events.

380. A number of witnesses testified to the accused's participation in the attack on Kozarac and the outlying areas. Witness Q, who knew the accused, testified that he saw the accused in Kozarac between 8 and 9 p.m. on the day the attack started, 24 May 1992. He had been at home eating lunch when the attack started, quickly changed clothes and then went to the hospital to try and prepare it for attack. As he was leaving the hospital in the evening to check on his family he saw the accused and one Bo{ko Dragi}evi} jump over a fence and head toward some nearby gardens. Soon thereafter a flare was fired from the garden area in the direction of the hospital and shelling followed which greatly damaged the hospital. The Defence questioned the veracity of this witness by pointing out that in a prior statement he had stated that when he heard the shelling he waited at home for several hours and it was only in the evening when he left for the hospital that he saw the accused. This contrasted with his testimony before the Trial Chamber which indicated that he had been at the hospital and was on his way home when he saw the accused. When challenged he responded that it was possible that there was a mistake in the prior statement because he had only given a superficial account without regard to the real sequence of events whereas he had never given a fuller account in his life than his testimony in court. The Trial Chamber accepts this explanation and considers Witness Q to be a reliable witness.

381. Armin Muj~i}, who has known the accused since childhood when he participated in the accused's karate training and later frequented the accused's café, was in Kozarusa when the attack began. On "the second day" he went towards Kozarac with the intention of joining the columns moving in from the northern part of Kozarac in the direction of the Banja Luka Road. In Kozarac he saw the accused in a camouflage uniform with Goran Borovnica on a tank which had been parked in Mar{ala Tita Street. There were other Serb soldiers accompanying a column of people towards the Banja Luka/Prijedor road and they were cursing at people passing by in columns.

382. Azra Bla`evi}, who has known the accused "superficially" since 1983 when she began practising veterinary medicine in Kozarac, saw the accused at the triangle in Kozarac town centre on 26 May 1992 at approximately 3 p.m. As she waited by the pastry shop someone called out, "there's Dule", and she looked around and noticed the accused crossing the street in the direction of the school. He was carrying a weapon and wearing a uniform. As the day was sunny she had a clear view of him, although she saw him for only a few seconds. She

remembers this sighting because one Nihad Bahonji}, a Muslim ambulance driver, was at that time being taken away from Mar{ala Tita Street near the triangle by an unknown soldier and the only other person she knew in the area was the accused. She had also seen the accused in the days immediately before the attack. The Defence has challenged her recognition of the accused because of the "fleeting glance" she had of him and the remark uttered at that time signifying it was the accused. The Prosecution responded by pointing out that she was looking for a familiar face and that a fleeting glance of someone one knows can be perfectly reliable, according to the evidence of Dr. Wagenaar, the Defence expert witness. Earlier on 26 May 1992, around 10 a.m., and again in the afternoon of 27 May 1992, Witness S saw the accused at Keraterm. The Trial Chamber finds Azra Bla`evi} and Witness S to be reliable witnesses. Salko Karaba{i}, Ferid Muj~i} and Sulejman Be{i}, who testified in detail regarding the events described in paragraph 11, all saw the accused on 27 May 1992 in Kozarac when their column of civilians moved down Mar{ala Tita Street towards locations for separation. As discussed in relation to that paragraph, the Trial Chamber accepts their testimony as to seeing the accused on that particular day calling out Muslim men from the column moving down the main street.

383. Additional evidence supporting the accused's role in the events relating to the attack on Kozarac comes from statements made by the accused himself. Kemal Su{i} testified that the accused told him after a meeting of the League of Peace, an organization attempting to avoid conflict in the Kozarac area, that Kozarac would be shelled and Witness AA testified that the accused said the area would be part of a Greater Serbia. Significantly, Mirsad Bla`evi} heard the accused say that he had "liberated Kozarac and nobody is going to take anything out of Kozarac, only over my dead body".

384. Evidence of the accused's role in the collection, selection and forced transfer of non-Serb civilians to detention camps is presented by several witnesses. Witness Q testified that when he returned to Kozarac on 26 May 1992 to check on his family, he saw a column of Muslims walking down Mar{ala Tita Street toward the triangle and from there they were directed first towards Prijedor and then towards Trnopolje and Sivci by the Serb police and army. He saw the accused by the triangle in Kozarac at this point. As previously noted, Azra Bla`evi} also testified to seeing the accused on that day carrying a weapon.

385. Nasiha Klipi}, who has known the accused almost her whole life, stated in evidence that upon leaving Vidovi}i on 27 May 1992 she and her children joined a convoy of people who were moving towards Kozarac to surrender. As they came to the intersection in Kozarac at about 2 p.m. there were soldiers, Serb policemen and tanks in the vicinity. They headed for Kozarusa in the direction of Prijedor and on the way she saw a Golf police car driven by Brane Bolta, moving in the opposite direction with the accused, wearing a camouflage uniform, in the passenger seat. She had an unobstructed view of the car for about one minute from a distance of less than one metre away. About one to one-and-a-half hours later the convoy arrived at the "Zikina" tavern in Kozarusa. The column was being guarded by Serb army and police personnel who were "singling people out and killing them". When the convoy arrived at the Kozarusa bus station by the tavern, males aged 15 to 65 were separated from women and children and the men were divided into three groups destined respectively, as she later found out, for the Omarska, Trnopolje and Keraterm camps. She recognized several of the Serbs who were engaged in separating the people and these Serbs included the accused and Goran Borovnica. At that time she was about three to four metres away from the accused and her view was unobstructed. She also heard the accused ask a policeman named Milo{ Preradovi}: "Where do I take these?" referring to those being rounded up. At that time the accused was bareheaded, dressed in a camouflage uniform and was armed with a pistol and an automatic rifle. As stated in relation to paragraph 11, the Trial Chamber accepts Nasiha Klipi} as a truthful witness.

386. Mehmed Ali} testified that he and his family joined the column of people in Kozarac to surrender to Serb forces on the morning of 26 May 1992. About 10 or 10.30 a.m. they arrived at the bus stop at Limenka where Serb soldiers had gathered and were separating Muslim men from women and children and placing the men on buses. As he waited by the side of the road at Limenka he saw the accused, wearing a camouflage uniform, passing by the bus in the company of Milo{ Balte and other policemen. Mehmed Ali} was a friend of the accused's father, knew the Tadi} family and his sons socialized with the accused. The Trial Chamber considers him to be a truthful witness.

387. The Trial Chamber has found beyond reasonable doubt that the accused entered the villages of Sivci and Jaski}i together with other armed men as charged in paragraph 12. In Sivci, the accused took part in the removal of the men from that village, who had been separated from the women and children, to the Keraterm camp and, in Jaski}i, took part in the

calling-out of residents, the separation of men from women and children and the beating and removal of the men. Although the date of these events, 14 June 1992, falls outside of the dates listed in this subparagraph, it comes well within the time-frame prescribed in the prefatory paragraph: 23 May to 31 December 1992.

388. Much testimony has been heard concerning the various killing and beatings with which the accused is charged, including those specifically mentioned as well as others not elaborated upon. A notable exception was the charge of killing an elderly man and woman near the cemetery in the area of "old" Kozarac, specifically charged in this subparagraph, for which no evidence has been offered. The evidence concerning the killings at the kiosk described in paragraph 11 has been discussed above, the Trial Chamber finding that although it is satisfied beyond reasonable doubt that the accused was present at the kiosk on 27 May 1992 and was engaged in the calling-out of Ekrem Karaba{i}, Ismet Karaba{i}, Seido Karaba{i} and Re|o Fori} from the column of civilians, no reliable evidence was presented to satisfy the Trial Chamber beyond reasonable doubt that the accused killed these individuals.

389. In regard to the killings described in paragraph 12, as discussed above, the Trial Chamber accepts that in the village of Jaski}i the five men, Sakib Elka{evi}, Osme Elka{evi}, Alija Javor, Abaz Jaski} and Nijaz Jaski}, were killed at the time of the presence of the group of armed men, of which the accused was part, in that village and further that this group forcibly removed Beido Bali}, [efik Bali}, Munib Be{i}, Ilijas Elka{ovi}, Nijas Elka{ovi}, Hassan Jakupovi}, Ismet Jaski}, Salko Jaski}, Senad Majdanac, Alija Nureski, Iso Nureski, Mirsad Nureski, Jasmin [ahbaz and Fehim Turkanovi}. The Trial Chamber has already made a finding that the accused participated in the removal of these men and that he beat Beido Bali}, [efik Bali}, Ismet Jaski} and Salko Jaski}.

390. With regard to the beatings of at least two former policemen from Kozarac at a road junction in Kozarac, the testimony of Witness Q is relevant. On 26 May 1992 he returned to Kozarac from his hiding place in the woods and as he headed towards his house he passed by the triangle between his house and the school when he saw 10 Muslim policemen standing in a line. With them were several Serbs, including the accused and Goran Borovnica, both of whom hit one of the policeman named Ali}, the accused inflicting a "karate blow". He saw the policeman Ali} stumble and fall as a result of the blow and Goran Borovnica grabbed him by the neck and pulled him back into the line. Witness Q watched for about 15 minutes from

behind a house. It is to be noted that Witness Q's testimony only goes to establish the beating of one policeman, not two as charged in this subparagraph.

391. Regarding the beating of a number of Muslim males who had been seized and detained at the Prijedor military barracks, Uzeir Be{i} and Sead Halvad`i} both testified to being beaten while they were held at the Prijedor military barracks in early June 1992; Uzeir Be{i} around 3 June 1992 and Sead Halvad`i} around 8 June 1992. Uzeir Be{i}, a Muslim, testified that during the attack on Kozarac he hid in the woods with friends, all of whom were unarmed, until 31 May 1992 when he was captured by Serb forces. On 3 June 1992 he was eventually taken with two other young men to the Prijedor military barracks where they entered a building and were placed in the hallway facing the wall with Uzeir Be{i} farthest to the right. Soldiers then began to curse them and beat them on their backs and shoulders with batons, making him fall on his knees with his head facing to the right toward some offices down the hall. While he was on his knees he saw the accused come out of a room to his right and approach him as he headed towards the exit. As he passed, the accused kicked Uzeir Be{i} several times and then continued on his way out of the building. Uzeir Be{i} has known the accused since boyhood.

392. Sead Halvad`i} had been a parachutist in the JNA and was posted in Serbia until 15 May 1992 when orders came that all soldiers of Bosnian origin had to be posted in Bosnia. He arrived in Banja Luka, later joined a resistance group of mostly Muslims and some Croats, was captured along with a friend on 6June 1992 and was transferred to the Prijedor military barracks sometime after noon on 9 June 1992. He was taken to the first floor and left with another man while one of the guards went to get the Commander. Another guard came along and asked: "What are you Usta{a doing here?" He forced them to raise three fingers in a Serb salute and lined them up against the wall with their faces against the wall. Then another guard asked, "Tadi}, do you see Usta{a", and then two military policemen entered, both dressed in camouflage uniforms with "white slings", one of whom was the man the guard had addressed as Tadi}. Thereupon he was struck by a very hard "karate blow". The two men then proceeded to kick and beat him with batons and other items whilst he and the other men had to lean with three fingers against the wall. He was able for a short while to see the faces of the men who were beating him. The Commander then told them to stop the beating, saying: "Tadi}, let those people alone", and one of the two replied, "They all have to, all their throats should be cut, that is the only way". They were then taken to a cell in the barracks

where they were beaten again by a different group of soldiers and the next day they were taken to the Omarska camp. He had not known any man named Tadi} prior to that day. He identified the accused through a photospread on 14 June 1996 as one of the two men who had physically abused him at the Prijedor barracks and asserted that prior to that time he had had not seen the image of the accused on television or any other media form. He stated that he was sure that the photograph he selected was of one of the people who had beaten him at the Prijedor barracks. As discussed in Section V of this Opinion and Judgment, the Trial Chamber has found the identification procedure to be valid. Although the Defence, by way of a preliminary objection, pointed out that the dates of these alleged events go beyond the time-frame of 24 to 27 May 1992 stated in this subparagraph, these events do fall within the time-frame prescribed in paragraph 4.

393. As for other killings, not specifically charged but relevant because of the use of the word "including" in this subparagraph, Nihad Seferovi} testified that on the afternoon of 26 May 1992, on his way back home from the hills in Be{i}i, he stopped at the orchard of a house across from the Serbian Orthodox church. In front of the church he saw approximately six Muslim policemen from Kozarac, including Edin Be{i}, Ekrem Be{i}, Emir Karaba{i} and one Osman with their hands behind their necks standing in line. In front of them were the accused, Goran Borovnica, "Dule" and about 15 other Serb paramilitaries who had weapons pointed at the Muslim policemen. He saw the accused pull two of the policemen, Osman and Edin Be{i}, out of the line and kill them by slitting their throats and stabbing each one several times. The Defence challenged the witness's ability to view clearly the events occurring in the churchyard. There is however, no evidence with regard to the killing of the old couple by the cemetery as alleged in this subparagraph.

(b) The case for the Defence

394. In support of the Defence assertion that the accused was not in Kozarac from 24 to 27 May 1992, the Defence called evidence to show that he was not there during the armed conflict and did not participate in the selection and transfer of civilians to collection centres. This evidence was discussed in relation to paragraph 11, where it was noted that Witnesses U, V, W and A did not see the accused in Kozarac on the days in question.

395. Witness U, who was in the front part of the column which passed through Kozarac on 27 May 1992, arrived at the triangle between 8.15 and 8.30 a.m. where he waited for one-and-a-half to two hours. During that time he did not see the accused. Witness V, who was in Kozarac on 27 May 1992 as a soldier, did not see the accused in Kozarac on that day. Similarly, Witness W was in Kozarac from 26 to 28 May 1992 and at no time saw the accused, although during cross-examination he clarified that he was stationed in the northern part of Kozarac where he spent the night of 27 and 28 May 1992. Witness A, who waited most of the day of 27 May 1992 at "Ziko's" restaurant before being transported along with 20 others to the Keraterm camp, did not see the accused at all during his long wait. Knowing the accused "very well" he stated that, had the accused been there, he would have recognized him. Additional Defence evidence concerning the events described in paragraphs 11 and 12 is described in relation to those paragraphs and requires no repetition.

(c) Findings of fact

396. As discussed in relation to paragraph 11 and in the section of the Opinion and Judgment addressing the accused's alibi, the Defence assertion that the accused was not in Kozarac at this time cannot be accepted. The evidence of the Defence witnesses who happened to be in the Kozarac area during the attack, namely Witnesses V, W, U and A attests only to their not having seen the accused in Kozarac when they were there. The Trial Chamber considers the Prosecution witnesses referred to as reliable witnesses and accepts their evidence that the accused was present in Kozarac during this period and actively participated in the attack on Kozarac and the surrounding areas and in the collection and forced transfer of civilians to detention centres.

397. The Trial Chamber finds beyond reasonable doubt that the accused participated in the calling-out of civilians as described in paragraph 11 of the Indictment as well as the calling-out, separation, beatings and forced transfer of civilians described in paragraph 12 of the Indictment. This Trial Chamber also finds beyond reasonable doubt that the accused beat a policeman named Ali} on Mar{ala Tita Street in Kozarac; that he kicked Uzeir Be{i} and beat Sead Halvad`i} while they were held at the Prijedor military barracks; and that he killed two policemen, Osman and Edin Be{i}, in front of the Serbian Orthodox church in Kozarac. All of these victims were Muslim. The Trial Chamber also finds that each of these acts was committed within the context of an armed conflict. All that remains for consideration in relation to these offences is whether the elements of the crime charged in Count 1 of the

Indictment (persecution on political, racial and/or religious grounds) are satisfied and, as stated previously, this will be considered in a later section of the Opinion and Judgment when legal findings are made.

2. Subparagraph 4.2 of the Indictment

(a) The events alleged

398. This subparagraph concerns events alleged to have taken place at the Omarska, Keraterm and Trnopolje camps. It reads as follows:

> Du{ko TADI] was also seen on numerous occasions in the three main camps operating within op{tina Prijedor: Omarska, Keraterm and Trnopolje. During the period between 25 May 1992 and 8 August 1992, TADI] physically took part or otherwise participated in the killing, torture, sexual assault, and beating of many detainees at Omarska camp, including: those acts set forth in paragraphs 5 through 10 below and other instances of torture and beating prisoners in the "white house", the "administration building", the "pista" and the main garage area. During the same period, in Keraterm camp, Du{ko TADI] physically took part or otherwise participated in the beating of detainees and looting of their personal property and valuables, including, on more than one occasion, the mass beating of a number of detainees from Kozarac being confined in "Room 2".

399. The Trial Chamber has been presented with an overwhelming amount of evidence regarding the existence of the Omarska, Keraterm and Trnopolje camps. In addition, virtually every Prosecution witness attested to the horrendous conditions of the camps. Thus at issue in these subparagraphs is the role, if any, of the accused in these incidents.

400. The evidence supporting these charges, not including that substantiating the allegations contained in paragraphs 5 to 10 of the Indictment, includes the testimony of several witnesses who testified to seeing the accused at the Omarska, Keraterm or Trnopolje camps.

(i) Omarska

401. In addition to the testimony given in regard to the events charged in paragraphs 5 to 10 of the Indictment, 12 Prosecution witnesses testified that they saw the accused at the Omarska camp between May and August 1992. The first sighting of the accused was on 29 May 1992

by Hamdija Kahrimanovi}, a Muslim who has known the accused since 1967 when he stayed in an apartment 15 to 20 metres from the accused's parents in Kozarac. Over the years while the father of the accused was alive, Hamdija Kahrimanovi} saw the accused's father nearly every day. Hamdija Kahrimanovi}'s wife worked in the health clinic with Mira Tadi}, the wife of the accused.

402. Hamdija Kahrimanovi} arrived at the Omarska camp on 27 May 1992 and saw the accused twice during his time there. When he saw him on 29 May 1992 Hamdija Kahrimanovi} was on the pista and the accused was standing 20-25 metres away in front of the administration building with two or three uniformed men. Hamdija Kahrimanovi} testified that the accused was wearing standard camouflage clothing. In the middle of the following week, which would be between 2 and 4 June 1992, Hamdija Kahrimanovi} again saw the accused. He was walking toward the administration building when he noticed the accused at approximately the same place he had seen him the previous week, again with two or three people. Hamdija Kahrimanovi} testified that he had a clear view of him and that he was approximately 10 or 15 metres away.

403. Senad Muslimovi}, a Muslim prisoner at the Omarska camp who was severely and frequently beaten during his time there, was the next witness to place the accused at Omarska. He testified that the accused, along with several others, beat him on two separate occasions. The first beating occurred after Senad Muslimovi} was interrogated. After leaving the interrogation, during which he was beaten, Senad Muslimovi} was on his way back to room 15 in the hangar building from a room above the kitchen. As he walked toward the hangar, he stole a look and saw men on the grass near the white house. Some of these men began to follow him and he sped up in a futile attempt to elude them. As he reached the door to the staircase, he felt a blow that made him fall on his hands and knees in the direction of the stairs. The accused came from behind and grabbed his hair, pulling left and right as if shaking him, turning him. He then saw a man who told him to kiss a beret that he was holding with a kokarda on it. Senad Muslimovi} refused until the man hit him, causing him to fall against the kokarda and cut his lips. This was followed by a series of blows. He was hit on his head so strongly that he stumbled forward and then he was severely hit from several sides. At one point an object was thrown that hit him in the back. He somehow got up and managed to escape up the stairs. The second beating of Senad Muslimovi}, which occurred on 18 June

1992, has been discussed in the portion of the Opinion and Judgment addressing paragraph 6 of the Indictment.

404. The Defence challenged the credibility of Senad Muslimovi}'s testimony as to the involvement of the accused on the basis that he may have seen media coverage of the arrest of the accused in Germany. In addition, the Defence implied that he may have followed news stories about the accused and that the passage of time between the events and his viewing of the photospread may have decreased his ability to identify the accused properly.

405. Edin Mrkalj, who worked as a policeman in Prijedor until 10 April 1992 and is a Muslim, also testified to receiving a beating by the accused. Edin Mrkalj was taken to the Omarska camp on 2 June 1992 and remained there until the camp was disbanded in August 1992. He had known the accused since 1991 when he met him in Prijedor through Emir Karaba{i}, his co-worker. After that occasion, he saw the accused several times prior to the conflict.

406. On 16 June 1992, at approximately 2 p.m., Edin Mrkalj and another inmate were taken to the first floor of the administration building for the purpose of transporting a dead body. When they got to the top of the stairs, they stopped with their heads down as was customary practice. He heard laughter, but could not see how many people were around him. The man standing next to him received a blow and fell down. Someone then put a rubber baton under Edin Mrkalj's throat in such a way that his head was forced up and he looked into the face of the accused, who was holding the baton. The accused then turned and hit him on his head. Edin Mrkalj testified that the accused asked him why he was there and what his occupation was, despite knowing that he had been a police officer. He answered and was told to stretch out his arms and hands. The accused then asked him which hand he used to write with, then began hitting him on that hand with the rubber baton. When the baton fell at one point, the accused told him to "pick up the baton and say, 'Here you are, sir' and 'Serb, Serb'". Edin Mrkalj stated that the accused then stuck the barrel of an automatic rifle in his mouth and began beating him on the head with a metal spring:

> The barrel was in my mouth and I was receiving double blows with a rubber baton and with the metal spring. Now, rubber baton, one can still survive, somehow manage it, but not a metal spring. My head was bursting, blood was bursting. It was awful. My teeth were breaking. Everything was breaking. I cannot remember exactly which blow was the last one. The last

> one was really terrible. I have a feeling that Du{ko Tadi} at that moment had stepped backward. I do not know whether the barrel was out of my mouth at that moment or before that, but I received a terrible blow there and everything burst. I fell. I fainted.

407. While the accused hit him with the metal spring, another person hit Edin Mrkalj with a rubber baton. He lost consciousness for a period of time. He testified that, when he came to, the accused ordered him to hit a man who was lying down with a crushed head. "You could not identify a nose or eyes or any part of his body only blood, blood, blood." After he hit the man, two civilians with a camera arrived and walked toward them. Edin Mrkalj stated that the accused then told him to run downstairs and he somehow managed to return to his group.

408. Edin Mrkalj testified that he had several minutes in which to see the accused, who had on a blue police jacket and soldier's boots and was unshaven. As a result of these incidents, Edin Mrkalj testified that he has had three operations on his gums and mouth and he suffered damage to his hand from which he had just recovered in March or April 1996.

409. The Defence challenged the credibility of his testimony on the basis that in a prior statement he said that the accused at the time of this incident looked 40 years old and in court he did not make the observation to the effect that the accused appeared to have aged.

410. Mehmedalija Huski} testified that he encountered the accused at Omarska on 20 June 1992. Mehmedalija Huski}, a Muslim, lived in op{tina Prijedor from birth mostly in the area of Kami~ani, a largely Muslim area of approximately 1,000 households, 12 kilometres from Prijedor and 1 kilometre from Kozarac. He knew the accused from seeing him in the street and saw him often around town over the past 20 years. He arrived in Omarska on the Friday after the attack on Kozarac and remained there until 6 August 1992. While there, he was kept in the electrical workshop room. He testified that on or around 20 June 1992 he was in the electrical workshop after coming back from being taken to get his gun from his home. The accused came in, walked by the inmates who, pursuant to an order from someone, were standing at attention in two lines, went to the end of the room and sat on a wooden bench. The accused used gross language and verbally abused them, mentioning "Alija's name in a very gross context". The accused had a pistol in his hand and hit every second person on the head with the pistol. The witness was one of the ones hit, so he had an opportunity to observe the accused from about half a metre away. As he hit people on the

head, the accused said: "You had a rifle." He then left the room. Mehmedalija Huski} testified that the accused was in camouflage attire, had an automatic rifle on his back and had a small beard of about a week's growth of hair. The witness stated that he observed the accused from a close distance during this incident for about three minutes and had no doubt as to his identity.

411. The Defence challenged Mehmedalija Huski}'s credibility on the basis that, in a June 1995 statement, he stated that the man who came into the room was clean-shaven while at trial he testified that the accused had a small beard at that time. In addition, the prior statement alleged that the accused entered the room with two or three soldiers instead of one other soldier as he testified at trial. The Defence also noted that although this incident allegedly occurred only two days after the events charged in paragraph 6 of the Indictment, no other witness who was in the electrical workshop mentioned the presence of the accused in the room on that day. The testimony indicates that Armin Kenjar, Muharem Be{i}, Elvir Grozdani}, Ferid Muj~i}, and Emsud Veli} were held in the electrical workshop around this time and none of them mentioned the incident to which Mehmedalija Huski} refers in regard to the accused.

412. Ziyad Jakupovi}, a Muslim who has known the accused from the time they were in primary school together, claims to have seen the accused on 21 or 22 June 1992 between 3 and 4 p.m. He was sitting in the white house, looking through the window of the first room to the right. He saw the accused in a group of three men coming from the direction of the pista and moving towards the white house. The accused was the closest to the white house of the three men. Although Ziyad Jakupovi} had a clear view of him, he only saw him from the waist up due to his view being partially blocked by the windowsill. The accused was about seven to ten metres from him. Ziyad Jakupovi} remembers this occasion because of his belief that people tended to kill those that they knew and his fear that the accused would recognize him. He testified that the accused had on the top part of a camouflage uniform like a shirt, with no cap, and was unshaven. Although he saw him only briefly, it was enough time to recognize him.

413. The remaining witnesses to the accused's presence at Omarska cannot pinpoint an exact date, although the testimony reveals that they each saw him between June and early August 1992. Ferid Muj~i}, a Muslim from Kozarac, has known the accused for most of his

life, although they did not socialize. In addition to seeing him on 18 June 1992, the day that Emir Karaba{i} and Jasmin Hrni} were called out, he saw the accused on a subsequent occasion moving from the administration building towards the white house when he was in line to go to lunch. The accused was accompanied by two men dressed in uniforms and the accused also had on a camouflage uniform with a pistol on his hip. No challenges were raised to this part of his testimony on cross-examination, although the Defence did question certain other elements of his testimony that related to paragraph 6 of the Indictment.

414. Another witness testified to seeing the accused at the Omarska camp at some point in late June 1992. This witness, Kemal Su{i}, was born in Kozarac and lived there on Mar{ala Tita Street until 1992. He is also a Muslim. His knowledge of the accused is indisputable; the accused was a pupil of his in school, he helped the accused gain access to the school gym for his karate lessons, his younger son helped the accused build the accused's house and café, and his uncle loaned him money to help complete his coffee bar. He also testified, as have many witnesses, to the distinctive gait of the accused. During the latter half of June 1992 Kemal Su{i} saw the accused, with a group of soldiers of the VRS, entering the administration building and walking upstairs. The accused wore camouflage trousers and an ordinary shirt with no jacket and was not carrying weapons. Kemal Su{i} testified that he had a good view of him in sunny weather.

415. D`emal Deomi} also knew the accused from their school days in Kozarac. D`emal Deomi}, a Muslim, saw him often in Kozarac and on one occasion had had a conversation with the accused about whether D`emal Deomi} could assist the accused with some work. At Omarska, D`emal Deomi} was held in the garage at the rear of the administration building during the first four weeks and while there he saw the accused during the month of June. He was standing in the front of the room, not much more than one metre from the door and less than one metre from the wall when he saw the accused through the open door eight to ten metres outside of the garage. D`emal Deomi} testified that the accused rode up slowly on a motor bike from the direction of Omarska town, from his left side, and a guard jumped out of an open van door and halted him. He stopped and talked to the soldier who was standing near the van. The witness then saw him approaching with a young soldier and feared that he might be seen, so he moved backwards to get as far away as he could inside the garage. The accused had a band on his head, was unshaven, was wearing a jacket with many pockets like a pilot's jacket and had an automatic rifle with a double chamber on his back.

416. D`emal Deomi} was later transferred to the white house, from which he twice saw the accused. The first time, he was in the corner next to the wall at the entrance to the second room on the right, crouching down when he saw the accused in the corridor through the glass of the closed door. However, D`emal Deomi} said that he only saw half of the face of the accused on this day. During the second sighting from the white house, D`emal Deomi} was in the same position although there were less people in the room with him at this time. Both of these sightings in the white house occurred in late June, July or early August 1992. The Defence argues that this witness's account is unreliable because the witness saw a picture of the outside of the garage in which it was raining, then incorporated the rain into his account of the occasion when he saw the accused on a motor bike, arguing that this shows great suggestibility.

417. Kasim Mesi}, a Muslim who did not know the accused prior to his time at Omarska, saw the accused in July 1992 on the pista area with a notebook or book of some kind in his hand, immediately after a man had been murdered, talking to the guard who had shot the man. The corpse of the man was still visible when the accused arrived to talk with the guard. On another occasion, Kasim Mesi} saw the accused upstairs in the administration building. Kasim Mesi} was ordered to take a prisoner who could not walk on his own there for interrogation. As he passed a table at the top of the stairs, he saw the accused sitting on a chair with his feet on a table. Kasim Mesi} did not know the accused but identified him from the photospread. Kasim Mesi} testified that he was approximately two metres away and was forced to stand there for about 15 minutes, and had a good opportunity to view the accused, despite his orders to face the wall, because he kept stealing glances in the direction of the accused. He claimed to have never seen a picture of the accused prior to the investigator from the Office of the Prosecutor showing him the photospread.

418. In cross-examination, it was revealed that the day this witness saw the accused on the pista, he was bleeding from cuts on his face, which may have affected his vision. His sighting of the accused on the pista was also challenged on the basis that he and everyone there were forced to lie on their stomach thus allowing him only a fleeting glance of the accused from the corners of his eyes. In addition, the Defence suggested that Kasim Mesi} was frightened because of the shooting and could have made a mistake about the identification.

419. Another Muslim from the Prijedor area, Nihad Haski}, testified that he saw the accused twice while at Omarska. Although he lived in Prijedor and Trnopolje, Nihad Haski} knew the accused because of the prominence of the accused's family. Nihad Haski} arrived in Omarska on 30 May 1992, spent his first night in the administration building and then was on the pista for nine or ten days before being transferred to the hangar. He first saw the accused during the time he was on the pista. There was a rumour spread among the inmates that the accused was there. Nihad Haski} looked over and saw the accused in a group of three or four guards in camouflage uniforms with weapons.

420. The second time he saw the accused was one to three days later, and Nihad Haski} was still on the pista. The accused was standing in a group, in a camouflage uniform, next to the administration building on the corner furthest from the white house and across from the hangar building. The members of the group were standing, pointing at something. Again, Nihad Haski}'s attention was drawn to the group because of a rumour that the accused was in the camp. Both times he only glanced up but had enough time to recognize the accused. Nihad Haski} testified that he saw the back of someone whom he thought was the accused on another occasion but cannot confirm that it was him.

421. Saud Hrni} also saw the accused on the pista. As he was from Kozarac, he knew the accused although they were not friends. Saud Hrni}, who was a Muslim, had taken karate lessons with him. He arrived at Omarska around 8 June 1992 and remained there until 6 or 7 August 1992. He saw the accused only once while there, holding something resembling a paper file, standing on the pista near the administration building. He does not know whether the accused was moving or standing still, or whether he had a beard or was clean-shaven. When he saw the accused, Saud Hrni} was lying on his back with his head positioned towards the hangar on the right side facing the direction of the grass and the white house. He does not remember if there were any other persons standing with the accused, but there was nothing blocking his vision and it was a sunny day. As soon as he saw the accused, Saud Hrni} put his face toward the ground so that the accused would not see him.

422. Witness R, a Muslim, also places the accused at Omarska, although he is not sure of the date. He did not personally know the accused before but had seen him in the sports pages of the *Kozarski Vjesnik* newspaper on four or five occasions. The day he saw him at Omarska, Witness R was on the pista having a conversation with a man named Hrni} from Kozarac, when Hrni} said: "That is Du{ko", and pointed. Hrni} bent down and Witness R

looked toward the white house to see the accused coming out of it. He watched him, for a minute or two, walk in the vicinity of the white house. Witness R testified that he had a clear view of the accused's face and testified that the accused was wearing a multicoloured jacket the colour of the skin of a giraffe. The date of this sighting was sometime between 30 May and 6 August 1992, the dates that Witness R was present at Omarska. This event registered in Witness R's mind because of his recognition of the accused from the sports page of the newspaper. He testified that he was sitting between two flower tubs with an unobstructed view. However, it appears that Witness R may have spoken with a witness who had testified previously or to the Prosecution about that witness's testimony because, in response to a question, he stated that the flower tubs did not impair his view even though the question that had been put to him did not make that suggestion. This witness testified that Kera, the young man who was shot as testified to by Kasim Mesi}, was killed in July 1992. Witness R testified that although he was also on the pista at this time in a position close to the white house, he did not see the accused that day even though he saw the guard who shot Kera and others approaching the guard.

423. Uzeir Be{i}, a Muslim who knew the accused prior to the outbreak of the conflict, testified that he also saw the accused while he was on the pista, sitting with his face toward the administration building. This was in the latter part of July 1992. On that occasion, he heard yells and shouts coming from behind the administration building. He looked in that direction and saw inmates coming from behind that building and also saw the accused with some soldiers. The prisoners on the pista were then ordered to lie down and those who had come from behind the administration building lay down beside them. They were moaning as if in pain. The witness then looked over at them and saw that they were being beaten and that the accused was hitting them and jumping on them. Their beating did not last long but Uzeir Be{i} looked two or three times at the accused while it was happening. Those prisoners were then ordered to stand up and go to the white house.

424. The Defence challenged the testimony of Uzeir Be{i} regarding the identification of the accused because Uzeir Be{i} had viewed a report of the arrest of the accused in Germany on television and, during his interrogation by the German police, he was shown a photograph of the accused.

a. The case for the Defence

425. The defence of the accused is that he was never at the Omarska camp. In support of this denial, the accused asserts that during the relevant times he was working at the Orlovci checkpoint, or at home, or with friends or family.

b. Findings of fact

426. Subparagraph 4.2 charges the accused with participation in killings, sexual assault, and beatings and torture in the white house, in the administration building, on the pista, and in the main hangar at the Omarska camp between 25 May and 8 August 1992 and incorporates the acts charged in paragraphs 5 to 10 of the Indictment. The Trial Chamber has already concluded that the Prosecution has proved beyond reasonable doubt certain of the charges alleged in paragraphs 6, 7, 8 and 10 of the Indictment. These findings support the conclusion that at the Omarska camp the accused participated in beatings in the white house and in the hangar before even reviewing the testimony of the witnesses just considered in regard to subparagraph 4.2 of the Indictment.

427. As the Prosecution has failed to present any evidence regarding the accused's participation in sexual assault and torture as alleged in this subparagraph, the allegations thus left for review are those that the accused participated in beatings in the administration building and on the pista. The Trial Chamber will now evaluate the evidence presented regarding these allegations.

428. Four of the above-named witnesses provide testimony as to the participation of the accused in beatings not charged elsewhere in the Indictment: Edin Mrkalj (administration building), Uzeir Be{i} (pista), Mehmedalija Huski} (hangar), and Senad Muslimovi} (hangar). Edin Mrkalj, whom the Trial Chamber finds to be a credible witness, saw the accused on 16 June 1992 at approximately 2 p.m. in a blue police jacket. This testimony is consistent with that of Mira Tadi}, who testified that the accused came home from his first day of duty in a blue police uniform. In addition, the Trial Chamber finds that the difference between the prior statement of Edin Mrkalj and his testimony at trial regarding the appearance of the accused is of no consequence considering his prior acquaintance with the accused and the insignificant nature of the difference. The Trial Chamber thus accepts the testimony of Edin Mrkalj that the accused beat him on 16 June 1992 in the administration building.

429. The Trial Chamber accepts Senad Muslimovi}'s testimony regarding the accused's beating of him on 11 June 1992.

430. Mehmedalija Huski} testified that the accused was in the Omarska camp on 20 June 1992. On this particular day, the Orlovci checkpoint records indicate that the accused was working from 3 p.m. to 9 p.m. and Advija ^ampara testified that the accused came to her apartment that morning. The accused confirmed this, stating that he received a key to that apartment that morning. Thus, the event alleged by Mehmedalija Huski} would have had to have taken place at some point after the accused left the apartment in Pe}ani and before he was to report for duty at the Prijedor police station at 2.30 p.m. as was, the accused testified, his customary practice. However, as discussed elsewhere in this Opinion and Judgment, the Trial Chamber finds that these records reflect only his assignment and not his actual presence at the checkpoint. More troublesome is the Defence challenge to the testimony of Mehmedalija Huski} on the basis that there were several other prisoners in the electrical room who testified at trial but who did not mention this incident. It is unlikely that, if the events occurred as described by Mehmedalija Huski}, these witnesses would not have seen the accused and accordingly referred to this incident during their testimony. Thus the Trial Chamber does not accept the testimony of Mehmedalija Huski}.

431. The testimony of Uzeir Be{i} suffers from the same infirmity in that no other witness testified to seeing the accused jump on the backs of prisoners on the pista despite the presence of many prisoners on the pista at that time. Thus the Trial Chamber does not accept the testimony of Uzeir Be{i}.

432. The second account given by Ferid Muj~i} in regard to the incidents charged in paragraph 6 of the Indictment differed substantially from that of other witnesses. Based on this difference, the Trial Chamber does not accept fully his testimony.

433. Witness R's credibility is challenged by the Defence not because of his testimony regarding his sighting of the accused but because of his unsolicited statement that the flower tubs on the pista did not impede his view of the accused. The Trial Chamber concludes that perhaps this testimony was given because Witness R had spoken with a witness who gave testimony prior to him or to the Prosecution about that testimony. Witness R's denial that he discussed the trial with anyone at all reflects adversely upon his testimony. However, this

incident is not sufficient to discredit his testimony fully and the Trial Chamber finds Witness R to be generally credible.

434. The accused's general denial of ever having been at the Omarska camp is rejected in view of the overwhelming credible testimony to the contrary. His assignment at the Orlovici checkpoint provides no conclusive alibi; rather it merely reflects his assignment there. The Defence evidence as to off-duty hours while living in Banja Luka and Prijedor is wholly unspecific as to dates and times and only establishes that he was generally resident there.

435. After observing the demeanour of the witnesses whom the Trial Chamber finds to be credible and considering all of the evidence for the Defence, the Trial Chamber finds beyond reasonable doubt that the accused took part in the beating of Edin Mrkalj and Senad Muslimovi} in the administration building and the hangar building respectively and that these acts were committed in the context of an armed conflict.

(ii) Keraterm

436. The Prosecution also offered a considerable amount of testimony regarding the presence of the accused at the Keraterm camp. Witness S is a Muslim from Kozarac who knew the accused's father and often saw the accused in Kozarac. He testified that he saw the accused, with an unobstructed view from 30 metres away, on 26 May 1992 after 10 a.m. at the Keraterm entrance gate. He described the accused as dressed in a police uniform camouflage top and single-coloured trousers. He next saw the accused at Keraterm when he went for his second interrogation in the afternoon on 27 May 1992. The accused had his foot on a car and was with a taxi-driver from Prijedor. Witness S testified that he was approximately 20 metres away from the accused and had time to observe him. He also stated that buses were being unloaded and loaded with prisoners not more than five metres from the accused. On this occasion, the accused wore the same police uniform.

437. [efik Kesi} is a Muslim from Kami~ani, a suburb of Kozarac. He was familiar with the accused as a resident of Kozarac. [efik Kesi} was taken to the Keraterm camp on approximately 15 June 1992. At Keraterm, the witness was held in Room 2. At some point during his first 10 days, he was called out of the room at approximately 9 p.m. A group of uniformed men came to the door and one of them asked if anyone wanted to get revenge on

him or the other soldiers for all the beatings. None of the prisoners volunteered, so the guard pointed to two men and called for the first ten after those two to come out of the room. They walked outside and were put into a line and one guard, whom [efik Kesi} recognized as the accused, went from prisoner to prisoner asking questions and beating them. This guard reached [efik Kesi}, who looked at his face, and asked him his name, where he came from, and whether he had any weapons. When [efik Kesi} responded that he did not have any weapons, the accused said: "They all say that", and struck him in his chest. [efik Kesi} fell and the accused continued down the line of prisoners. After all of the prisoners had been beaten, they were taken back to the room. [efik Kesi} noted that the accused had on a multicoloured camouflage uniform. He testified that he could see the accused clearly despite it being dark because of a light from a vehicle that faced the building. The Defence challenged the accuracy of [efik Kesi}'s testimony on the basis that he had withdrawn additional allegations of seeing the accused.

438. Hakija Elezovi}, also a Muslim, testified that the accused kicked him during an interrogation at the Keraterm camp. Hakija Elezovi} had known the accused by sight for five or six years prior to the conflict because the accused and his elder son were friends. On 9 July 1992 Hakija Elezovi}'s village was cleansed and its inhabitants were led to Trnopolje, then taken to Keraterm, where he stayed for about 10 days in Room 2 with over 500 people. While there, he was interrogated by Dragan Radakovi}, the Director of the Kozarac National Park. During this interrogation, Hakija Elezovi} testified, the accused appeared to be a bodyguard for Dragan Radakovi}. While Dragan Radakovi} questioned him, the accused kicked him, knocking him down, then came around the table and kicked him on the back and chest. Dragan Radakovi} grinned and laughed as the accused beat him. The interrogation lasted approximately half an hour and the accused beat him for a few minutes during this time. He saw the accused clearly the entire time. He was wearing a police uniform and had a pistol and a short beard. As a result of the beatings that he suffered during his confinement, Hakija Elezovi}'s ribs were broken, his kidneys were injured and as a consequence of the beating, he suffers headaches and has difficulty breathing.

439. The Defence challenges this testimony on the basis that the witness is confused about whether he saw the accused at Keraterm as well as Omarska, or only at Omarska. As noted elsewhere in this Opinion and Judgment the context in which the testimony was given indicates that the witness was in fact stating that the accused beat him in both camps.

440. Witness Q grew up in Kozarac, is a Muslim, and has known the accused since childhood. Although the accused is older than he, they began to socialize about five years or so before the conflict, when the accused opened his café. They saw each other regularly for business and social purposes. As the outbreak of the conflict approached, the accused began to distance himself from Witness Q, who similarly stopped frequenting the accused's café because of the nationalistic Serbs who were often there. This witness was taken to Keraterm on 14 June 1992 and was put in Room 2 with 500 to 600 other prisoners.

441. Witness Q stated that, in general, people knew of the accused's comings and goings at the Keraterm camp because he was from Kozarac. Towards the end of July 1992, approximately one month after Witness Q's arrival at Keraterm, new prisoners began to arrive from the Hambarine area. Five to seven days before their arrival, this witness heard someone say that the accused was coming and he moved from his normal position so he could see outside and, after seeing the accused, went immediately back to his place for fear of being detected. He testified that he saw the accused in a camouflage uniform, laughing and joking with the guards. Approximately a quarter of an hour later, he heard someone say that the accused was leaving. He looked out again and saw the accused leaving in a van with prisoners in it, headed toward Kozarac and Omarska.

442. The Defence challenged the credibility of Witness Q on the basis of an accusation that he belonged to a local force formed to defend Kozarac organized by Captain Sead ^irkin and was untruthful about this membership at trial, based on a prior statement he gave. The witness denies that he was a part of this group and contends that this statement was improperly translated and therefore not representative of his remarks at the time.

a. The case for the Defence

443. The accused denies ever having been at the Keraterm camp. By way of an alibi he asserts that during the times charged in the Indictment he was working as a traffic policeman at the Orlovci checkpoint and during periods when he was not assigned to those duties, he was in Banja Luka or Prijedor with family and friends.

b. Findings of fact

444. Witness S's sighting of the accused on 26 and 27 May 1992 is not contradicted by any other evidence presented to the Trial Chamber. Having observed the demeanour of this witness while testifying and considering the evidence of the Defence, the Trial Chamber finds him credible and accepts his testimony.

445. [efik Kesi} knew the accused well enough to recognize him from the close view that he had during the attack on the prisoners from Room 2. The Defence challenge to this witness, because he withdrew prior allegations of seeing the accused, does not affect his credibility. Indeed, the withdrawal of the other testimony reflects this witness's desire to testify only about that of which he is absolutely certain. Accordingly, the Trial Chamber accepts the testimony of [efik Kesi} in regard to the accused's beating of the men in Room 2 in June 1992.

446. The Trial Chamber also finds Hakija Elezovi} to be a credible witness and accepts his account of the accused's presence in the Keraterm camp as well as the assault upon him. Finally, the Trial Chamber also finds Witness Q's testimony regarding the presence of the accused at the Keraterm camp to be credible, due to his prior knowledge of the accused and his demeanour while testifying, and accepts his testimony regarding the accused's presence at the Keraterm camp in mid- or late July 1992.

447. As with the accused's denial of ever having been at the Omarska camp, the denial is rejected in view of the overwhelming credible testimony to the contrary. His assignment at the Orlovci checkpoint provides no conclusive alibi; rather it merely reflects his assignment there. The Defence evidence as to off-duty hours while living in Banja Luka and Prijedor is wholly unspecific as to dates and times and only establishes that he was generally resident there.

448. The Trial Chamber accordingly concludes that the accused was present on several occasions at the Keraterm camp and finds that the Prosecution has proved beyond reasonable doubt that the accused took part in the beatings of the prisoners at Keraterm as charged in subparagraph 4.2 of the Indictment and that he took part in one mass beating of prisoners

from Room 2. These acts were committed in the context of an armed conflict. In the absence of evidence to support the remaining charges, the Trial Chamber finds that the accused did not take part in the looting of valuables or personal property.

(iii) Trnopolje

449. Several Prosecution witnesses testified that they saw the accused at various locations in or around the Trnopolje camp, including inside the fenced area surrounding the school, dressed in uniform or civilian clothes and in conversation with the camp commander, between May and November 1992. These witnesses included Witness S, Nasiha Klipi}, Eniz Be{i}, Mesud Arifagi}, Mirsad Bla`evi}, Elvir Grozdani}, Jusuf Arifagi}, Bahrija Deni}, Vasif Guti}, Advija ^ampara and Nasiha Jakupovi}.

a. The case for the Defence

450. The accused acknowledges visiting Trnopolje five times: once with Jozo Samard`ija looking for the latter's sister during the summer of 1992; on 1 October 1992 as security detail for the local Red Cross, when he acted as a reserve policeman and stood by the bus to help the Red Cross with its activities; at the end of October 1992 to visit Adil Jakupovi}; with his brother Ljubomir Tadi} to look for a friend; and once as Secretary of the Local Commune to deliver Red Cross messages.

b. Findings of fact

451. Subparagraph 4.2 alleges in regard to the Trnopolje camp that the accused was seen there on numerous occasions; it does not charge him with taking or participating in any action while there. Since the accused admits to having gone to Trnopolje on several occasions and many credible witnesses described his presence in or around the camp on several occasions from 27 May 1992 to late November 1992, the Trial Chamber finds beyond reasonable doubt that the accused was indeed present in or around the Trnopolje camp during the relevant time period.

3. Subparagraph 4.3 of the Indictment

452. This subparagraph concerns alleged incidents of transfer and unlawful confinement in the Trnopolje camp. As originally charged, it read as follows:

> During the period between 25 May 1992 and 31 December 1992, Du{ko TADI] physically participated and otherwise assisted in the transfer to and unlawful confinement in Trnopolje camp of non-Serb persons from the Kozarac area. Additionally, during the period between September, 1992 and December, 1992, in Trnopolje camp or in the adjacent area, TADI] physically took part or otherwise participated in the killing of more than 30 detainees, including groups of male detainees executed near a white house adjacent to the camp and a group of male detainees executed in a plum orchard adjacent to the camp. TADI] also physically took part or otherwise participated in the torture of more than 12 female detainees, including several gang rapes, which occurred both in the camp and at a white house adjacent to the camp during the period between September, 1992 and December, 1992.

With the exception of the first sentence, the allegations contained in this paragraph were supported only by the testimony of Dragan Opaci}, who was originally given the pseudonym "L". During trial, aspects of his testimony were revealed which led the Prosecution to state in open court that it did not consider Dragan Opaci} a witness of truth and to submit a motion to withdraw these allegations. Thus the only remaining portion of this charge alleges: "During the period between 25 May 1992 and 31 December 1992, Du{ko Tadi} physically participated and otherwise assisted in the transfer to and unlawful confinement in Trnopolje camp of non-Serb persons from the Kozarac area." These remaining allegations are now subsumed in the charges in subparagraph 4.1, already discussed, which charges the accused in part with the "seizure, collection, segregation and forced transfer to detention centres" of non-Serbs in the Kozarac area. The Trial Chamber has already found beyond reasonable doubt that the accused participated in such acts.

(a) The role, if any, of the accused

453. The Trial Chamber has previously considered the testimony of witnesses relevant to this charge, including that of Armin Muj~i}, Azra Bla`evi}, Witness Q and Nasiha Klipi}. In addition, as noted in subparagraphs 4.2 and 4.4, numerous witnesses placed the accused at Trnopolje on several occasions.

(b) The case for the Defence

454. The evidence presented by the Defence in regard to this subparagraph is the same as that offered in regard to subparagraphs 4.1 and 4.2.

(c) Findings of fact

455. The Trial Chamber has already found beyond reasonable doubt that the accused played an active role in the moving of non-Serbs from the Kozarac area in columns through and out of Kozarac to assembly points and in their subsequent separation into categories by age and sex for transport to camps, including Trnopolje, all effected by force or the threat of force. Thus the Trial Chamber finds beyond reasonable doubt that the accused participated in the transfer to and in the initial confinement of non-Serbs in camps generally, and in the Trnopolje camp in particular, as charged in this subparagraph and that these acts were committed in the context of an armed conflict. However, the Trial Chamber finds that the accused did not take an active role in the continued confinement of non-Serbs in the Trnopolje camp.

4. Subparagraph 4.4 of the Indictment

456. This subparagraph concerns alleged participation in the seizure, selection and transportation of individuals for detention. It reads as follows:

> Between 25 May and 31 December 1992, TADI] physically participated in the seizure and selection of individuals for detention in the camps and transported Muslims and Croats who had been seized, to the camps for detention. During the time he was engaged in this seizure, selection and transfer of non-Serbs to various detention centres, Du{ko TADI] was aware that the majority of those detainees who survived detention would be deported from the territory of Bosnia-Herzegovina.

457. A substantial body of evidence has been presented and already summarized regarding the seizure, detention and ultimate deportation from op{tina Prijedor of non-Serbs, and the use of the Trnopolje camp in particular for those selected for deportation. Evidence has been presented that the release of prisoners from camps was made conditional upon the signing of

documents relinquishing all material goods and undertaking not to return to op{tina Prijedor. The issue raised by this subparagraph is the role of the accused in these events.

458. Much of the evidence discussed in the previous subparagraphs concerns the accused's role in the seizure, selection and transfer of individuals from the Kozarac area. In particular, deportation from the Trnopolje camp was testified to by the following witnesses. Mustafa Mujkanovi}, who has known the accused for "many, many years", testified that he saw the accused twice while at the Trnopolje camp. The first sighting was on or around 21 August 1992 when a convoy of buses was leaving the camp. The accused, who was wearing civilian clothes, was with Goran Borovnica and several others and they followed the convoy by car when it left. The witness saw the accused from a distance of 10 to 15 metres. His second sighting of the accused was on 1 October 1992 when the witness was evacuated by bus along with others for Karlovac in Croatia and the accused was on the road outside of the camp. Mesud Arifagi}, who knew the accused "for as long as I have known myself", saw the accused at the Trnopolje camp four times and on the last of these sightings, on 1 October 1992 at about 8.30 a.m., saw him near buses which were there to remove prisoners from the camp. He walked past the accused on his way to board the bus which took him from Trnopolje to Karlovac in Croatia. Elvir Grozdani} testified that he saw the accused at the Trnopolje camp on the day that 1,600 people were evacuated to Karlovac. The accused, wearing a camouflage uniform, was standing, armed with a rifle, at the corner of the school fence watching. Jusuf Arifagi}, who has known the accused since the witness started going to school, testified that when the Trnopolje camp was being dissolved in October 1992 he saw the accused as he was being evacuated along with a number of other people, enough to fill 33 to 35 buses, on 30 September or 1 October 1992. He saw the accused, who was leaning against the fence wearing a police uniform and armed with an automatic rifle, at around 10 or 11 a.m. Bahrija Deni}, who has known the accused for about 20 years, saw the accused around noon on 1 October 1992 as the witness boarded a bus to leave the camp at Trnopolje. The accused was near the fence by the school, dressed in a sort of police uniform, about four to seven metres away from him. Additionally, Mirsad Bla`evi}, who knew the accused from Kozarac, saw the accused at the end of August entering the office of the local Red Cross and command headquarters in Trnopolje. The accused was wearing a camouflage uniform and carried an automatic rifle.

459. The accused's presence at the Trnopolje camp when the surviving prisoners were deported to Croatia is significant evidence with regard to the charge in this subparagraph. The question remains, however, whether when the accused was participating in the seizure and selection of non-Serbs, as established above, he knew that the majority of the prisoners who survived would be deported. His presence at the Trnopolje camp when thousands of prisoners were being removed is relevant in this regard, as is his description of himself in his work report as an "earnest SDS member and an enthusiastic supporter of the idea of creating Republika Srpska", both of which embrace the notion of an ethnically pure Serbian territory. Additionally, in his role as SDS President in Kozarac, he must have had knowledge of the SDS programme, which included the vision of a Greater Serbia. Witnesses including Witness AA provided evidence which not only showed that the accused knew of this goal but that he was an active supporter of it. Witness AA testified to an argument about politics that the accused had with [efik Sivac shortly before the conflict in which the accused said that the area "would be a Greater Serbia, it would be theirs, and that we, Muslims, will not be there, that there will be no place for us there".

(a) The case for the Defence

460. Again, the defence is that the accused, apart from five visits to Trnopolje, was never at the camps and did not take part in any way whatsoever in the ethnic cleansing activities occurring in the region, a discussion of which need not be repeated here. As for challenges to Prosecution witnesses, the Defence for the most part relied on challenges presented within the context of other subparagraphs of paragraph 4 and other paragraphs of the Indictment.

(b) Findings of fact

461. Based on the presence of the accused at the Trnopolje camp when surviving prisoners were being deported, as well as his support both for the concept and the creation of a Greater Serbia, necessarily entailing, as discussed in the preliminary findings, the deportation of non-Serbs from the designated territory and the establishment of the camps as a means towards this end, the Trial Chamber is satisfied beyond reasonable doubt that the accused participated in the seizure, selection and transfer of non-Serbs to various camps and did so within the context of an armed conflict and that while doing so, he was aware that the majority of surviving prisoners would be deported from Bosnia and Herzegovina.

5. Subparagraph 4.5 of the Indictment

462. This subparagraph concerns alleged participation in the plunder and destruction of personal and real property of non-Serbs and reads as follows:

> Concurrent with the attack and seizure of the non-Serb population of Kozarac and the surrounding area, the Serb forces plundered and destroyed the homes, businesses, and other property of non-Serbs. The seizure, transfer and detention of the non-Serb population and the plundering and destruction of their property continued for a number of weeks. During the period between 23 May and 31 August 1992, Du{ko TADI] was aware of the widespread nature of the plunder and destruction of personal and real property from non-Serbs and was physically involved and otherwise participated in that plunder and destruction, including the plunder of homes in Kozarac and the looting of valuables from non-Serbs as they were seized and upon their arrival at the camps and detention centres.

463. The evidence from Prosecution and Defence witnesses alike supports the charge that Serb forces destroyed homes, businesses, and other property of non-Serbs and plundered private property. These witnesses, including the accused, all describe the widespread destruction and looting, as well as the near total destruction of Kozarac.

464. Despite copious testimony regarding the looting and destruction of Kozarac, evidence supporting the allegations regarding the accused's role in the destruction, plunder and looting is non-existent. Accordingly, the Trial Chamber finds that the accused did not commit the acts as charged in this subparagraph.

6. Discriminatory Grounds for the Acts Taken

(a) The acts were taken within a general context of discrimination

465. As discussed in the preliminary findings, after the take-over of Prijedor, the Prijedor Crisis Staff, at the direction of the ARK Crisis Staff, implemented a policy of discrimination against non-Serbs. Non-Serbs were fired from their jobs, particularly leadership positions for which they were no longer considered qualified, refused necessary documentation and their children were prevented from attending school. Travel outside of the op{tina for non-Serbs

was prevented and within the op{tina severely restricted by means of a curfew and checkpoints. Daily searches were conducted in almost every apartment inhabited by non-Serbs, mosques and other religious and cultural institutions were targeted for destruction and the property of Muslims and Croats was seized. The main non-Serb settlements were surrounded, bombarded and invaded and, during these attacks, care was taken not to damage the property of Serbs.

466. Most of the non-Serb inhabitants of op{tina Prijedor were sent to the camps, the horrors of which have already been recounted and, reminiscent of the Second World War, one witness testified to hearing that over 30 freight carriages with women and the elderly had been taken away in an unknown direction. Those who remained were required to wear white armbands to distinguish themselves and were continuously subject to harassment, beatings and worse, with terror tactics being common. Non-Serbs in op{tina Prijedor were subjected to gross abuses, seemingly as a means of attaining the historical goal of a Greater Serbia. One witness, Vasif Guti}, testified to hearing the Trnopolje camp commander, Slobodan Kuruzovi}, explain the Serb plan as being to reduce the number of Muslims in Prijedor to 10 percent or less, and then later reduced this to 2 percent or less. Radoslav Br|anin, the President of the ARK Crisis Staff, repeatedly publicised his position that the largest percentage of non-Serbs acceptable in the territory designated as Greater Serbia was 2 percent. The statement of Radislav Vuki}, who was elected to high positions in the municipal SDS committee in Banja Luka, the regional board of the SDS and the SDS Main Board of Bosnia and Herzegovina, that children of mixed marriages "were good only for making soap", is reflective of the discriminatory environment against non-Serbs. Serbs who had not previously exhibited nationalistic tendencies were encouraged to accept the policy of discrimination through the use of propaganda, dissent against which was silenced, and acceptance of which was considered a necessity for advancement within the SDS. Those refusing to comply were branded traitors.

467. The abuses against non-Serbs were motivated by religious and political reasons. The curse directed at Muslims most often was the derogatory term, "balija", as well as "Fuck your Alija", referring to the SDA leader Alija Izetbegovi}. These indicate the motivations of the perpetrators. Abuse was also directed towards Croats for political reasons. There was repeated testimony that men were forced to hold their hands in the three-finger Serb salute, which is a traditional Serb greeting and has meaning within the Serbian Orthodox church, and

several witnesses testified that crosses were carved on men's bodies. Numerous witnesses testified to hearing discriminatory curses such as "balija mother", "Usta{a mother", and "Alija mother", usually in association with a beating. Many were required to sing Serb nationalistic songs and some of the camp guards wore the "Chetnik kokarda", the two-headed eagle described as equivalent to wearing a Nazi swastika. A few specific examples are sufficient to indicate the horrendous treatment inflicted on the non-Serb population of op{tina Prijedor on the basis of religion and politics.

468. Uzeir Be{i}, a Muslim, testified that after he was beaten at the Prijedor military barracks, as discussed in regard to subparagraph 4.1, he was taken along with two others to the Keraterm camp where they were turned over to a Serb soldier named Zoran @igi}, who immediately asked their nationality. When they said that they were Muslims he ordered them to demonstrate how Muslims pray and to remove their trousers to see if they were circumcised, threatening that if they were not he would perform the operation. After they did so he beat them with the butt of his rifle and afterwards took them to Room 1. Uzeir Be{i} testified that he saw others being treated in the same manner and that he and others were called out and beaten and forced to sing Serbian songs.

469. Fikret Kadiri}, commander of the police station in Prijedor until 1991 and thereafter commander of the Traffic Police in Prijedor until the take-over, testified that he was arrested in his apartment in Prijedor on 24 May 1992. He was taken to the first floor of the SUP and after a while he heard "beatings, screamings, shoutings, shooting". From the window he saw a tank with two soldiers going by from the direction of the post office towards the SUP, their hands raised in the three-finger Serb salute, shooting with automatic rifles. Then he saw two buses stop in front of the main entrance of the SUP and two soldiers got off and posted themselves on both sides of the bus doors. As the prisoners, all of who were Muslims, left the buses they were made to run into the SUP with their hands on the back of their heads. The SDS President, Simo Mi{kovi}, dressed in civilian clothes, and [kondri} Vaso, a police inspector from Sarajevo dressed in a uniform, and both armed, were at the entrance. He could hear curses, such as "Alija, fuck you, fuck your Usta{a mother", coming from the entrance of the SUP as well as screams of people in pain. Almost all the Serb police officials were in the SUP at the time. Later that evening he was taken from the SUP for interrogation, during which he was beaten from head to toe with rubber bats, wooden poles, a pistol, a knife and cables and tortured until he was rendered unconscious.

470. Suada Ramić, a Muslim, testified that she was raped at the Prijedor military barracks. After the rape she was bleeding terribly and went to the hospital where she was told by one of the doctors that she was approximately three to four months pregnant and that an abortion would have to be performed without anaesthetic because there was none. When this doctor asked another doctor for assistance, the second doctor started cursing, saying that "all balija women, they should be removed, eliminated", and that all Muslims should be annihilated, especially men. He cursed the first doctor for helping Muslims. Prior to the rape there had been no problems with her pregnancy. When she returned from the hospital she went to stay with her brother in Donja Ljela, eventually returning to her apartment in Prijedor where she was subsequently raped for a second time by a former Serb colleague who had come to search her apartment. The next day she was taken to the Prijedor police station by a Serb policeman with whom she was acquainted through work. On the way he cursed at her, using ethnically derogatory terms and told her that Muslims should all be killed because they "do not want to be controlled by Serbian authorities". When she arrived at the police station she saw two Muslim men whom she knew, covered in blood. She was taken to a prison cell which was covered in blood and where she was raped again and beaten, afterwards being taken to the Keraterm camp. She recognized several prisoners at Keraterm, all of whom had been beaten up and were bloody. She was transferred to the Omarska camp where she often saw corpses and, while cleaning rooms, she found teeth, hair, pieces of human flesh, clothes and shoes. Women were called out nightly and raped; on five separate occasions she was called out of her room and raped. As a result of the rapes she has continuing and irreparable medical injuries. After Omarska she was taken to the Trnopolje camp and then returned to Prijedor, where she was often beaten.

471. Hase Ičić, whose testimony is recounted in relation to paragraph 10 of the Indictment, testified that while at the Omarska camp he was forced along with other prisoners to lie on his stomach with his arms outstretched over his head with three fingers together in the Serb salute. If a prisoner's fingers were not in the correct position he was beaten by the guards with rifle butts and the prisoners were all made to shout: "Be a great Serb, you Serb." Some of the Serbs slashed the prisoners' clothes and cut crosses in prisoners' backs. He testified that at one point he was called out and forced to greet the group of Serbs by saying: "God be with you, heroes", before a noose was put around his neck and pulled as he was being beaten.

472. The testimony of these witnesses is not unique and their experiences reflect the horror suffered by non-Serbs who were subjected to such treatment simply because their religion or politics offended those who gained control of the region. A policy to terrorize the non-Serb civilian population of op{tina Prijedor on discriminatory grounds is evident and that its implementation was widespread and systematic throughout, at the minimum, op{tina Prijedor is apparent. The events described in paragraph 4 of the Indictment, which took place during and were not unrelated to the armed conflict, occurred within this context of discrimination.

(b) The discriminatory basis for the accused's actions

473. As discussed in the preliminary findings, the accused became more overtly nationalistic with the development of political parties. He was one of the first SDS members in op{tina Prijedor and, in his own estimation, a trusted SDS member who was asked to run a crucial plebiscite in the Kozarac area. The accused was well versed in, and a supporter of, the SDS programme which advocated the creation of *Republika Srpska* as part of the plan for a Greater Serbia and, necessarily, the removal of the vast majority of the non-Serb population from the territory designated as *Republika Srpska*. Acceptance of this policy, and the discriminatory means to achieve it, was considered to be a requirement for advancement in the SDS. In this regard one witness testified that the plebiscite was regarded at the time as an extremely important event by the Serbs and by the SDS as, *inter alia*, it provided the basis for the creation of a Serb state in the territory of Bosnia and Herzegovina, and that responsibility for conducting the plebiscite would not be given to an SDS member who was unaware of its programme or who was not ideologically committed to its programme and certainly not in an area such as Kozarac, where Serbs were a minority.

474. As organizer of the plebiscite in Kozarac and President of the local SDS, the accused had knowledge of and supported the plan for a Greater Serbia. As already mentioned Witness AA heard the accused say before the conflict that there would be a Greater Serbia without the Muslims. He himself admits his knowledge and support for the plan when, in his work report, he describes himself as an enthusiastic supporter of the creation of *Republika Srpska*. This is in contrast to the impression given by several Defence witnesses, all of whom testified that they never heard the accused express nationalistic sentiments. The accused's version of his sentiments is further supported by Sofia Tadi}, the accused's ex-sister-in-law. She testified to the accused's desire to name his child after Slobodan Milo{evi} and his statement that

Slobodan Milo{evi} was the only real politician in the former Yugoslavia. The accused admits that he actively worked toward the creation of *Republika Srpska* when he wrote in his work report, "after all I have done since 1990, only wishing to contribute to the creation of our common country even when it implied risking my life and my family safety, after all I have done as activist and a representative to the Prijedor Municipal Assembly tragedy befell us all . . . ."

475. Evidence has been presented of the steps taken by the accused to foster division between the ethnic groups. Armin Kenjar testified that before the attack on Kozarac, in the course of his duties as a reserve policeman, he had verified that a complaint had been made against the accused claiming that the accused was seen in the vicinity of the Serbian Orthodox church with canisters of petrol with the probable intent of setting the church on fire. It is suggested that by this act the accused was attempting to place responsibility for the destruction of the church upon the non-Serb population and thereby foment dissension among the various ethnic groups in Kozarac. The accused supports this when, in his work report, he notes that several Serbs and Muslims began to boycott his café because he wanted to "disturb relations between ethnic groups". Several other witnesses testified to the accused's involvement with the Serb authorities responsible for implementing the SDS's discriminatory policies. Hamdija Kahrimanovi}, who had known the accused for a very long time, testified that while he was in Prijedor from the first week of June 1992 until August 1992 he frequently saw the accused in the company of Simo Drlja~a, Chief of the Prijedor police station after the take-over, often in front of the police station. Nasiha Klipi} saw the accused at the SUP in mid- to late June 1992 with Adil and Nasiha Jakupovi} and continued to see him in passing in the SUP, often with other Serb policemen.

476. The testimony of Sofia Tadi} is relevant not only with regard to the accused's nationalism but also his growing anti-Muslim disposition. She testified that at one point the family was standing in the yard watching as people passed on their way to the mosque and the accused commented that "the balijas are going to the mosque". This growing disposition is supported by the testimony of other individuals with personal knowledge. The testimony of Hase Ici}, discussed at length elsewhere, is of particular relevance in this regard. Concerning his own beating, the subject of paragraph 10 of the Indictment, Hase Ici} testified that when he entered the "beating room" at Omarska he stood face to face with the accused who was part of the group of Serbs whom Hase Ici} was forced to greet by saying: "God be with you,

heroes", before being beaten. Hase Ici} also testified in relation to paragraph 7 that while at the Omarska camp he heard sounds of beatings coming from in front of the white house. He heard people cursing as they approached his room and he recognized one of the voices as being that of the accused. He recognized the accused when he cursed at one of the victims in the same way as he had at Hase Ici} himself during his own beating. He then saw the accused and another person as they threw the badly beaten prisoner into the room. As he was throwing the prisoner into the room the accused said: "You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb." Hase Ici} later recognized the prisoner as [efik Sivac, a Muslim. Significantly, Witness AA testified that the accused and [efik Sivac had had a good relationship until shortly before the war when they had an argument about politics in which the accused stated that the area "would be a Greater Serbia, it would be theirs and that we, Muslims, will not be there, that there will be no place for us there". Sead Halvad`i}, another Muslim, testified that he recognized the accused, whom he had not known before that day, as one of two men who forced him to keep his three fingers raised in the Serb salute while he was beaten at the Prijedor military barracks. In response to an order to stop the beating, one of those two replied that his throat should be cut because he was Usta{a.

477. Based upon the testimony of witnesses whom the Trial Chamber considers to be credible the Trial Chamber finds beyond reasonable doubt that the accused committed the acts described in paragraph 4; when he did so he was aware of the policy of and discrimination against non-Serbs, and acted on the basis of religious and political grounds. It is also satisfied that these acts took place within and were not unrelated to the armed conflict.

IV. THE ACCUSED'S DEFENCE OF ALIBI

A. Introduction

478. The accused entered a plea of not guilty to all counts of the Indictment and by way of defence to each of the counts charged in the Indictment the accused, quite apart from distinct arguments of law, raises a defence of alibi in the sense that he says that he was elsewhere when each of those acts is said to have occurred.

479. Pursuant to Rule 67(A)(ii)(a) of the Rules, the Defence filed a Notification[28], and subsequently, an Amended Notification[29], of the Defence of Alibi. Further, the accused testified under solemn declaration that he had never been to the Omarska or Keraterm camps nor had he participated in ethnic cleansing in Kozarac. He testified that he had been to Trnopolje on five occasions but was never inside the camp.

480. The accused also gave statements to the German authorities after his arrest on 12 February 1994 (the First Statement, dated 11-12 October 1994) and to the Office of the Prosecutor of the International Tribunal on 9 and 10 May 1995 (the Second Statement) and on 21 and 22 December 1995 (the Third Statement). These statements, which bear on his alibi, were offered as evidence by the Prosecution, without objection by the Defence (Prosecution Exhibits 321, 366A, 366B).

481. In summary, the accused and numerous witnesses called for the Defence have said in evidence that from the afternoon of 23 May until 15 June 1992 he was living in Banja Luka, some 45 kilometres by road from Kozarac and somewhat further from Prijedor, making only four journeys from Banja Luka. Thereafter, until August 1993, he was living in Prijedor, until 1 August 1992 working as a reserve traffic policeman at a traffic checkpoint at Orlovci, some five or six kilometres from Prijedor on the road to Kozarac, then as a reserve policeman in Prijedor itself and from 15 August 1992 until November 1992 as a reserve policeman in Kozarac. On 15 August 1992 he was elected President of the Local Board of the SDS in

[28] Notification ex Rule 68[sic](A)(ii)(a), filed 10 Apr. 1996.
[29] Amended Notification ex Rule 67(A)(II)(a), filed 3 May 1996.

Kozarac and appointed as Acting Secretary of the Local Commune of Kozarac. On 9 September 1992 he was elected Secretary of the Local Commune and this decision was implemented on 9 November 1992.

B. The Whereabouts of the Accused from 23 May to 15 June 1992

482. In the Amended Notification of Alibi, the Defence asserts that during his stay in Banja Luka from 23 May to 15 June 1992 he left it only for a visit to Kozarac on 30 May 1992, returning to Banja Luka the same day; a visit to the village of Babi}i and the town of Kozarac on 1 June 1992, returning on 2 June, and a visit to Trnopolje on 6 June. On 15 June 1992, when he left Banja Luka for Prijedor, he visited Kozarac again.

483. The period of the accused's residence in Banja Luka, from 23 May until 15 June 1992, is the subject of evidence by the accused, his wife, his sister-in-law Jelena Gaji}, his brother Ljubomir Tadi}, a neighbour Dragolje Balta, a former Kozarac neighbour Trivo Relji} and four friends who lived in Banja Luka, Nikola Petrovi}, Bora Raki}, Witness X and Witness D.

484. The accused described his departure from Kozarac on the morning of 23 May 1992 and is supported by his neighbour, Trivo Relji}, who was also leaving Kozarac on that day and at the accused's request gave him a lift as far as Prijedor. In Prijedor the accused says that he visited his sister-in-law, Jelena Gaji}, had a meal at her apartment and continued on his journey to his family in Banja Luka by train at noon. Jelena Gaji} supports him in this account and there is evidence that a train did leave Prijedor for Banja Luka that day shortly after noon. The accused says that, on arrival in Banja Luka, he went briefly to his brother Ljubomir Tadi}'s house and then to the house where his wife, children and mother were living in Koste Jakica Street. Ljubomir Tadi} supports him in this, as does his wife, Mira Tadi}, who describes his arrival at the Koste Jakica Street house and their visiting and staying the night of 23 May 1992 at the house of Witness X. The accused and Witness X likewise describe this, the accused describing the long walk there with his sick mother and his wife and children, that they stayed there that night and part of the next day, 24 May 1992, later returning to the house in Koste Jakica Street.

485. All this occurred on the day before and the day of the attack on Kozarac, on 24 May 1992, and the witnesses identify the date by reference to that fact. There is no evidence to contradict the departure of the accused from Kozarac on 23 May 1992, his arrival in Banja Luka via Prijedor and his subsequent movements on that day.

486. As to 24 May 1992 the accused says he stayed at the house of Witness X until, towards the evening, he and his family returned to their home in Koste Jakica Street. Mira Tadi} gives a similar account. Nikola Petrovi}, however, says that the accused and his wife and children visited him and his wife on "the very day when the conflict broke out in Kozarac" and spent the whole afternoon there until evening, having a meal with them. However, apart from associating the visit with the attack on Kozarac, he is not otherwise clear about the date. This conflict is perhaps not important since it is only during the evening, not the day, of 24 May 1992 that the accused's whereabouts become significant since a Prosecution witness, Witness Q, said in evidence that he saw the accused with Bo{ko Dragi}evi} in Kozarac on the night of 24 May 1992 about 9 p.m. in the area from which a flare was fired in the direction of the hospital. That witness's evidence is itself in some respects in conflict with his own prior written statement and has already been referred to; however it does make relevant the whereabouts of the accused on the evening of 24 May 1992.

487. For the evening of 24 May 1992 and for the rest of the accused's stay in Banja Luka there is a lack of any specific Defence evidence as to his whereabouts at particular times on particular dates. The accused, without attributing precise dates or times, says that he spent the time, other than his four short absences already referred to, at the Koste Jakica Street house attempting to make the house more habitable, visiting the authorities in Banja Luka, arranging for a job as a traffic policeman in the Prijedor area and visiting friends and relatives. His wife's evidence is not more specific; she says that he spent each night at home with her and their children. The same is the case with the evidence of his brother Ljubomir Tadi}, who says that he had had drinks with the accused at cafés in Banja Luka most evenings, and with the evidence of those friends in Banja Luka who testified to meetings with the accused. All the evidence is essentially unspecific and does no more than establish that the accused was generally resident in Banja Luka until 15 June 1992. A number of Prosecution witnesses have given evidence of seeing the accused in Kozarac and its vicinity on particular occasions during this period and the accused's alibi that he remained in Banja Luka during the whole

period, never leaving it, apart from his four short absences, has to depend essentially upon his own evidence and that of his wife Mira Tadi} and his brother Ljubomir Tadi}.

488. The accused's testimony before the Trial Chamber for the period up to 15 June 1992 does not wholly accord with his Amended Notification of Alibi. The accused testified that he first returned to Kozarac on 1 June, not 30 May 1992, accompanied by his brother Ljubomir. They left by train around 5 or 6 a.m., arrived in Omarska and went on foot to the village of Timarci to the home of Milenko Timarac who had worked as a waiter in the accused's café. The accused then went to the headquarters of the local Crisis Staff in Lamovita and there obtained a certificate to purchase fuel for Milenko Timarac's car and they drove to the Tadi} family house in Kozarac. They took some equipment from the accused's café and two rifles from his house, a hunting rifle that belonged to his brother, Mladen, and an automatic rifle that the accused had received from a deserter from the army. He left the hunting rifle with Milenko Timarac and took the automatic rifle with him, he and his brother hitchhiking in a lorry from the village of Timarci around 5 or 6 p.m. and returning to Banja Luka the same day. The accused testified that on this trip he wore civilian clothes and Ljubomir Tadi} gave him a camouflage coverall when they got back to Banja Luka because they were told it was dangerous to move around without a uniform.

489. Ljubomir Tadi} testified and confirmed the accused's testimony regarding their first trip to Kozarac. He testified, however, that he carried the automatic rifle for the accused and entered the number for the rifle on a blank certificate he had received from the TO unit to which he was assigned.

490. Mira Tadi} testified that she thought the accused and his brother went to Kozarac by car, perhaps Ljubomir's, on the first visit, and returned the same day.

491. The accused testified that his second departure from Banja Luka was on 6 June 1992 when he went to Trnopolje camp with Jovo Samard`ija, an old friend of his father, who was looking for his sister whom he believed to be there. They went by train and returned to Banja Luka the same day. The accused said he was wearing the yellow multicoloured uniform his brother had given him over civilian clothes and took his automatic rifle with him. During this visit to the "collection centre", as he described it, he greeted and kissed neighbours he knew.

492. Jovo Samard`ija, a retired JNA officer, testified that the accused went with him to the "collection centre" at Trnopolje a month after the fighting had started. He stated, contrary to the accused's description of what he was wearing, that the accused was wearing the old JNA uniform known as an "SMB uniform" due to its colour. He stated that the accused talked with guards who were from op{tina Prijedor and the accused had lunch with some of them.

493. Mira Tadi} testified and confirmed the account of the accused regarding his trip to Trnopolje with Jovo Samard`ija.

494. The accused testified that he made a second trip to Kozarac around 8 or 9 June 1992, not on 1 and 2 June as stated in his Amended Notification of Alibi. He stated hat he went with his brother Ljubomir Tadi} by train to Omarska and got a ride in a "military jeep type vehicle" to the vicinity of Timarci. They spent the night with Milenko Timarac who the next day drove the accused and his brother to Omarska where they rented a lorry and were driven to Kozarac, loaded some goods from Ljubomir Tadi}'s business and from the accused's café and home, and were driven back to Banja Luka in the lorry.

495. Mira Tadi} testified and confirmed the accused's account of his second trip to Kozarac which she described as occurring a couple of days after his first trip there.

496. Ljubomir Tadi} likewise confirmed the accused's account of their second visit to Kozarac, placing it as occurring seven or eight days after their first visit. On this visit, he also wore a camouflage uniform and carried a pistol that had been given to him by his father. He stated that on their return they were not stopped on the Kozarac/Banja Luka road because the driver was wearing a uniform.

497. In his First Statement the accused gave different information to the German police in regard to his trips to Kozarac and as to his clothing. He stated that between 23 May 1992 and until 16 or 18 July 1992 (sic) he did not return to Kozarac. At trial, the accused testified that by that statement he meant that he slept in Banja Luka during this period.

C. The Whereabouts of the Accused from 15 June to 31 December 1992

498. The accused's Amended Notification of Alibi states that the accused lived in Prijedor during this period of time. It asserts that he was on duty as a reserve policeman at the Orlovci checkpoint from 16 June 1992 until 1 August 1992. It states that the accused visited Kozarac on 15 and 18 June, 15 July and 15 August 1992 when he was appointed as the Acting Secretary of the Local Council (or Commune). Thereafter the accused visited Kozarac frequently. From 13 September until 6 November 1992 it states that he was on duty as a reserve policeman and worked as the Secretary of the Local Council of Kozarac and during this period, from 13 September until 20 September, he conducted patrols from the police station of Kozarac in the area of Vidovi}i. On 2 November he visited Trnopolje. Finally, from 7 November 1992 until 31 December 1992, it states that he worked for the Local Council at Kozarac.

499. The accused's whereabouts between 15 June and 17 June 1992 was the subject of much contention and discrepancy. The accused testified that he reported for duty on 15 June and was mobilized into the traffic police on 16 June, his first day on duty at the Orlovci checkpoint. He stated that he had travelled to Prijedor alone on a Monday and met his cousin, Radovan Voki}, who spoke with the commander of the traffic police to obtain an assignment for the accused. The accused also testified that on 15 June he received a certificate, which was tendered in evidence as an exhibit (Prosecution Exhibit 332), from the Chief of Police of Prijedor, Simo Drlja~a, to travel from Prijedor to Kozarac and back to transport firewood. A friend allowed him on that day to use his truck to transport goods from his café and home in Kozarac and they took them to be stored at the home of his aunt, Sava Voki}, in Palan~i{te. He testified that he spent the night of 15 June with Radovan Voki} and that some days later he arranged for an apartment in Pe}ani, a suburb of Prijedor, to be given to him, as a traffic policeman, by the local Crisis Staff. He moved into the apartment on 27 June; he and his family lived there throughout 1992 and on into 1993. He stated that he returned to Banja Luka to pick up his wife although he was not certain of the exact date. However, he was certain that after his first day's duty at the Orlovci checkpoint on 16 June 1992 he went to Banja Luka, getting a ride in a truck that was going towards Serbia, and picked up his wife. He and his wife then returned to Prijedor by train and together spent the night of 17 June at the home of Martin D`aja. He also spent the night with the D`aja family in Prijedor on three or four subsequent occasions.

500. Mira Tadi} testified that the accused went to Prijedor on 15 June 1992 by train. He returned to Banja Luka on the evening of 16 June dressed in the police uniform of dark-blue trousers, a dark-blue blouse and a light-blue shirt. She said he stayed the night in Banja Luka and they left together the next morning, 17 June, at 6 a.m. by train for Prijedor, he to his duty as a traffic policeman, she to enquire about work at the Prijedor hospital. A Defence witness, Drogolub Savi}, testified that the train trip took one to one and a half hours. Train schedules for 23 May and 15 June 1992 were admitted into evidence showing arrivals in Prijedor at 6.42 a.m. and 6.48 a.m. respectively (Defence Exhibit 79). Mira Tadi} said that she reported for work at the hospital but that since she was not needed she did not actually begin work there until August. She testified that they spent the night with Martin and Mileva D`aja and that she returned the next day to Banja Luka. She did not return to Prijedor again until 23 June 1992 when she cleaned the apartment in Pe}ani. Finally, she returned once again on 27 June 1992 with her children and mother-in-law and moved into the apartment.

501. Ljubomir Tadi} testified that the accused remained living in Banja Luka until 16 June 1992, the date of the general mobilization called for in the Autonomous Region of Krajina. He later stated, upon questioning by Defence counsel, that the accused could have gone to Prijedor on 15 June 1992. While at Ljubomir's apartment, the accused had spoken by telephone to Dusan Jankovi}, the Chief of Police in Prijedor, on the day before the mobilization, and was told to come to Prijedor immediately. Ljubomir Tadi} testified that he did not accompany the accused to Prijedor when the latter was mobilized into the traffic police, contrary to what the accused said in his Second and Third Statements.

502. In his First Statement, to the German police, the accused stated that he was mobilized on 16 June 1992 and drafted into the reserve unit of the traffic police. He said that on that date he was in Banja Luka and spent that night with Radovan Voki} and subsequent nights at the home of the D`aja family. In his Second Statement, to the Office of the Prosecutor, the accused again stated that he was mobilized on 16 June 1992 and came to Prijedor on that morning with his brother Ljubomir, was told to report for duty the next day and repeated that he spent that night in Prijedor with Radovan Voki} and subsequent nights in Prijedor with the D`aja family. In his Third Statement, the accused reiterated that he had gone to Prijedor on 16 June 1992 with his brother and was then mobilized into the traffic police. He stated that thereafter they went to a café-bar restaurant to meet a neighbour and after some time his brother returned to Banja Luka. He further stated that he spent two nights, on 16 and 17 June, with the Voki} family. On 17 June he went with Radovan Voki} in an official car to the

police station in Prijedor. In none of these statements did he mention what he described in his evidence: his return to Banja Luka after his first day of service at the checkpoint, his journey next day back to Prijedor with his wife and her presence in Prijedor on that, and the subsequent, day.

503. From 16 June until 1 August 1992 the alibi evidence relies upon records of the accused's service as a traffic policeman at the Orlovci checkpoint. Specific dates which are relevant, because they coincide with dates on which it is alleged that the accused committed the acts charged against him, are referred to in dealing with specific charges. However, some general remarks about the Orlovci checkpoint, the records relating to service at that checkpoint and the accused's movements during the period covered by those records are necessary.

504. The accused was from 17 June 1992 resident in Prijedor while working at the checkpoint until 26 June often at the home of friends, the D`aja family, or of his cousin Radovan Voki}, and from 27 June onwards, when his family joined him from Banja Luka, living in an apartment in the suburb of Pe}ani. The Orlovci checkpoint was in 1992 one of four under the authority of the Prijedor traffic police of which the Defence witness \uro Prpo{ was commander. The checkpoint was situated some five or six kilometres to the east of Prijedor on the main Prijedor/Banja Luka road. It was manned by three traffic policemen and the military authorities also maintained a checkpoint there, manned by two or three military policemen. The task of the civilian traffic police at their checkpoint was described by \uro Prpo{ as being to control civilian traffic in the area, ensuring that traffic took place in an unhindered manner, and that control was exercised over the participants in traffic, as well as over freight that was being transported. The checkpoint was manned 24-hours a day in three shifts. The length of shifts varied from some seven to twelve or more hours and there would be whole days off duty. Conflicting evidence was given as to details of service at this checkpoint. The accused says that on each day that he was rostered for duty he would report to police headquarters in Prijedor half an hour before the beginning of his shift. There he would join the two other members of his shift, take the police car, in which the previous shift had returned to Prijedor from the checkpoint, and drive to the checkpoint, remaining there with the police car during the hours of his shift and returning in that car to the Prijedor police station at the end of the shift, there handing over the car to the next shift. He said that he had regular duties at the checkpoint from 16 June 1992, always went to work, was never absent,

and did not want to displease the persons in charge since that could result in his being sent to the front line.

505. The other two members of the accused's shift were Miroslav Brdar and Miroslav Cviji}, of whom only the former, who was in command of the shift, gave evidence. Miroslav Brdar in his evidence confirmed the accused's account of meeting outside the Prijedor police station, where he, Miroslav Brdar, would get the day's orders from \uro Prpo{ and they would then drive to the checkpoint in a dark-blue Golf car with police markings, keep the car there, and return in it to Prijedor at the end of the shift, where the next shift would take it over. He said that the accused worked on his shift and worked regularly, that the records reflect that the accused served at the checkpoint every day that he was assigned there, that the accused could not be absent for long periods during his assignment and that they did not sleep while on duty. Both he and the accused said that all members of the shift had to remain at the checkpoint during their tour of duty and that the car could not be used by them save for the journey from and to Prijedor since petrol usage and mileage travelled were strictly controlled. They both said that \uro Prpo{ would make frequent unscheduled visits to the checkpoint to make sure that they were present and \uro Prpo{ confirmed this. Further, when asked about the location of the checkpoint, this witness testified that it was on the old Banja Luka road. All other witnesses testified that the checkpoint was on the new Banja Luka road. Finally, Miroslav Brdar testified that he did not know Zoran Cviji} who, according to \uro Prpo{, was working under his supervision in the office right next to his. The witness testified that he socialized with the accused when off duty in Prijedor.

506. \uro Prpo{ describes the shift routine rather differently. He says that only sometimes was a car available to take the members of the shift to the checkpoint and bring them back again and that "very often there was no such vehicle available so they had to get there on their own one way or another", in which case they would not report first at the Prijedor police station but would go directly to the checkpoint. Either police vehicles, generally Golfs, or private cars were used by the traffic police. \uro Prpo{ would make a daily check of the checkpoints "to make sure they were coming on time". @eljko Mari}, another traffic policeman who also served on the Orlovci checkpoint, described the routine more in accordance with the description by \uro Prpo{ than with the tightly structured routine described by the accused and Miroslav Brdar. When asked whether "after you finished your shift you went home, did you?", @eljko Mari} replied: "It depends at what time it would be",

and clarified that by saying: "There were points in time when we would not go home, when we were supposed to go to the police station to see whether there were other tasks and duties awaiting us, and there were other times when we would normally go home after our shift."

507. Four other witnesses testified to seeing the accused at the Orlovci checkpoint. However, their testimony does no more than establish that he was on occasions present there. Radoslavka Luki} lived quite close to the checkpoint. She is remotely related to the accused's wife and says she saw the accused on duty there several times a week during the latter part of June and July 1992 when, from about 20 June, she worked in Prijedor. The accused often visited her to have a cup of coffee, sometimes bringing a colleague with him, and would often stop a vehicle going towards Prijedor for her so that she could get a ride in it to Prijedor on her way to work. So too Nada Vla~ina, who had known the accused and his family for some years, testified that she often saw the accused at the checkpoint from the second half of June. Her mother-in-law lived nearby and, in the absence of public transport, the accused would stop a car and get her and her children a ride back to her home in Prijedor when she was returning from visits to her mother-in-law. Rajko Karanovi} drove a truck delivering food for the troops in Kozarac and would very often see the accused in June and early July as he passed several times a day through the checkpoint and would leave food for the traffic police there. The evidence of these three witnesses can do no more than establish that the accused was on occasions present at the Orlovci checkpoint. Dragoje Jankovi}, who is a cousin of the accused, testified that he saw the accused on duty at the Orlovci checkpoint in May 1992. This testimony cannot be accepted since the records do not show an assignment before 17 June 1992 and the Defence does not contend otherwise.

508. The most substantial evidence of the accused's service at the Orlovci checkpoint consists of shift records kept at the Prijedor headquarters of the traffic police. They comprise a daily logbook entitled "Official Duty Plan" (Defence Exhibit 66), duty lists for the months of June, July and August 1992 (Defence Exhibits 63-65) and pay records (Defence Exhibits 75 and 77).

509. The daily logbook was written out one day in advance by a policeman who acted as a clerk, after the commander had determined the shifts. It would then be verified by the commander, \uro Prpo{, and a copy put on the bulletin board so that policemen would know their shift times. If a rostered policeman failed to report for duty his name was to be crossed

out and recorded as absent and the name of his replacement would be inserted. The name of the accused first appears in the daily logbook on 16 June 1992 as rostered for the Orlovci checkpoint together with those of Miroslav Brdar and Miroslav Cviji}. This daily logbook records the accused and his two colleagues as working at the checkpoint on various shifts during the period from 16 June until 3 August 1992.

510. The second series of records, the duty lists, were filled out after the duty had been completed, based on the information in the daily logbook and reports from the shift leaders, and show the actual time spent on duty by individual traffic policemen day by day at particular checkpoints; if a policeman did not attend when rostered this was to be reported by the shift leader and be appropriately recorded in the duty list. The duty lists record the accused as present at the Orlovci checkpoint with his two colleagues at various times from 16 June until 1 August 1992. The third series of records derive from the accounting service of the public security service and record the payment to police according to the time served by them. They record payment to the accused for his service as traffic policeman during the months of June, July and August 1992.

511. The daily logbook and duty lists were said by \uro Prpo{ to have been kept in a safe at the police station as official records and to show correctly the times spent on duty by the traffic policemen. He said that the leader of the shift was required to prepare a report and that, at the checkpoint itself, a record was kept on a daily basis. These latter records were not offered in evidence.

512. Even accepting these shift records as genuine and as correctly establishing the shifts worked by the accused at the Orlovci checkpoint, they, of course, only record the hours when he was meant to be on duty at the checkpoint; they do not of themselves establish his presence there throughout those hours. Miroslav Brdar said that the accused never absented himself during his hours on duty at the checkpoint and the accused gave evidence to the same effect, that he was never absent from duty and never left the Orlovci checkpoint during his shift. There was also evidence, both from the accused and from Miroslav Brdar, that during off-duty hours traffic police were obliged to remain at home on call if needed, the police station having their home telephone numbers, and that no one could travel around the countryside without express permission. The accused said that if there were occasion to leave home

during off-duty hours one had to call and inform the policeman on duty as to where one would be "because our duty was to be present at the address where we lived".

513. As to both hours on duty and off duty, the accused's alibi, as it relates to his employment as a traffic policeman, depends entirely both upon acceptance of the evidence that there was strict compliance with what is said to have been the requirement of service as traffic police and upon the assumption that the authorities did not in fact allow or, perhaps, encourage the accused to engage in activities during hours of duty which would more directly serve the cause of ethnic cleansing than his remaining at the Orlovci checkpoint. The Prosecution submits that assignment to duty at a checkpoint would not foreclose the accused engaging in the overriding objective of the Prijedor police at the time, that is, taking part in and facilitating the persecution of non-Serbs which the Prosecution calls a "higher duty".

514. In fact, as it happens, the hours during which the records show the accused as being on duty at the Orlovci checkpoint rarely coincide with dates and times of day or night during which the offences alleged in the Indictment are said to have occurred. When they do, the weight to be given to the evidence of presence at the checkpoint is examined when dealing in detail with the relevant paragraph of the Indictment. As to off-duty hours, mere membership of the traffic police cannot avail the accused of an alibi for those hours since, even accepting that he was required to be available on call, the evidence for the accused suggests that, as long as he informed the police station where he was going to be, he could absent himself from his Prijedor home.

515. According to Radoslavska Luki} there was in force at the time of the accused's checkpoint service a curfew for civilians from 9 p.m. until 6 a.m., which prevented movement on the roads during those hours; that, combined with the fact that the traffic police had authority only over civilian traffic and that fuel for civilian vehicles was in very short supply, suggests, according to the Prosecution, that there would be little need indeed for five men, the accused and his two colleagues and two military policemen, to all remain at the checkpoint, especially during night-time.

516. The accused says that he did not possess a vehicle of his own during 1992 and that during his months of checkpoint duty he never used the police vehicle assigned to the checkpoint except on journeys between Prijedor and the checkpoint. However, @eljko Mari}

testified that while a traffic policeman at the Orlovci checkpoint he, @eljko Mari}, drove the checkpoint police vehicle to Omarska. There is also evidence, some already referred to, of the accused providing transportation for others by getting them lifts in cars he stopped when they passed through the checkpoint and of the accused also availing himself of lifts in the vehicles of others. It was common practice to seek lifts in the vehicles of others and it would no doubt be relatively easy for a traffic policeman to do so. Mira Tadi} testified that the accused usually returned from Kozarac to Prijedor after work as Secretary of the Kozarac Local Commune by hitchhiking or getting a ride in Goran Babi}'s vehicle. @eljko Mari} stated that he saw the accused passing through the checkpoint in different vehicles after the accused had stopped working at the Orlovci checkpoint but did not know whether the accused was driving or was a passenger. There is also testimony, much of it offered by the accused himself, of his renting or borrowing trucks, using his brother's vehicle, hitchhiking, and taking the train and bus to various destinations and at least one witness for the Prosecution testified to seeing the accused and Goran Borovnica in a police car on 27 May 1992, before the accused was "mobilized" into the traffic police. Distances are not great, even Banja Luka is only some 45 kilometres from Kozarac and the Omarska camp is only some 20 kilometres from the Orlovci checkpoint. Travel from Prijedor to Omarska village by train takes only some twenty minutes and the camp was some two kilometres out of the village.

517. As to the accused's off-duty hours, Jelena Gaji}, sister of the accused's wife, testified that in Prijedor they "would see each other often after mid-June". Nada Vla~ina said that she started visiting the Tadi} family in Prijedor, visiting regularly in the second half of July. Witness D testified that she met the accused and his wife in Prijedor when they were looking for accommodation, that they later settled in Prijedor and that she then saw the Tadi} family "very often, every week, several times, it depended". She saw them in their apartment in Pe}ani and they would also come to see her family. Mira Tadi} confirmed that she, the accused, her children, and her mother-in-law moved into their apartment in Prijedor, allocated to them by the Prijedor Crisis Staff, on 27 June 1992 and that when the accused was off duty, he was either at home or with their friends, the Vla~ina family and the [obot family, and that he did not spend any periods away from home at that time. The accused's brother, Ljubomir Tadi}, testified that he visited his brother in Prijedor three times between 16 June and 6 or 7 July 1992.

518. The Prosecution called Munevera Kula{i} as a witness who confirmed that the accused moved into the apartment at Pe}ani. She is the sister-in-law of Hasan Tulundzi}, a Muslim who, until the Serb take-over of Prijedor, had been the Chief of Police in Prijedor and was the former occupant of this apartment. The witness described it as a "quite big apartment, about 80 square metres, and very nicely decorated, with embroidered table cloths and a silver table set." The Tulundzi}s had left Prijedor in May 1992 and the witness's aunt, mother and a sister, as well as the witness, were occupying it when, on 20 June 1992, civilian policemen called and told them they had to leave the apartment, but did not insist upon it. Later, representatives from the Ljubija mine company, which officially owned the apartment, called and then the accused entered, dressed in a camouflage uniform. The accused ordered the representatives from the Ljubija mine company to leave, which they did. The accused then ordered the witness and her relatives to leave the apartment immediately, a brief inventory was taken and the witness, her handicapped sister and her elderly mother packed their belongings and in 15 minutes left the apartment. When she was leaving the witness says that she saw the accused put a note on the door that stated: "Du{ko Tadi}".

519. After the conclusion of the accused's duty at the Orlovci checkpoint in August 1992 he spent some time partly off duty in Prijedor and partly on duty as a policeman at locations in the town until, on 7 August 1992, he was transferred from the traffic police to a police station at Prijedor where he served until 8 September 1992. He, at the same time, was working from mid-August with the Local Commune of Kozarac while still residing in Prijedor. His periods of duty in Prijedor as a policeman are recorded in a manner similar to his service at the Orlovci checkpoint. Then in September 1992 he began work with the Kozarac police while also working for the Local Commune of Kozarac, both the police and the Local Commune being located in the same building, a school building, in Kozarac. No written record of the hours or days that he worked as a policeman in Kozarac were tendered. Although he continued to live with his family in Prijedor from September 1992 until the end of the year, the accused's work was exclusively in Kozarac, during which period he served as the Secretary of the Local Commune and the President of the Local Branch of the SDS. During this time he visited Trnopolje a number of times but was, he says, otherwise wholly engaged with affairs in the Kozarac region, sometimes sleeping overnight in Kozarac but usually returning home to his family in Prijedor.

520. Tomislav Da{i} testified that from early October until early December 1992 the accused frequently worked with him and a third person in a team as a Commission responsible for making an inventory of property in the Kozarac area, where many houses had been destroyed or damaged during the attack on the town, to determine their availability for occupancy. The accused travelled with him by car from Prijedor to Kozarac, normally leaving at about 8 a.m. and arriving in Kozarac by 8.30 or 9 a.m. and they usually worked throughout the day. The witness stated that the accused was appointed to the Commission because he was the head of the Local Commune. However, he was unspecific as to the dates when they worked together and no records of this work were tendered.

521. Stojan Smolji} testified that he met the accused when he came to Kozarac as a Serb refugee from Jajca in October 1992. He stated that he saw the accused every day between October and November 1992 and that the accused would leave Kozarac by bus for Prijedor around 2 or 3 p.m.

522. Witness Y worked with the accused at the police station in Kozarac from August to November 1992. He testified that the accused ceased to work in the police station in November 1992. Thereafter, the accused worked in Kozarac for the Local Commune and wore civilian clothes, usually a coffee-coloured leather jacket and jeans or black trousers.

523. Joso Popovi} testified that he came as a refugee from Velika Kladusa to Kozarac. He served as Vice-President of the Local SDS Committee when the accused was the President and became its President and Secretary when the accused left Kozarac in 1993. During the autumn of 1992 he saw the accused almost every day; the accused was working either out of the elementary school building in Kozarac or on locations somewhere within the commune.

524. The accused testified that he was at Trnopolje on four occasions on official business in addition to the visit he made with Jovo Samarad`ija. He went to Trnopolje sometime in October 1992 as a reserve policeman with Goran Babi}, commander of the police station in Kozarac, and other policemen, as a security detail for the Red Cross when refugees were going to Karlovac. In his First Statement he had told the German police that he was assigned to safeguard the work of the Red Cross and the buses transporting Muslim refugees from Trnopolje. The accused testified he also went to Trnopolje with his brother, but could not recall the date. He also went to Trnopolje with Joso Popovi} in connection with his duties as Secretary of the Local Commune to get messages from refugees. Also, towards the end of

1992 he went there to meet Adil Jakupovi} and his wife. The accused stated that on no occasion did he go into the school building at Trnopolje but stayed in the street outside.

525. Adil and Nasiha Jakupovi} both testified that the accused came to Trnopolje with a man who identified himself as being from Velika Kladusa who wanted to "swap" his house for the Jakupovi}'s home. Other witnesses testified that they saw the accused several times at Trnopolje including Advija ^ampara, who stated she saw him over 20 times inside the camp, sometimes coming from the school at the Trnopolje camp. Witness Y, who served as a policeman with the accused in Kozarac and was elected as a representative of the settlers from Velika Kladusa, testified that the policemen in Kozarac had no jurisdiction in Trnopolje and did not "dare to go down there because that was another police detachment there that covered Trnopolje".

526. In his First Statement, in response to a question as to whether he owned a camouflage uniform or other military uniform, the accused replied: "No. No as far as the camouflage uniform goes", and added that "during my activity at Orlovci during the day-time, I wore blue trousers and a short-sleeved, light-blue shirt, also with the police insignia and at night, I also wore a jacket. Now this is the uniform of the police unit I was serving with".

527. However, Miroslav Brdar, who was the chief of the shift to which the accused was assigned at the Orlovci checkpoint, testified that the accused wore a camouflage uniform. Also, @eljko Mari}, another policeman assigned to the Orlovci checkpoint, testified that in June or July 1992 the traffic police received camouflage uniforms.

528. The accused denies ever being at the Omarska or Keraterm camps. The Defence offered the testimony of two witnesses in regard to Omarska. Witness Z testified that he was a guard at the Omarska "collection centre" from 5 June until August 1992, there to protect the people who were inside and to guard against others breaking into the camp, and that he never saw the accused at the Omarska camp while he was on guard. He testified that he was on duty for 12 hours and then free for 24 hours. However, his guard post was 500 to 600 meters from the Omarska buildings, he never went into the buildings at the camp, never stopped anyone from entering, could not identify anyone there because of the distance he was from the camp and would not be able to recognize anyone coming in a vehicle to the camp because his guard post was some distance from the road. Witness A, who is a non-Serb, testified that he

was held at the Omarska camp from 27 May to 16 June 1992 and never saw the accused during that period. However, although he had lived in Kozarac since 1969, he could not recall seeing anyone he knew in the camp during that period; he saw no guards he knew and no persons he knew in the room in which he was placed. The only person he did recognize was someone named Melo whom he saw when the buses were being loaded on 27 May 1992. While he was at the Omarska camp he testified that people were called out by name from the rooms in which he was placed but he did not recall the names of any of these prisoners. These two witnesses, because of the nature of their evidence, add very little to the strength of the alibi evidence.

V. EVIDENTIARY MATTERS

529. During the course of proceedings, both before and during trial, a number of issues arose relating to procedure or to evidence. These concerned: (i) the access to evidence; (ii) the lack of specificity of the charges; (iii) the need for corroboration; (iv) victims of the conflict as witnesses; (v) the impact of pre-trial media coverage on testimony; (vi) the question of identification evidence; (vii) the effect of the apparently false evidence of one Prosecution witness; and (viii) the use of hearsay evidence. The Trial Chamber will deal with each of these in turn.

A. Access to Evidence

530. A difficulty encountered by both parties has been their limited access to evidence in the territory of the former Yugoslavia, due in no small part to the unwillingness of the authorities of the *Republika Srpska* to cooperate with the International Tribunal. While witnesses called by the Prosecution, mainly Muslims and former residents of Bosnia, were now living in Western European or North American countries, most Defence witnesses, almost all Serb, were still resident in *Republika Srpska*.

531. A number of steps have been taken by the International Tribunal to assist the parties. A video-conferencing link from a secure location in the territory of the former Yugoslavia was established so that numerous Defence witnesses otherwise unable or unwilling to give evidence were able to do so. The identities were suppressed of a number of Defence and Prosecution witnesses who sought it as a condition of giving evidence and some testimony was given in closed session or with special steps taken to conceal their identity from the public. Some Defence witnesses, concerned about coming to the seat of the International Tribunal to testify, were granted safe conduct against arrest or other legal process against them by the Prosecutor of the International Tribunal while present to testify in The Hague. These steps did appear to alleviate the inherent difficulties of the situation.

B. The Lack of Specificity of the Charges

532. As appears from the Indictment, in some of its paragraphs it is charged that the offence in question occurred "around" or "about" a particular date. This is the case in all paragraphs charging offences other than paragraphs 4, 5, 6, 8 and 9. However, neither paragraphs 5 or 9 are relevant to this discussion; the counts relating to paragraphs 5 were withdrawn at the commencement of the Prosecution case and, in the case of paragraph 9, it becomes irrelevant because of the conclusion that this Trial Chamber has reached on the charges made in that paragraph. In paragraphs 6 and 8 relatively short periods of time were stated and, in fact, for each of these paragraphs the exact date of occurrence of the acts alleged was established by the Prosecution evidence in its case-in-chief. Paragraph 4, which alleges persecution, does of its nature encompass a considerable period of time, involving acts that are widespread or systematic. However, several of its subparagraphs do incorporate other paragraphs of the Indictment for which specific dates were given or established in evidence or which themselves refer to dates with greater specificity.

533. At the close of the Prosecution case the Trial Chamber adjourned for three weeks at the request of the Defence to allow it additional time for the preparation of its case. The difficulty of establishing an alibi defence for those paragraphs that cover long periods of time is appreciated. In regard to those paragraphs, a major cause of difficulty for the Defence lies, however, in the very special character of its alibi defence, which not only has to extend over many months but also does not involve anything like total absence from the region where the offences are alleged to have occurred. Instead, it only asserts that the accused, although present within the region, was not involved in any of the activities alleged in the Indictment, but was instead leading his own quite innocent life and living with his family. Such a defence does not readily afford a complete answer to charges in the Indictment, since it cannot be expected, even in the most favourable circumstances, to provide anything like a 24-hour, day-by-day and week-by-week account of the accused's whereabouts. Favourable circumstances did apply to an extent to the period during which the accused served as a traffic policeman at the Orlovci checkpoint since written records exist of that service. However, even in the case of this period, and despite these written records, the accused's alibi for that period is, as has already been shown, far from conclusive.

534. Whereas the Prosecution is bound to prove each of the elements of the offence charged, to specify and prove the exact date of an offence is not required when the date or time is not also an element of the offence. While it is usual to allege and prove the date on which the offence charged is asserted to have been committed, the date is not material unless it is an essential part of the offence[30]. The date may be of the essence of an offence if an act is criminal only if done, or only if the consequences of the act manifest themselves, within a certain period of time, or if the date is an essential ingredient of the offence, or if a statute of limitations or its equivalent applies[31]. However, in none of the offences here alleged was the date or time of the essence. For the foregoing reasons the events charged and the evidence adduced by the Prosecution was sufficiently precise and lack of specificity did not result in any denial of the accused's right to a fair trial.

C. Corroboration

535. The Defence contends that in the civil law, as distinct from the common law, some degree of independent causal corroboration of evidence is required. This *unus testis, nullus testis* (one witness is no witness) rule, the Defence submits, should be applied in cases before this International Tribunal in order to meet what it said were "fair and settled standards of proof" rather than developing what were somewhat extravagantly described as "ad hoc standards to enable it (the Tribunal) to convict".

536. The general principle which the Rules require the Trial Chamber to apply is that any relevant evidence having probative value may be admitted into evidence unless its probative value is substantially outweighed by the need to ensure a fair trial[32]. Rule 96(i) alone deals with the issue of corroboration, and then only in the case of sexual assault, where it says that no corroboration is to be required. The function of this Sub-rule is stated in *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* by Virginia Morris

[30] *See*, for example, *R. v. Dossi* (1918) 13 Cr. App. Rep. 158, 87 L.K.J.B. 1024; *R. v. James* (1923) 17 Cr. App. Rep. 116 (Court of Appeal).
[31] *See* Halsbury's Laws of England (London, Butterworths, 1990), Volume 11(2), para. 926.
[32] Sub-rules 89(C) and (D).

and Michael P. Scharf[33]. It is explained that this Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law. Thus what the Sub-rule certainly does not do is to justify any inference that in cases of crimes, other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary.

537. Quite apart from the effect of the Rules, it is not correct to say that in present day civil law systems corroboration remains a general requirement. The determinative powers of a civil law judge are best described by reference to the principle of free evaluation of the evidence: in short, the power inherent in the judge as a finder of fact to decide solely on the basis of his or her personal intimate conviction[34]. This wide discretionary power is subject to a limited number of restrictions. However, the principle reflected in the Latin maxim *unus testis, nullus testis*, which requires testimonial corroboration of a single witness's evidence as to a fact in issue, is in almost all modern continental legal systems no longer a feature.

538. As early as 1864 the *Cour de Cassation* in France held that French Courts were not obliged to apply the principle of *unus testis, nullus testis*[35]. Indeed, the Belgian *Cour de Cassation* has held that when a judge evaluates the evidentiary value of witness statements "there are no provisions in the law which make it impossible for the judge to found his decision on the sole basis of the declarations of the victim"[36]. In former times, German judges could consider a fact as proved only if, for example, the accused had confessed to the offence or if two impeccable witnesses had testified, the testimony of one witness being only "half a proof". However, no such restriction exists today limiting the freedom of assessment of evidence by a judge[37]. Article 342.2 of the Code of Criminal Procedure of the Netherlands, which explicitly forbids the court to base a conviction on the basis of the testimony of only one witness, is an exception to the prevailing approach in the civil law. However, the *Hoge Raad* has interpreted this provision very narrowly so that any corroborative evidence, whether

[33] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (*New York, Transnational Publishers, 1995*)*, Vol. 1, 263.
[34] *See* Article 342, Code of Criminal Procedure, Belgium; Section 896, Criminal Code, Denmark; Article 261, Criminal Procedure Code, Germany; Article 177, Code of Criminal Procedure, Greece; Article 188, Code of Criminal Procedure, Italy; Article 177, Code of Criminal Procedure, Portugal; Article 741, Code of Criminal Procedure, Spain.
[35] *See* Rej., 20 Jun. 1864.
[36] Cass., 9 Jun. 1969, Pas., 1969, I, 912.
[37] *See* Claus Roxin, *Strafverfarensrecht* (24th ed. Munich, 1995), 90.

or not direct testimonial evidence or otherwise, supporting the testimony of the single witness to the alleged acts may suffice in the formation of the judge's personal intimate conviction[38]. Civil law codes enacted in this century, well after the *unus testis, nullus testis* principle had disappeared from most civil law jurisprudence, have not dealt further with this principle which cannot be found in them. According to Miguel Fenech, writing on the Spanish Code of Criminal Procedure:

> It is important to note that the testimonial evidence has to be appreciated independently of the number of witnesses, and as there exists no rules concerning the matter it is possible that one witness is worthy of more credit than a number of witnesses, and it has to be said that, in most cases, the testimonial evidence must be seen in relation to other pieces of evidence which should contribute to evaluation of the testimonial evidence.[39]

Similarly, this principle does not exist in Marxist legal systems, including those of the former Yugoslavia and China, which largely follow the civil law principle of the freedom of evaluation of evidence[40].

539. It follows that there is no ground for concluding that this requirement of corroboration is any part of customary international law and should be required by this International Tribunal.

D. Victims of the Conflict as Witnesses

540. Each party has relied heavily on the testimony of persons who were members of one party or other to the conflict and who were, in many cases, also directly made the victims of that conflict, often through violent means. The argument has been put by the Defence that, while the mere membership of an ethnic group would not make a witness less reliable in testifying against a member of another ethnic group, the "specific circumstances of a group of people who have become victims of this terrible war . . . causes questions to be raised as to their reliability as witnesses in a case where a member of the victorious group, their oppressors, is on trial".

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[38] *See Hoge Raad*, 19 Oct. 1954, NJ 1955; *Hoge Raad*, 15 Nov. 1983, DD 84.132.
[39] *Derecho Procesal Penal*, (*Libreria Bosch*, Madrid, 1945), Tomos II, 238.
[40] *See* Article 347, 1977 Code of Criminal Procedure, SFRY; Article 35, 1979 Law of Criminal Procedure, China, (which requires only that the evidence be complete and reliable).

541. The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred, even without the exacerbating influences of violent conflict between ethnic groups, can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief.

E. Pre-trial Media Coverage and the Infection of Testimonial Evidence

542. Attention was drawn during the course of the trial to the impact of pre-trial media reporting of events in op{tina Prijedor and of the indictment and arrest of the accused. In particular, the Defence directed the attention of the Trial Chamber to media coverage in areas to which many refugees from the former Yugoslavia have fled since the events in question. To some extent, this issue related to the reliability of identification witnesses who had not known the accused prior to the conflict. For example, of the 20 television programmes about this case which were considered in a survey of which evidence was given, 15 carried the picture of the accused for at least a part of the report. This is an issue which will be addressed below.

543. Beyond issues of identification, it was the submission of the Defence that this coverage potentially affected the trustworthiness or reliability of testimony given by Prosecution witnesses generally. By contrast, a number of Prosecution witnesses denied having seen reports; many said that they were not interested in seeing reports of events in the former Yugoslavia as they did not wish to relive their experiences. Some of the print media reports noted in another survey of which evidence was given on behalf of the Defence did not contain any reference to the accused. In that survey a large number of newspaper articles and

reports in some way relating to the accused were reported on but, of the 83 articles cited, only 12 carried photographs and some articles proved not to be specifically about the accused in another survey of which evidence was given on behalf of the Defence (Defence Exhibit 101). Further, none of the reports published or television programmes shown were the native language of the witnesses.

544. In all trials, the potential impact of pre-trial media coverage is a factor that must be taken into account in considering the reliability of witnesses, and where this aspect was raised in cross-examination of witnesses, it has been taken into account in the evaluation of their testimony.

F. Identification Evidence

545. Where, as here, an accused's defence, arguments of law apart, consists of an alibi, evidence of visual identification of the accused assumes great significance. This Trial Chamber heard much such evidence from witnesses, many of whom had either known the accused since childhood or from long acquaintance with the accused in the Kozarac area, together hereafter referred to as recognition witnesses. In the case of four witnesses, to whom the accused was previously unknown by sight, they had identified him from a collection of 13 photographs in a photospread, shown to them by the Prosecution before giving evidence (Prosecution Exhibits 242, 243, 255, 294); they are hereafter referred to as identification witnesses. Both classes of witnesses identified the witness in court by way of dock identification.

546. The Defence challenged the identifications made by all these witnesses. The Trial Chamber places little weight upon mere dock identification; the circumstances attendant upon such identification, with the accused seated between two guards in the courtroom, require the Trial Chamber to assess the credibility of each witness independently of that identification. The credibility accorded to the testimony of each such witness as to recognition or identification has been considered in the course of this Opinion and Judgment. This portion of the Opinion and Judgment is concerned, however, with the evidence of the

four identification witnesses who were involved in the photospread procedure. In fact the photospread procedure was also undertaken, quite unnecessarily, by Draguna Jaski} who had known the accused for very many years and was, therefore a recognition witness. What follows accordingly does not apply to her evidence regarding the accused.

547. The expert Defence witness, Dr. Willem A. Wagenaar, gave evidence regarding identification generally and, in particular, concerning photospread procedure. He was acknowledged by both parties as expert in the field. The Trial Chamber accepts his very substantial approval of the format of the photospread itself which, he said, in his opinion would afford witnesses a wholly unbiased opportunity to identify the accused, his only qualification being that the 12 men other than the accused, the "foils", should prove to be of the same ethnic background as the accused. It emerged in evidence that with three exceptions this was the case; nine of the foils were from or were born in former Yugoslavia. The Trial Chamber accepts the suitability of the foils and accordingly of the photospread itself.

548. There remains the procedure employed in showing the photospread to the four witnesses. No written directions were given to the officer who conducted the procedure in the case of three of the four witnesses; written guidelines were supplied to the other officer, who attended to the fourth witness, Senad Muslimovi}. These guidelines were not produced in evidence and neither of the two officers was called as a witness on this issue.

549. What is known of the procedure adopted by these two officers comes from the evidence of the Prosecution chief investigator, Robert Reid, who was not present at any of the procedures but described what he had been told by those officers as to the procedure they had adopted. That procedure, if accurately described to the chief investigator and then accurately recounted by him in evidence, was generally, although not in every detail, in accordance with what Dr. Wagenaar regarded as satisfactory. Dr. Wagenaar stated in evidence that it was a fair conclusion to say that more would have to be known about the procedure in fact adopted in order to determine the value to be given to the four photospread identifications and yet stated that only if there were gross violations of his suggested procedure would the identification be invalid.

550. In the absence of evidence from the officers who conducted the photospread procedure the Trial Chamber has had recourse to the evidence of the four witnesses themselves as to that

procedure, a less satisfactory course in view of the relative brevity of that evidence. However, having examined that evidence, in each case it does not suggest any gross violation of what are said to be proper procedures nor any such impropriety in the procedure as would of itself cause the witness to select the photograph of the accused in preference to any of the other 12 photographs shown to him or her. In the outcome, and despite the absence of evidence of that degree of perfection of procedure which might have been established had the officers who conducted the photospread procedure given evidence, the Trial Chamber is satisfied that the four witnesses utilized an unbiased identification procedure to select the photograph of the accused as the person they described as committing the acts to which they testified.

551. The Defence contended that, since the photospread procedures were all conducted after the much-publicized commencement of this trial, some four years after the witnesses had last seen the accused, and following the widespread display of his photograph in newspapers and on television, which each of them denied having seen, and also in view of the testimony of Dr. Wagenaar, reliance should not be placed on their identification.

552. The Trial Chamber rejects this submission in view of the convincing testimony of these witnesses that they had not seen any such media pictures of the accused before being shown the photospread. It is true that each of them knew very well that it was for the purpose of this trial that they were looking through the photospread, and that for this and other reasons, all that Dr. Wagenaar would wish by way of procedure was not complied with; for instance, the witnesses were apparently not asked in advance to give their own description of the accused so that it might be compared with the particular photograph which they selected from the photospread. However, despite what has been said to be these defects in procedure, the Trial Chamber accepts the four witnesses' identification of the accused.

G. Testimony of Dragan Opaci}

553. During the course of this trial the truthfulness of the testimony of one witness, Dragan Opaci}, first referred to as Witness L, was attacked and ultimately, on investigation, the Prosecution disclaimed reliance upon that witness's evidence. The Defence contends that this

incident is but one instance of a quite general failure by the Prosecution to test adequately the truthfulness of the evidence to be presented against the accused, instead simply accepting as true the evidence given against a single Serb accused by a whole array of Muslim witnesses.

554. Two points should be made in regard to this submission. First, the provenance of Dragan Opaci} was quite special. Apparently, of all the witnesses, he was the only one who came to the notice of the Prosecution as proffered as a witness by the authorities of the Republic of Bosnia and Herzegovina in whose custody he then was. The circumstances surrounding his testimony were, accordingly, unique to him; the fact that his evidence came to be acknowledged as untruthful casts no light on the evidence of other Prosecution witnesses, none of whom share his provenance. Secondly, this Trial Chamber does not consider that either what occurred with Dragan Opaci}, or what emerged in the case of any other witnesses, demonstrate any relevant or blameworthy lack of diligence on the part of the Prosecution such as should, of itself, lead the Trial Chamber to discount the reliability of any particular testimony, other, of course, than that of Dragan Opaci}.

H. Hearsay

555. The use of hearsay evidence was debated at length before this Trial Chamber in an interlocutory motion in this case and was ruled upon in the Decision on the Defence Motion on Hearsay[41]. Since that Decision may be consulted directly, all that need be said of it here is that it concluded that the mere fact that particular testimony was in the nature of hearsay did not operate to exclude it from the category of admissible evidence.

556. In the course of this trial, and despite that Decision, objection was occasionally taken to the acceptance of certain hearsay evidence. However, these objections were not usually

[41] Decision on the Defence Motion on Hearsay, *supra*.

sustained and the testimony in question was admitted into evidence and assessed in the usual way for its probative value pursuant to Rule 89.

VI. Applicable Law

A. General Requirements of Articles 2, 3 & 5 of the Statute

557. Having considered the evidence offered at trial, it is now appropriate to discuss the law relating to the offences charged.

558. The competence of this International Tribunal and hence of this Trial Chamber is determined by the terms of the Statute. Article 1 of the Statute confers power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The Statute then, in Articles 2, 3, 4 and 5, specifies the crimes under international law over which the International Tribunal has jurisdiction. In the present case, only Articles 2, 3 and 5 are relevant. It is not in dispute that the offences as alleged in the Indictment satisfy the requirements of time and place imposed by Article 1 and, as will be seen, each of the rules of customary international humanitarian law to which the Indictment directs the Trial Chamber is concerned with serious violations of that body of law.

559. Each of the relevant Articles of the Statute, either by its terms or by virtue of the customary rules which it imports, proscribes certain acts when committed "within the context of" an "armed conflict". Article 2 of the Statute directs the Trial Chamber to the grave breaches regime of the Geneva Conventions which applies only to armed conflicts of an international character and to offences committed against persons or property regarded as "protected", in particular civilians in the hands of a party to a conflict of which they are not nationals[42]. Article 3 of the Statute directs the Trial Chamber to those sources of customary international humanitarian law that comprise the "laws or customs of war". Article 3 is a general provision covering, subject to certain conditions, all violations of international humanitarian law which do not fall under Article 2 or are not covered by Articles 4 or 5. This includes violations of the rules contained in Article 3 common to the Geneva Conventions ("Common Article 3"), applicable to armed conflicts in general, with which the accused has

[42] *Appeals Chamber Decision*, para. 81.

been charged under Article 3 of the Statute[43]. Article 5 of the Statute directs the Trial Chamber to crimes against humanity proscribed by customary international humanitarian law. By virtue of the Statute, those crimes must also occur in the context of an armed conflict, whether international or non-international in character. An armed conflict exists for the purposes of the application of Article 5 if it is found to exist for the purposes of either Article 2 or Article 3[44].

560. Consequently, it is necessary to show, first, that an armed conflict existed at all relevant times in the territory of the Republic of Bosnia and Herzegovina and, secondly, that the acts of the accused were committed within the context of that armed conflict and for the application of Article 2, that the conflict was international in character and that the offences charged were committed against protected persons.

1. Existence of an Armed Conflict

561. According to the *Appeals Chamber Decision*, the test for determining the existence of such a conflict is that

> an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[45]

(a) Protracted armed violence between governmental forces and organized armed groups

562. The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international

[43] *Id.*, para. 89.
[44] *Id.*, paras. 141-142.
[45] *Id.*, para. 70.

humanitarian law[46]. Factors relevant to this determination are addressed in the Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention I, ("*Commentary*, Geneva Convention I")[47].

563. The parties to the conflict in the area of op{tina Prijedor and the main parties to the conflict in Bosnia and Herzegovina as a whole were the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces, the latter controlling territory under the banner of the *Republika Srpska* and, at least before 19 May 1992, supported by or under the command of the JNA. The Government of the Republic of Bosnia and Herzegovina was also in conflict with various Bosnian Croat forces supported by the Government of Croatia. The Republic of Bosnia and Herzegovina was admitted as a State member of the United Nations, following decisions adopted by the Security Council and the General Assembly[48], on 22 May 1992, two days before the shelling and take-over of Kozarac. It was the *de jure* State against which the Bosnian Serb forces were in revolt. Even before that date, the Republic of Bosnia and Herzegovina was an organized political entity, as one of the republics of the Socialist Federal Republic of Yugoslavia, having its own republican secretariat for defence and its own TO.

564. The territory controlled by the Bosnian Serb forces was known initially as the "Serbian Republic of Bosnia and Herzegovina" and renamed *Republika Srpska* on 10 January 1992. This entity did not come into being until the Assembly of the Serbian People of Bosnia and Herzegovina proclaimed the independence of that Republic on 9 January 1992. In its revolt against the *de jure* Government of the Republic of Bosnia and Herzegovina in Sarajevo, it possessed, at least from 19 May 1992, an organized military force, namely the VRS, comprising forces formerly part of the JNA and transferred to the *Republika Srpska* by the Federal Republic of Yugoslavia (Serbia and Montenegro). These forces were officially under the command of the Bosnian Serb administration located in Pale, headed by the Bosnian Serb President, Radovan Karad`ic. The Bosnian Serb forces occupied and operated from a determinate, if not definite, territory, comprising a significant part of Bosnia and

[46] Jean Pictet (gen. ed.) *Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Convention II (ICRC, Geneva, 1960), 33 ("*Commentary*, Geneva Convention II"); Jean Pictet (gen. ed.) *Commentary, Geneva Convention Relative to the Treatment of Prisoners of War*, Convention III, (ICRC, Geneva, 1960), 37 ("*Commentary*, Geneva Convention III").
[47] (ICRC, Geneva, 1952) 49-50.
[48] *See* General Assembly Resolution 46/237, U.N. Doc. A/RES/46/237.

Herzegovina, bounded by the borders of the Republic of Bosnia and Herzegovina on the one hand, and by the front-lines of the conflict between the Bosnian Serb forces and the forces of the Government of the Republic of Bosnia and Herzegovina and the forces of the Bosnian Croats, on the other.

565. In op{tina Prijedor, hostilities did not cease following the withdrawal from the territory of Bosnia and Herzegovina of the JNA on 19 May 1992. As has been seen, areas to the south-west of the town of Prijedor were attacked by Bosnian Serb armed forces in late May 1992 following the clash between Serbs and Muslims at the Muslim-manned checkpoint in Hambarine referred to earlier, in which there were casualties on both sides. Then, on 24 May 1992, the predominantly Muslim town of Kozarac was attacked by Bosnian Serb forces, with an artillery bombardment which lasted until 26 May 1992 and extended to surrounding Muslim villages. As a result of this shelling many dwellings were destroyed, over 800 inhabitants were killed and the remainder, including those from surrounding Muslim villages, were expelled, the town and its vicinity being then occupied by Bosnian Serb forces. Similarly, the two villages of Jaski}i and Sivci and their inhabitants were attacked by armed Bosnian Serbs on 14 June 1992 with like consequences. It is with the attacks upon Kozarac and these Muslim villages and all that ensued for their inhabitants that the Indictment is concerned.

566. In considering the conflict relating to the events in op{tina Prijedor, the Trial Chamber is not, however, bound to confine its attention to the immediate area of that op{tina or to the time of the alleged offences but may consider the ongoing conflict between the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces in its entirety. As the Appeals Chamber pointed out, "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities."[49] Even after these attacks, until the Dayton Peace Agreement was concluded and notwithstanding various cease-fire agreements entered into in various parts of Bosnia and Herzegovina, no general cessation of hostilities had occurred there or elsewhere in the territory of the former Yugoslavia. The ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the Government of the Republic of Bosnia and

[49] *Appeals Chamber Decision*, para. 67.

Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of Bosnia and Herzegovina, and various paramilitary groups, all of which had occupied or were proceeding to occupy a significant portion of the territory of that State.

567. The intensity of the conflict has ensured the continuous involvement of the Security Council since the outbreak of fighting in the former Yugoslavia. As early as 25 September 1991, considering that the situation in the former Yugoslavia constituted a threat to international peace and security, the Security Council invoked Chapter VII of the Charter of the United Nations to declare a total arms embargo on the region[50]. After that time, the Security Council took numerous steps to maintain international peace and security in the region, including the imposition of economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro) for its involvement in the conflict in Bosnia and Herzegovina[51] and the establishment of this International Tribunal[52].

568. Having regard then to the nature and scope of the conflict in the Republic of Bosnia and Herzegovina and the parties involved in that conflict, and irrespective of the relationship between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Bosnian Serb forces, the Trial Chamber finds that, at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the laws or customs of war embodied in Article 3 common to the four Geneva Conventions of 12 August 1949, applicable as it is to armed conflicts in general, including armed conflicts not of an international character.

(b) Use of force between States

569. Applying what the Appeals Chamber has said, it is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina. This was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA

[50] *See* Security Council resolution 713, U.N. Doc. S/RES/713 (1991).
[51] Security Council resolution 757, U.N. Doc S/RES/757 (1993).

(later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other. While the forces of the VJ continued to be involved in the armed conflict after that date, the character of the relationship between the VJ and the Bosnian Serb forces from that date, and hence the nature of the conflict in the areas with which this case is concerned, is discussed in the consideration of Article 2 of the Statute. It suffices for the moment to say that the level of intensity of the conflict, including the involvement of the JNA or the VJ in the conflict, was sufficient to meet the requirements for the existence of an international armed conflict for the purposes of the Statute.

570. For evidence of this it is enough to refer generally to the evidence presented as to the bombardment of Sarajevo, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina's border with Serbia on the Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro. That the hostilities involved in this armed conflict extended into op{tina Prijedor is also clear and is evidenced by the military occupation and armed seizure of power in the town of Prijedor itself on 30 April 1992 by JNA forces, aided by Bosnian Serb members of the police and administration and, following an unsuccessful revolt, their subsequent expulsion by force of arms of the majority of the non-Serb inhabitants from, and the bombardment and substantial destruction of, Stari Grad, the old, predominantly Muslim, section of Prijedor. These attacks were part of an armed conflict to which international humanitarian law applied up until the general cessation of hostilities.

571. However, the extent of the application of international humanitarian law from one place to another in the Republic of Bosnia and Herzegovina depends upon the particular character of the conflict with which the Indictment is concerned. This depends in turn on the degree of involvement of the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA on 19 May 1992. That issue will be dealt with in Section VI. B of this Opinion and Judgment.

2. Nexus between the Acts of the Accused and the Armed Conflict

[52] *See* Security Council resolution 827, U.N. Doc S/RES/827 (1993).

572. The existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.

573. In relation to the applicability of international humanitarian law to the acts alleged in the Indictment, the Appeals Chamber has held that:

> Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[53]

For an offence to be a violation of international humanitarian law, therefore, this Trial Chamber needs to be satisfied that each of the alleged acts was in fact closely related to the hostilities. It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred, as the Appeals Chamber has indicated, nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law[54]. The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.

574. In any event, acts of the accused related to the armed conflict in two distinct ways. First, there is the case of the acts of the accused in the take-over of Kozarac and the villages

[53] *Appeals Chamber Decision*, para. 70.

of Sivci and Jaski}i. Given the nature of the armed conflict as an ethnic war and the strategic aims of the *Republika Srpska* to create a purely Serbian State, the acts of the accused during the armed take-over and ethnic cleansing of Muslim and Croat areas of op{tina Prijedor were directly connected with the armed conflict.

575. Secondly, there are the acts of the accused in the camps run by the authorities of the *Republika Srpska*. Those acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners in the camps in op{tina Prijedor. Indeed, such treatment effected the objective of the *Republika Srpska* to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict.

576. The Trial Chamber now turns to the specific provisions of the Statute, and the sources of customary international law to which they direct this Trial Chamber, in order to determine whether the acts of the accused violated any of these provisions. To the extent required, the connection of the acts of the accused to the events in question will be discussed further in the following sections.

B. Article 2 of the Statute

1. The Customary Status of Article 2

577. Article 2 of the Statute provides that the "International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949", and there follows a list of the specific crimes proscribed. Implicit in the *Appeals Chamber Decision* is the conclusion that the Geneva Conventions are

[54] *See* Article 4, I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind, ("*I.L.C. Draft Code*") *Report of the International Law Commission on the Work of its Forty-eighth session, 6 May - 26 July 1996*, G.A.O.R., 51st Sess., Supp. No. 10, 30, U.N. Doc. A/51/10.

a part of customary international law, and as such their application in the present case does not violate the principle of *nullum crimen sine lege*[55].

2. Status of the Victims as "Protected Persons"

(a) Introduction

578. According to the Appeals Chamber, the Statute specifically restricts the prosecution of grave breaches to those committed against "persons or property protected under the provisions of the relevant Geneva Conventions"[56]. In this case, each of the victims of the crimes alleged to have been committed by the accused were civilians caught up in the ongoing armed conflict in the Republic of Bosnia and Herzegovina. Some of the victims were in towns and villages captured by the VRS, while others fell victim to the acts of the accused while detained at one of the camps established in op{tina Prijedor to facilitate the ethnic cleansing of that area. As such, their status under the Geneva Conventions is governed by the terms of Article 4 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"), which defines those civilians who fall under the protection of that Convention ("protected persons") as follows:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.[57]

The central question is thus whether at all relevant times the victims of the accused were in the hands of "a Party to the conflict or Occupying Power of which they are not nationals". Implicit in this expression is a threefold requirement. The first and second requirements are that the victims be "in the hands of" a "Party to the conflict or Occupying Power". The third is that the civilian victims not be nationals of that Party or Occupying Power.

(b) Were the victims in the hands of a party to the conflict?

[55] *See Appeals Chamber Decision*, paras.79-85.
[56] *Id.*, para. 81.
[57] Geneva C onvention IV, *supra*.

579. As previously discussed, the *Republika Srpska* was a party to the conflict in the Republic of Bosnia and Herzegovina opposed to the Republic's secession from the Socialist Federal Republic of Yugoslavia. While the victims in the camps at Omarska, Keraterm and Trnopolje were in the hands of the armed forces and authorities of the *Republika Srpska*, the expression "in the hands of" is not restricted to situations in which the individual civilian is physically in the hands of a Party or Occupying Power. As the Commentary to Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Convention IV, ("*Commentary*, Geneva Convention IV") explains:

> The expression "in the hands of" is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a party to the conflict or an occupied territory implies that one is in the power, or "hands", of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression 'in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.[58]

Consequently, those persons who found themselves in territory effectively occupied by a party to the conflict can be considered to have been in the hands of that party. However, given that the take-over of op{tina Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date, the exact date when the victims of the acts of the accused fell into the hands of the opposing armed forces is highly relevant to an assessment of their status under international humanitarian law.

580. Most of the victims of the accused's acts within the op{tina Prijedor camps with whom the Trial Chamber is concerned in this case were, prior to the occurrence of the acts in question, living in the town of Kozarac or its surrounds or in the villages of Sivci and Jaski}i. In some instances, the exact date and place when some of the victims of the acts of the accused fell into the hands of forces hostile to the Government of the Republic of Bosnia and Herzegovina is not made clear. Whether or not the victims were "protected persons" depends on when it was that they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has

[58] Jean Pictet (gen. ed.), *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Convention IV, (ICRC, Geneva, 1958), 47 ("*Commentary*, Geneva Convention IV").

effective control over an area[59]. According to Georg Schwarzenberger, in *International Law as applied by International Courts and Tribunals*, the law relating to belligerent occupation:

> . . . applies only to invaded territory, but not to the whole of such territory. It does not extend to invaded enemy territory in which fighting still takes place or to those parts of it which the territorial sovereign may have abandoned, but in which the invader has not yet established his own authority.
> . . . [I]n invaded territory which is not yet effectively occupied, the invader is bound merely by the limitations which the rules of warfare *stricto sensu* impose. The protection which the civilian population in such areas may claim under international customary law rests on the continued application in their favour of the standard of civilisation in all matters in which this does not run counter to the necessities of war. Those of the provisions of Geneva Red Cross Convention IV of 1949 which are not limited to occupied territories add further to this minimum of protection.[60]

In the case of op{tina Prijedor, only parts of the op{tina, including the main population centre of Prijedor town, were occupied on or before 19 May 1992. In relation to the citizens of Kozarac and other Muslim-controlled or dominated areas of op{tina Prijedor, they fell into the hands of the VRS upon their capture by those forces on or after 27 May 1992. That is not, however, to say that, because some parts of op{tina Prijedor were not controlled by the VRS until 27 May 1992, there was not an effective occupation of the remainder of op{tina Prijedor. This point is made clear, for example, by the *British Manual of Military Law*, which states:

> The fact that there is a defended place or zone still in possession of the national forces within an occupied district does not make the occupation of the remainder invalid, provided that such place or defended zone is surrounded and effectively cut-off from the rest of the occupied district.[61]

581. In any event, for those persons in op{tina Prijedor who were in territory occupied prior to 19 May 1992 by Bosnian Serb forces and JNA units, their status as "protected persons", subject to what will be said about the relationship between the VRS and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) below, ceased on that date. As Schwarzenberger points out:

> In accordance with its territorial and temporal limitations, the law of belligerent occupation ceases to apply whenever the Occupying Power loses

[59] *Id.*, 47.
[60] Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals* (Stevens & Sons, London, 1968), Vol II, 174, 176.
[61] *British Manual of Military Law*, Part III (The Law of War on Land), (1958), para. 501.

> effective control the occupied territory. Whether, then, this body of law is replaced by the laws of war in the narrower sense or by the law of the former territorial sovereign, depends on the fortunes of war.[62]

582. On 15 May 1992 the Security Council, in resolution 752 of 1992[63], demanded that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately and that those units either be withdrawn, be subject to the authority of the Government of the Republic of Bosnia and Herzegovina, or be disbanded and disarmed. Subject to what will be said below regarding the relationship between the JNA or the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), on the one hand, and the VRS and the *Republika Srpska* on the other, by 19 May 1992 the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) had lost or given up effective control over op{tina Prijedor and most other parts of the Republic of Bosnia and Herzegovina. As each of the crimes alleged to have been committed by the accused occurred after 19 May 1992, the question to which the Trial Chamber now turns, having clearly determined that the victims were at all relevant times in the hands of a party to the conflict, is whether, after that date and at all relevant times, those victims were in the hands of a party to the conflict or occupying power of which they were not nationals.

583. In making this assessment, the Trial Chamber takes notice of two facts. The first is the conclusion inherent in the *Appeals Chamber Decision* and in the statements of the Security Council in relation to the conflict in the former Yugoslavia that that conflict was of a mixed character, and the Appeals Chamber's implicit deference to this Trial Chamber on the issue of whether the victims were "protected persons" in the present case[64]. It is thus for the Trial Chamber to characterize the exact nature of the armed conflict, of which the events in op{tina Prijedor formed a part, when applying international humanitarian law to those events. The second fact is the nature of the conflict in the Republic of Bosnia and Herzegovina as understood by the parties to that conflict, which was made clear by the signing, on 22 May 1992, just two days before the attack on Kozarac, of an agreement by the representatives of Alija Izetbegovi} (President of the Republic of Bosnia and Herzegovina and the SDA), Radovan Karad`i} (President of the SDS) and Miljenko Brki} (President of the Croatian Democratic Community) to abide by the substantive rules of armed conflict not of an

[62] Schwarzenberger, 317, *supra*.
[63] Security Council Resolution 752, U.N. Doc. S/RES/752 (1992).
[64] *See Appeals Chamber Decision*, paras. 73-77.

international character prescribed by Common Article 3 of the Geneva Conventions. It was also agreed, on the basis of paragraph 3 of Common Article 3, to apply certain provisions of the full Geneva Convention regime concerning international conflicts. This agreement was supported by the ICRC[65]. In accordance with the terms of Common Article 3, the signing of such agreements does not in any way affect the legal status of the parties to the conflict and does not in any way affect the independent determination of the nature of that conflict by this Trial Chamber.

(c) Were the victims in the hands of a party to the conflict of which they were not nationals?

(i) Applicable legal test

584. The armed forces of the *Republika Srpska*, and the *Republika Srpska* as a whole, were, at least from 19 May 1992 onwards, legal entities distinct from the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). However, as a rule of customary international law, the acts of persons, groups or organizations may be imputed to a State where they act as de facto organs or agents of that State. One may speak of imputability as "the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the State."[66] In this case, the acts of the armed forces of the *Republika Srpska*, although nationals of the Republic of Bosnia and Herzegovina, after 19 May 1992 in relation to op{tina Prijedor may be imputed to the Federal Republic of Yugoslavia (Serbia and Montenegro) if those forces were acting as de facto organs or agents of that State for that purpose or more generally. Were the Trial Chamber to make this imputation it would not be concerned further with questions of State responsibility for those acts; the Trial Chamber would conclude that the civilian victims of the accused's acts were "protected persons" within the meaning of Geneva Convention IV as persons in territory occupied by a Party to the conflict of which they are not nationals. This principle of customary international law is also to be found in Article 29 of Geneva Convention IV, which provides:

[65] *See Appeals Chamber Decision*, para.73.
[66] I.A. Shearer, *Starke's International Law* (11 ed., Butterworths, Sydney, 1994), 276.

> The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.[67]

The *Commentary*, Geneva Convention IV, to this Article further clarifies this provision:

> The nationality of the agents does not affect the issue. That is of particular importance in occupied territories, as it means that the occupying authorities are responsible for acts committed by their locally recruited agents of the nationality of the occupied country.[68]

This approach to the problem finds implicit support in the discussion of the Security Council's view of the nature of the armed conflict by the Appeals Chamber[69]. Such a situation is not restricted to circumstances in which the foreign Power has occupied a certain territory and then recruits local agents. As will be seen, the relationship of de facto organs or agents to the foreign Power includes those circumstances in which the foreign Power "occupies" or operates in certain territory solely through the acts of local de facto organs or agents.

585. The particular problem of applying general principles of international law relating to State responsibility for de facto organs or agents to the specific circumstance of rebel forces fighting a seemingly internal conflict against the recognized government of a State, but dependent on the support of a foreign Power in the continuation of that conflict, was considered by the International Court of Justice ("Court") in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v U.S.) (Merits)[70], ("*Nicaragua* case"). That case was concerned ultimately with the responsibility of a State for the breach, *inter alia*, of rules of international humanitarian law, while the instant case is concerned ultimately with the responsibility of an individual for the breach of such rules. However, in the *Nicaragua* case, as in the instant case, the Court was also concerned with the intermediate question as to which part of international humanitarian law to apply to the relevant conduct. In determining the legal obligations of the United States towards Nicaragua, including international humanitarian law obligations, the Court effectively concluded that the conflict was of a mixed character. According to the Court:

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[67] Geneva Convention IV, *supra*.
[68] *Commentary*, Geneva Convention IV, 212, *supra*.
[69] *See Appeals Chamber Decision*, para.76.
[70] 1986 I.C.J. Reports,14.

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; while the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[71]

Considering whether the acts of the *contras*, being the rebel forces opposed to the Government of Nicaragua, could be imputed to the United States the Court asked

> whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[72]

In concluding that the United States had not exercised sufficient control "in all fields as to justify treating the *contras* as acting on its behalf"[73], the Court set a particularly high threshold test for determining the requisite degree of control on the part of the United States. On the facts of that case, the Court took the view that:

> . . . United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. *For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*.[74]

586. However, the facts of the *Nicaragua* case and this case are very different, and especially so in two important respects. First, the VRS was an occupying force, rather than

[71] *Id.*, para. 219.
[72] *Id.*, para. 109.
[73] *Id.*, para. 109.

just a raiding army. Many of the violations in this case were committed in camps run by the local authorities of the *Republika Srpska* without any VJ involvement and with relatively little involvement of those parts of the VRS formerly part of the JNA. However, the camps into which Muslim and Croat civilians were driven following the VRS's offensive operations in op{tina Prijedor were located in territory occupied by the VRS. Consequently, if the requisite degree of command and control by the VJ, and hence the Federal Republic of Yugoslavia (Serbia and Montenegro), over the VRS is established for the purposes of imputing the acts of those forces operating in op{tina Prijedor or the VRS as a whole to the Federal Republic of Yugoslavia (Serbia and Montenegro), those persons can still be said to be in the hands of a party to the conflict of which they are not nationals within the meaning of Article 4 of Geneva Convention IV and hence for the purposes of applying international humanitarian law to the instant case.

587. Secondly, prior to the withdrawal of forces of the Federal Republic of Yugoslavia (Serbia and Montenegro) on or before 19 May 1992, Bosnian Serb troops served in the ranks of the JNA, and were transferred into the newly-formed VRS after that date. Thus, unlike the *Nicaragua* case in which the Court considered whether the *contra* forces had, over time, fallen into such a sufficient state of dependency and control *vis-à-vis* the United States that the acts of one could be imputed to another, the question for this Trial Chamber is whether, after 19 May 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS so that those forces could not be regarded as de facto organs or agents of the VJ and hence of the Federal Republic of Yugoslavia (Serbia and Montenegro).

588. Consequently, the Trial Chamber must consider the essence of the test of the relationship between a de facto organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of op{tina Prijedor, can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)[75]. That is not to say, however, that it is for the Defence to disprove such a relationship between Bosnian Serb forces and the JNA or VJ. It remains

[74] *Id.*, para. 115 (emphasis added).

the task of the Prosecution to prove that the nature of the relationship between the VRS and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), and between the VRS and the VJ in particular, was of such a character. In doing so it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) for the necessities of war. It must also be shown that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

(ii) The creation of the VRS and the transfer of responsibility to the VRS by the JNA/VJ in May 1992

589. The details of the creation of the VRS in May 1992 have already been dealt with in Section II. A. 7 of this Opinion and Judgment but its principal features may be restated. As a response to Security Council resolution 752, from 15 May 1992 JNA soldiers born in Bosnia and Herzegovina who were serving in JNA units in Serbia or Montenegro were ordered to report to, and place themselves at the disposal of, JNA units in Bosnia and Herzegovina, while those born elsewhere were to report to JNA units in Serbia or Montenegro. However, this was not applied in the case of many officers and non-commissioned officers not of Bosnian extraction who remained in Bosnia and Herzegovina in units which became part of the VRS. In addition, the Federal Republic of Yugoslavia (Serbia and Montenegro) transferred to VRS units most of the *matériel* which had been withdrawn from Slovenia and Croatia.

590. The occupation of Kozarac and of the surrounding villages was part of a military and political operation, begun before 19 May 1992 with the take-over of the town of Prijedor on 29 April 1992, aimed at establishing control over the op{tina which formed part of the land corridor of Bosnian territory linking the Federal Republic of Yugoslavia (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia. The town of Kozarac lay on the supply route running through this corridor. The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the "Banja Luka" or "1st Krajina" Corps after

[75] *Id.*, para.109.

19 May 1992 but retained the same Commander, Lieutenant-General Tali}, a Bosnian Serb. It relied for logistics, as previously, on the Rear Service Base at Banja Luka, commanded, as previously, by Colonel Selak, a Bosnian Muslim.

591. The actual assault on Kozarac was carried out by units centred around what was formerly the JNA 343rd Mechanised Brigade from Prijedor but which later became the VRS 43rd Brigade. These units included 'Light Brigades' (Bosnian Serb paramilitary forces) from Sanski Most and Bosanski Dubica. In command of the units of the 43rd Mechanised Brigade forces involved in the assault was Major Radmilo Zeljaja, apparently a Bosnian Serb, the Deputy Brigade Commander and Brigade Chief of Staff. According to one witness, Major Zeljaja was closely linked to the SDS in 1991 and 1992. In overall command of the 43rd Mechanised Brigade and the officer commanding the military operation against Kozarac was Colonel Arsi}, a former JNA officer and a Bosnian Serb. Colonel Arsi} was a member of the Municipal Assembly of Prijedor and had also become closely linked to the SDS over time in the period prior to 19 May 1992.

592. Despite being Bosnian Serbs, such officers as Lieutenant-General Tali} and Colonel Arsi}, as with other officers of the 1st Krajina Corps, continued to receive their salaries from the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the pensions of those who in due course retired were paid, and in 1996 were still being paid, by that Government. At a briefing of officers concerned with logistics, General \uki}, then of the VRS but who had, until 18 May 1992, been Chief of Staff of the Technical Administration of the JNA in Belgrade, announced that all active duty members of the VRS would continue to be paid by the federal government in Belgrade, which would continue to finance the VRS, as it had the JNA, up to the same numerical strength of officers as were registered on 19 May 1992.

593. Excluding the Rear Service Base troops, the 1st Krajina Corps numbered some 100,000 troops, expanded from its JNA peacetime strength of 4,500. These forces included or were supplemented by various paramilitary forces. Prior to May 1992 the JNA had played a significant role in the training and equipping of Bosnian Serb paramilitary forces. In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and acted under the command and within the framework of the JNA. These forces included Arkan's Serbian Volunteer Guard and various forces styling themselves as Chetniks, a name

which, as has been seen, is of significance from the fighting in the Second World War against the German, Italian and Croat forces in Yugoslavia. Some were even given training in the compounds of the 5th JNA Corps in Banja Luka. The reliance placed on such forces by the JNA reflected a general manpower shortage. According to one witness, "whilst the JNA was prepared to use its artillery in operations, it relied on paramilitary groups to go into built up areas and to act as a substituted infantry". Air support was given to such paramilitary forces which continued into 1992. Evidence was also presented that the Serbian Security Service had been directing at least one paramilitary leader, Vojislav [e{elj, in the disposition of his forces in 1991 and 1992.

594. Many former JNA officers not of Bosnian Serb extraction remained in the command structure of the 1st Krajina Corps, especially in the combat units. General Kadijevi}, writing of the role of the JNA in Bosnia and Herzegovina, recounts how "the units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment" and adds that "first the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina by political means . . . ." (Prosecution Exhibition 30.) According to Colonel Selak, while it would usually have been illegal for a soldier or officer to fight for any force other than the VJ, those non-Bosnian Serb officers who remained to serve with the VRS considered themselves to be on temporary assignment, and thus able to remain. This was done despite the shortage of trained officers in the JNA at that time.

595. It can be seen then that the JNA played a role of vital importance in the establishment, equipping, supplying, maintenance and staffing of the 1st Krajina Corps, as it did with other VRS units. However, that in itself is not enough; it is also necessary to show, as the Court required of Nicaragua in proving control by the United States over the *contras*, that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) continued to exercise effective control over the operations of the VRS, after the transfers of men and *matériel* on or before 19 May 1992.

(iii) Relationship of the VRS to the Federal Republic of Yugoslavia (Serbia and Montenegro) after 19 May 1992

596. Of particular concern to the issue of control over events after 19 May 1992 in the Banja Luka area generally, and op{tina Prijedor in particular, are the circumstances surrounding the Commander of the 1st Krajina Corps, Lieutenant-General Tali}, the former Commander of the 5th Corps who, unlike many of his subordinates and as previously noted, is a Bosnian Serb. His importance to all of the operations of the 1st Krajina Corps cannot be overstated. Colonel Selak testified that reports and requests had to be filed with the Corps Commander before any troop movements occurred and that a strong degree of oversight was exercised at Corps level in regard to the activities of subordinate units. The attack on Kozarac, in common with all combat activities, would necessarily have had to be approved, in accordance with military command procedures, by Lieutenant-General Tali}, who alone could order the commitment of 1st Krajina Corps units to combat.

597. What command or influence, if any, was exercised over Lieutenant-General Tali}? Militarily, the 1st Krajina Corps was under the authority of the Main Staff of the VRS in Pale, to which all reports were directed. According to Colonel Selak, there was no change in the everyday running of logistics operations after 19 May 1992. In relation to the question of command and control he noted that the flow of logistics for the Corps after that date went through VRS Chief of Staff and the Main Staff of the VRS in Pale, rather than direct to Belgrade or through any JNA structure such as the Headquarters of the 2nd Military District (formerly in Sarajevo). In command of the VRS Main Staff was General Mladi}, Lieutenant-General Tali}'s superior and a fellow Bosnian Serb. No evidence was led by the Prosecution as to the relationship between these two men. As a disciplined general officer, however, it can only be presumed, without further evidence, that Lieutenant-General Tali} acted in accordance with the orders of the VRS Main Staff when they were issued. At the political level, all that the evidence discloses is that Lieutenant-General Tali} was a member, by virtue of his military post, of the ARK Crisis Staff, a creation of the *Republika Srpska*. Indeed, Colonel Selak testified that Lieutenant-General Tali} coordinated with the Crisis Staff and acted on their requests, such as the request to open a military corridor to Serbia.

598. This leads the Trial Chamber to a consideration of two relationships of especial importance to the question which this Trial Chamber must determine. The first is the relationship of General Mladi}, and hence the VRS Main Staff, to Belgrade. The Trial Chamber has already considered the overwhelming importance of the logistical support

provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. The only evidence which the Prosecution was able to adduce as to the command and control relationship between the VRS Main Staff and Belgrade was that provided by Colonel Selak. He said, speaking of a Prosecution exhibit displaying a link between the Main Staffs of the VRS and VJ after 18 May 1992 (Prosecution Exhibit 174):

> [T]here was no real chain of command because officially the Commander of the army of the Republika Srpska was Colonel General Ratko Mladi}. So this [link] is just *pro forma* because other relations between the Chief of Staff, the main staff of the Yugoslav Army and the main staff of the army of the Republika Srpska were not really existing but, in fact, they did co-ordinate.

Coordination is not the same as command and control. The only other evidence submitted by the Prosecution was that, in addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade. No further evidence was led by the Prosecution on the nature of this relationship.

599. What then of the second relationship, namely that between the SDS (and hence the *Republika Srpska*) and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)? Unlike the situation confronted by the Court in the *Nicaragua* case, where the United States had largely selected and installed the political leaders of the *contras*[76], in the *Republika Srpska* political leaders were popularly elected by the Bosnian Serb people of the Republic of Bosnia and Herzegovina. Indeed, as previously noted, the independence of the *Republika Srpska* itself was declared at a vote of the Assembly of the Serbian People of Bosnia and Herzegovina on 9 January 1992. The Assembly and its leaders played a role in the overall conduct of the war both in the Republic of Bosnia and Herzegovina and beyond, in addition to the supply of paramilitary forces to supplement the fighting strength of the new VRS units, which forces took part in the military operations in op{tina Prijedor.

600. In the absence of sufficient direct evidence as to the exercise of command and control by Belgrade, the question is one as to the appropriate inference or inferences of fact which the Trial Chamber can and should draw from the evidence presented before it; should it be inferred that the necessary degree of effective control was exercised by the Federal Republic of Yugoslavia (Serbia and Montenegro), over the military operations of the armed forces of

the *Republika Srpska*? If so, despite the changes in the command structure of the Bosnian Serb forces in the period after 19 May 1992, and in particular the establishment of a separate armed force, the VRS, on or after that date, the appropriate conclusion would be that the VRS was nothing more than a de facto organ or agent of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

601. Two factors seemed of considerable weight to the case of the Prosecution in drawing such an inference. The first is the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor. Secondly, there is the continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro). It seems clear to the Trial Chamber that the officers of non-Bosnian Serb extraction were sent as "volunteers" on temporary, if not indefinite, assignment to the VRS. In that sense, they may well be considered agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)[77]. In the *Nicaragua* case, by contrast, no evidence was led to the effect that United States personnel operated with or commanded troops of the *contras* on Nicaraguan territory. As Judge Ago, formerly the Special Rapporteur to the International Law Commission on State Responsibility, explained in the course of his Separate Opinion in the *Nicaragua* case:

> [T]he negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the *contra* forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft [i.e., Article 8 read together with Article 11]. It would indeed be inconsistent with the principles governing the question to regard members of the *contra* forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment,

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[76] *Id.*, para. 112.

[77] *See* Commentary to Article 8, I.L.C. Draft Articles on State Responsibility, *Report of the International Law Commission on the Work of its Twenty-sixth session,* Ybk I.L.C., 1974, Vol. II, Pt 1, 283-286, U.N. Doc A/9610/Rev.1.

> accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the *contras* against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.[78]

The Trial Chamber does not consider that this assists the Prosecution. First, in relation to the attack on Kozarac and the running of the detention camps specifically, no evidence of the involvement of non-Bosnian Serb officers has been presented. Secondly, even if the attack on Kozarac and the running of the camps had been carried out under the orders of such officers within the 1st Krajina Corps, on the evidence presented to this Trial Chamber such orders could only be considered as having originated with, been at the behest of, or been issued under the authority of, the Corps Commander, Lieutenant-General Tali}. Consequently, any operations commanded by such officers, although they may be considered as instances in which, to paraphrase Judge Ago, 'certain members of the VRS happened to have been specifically charged by Federal Republic of Yugoslavia (Serbia and Montenegro) authorities to commit a particular act, or to carry out a particular task of some kind', without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out "on behalf of" the Federal Republic of Yugoslavia (Serbia and Montenegro). Consequently, this Trial Chamber must consider the inferences which should be drawn in relation to either the 1st Krajina Corps or the VRS as a whole.

602. In relation to the second factor of importance put to the Trial Chamber by the Prosecution, it is clear from the evidence presented that the pay of all 1st Krajina Corps officers, and presumably of all senior VRS Commanders as former JNA officers, continued to be received from Belgrade after 19 May 1992. It has been said that, in most circumstances relating to individuals, payment may be equated with control[79]. Even so, given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that existing administrative mechanisms for financing those soldiers and their

[78] *Nicaragua* case, *supra*, Sep. Op. Judge Ago, para.16.
[79] *See* Amerasinghe, *Studies in International Law* (1968), 215; Wedderburn, 6 I.C.L.Q. (1957) 290.

operations would be relied on after 19 May 1992. In the circumstances of the time, continuity of command structures, logistical organization, and strategy and tactics were as much matters of convenience as of military necessity. As to the financing of the VRS as a whole, such evidence, without more, as with the direct relationship established in the *Nicaragua* case between financing of *contra* activities against the Government of Nicaragua by the United States and the nature and intensity of those activities, establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.

603. The Trial Chamber turns again to the relationship of the VRS and the *Republika Srpska* as a whole to the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro). It is clear from the evidence that the military and political objectives of the *Republika Srpska* and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary. The Federal Republic of Yugoslavia (Serbia and Montenegro), heavily engaged as it had been in activities in Croatia against the forces of the Croatian Army, was concerned with maintaining a supply corridor running from Serbia through northern Bosnia (which included op{tina Prijedor) to the Serbian Krajina in Croatia. The SDS political leadership of the *Republika Srpska* and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a Greater Serbia, unifying as it would the territories in which Serbs lived in the former Yugoslavia. This was also the desire of the majority of the Bosnian Serb people, who feared, rightly or wrongly, their fate in the hands of a State controlled or dominated by other ethnic groups.

604. In that sense, there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the *Republika Srpska* and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies could coordinate their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued. In particular, the relationship between the Main Staff of the VRS and the Main Staff of the VJ cannot, on the evidence presented before this Trial Chamber, be said to

involve anything more than a general level of coordination consonant with their relationship as allied forces in the Serbian war effort.

605. Thus, while it can be said that the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of *matériel* by the VJ, had the capability to exercise great influence and perhaps even control over the VRS, there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS, or to influence those operations beyond that which would have flowed naturally from the coordination of military objectives and activities by the VRS and VJ at the highest levels. In sum, while, as in the *Nicaragua* case, the evidence available to this Trial Chamber clearly shows that the "various forms of assistance provided" to the armed forces of the *Republika Srpska* by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) was "crucial to the pursuit of their activities" and, as with the early years of the *contras'* activities, those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations, evidence that the Federal Republic of Yugoslavia (Serbia and Montenegro) through the VJ "made use of the potential for control inherent in that dependence", or was otherwise given effective control over those forces and which it exercised, is similarly insufficient.

606. It is of course possible, on or in spite of the evidence presented, to view the acts of the JNA and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) on or about 19 May 1992 as nothing more than a cynical and intentional creation of the objective factors necessary to distance themselves from direct legal responsibility for the acts of the armed forces of the *Republika Srpska*, while doing everything to ensure that the material factors necessary to ensure the successful continuation of the armed conflict to achieve the same military and political goals were kept in place. Even if the legal effect of creating such objective factors, which caused no small amount of difficulty to the JNA and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), could be vitiated by reason of some fraudulent intention, which this Trial Chamber doubts, that is not the only nor the most reasonable conclusion open on the evidence presented. There is, in short, no evidence on which this Trial Chamber may confidently conclude that the armed forces of the *Republika Srpska*, and the *Republika Srpska* as a whole, were anything more than mere allies, albeit highly dependent allies, of the Government of the Federal Republic of Yugoslavia (Serbia and

Montenegro) in its plan to achieve a Greater Serbia from out of the remains of the former Yugoslavia. The continued, indirect involvement of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the armed conflict in the Republic of Bosnia and Herzegovina, without the ability to impute the acts of the armed forces of the *Republika Srpska* to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), gives rise to issues of State responsibility beyond the scope and concern of this case.

3. Legal Findings

607. The Trial Chamber is, by majority with the Presiding Judge dissenting, of the view that, on the evidence presented to it, after 19 May 1992 the armed forces of the *Republika Srpska* could not be considered as de facto organs or agents of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), either in opština Prijedor or more generally. For that reason, each of the victims of the acts ascribed to the accused in Section III of this Opinion and Judgment enjoy the protection of the prohibitions contained in Common Article 3, applicable as it is to all armed conflicts, rather than the protection of the more specific grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals, which falls under Article 2 of the Statute. Such a conclusion is, of course, without prejudice to the position of those citizens of the Republic of Bosnia and Herzegovina who found themselves in the hands of forces of the JNA before 19 May 1992 or in the hands of forces of the VJ after that date, whether in the territory of the Republic of Bosnia and Herzegovina or elsewhere, or to those citizens of the Republic of Bosnia and Herzegovina in the hands of units of the VRS which, from time to time, may have fallen under the command and control of the VJ and of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro).

608. The consequence of this finding, as far as this trial is concerned, is that, since Article 2 of the Statute is applicable only to acts committed against "protected persons" within the meaning of the Geneva Conventions, and since it cannot be said that any of the victims, all of whom were civilians, were at any relevant time in the hands of a party to the conflict of which they were not nationals, the accused must be found not guilty of the counts which rely upon that Article, namely Counts 5, 8, 9, 12, 15, 18, 21, 24, 27, 29 and 32.

C. Article 3 of the Statute

609. Article 3 of the Statute directs the Trial Chamber to the laws or customs of war, being that body of customary international humanitarian law not covered by Articles 2, 4 or 5 of the Statute. As previously noted, that body of law includes the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character, as a reflection of elementary considerations of humanity, and which is applicable to armed conflicts in general[80]. Two aspects must be considered. First, there are the requirements imposed by Article 3 of the Statute for the inclusion of a law or custom of war within the jurisdiction of this International Tribunal. Secondly, there are the additional requirements for the applicability of the proscriptive rules contained in paragraph 1 of Common Article 3 in addition to the elements of the proscribed acts contained therein.

1. Requirements of Article 3 of the Statute

610. According to the Appeals Chamber, the conditions that must be satisfied to fulfil the requirements of Article 3 of the Statute are:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
> (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ; and
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [81]

Those requirements apply to any and all laws or customs of war which Article 3 covers.

611. In relation to requirements (i) and (ii), it is sufficient to note that the Appeals Chamber has held, on the basis of the *Nicaragua* case, that Common Article 3 satisfies these requirements as part of customary international humanitarian law[82].

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[80] *Appeals Chamber Decision*, paras. 89, 98, 102; *Nicaragua* case, para. 218, *supra.*
[81] *Appeals Chamber Decision*, para. 94.

612. While, for some laws or customs of war, requirement (iii) may be of particular relevance, each of the prohibitions in Common Article 3: against murder; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying-out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples, constitute, as the Court put it, "elementary considerations of humanity", the breach of which may be considered to be a "breach of a rule protecting important values" and which "must involve grave consequences for the victim"[83]. Although it may be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim", each of the violations with which the accused has been charged clearly does involve such consequences.

613. Finally, in relation to the fourth requirement, namely that the rule of customary international humanitarian law imposes individual criminal responsibility, the Appeals Chamber held in the *Appeals Chamber Decision*[84] that

> customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

Consequently, this Trial Chamber has the competence to hear and determine the charges against the accused under Article 3 of the Statute relating to violations of the customary international humanitarian law applicable to armed conflicts, as found in Common Article 3.

2. Conditions of Applicability of the Rules Contained in Common Article 3

614. The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which: (i) are committed within the context of an armed conflict; (ii) have a close connection to the armed conflict; and (iii) are committed against persons taking no active part in

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[82] *Id.*, para.98; *Nicaragua* case, para. 218, *supra*.
[83] *See Nicaragua* case, *supra*.
[84] *Appeals Chamber Decision*, para. 134.

hostilities. The first and second of these requirements have already been dealt with above. Consequently, the Trial Chamber turns to the third requirement.

615. The customary international humanitarian law regime governing conflicts not of an international character extends protection, from acts of murder, torture and other acts proscribed by Common Article 3, to:

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

This protection embraces, at the least, all of those protected persons covered by the grave breaches regime applicable to conflicts of an international character: civilians, prisoners of war, wounded and sick members of the armed forces in the field and wounded sick and shipwrecked members of the armed forces at sea. Whereas the concept of "protected person" under the Geneva Conventions is defined positively, the class of persons protected by the operation of Common Article 3 is defined negatively. For that reason, the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.

616. It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time. Violations of the rules contained in Common Article 3 are alleged to have been committed against persons who, on the evidence presented to this Trial Chamber, were captured or detained by Bosnian Serb forces, whether committed during the course of the armed take-over of the Kozarac area or while those persons were being rounded-up for transport to each of the camps in op{tina Prijedor. Whatever their involvement in hostilities prior to that time, each of these classes of persons cannot be said to have been taking an active part in the hostilities. Even if they were members of the armed forces of the Government of the Republic of Bosnia and Herzegovina or

otherwise engaging in hostile acts prior to capture, such persons would be considered "members of armed forces" who are "placed *hors de combat* by detention". Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts, as contained in Article 3 of the Statute.

3. Legal Findings

617. For the purposes of the application of the rules of customary international humanitarian law contained in Common Article 3, this Trial Chamber finds, in the present case, that: (i) an armed conflict existed at all relevant times in relation to the alleged offences; (ii) each of the victims of the acts charged was a person protected by those provisions being a person taking no active part in the hostilities; and (iii) the offences charged were committed within the context of that armed conflict. Accordingly, the requirements of Article 3 of the Statute are met.

D. Article 5 of the Statute

1. The Customary Status in International Humanitarian Law of the Prohibition Against Crimes Against Humanity

618. The *Appeals Chamber Decision* discusses Articles 2 and 3 of the Statute at some length. In contrast, the discussion of Article 5 is confined to the requirement of a link to an armed conflict as provided in the Statute and thus now requires further discussion in considerable detail. The notion of crimes against humanity as an independent juridical concept, and the imputation of individual criminal responsibility for their commission, was first recognized in Article 6(c) of the Nürnberg Charter (Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement) ("Nürnberg Charter")[85]), which granted the International Military Tribunal for the

[85] London, 8 August 1945, 85 U.N.T.S. 251.

Trial of the Major War Criminals ("Nürnberg Tribunal") jurisdiction over this crime[86]. The term "crimes against humanity", although not previously codified, had been used in a non-technical sense as far back as 1915 and in subsequent statements concerning the First World War and was hinted at in the preamble to the 1907 Hague Convention in the so-called "Martens Clause"[87]. Thus when crimes against humanity were included in the Nürnberg Charter, although it was the first technical use of the term, it was not considered a novel concept[88]. Nevertheless a new category of crime was created[89].

619. The decision to include crimes against humanity in the Nürnberg Charter and thus grant the Nürnberg Tribunal jurisdiction over this crime resulted from the Allies' decision not to limit their retributive powers to those who committed war crimes in the traditional sense but to include those who committed other serious crimes that fall outside the ambit of traditional war crimes, such as crimes where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator. The origins of this decision can be found in assertions made by individual governments, the London International Assembly and the United Nations War Crimes Commission[90].

620. Unlike the crime of aggression[91] and war crimes[92], the Trial of the Major War Criminals before the International Military Tribunal[93] ("Nürnberg Judgment") does not delve into the legality of the inclusion of crimes against humanity in the Nürnberg Charter and the pre-existence of the prohibition[94], noting only that "from the beginning of the War in 1939

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[86] *See Appeals Chamber Decision*, para. 138, citing the *Report of the Secretary-General*, para. 47, *supra*; *see also* Egon Schwelb, *Crimes Against Humanity*, 23 Brit. Ybk. Int'l L. 178, 178 (1946).

[87] *See* the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established at the Peace Conference in Paris on 25 Jan 1919, which found, *inter alia*, that violations of "the elementary laws of humanity" had occurred. Reports of the Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities (Clarendon Press: Oxford, 1919). S*ee also* Declaration of 28 May 1915 of the Governments of France, Great Britain and Russia denouncing the massacres of the Armenian population in Turkey as "crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres", quoted in Egon Schwelb, *Crimes Against Humanity*, 23 Brit. Ybk. Int'l L. 178, 181 (1946). *See also* History of the United Nations War Crimes Commission and the Development of Laws of War 32-38 (The United Nations War Crimes Commission: London, 1948) ("War Crimes Commission").

[88] War Crimes Commission, 188, *supra.*

[89] Antonio Cassese, *Violence and Law in the Modern Age* 109 (1988).

[90] *See* Schwelb, *supra* at 183-187; *see also* War Crimes Commission *supra* at 174-177.

[91] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany, (1947) ("Nürnberg Judgment") 219-224.

[92] *Id.*, 253-254.

[93] *Id.*

[94] *Id.*, 254-255.

War Crimes were committed on a vast scale, which were also Crimes against Humanity"[95]. Thus the inclusion of crimes against humanity in the Nürnberg Charter was justified by their relation to war crimes, the gaps in the traditional definition of which it was designed to fill, the customary nature of which is described[96]. Additionally, the Nürnberg Judgment noted that, in regard to the law to be applied, the Nürnberg Charter was decisive and binding on the Nürnberg Tribunal [97] and that it "is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law"[98]. On the basis of the Nürnberg Charter the prohibition against crimes against humanity, and the attribution of individual criminal responsibility for their commission, was also contained in the Charter of the International Military Tribunal for the Far East of 19 January 1946 ("Tokyo Charter")[99] and in Law No. 10 of the Control Council for Germany ("Control Council Law No. 10")[100], which were utilised for additional prosecutions for atrocities committed during the Second World War.

621. The prohibition of crimes against humanity was subsequently affirmed by the General Assembly in its resolution entitled Affirmation of the Principles of International Law recognized by the Charter of the Nürenberg Tribunal[101] and thereafter confirmed in the Principles of International Law Recognized in the Charter of the Nürenberg Tribunal and in the Judgement of the Tribunal ("Nürenberg Principles"), adopted by the International Law Commission in 1950 and submitted to the General Assembly[102], Principle VI.c of which provides that a crime against humanity is punishable as a crime under international law. The attribution of individual criminal responsibility for the commission of crimes against humanity, as it was applied by the Nürnberg Tribunal, was also approved in Principle I of the Nürenberg Principles, which provides that "[a] person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment".

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[95] *Id.*, 254.
[96] *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*. 7, 114-119 (Martinus Nijhoff: Dordrecht, 1992).
[97] Nürnberg Judgment, 174, 218, *supra*.
[98] *Id.*, 218.
[99] Article 5(c).
[100] Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, Journal Officiel du Commandement en Chef Francais en Allemagne, No. 12 of 11 January 1946, Art. II(c) ("Control Council Law No. 10").
[101] U.N.G.A. res. 95 (I) of 11 December 1946.
[102] Nürnberg Principles, Ybk I.L.C., 1950, Vols I and II.

622. The customary status of the Nürnberg Charter, and thus the attribution of individual criminal responsibility for the commission of crimes against humanity, was expressly noted by the Secretary-General[103]. Additional codifications of international law have also confirmed the customary law status of the prohibition of crimes against humanity, as well as two of its most egregious manifestations: genocide and apartheid[104].

623. Thus, since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned. It would seem that this finding is implicit in *the Appeals Chamber Decision* which found that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict"[105]. If customary international law is determinative of what type of conflict is required in order to constitute a crime against humanity, the prohibition against crimes against humanity is necessarily part of customary international law. As such, the commission of crimes against humanity violates customary international law, of which Article 5 of the Statute is, for the most part, reflective. As stated by the Appeals Chamber: "[T]here is no question . . . that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege*."[106]

2. Conditions of Applicability

624. Article 5 of the Statute grants the International Tribunal subject-matter jurisdiction over crimes against humanity and there follows a list of the specific offences proscribed.

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[103] *Report of the Secretary-General*, para. 35, *supra*.

[104] *See, e.g.*, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 Nov. 1968` at Art. I (deciding that no statutory limitation shall apply to crimes against humanity, "even if such acts do not constitute a violation of the domestic law of the country in which they were committed"); *I.L.C. Draft Code* at Art. 18 (including crimes against humanity as a crime against peace and security of mankind) and Art. 2 (providing for individual responsibility for crimes against peace and security of mankind); the I.L.C.'s Draft Statute for a Permanent International Criminal Court, *Report of the I.L.C. on the work of its Forty-sixth Session*, U.N. Doc. G.A.O.R. A/49/10 ("*I.L.C. Draft Statute*") at Art. 20 (including crimes against humanity as a crime within the jurisdiction of the court and one which is a crime under general international law); the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), 9 Dec. 1948, 78 U.N.T.S. 277, at Art. 1 (noting that genocide is a crime under international law) and Art. IV (establishing individual criminal responsibility), and the International Convention on the Suppression and Punishment of the Crime of Apartheid ("Convention on Apartheid"), 30 Nov. 1973, 1015 U.N.T.S. 243, at Art. I (declaring that apartheid is a crime against humanity and that inhumane acts resulting from apartheid are crimes violating international law) and Art. III (attaching individual international criminal responsibility for the crime of apartheid).

[105] *Appeals Chamber Decision*, para. 141.

[106] *Id.*

625. The Indictment charges the accused with 10 counts of crimes against humanity. In each case the accused is charged under the appropriate head of Article 5 of the Statute as well as Article 7, paragraph 1. In order to prove that the accused committed the crimes alleged, both the conditions of applicability for crimes against humanity as well as the specific elements of each offence must be established. It is the common conditions of applicability for crimes against humanity that are the subject of this section.

626. Article 5 of the Statute grants the International Tribunal jurisdiction to prosecute crimes against humanity only "when committed in armed conflict" (whether international or internal) and they must be "directed against any civilian population". These conditions contain within them several elements. The Prosecution argues that the elements of crimes against humanity are: (1) that the accused committed one of the acts enumerated in Article 5; (2) the acts were committed during an armed conflict; (3) at the time of the commission of the acts or omissions there was an ongoing widespread or systematic attack directed against a civilian population; and (4) the accused knew or had reason to know that by his acts or omission, he was participating in the attack on the population. The Defence for the most part agrees with these elements, although it argues that: (1) the crimes must be committed in an armed conflict; and (2) the attack must be widespread and systematic. The Trial Chamber's determination of the conditions of applicability, as elaborated below, is that, first, "when committed in armed conflict" necessitates the existence of an armed conflict and a nexus between the act and that conflict. Secondly, "directed against any civilian population" is interpreted to include a broad definition of the term "civilian". It furthermore requires that the acts be undertaken on a widespread or systematic basis and in furtherance of a policy. The *Report of the Secretary-General* and the interpretation of several Security Council members reveal the additional requirement that all relevant acts must be undertaken on discriminatory grounds. Finally, the perpetrator must have knowledge of the wider context in which his act occurs.

(a) When committed in armed conflict

627. Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict". The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter

which limited the Nürnberg Tribunal's jurisdiction to crimes against humanity committed "before or during the war", although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed "in execution of or in connection with" war crimes or crimes against peace[107]. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."[108] In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that the acts be committed as part of an attack against a civilian population[109]. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law"[110], having stated earlier that "[s]ince customary international law no longer requires any nexus between crimes against humanity and armed conflict . . . Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal."[111] Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.

(i) The existence of an armed conflict

628. The Appeals Chamber, as discussed in greater detail in Section VI. A of this Opinion and Judgment, stated that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." [112] Consequently, this is the test which the Trial Chamber has applied and it has concluded that the evidence establishes the existence of an armed conflict.

(ii) The nexus between the act or omission and the armed conflict

[107] Nürnberg Charter, Art. 6(c), *supra*.
[108] *Report of the Secretary-General*, para. 47, *supra; see also I.L.C. Draft Code*, 96, *supra.*
[109] The Statute of the International Tribunal for Rwanda, ("*Rwanda Statute*") Art. 3,U.N. Doc. S/RES/955 (1994).
[110] *Appeals Chamber Decision*, para. 141.
[111] *Id*., para. 78.

629. The next issue which must be addressed is the required nexus between the act or omission and the armed conflict. The Prosecution argues that to establish the nexus necessary for a violation of Article 5 it is sufficient to demonstrate that the crimes were committed at some point in the course or duration of an armed conflict, even if such crimes were not committed in direct relation to or as part of the conduct of hostilities, occupation, or other integral aspects of the armed conflict. In contrast the Defence argues that the act must be committed "in" armed conflict.

630. The Statute does not elaborate on the required link between the act and the armed conflict. Nor, for that matter, does the *Appeals Chamber Decision*, although it contains several statements that are relevant in this regard. First is the finding, noted above, that the Statute is more restrictive than custom in that "customary international law no longer requires any nexus between crimes against humanity and armed conflict"[113]. Accordingly, it is necessary to determine the degree of nexus which is imported by the Statute by its inclusion of the requirement of an armed conflict. This, then, is a question of statutory interpretation.

631. The *Appeals Chamber Decision* is relevant to this question of statutory interpretation. In addressing Article 3 the Appeals Chamber noted that where interpretative declarations are made by Security Council members and are not contested by other delegations "they can be regarded as providing an authoritative interpretation" of the relevant provisions of the Statute[114]. Importantly, several permanent members of the Security Council commented that they interpret "when committed in armed conflict" in Article 5 of the Statute to mean "during a period of armed conflict"[115]. These statements were not challenged and can thus, in line with the *Appeals Chamber Decision*, be considered authoritative interpretations of this portion of Article 5.

632. The Appeals Chamber, in dismissing the Defence argument that the concept of armed conflict covers only the precise time and place of actual hostilities, said: "It is sufficient that

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[112] *Id.*, para. 70.
[113] *Id.*, para. 78; *see also id.* para. 141.
[114] *Id.*, para. 88.
[115] *See* Provisional Verbatim Record of the 3217th Meeting, U.N. Doc. S/PV.3217 (25 May 1993), 11 (statement of France), 16 (statement of the United States, included in which was the statement that the United States understood that the other members of the Council shared its view), 45 (where the Russian Federation used the formulation "during an armed conflict" and 19 (where the United Kingdom used "in time of armed conflict").

the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict"[116]. Thus it is not necessary that the acts occur in the heat of battle. The foregoing supports a narrow interpretation of the required nexus to an armed conflict. This interpretation is further supported by Virginia Morris and Michael P. Scharf who note in regard to the inclusion of the requirement "in armed conflict" that "[t]his limitation is temporal rather than substantive in character, as indicated by the phrase '*when* committed in armed conflict'. This phrase does not require any connection with a war crime or any substantive connection to an armed conflict."[117]

633. On the basis of the foregoing the Trial Chamber accepts, with some caveats, the Prosecution proposition that it is sufficient for purposes of crimes against humanity that the act occurred in the course or duration of an armed conflict. The first such caveat, a seemingly obvious one, is that the act be linked geographically as well as temporally with the armed conflict. In this regard it is important to note that the Appeals Chamber found that:

> the temporal and geographic scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.
> . . . .
> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[118]

634. Secondly, the act and the conflict must be related or, to reverse this proposition, the act must not be unrelated to the armed conflict, must not be done for purely personal motives of the perpetrator. This is further discussed below in regard to the level of intent required.

(b) Directed against any civilian population

635. The requirement in Article 5 that the enumerated acts be "directed against any civilian population" contains several elements. The inclusion of the word "any" makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality. However, the

[116] *Appeals Chamber Decision*, para. 70.
[117] Morris and Scharf, 83, *supra*.

remaining aspects, namely the definition of a "civilian" population and the implications of the term "population", require further examination.

(i) The meaning of "civilian"

636. That the prohibited act must be committed against a "civilian" population itself raises two aspects: what must the character of the targeted population be and how is it to be determined whether an individual victim qualifies as a civilian such that acts taken against the person constitute crimes against humanity?

637. The Statute does not provide any guidance regarding the definition of "civilian" nor, for that matter, does the *Report of the Secretary-General*. The Prosecution in its pre-trial brief argues that the term "civilian" covers "all non-combatants within the meaning of common Article 3 to the [Geneva] Conventions" because of the finding that the language of Common Article 3 reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict"[119]. The Defence agrees that "civilians" under Article 5 covers all non-combatants, arguing however that the concept of "non-combatants" is not always clear in application. The Defence notes that particularly in situations such as that in Bosnia and Herzegovina, "where groups are mobilising without necessarily being under the direct control of the central government," there is a "grey area" between combatants and non-combatants. Thus the Defence concludes that the notion of non-combatants may not be sufficiently defined to determine in all cases whether the victims were civilians.

638. Regarding the first aspect, it is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population[120].

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[118] *Appeals Chamber Decision*, paras. 67, 70.

[119] Prosecutor pre-trial brief filed 10 Apr.1996, *quoting Appeals Chamber Decision*; *see also Nicaragua* case, para. 218, *supra*.

[120] *See* Article 50(3) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I") (ICRC, Geneva, 1977); *see also* Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie (*Barbie* case); Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), ("*Final Report of the Commission of Experts*"), paras. 77-78, U.N. Doc. S/1994/674.

639. The second aspect, determining which individual of the targeted population qualify as civilians for purposes of crimes against humanity, is not, however, quite as clear. Common Article 3, the language of which reflects "elementary considerations of humanity" which are "applicable under customary international law to any armed conflict"[121], provides that in an armed conflict "not of an international character" Contracting States are obliged "as a minimum" to comply with the following: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I)[122] defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the *Commentary,* Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term "civilian". They, and particularly Common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.

640. In this regard the United Nations War Crimes Commission stated in reference to Article 6(c) of the Nürnberg Charter that "[t]he words '*civilian* population' appear to indicate that 'crimes against humanity' are restricted to inhumane acts committed against civilians as opposed to members of the armed forces . . ."[123]. In contrast, the Supreme Court of the British zone determined that crimes against humanity were applicable in all cases where the perpetrator and the victim were of the same nationality, regardless of whether the victim was civilian or military[124]. Similarly, the possibility of considering members of the armed forces

[121] *Appeals Chamber Decision*, para. 102; *see also Nicaragua* case, para. 218, *supra.*
[122] Protocol I, *supra.*
[123] War Crimes Commission, 193, *supra*.
[124] Henri Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle* 282 (1960) (unofficial translation).

as potential victims of crimes against humanity was recognized as early as 1946[125]. The Commission of Experts Established Pursuant to Security Council Resolution 780 ("Commission of Experts") observed: "It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms."[126] The Commission of Experts then provided an example based on the situation in the former Yugoslavia and concluded: "A Head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm."[127]

641. Precisely this issue was considered in the case of *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie* (*Barbie* case)[128]. In this case the *Chambre d'accusation* of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons during the Second World War, but only for "persecutions against innocent Jews", and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity[129]. The order of the examining magistrate along the same lines was confirmed by the *Cour d'Assises* and an appeal was lodged. On appeal the *Cour de Cassation* quashed and annulled the judgment in part, holding that members of the Resistance could be victims of crimes against humanity as long as the necessary intent for crimes against humanity was present[130]. As the court stated, "[n]either the driving force which motivated the victims, nor their possible membership of the Resistance, excludes the possibility that the accused acted with the element of intent necessary for the commission of crimes against humanity."[131] Thus, according to the *Cour de Cassation*, not only was the general population considered to be one of a civilian character despite the presence of Resistance members in its

[125] Schwelb, 191, *supra.*
[126] *Final Report of the Commission of Experts*, para. 78, *supra*.
[127] *Id*., para. 78.
[128] (1985) I.L.R. 125.
[129] Cited by the *Cour de Cassation*, *id*. 139.
[130] *Id*., 140.
[131] *Id*.

midst but members of the Resistance themselves could be considered victims of crimes against humanity if the other requisite elements are met.

642. While instructive, it should be noted that the court in the *Barbie* case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter (law of 26 December 1964[132]; and the fact that a crime against humanity is an international crime was relied upon to deny the accused's appeal on the bases of disguised extradition[133] and an elapsed statute of limitations[134].

643. Despite the limitations inherent in the use of these various sources, from Common Article 3 to the *Barbie* case, a wide definition of civilian population, as supported by these sources, is justified. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity. As noted by Trial Chamber I of the International Tribunal in its Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in *The Prosecutor v. Mile Msksi}, Miroslav Radi}, and Veselin [ljivan~anin* ("*Vukovar Hospital Decision*")[135], although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity[136]. In the context of that case patients in a hospital, either civilians or resistance fighters who had laid down their arms, were considered victims of crimes against humanity[137].

(ii) The meaning of "population"

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[132] *See* Jean-Louis Clergerie, *La notion de crime contre l'humanité,* Revue du Droit Public 1251, 1251 n.3 (1988).
[133] *Id.*, 128.
[134] *Id.*, 134, 136.
[135] *The Prosecutor v. Mile Msksi}, Miroslav Radi}, and Veselin [ljivan~anin*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-13-R61, T.Ch.I, 3 Apr. 1996 ("*Vukovar Hospital Decision*").
[136] *Id.*, para. 29.
[137] *Id.*, para. 32.

644. The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian "population" does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the "population" element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity[138]. As explained by this Trial Chamber in its *Decision on the Form of the Indictment*, the inclusion in Article 5 of the requirement that the acts "be 'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct."[139] The purpose of this requirement was clearly articulated by the United Nations War Crimes Commission when it wrote that:

> Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[140]

Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population. This has been interpreted to mean, as elaborated below, that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken, as well as the requirement imported by the Secretary-General and members of the Security Council that the actions be taken on discriminatory grounds.

a. The widespread or systematic occurrence of the acts

645. The Prosecution argues that the term "population" in Article 5 contemplates that by his actions the accused participated in a widespread or systematic attack against a relatively large

[138] *See* Schwelb, 191; *supra; see also* Memorandum of the Secretary-General on The Charter and Judgement of the Nürnberg Tribunal; History and Analysis, 67 (U.N. Publication, Sales No. 1949, V. 7).
[139] *Decision on the Form of the Indictment, supra*.

victim group, as distinct from isolated or random acts against individuals. The Defence, while generally in agreement, argues that in order to constitute a crime against humanity the violations must be both widespread and systematic.

646. While this issue has been the subject of considerable debate, it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts. The *Report of the Secretary-General* stipulates that crimes against humanity "refer to inhumane acts of a very serious nature . . . committed as part of a widespread or systematic attack against any civilian population"[141]. The Defence points to the fact that later in that same paragraph the Secretary-General states that in the conflict in the former Yugoslavia rape occurred on a "widespread and systematic" basis as support for its proposition that both widespreadness and systematicity are required. However, in the Trial Chamber's view, this passage is no more than a reflection of the situation as the Secretary-General saw it, as was the well-known finding by the Nürnberg Tribunal that "[t]he persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of *consistent and systematic* inhumanity on the greatest scale."[142]

647. In addition to the *Report of the Secretary-General* numerous other sources support the conclusion that widespreadness and systematicity are alternatives. For example, Trial Chamber I came to this conclusion in the *Vukovar Hospital Decision*[143]. The Report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court provides that crimes against humanity "usually involved a widespread or systematic attack against the civilian population rather than isolated offences"[144]. Article 18 of the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind[145] ("I.L.C. Draft Code") requires that the act be committed "in a systematic manner or on a large scale" and explicitly states that these are two alternative requirements. Similarly in its 1994 Report the International Law Commission stated that "the definition of crimes against humanity

[140] War Crimes Commission, 179, *supra*.
[141] *Report of the Secretary-General*, para. 48, *supra*.
[142] Nürnberg Judgment, 247, *supra*, (emphasis added).
[143] *Vukovar Hospital Decision*, para. 30, *supra*.
[144] *Report of the Committee on the Establishment of a Permanent International Criminal Court ("Report of the Ad Hoc Committee")*, U.N. Doc. G.A.O.R. A/50/22 (1995) at 17.
[145] *I.L.C. Draft Code, supra*.

encompasses inhumane acts of a very serious character involving widespread *or* systematic violations aimed at the civilian population", although it also stated that "[t]he hallmarks of such crimes lie in their large-scale *and* systematic nature", and that the "particular forms of unlawful acts (murder, enslavement, deportation, torture, rape, imprisonment etc.) are less crucial to the definition [sic] the factors of scale and deliberate policy."[146] Despite this seeming inconsistency the prevailing opinion was for alternative requirements, as is evident from the article addressing crimes against humanity in the 1991 Report of the International Law Commission which was entitled "Systematic or mass violations of human rights"[147].

648. It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population", and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement. As explained by the commentary to the I.L.C. Draft Code:

> (3) The opening clause of this definition establishes the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity covered by the present Code. The first condition requires that the act was "committed in a systematic manner or on a large scale". This first condition consists of two alternative requirements. . . Consequently, an act could constitute a crime against humanity if either of these conditions is met.

The commentary to the I.L.C. Draft Code further explains these requirements and their origins. It states:

> The first alternative requires that the inhumane acts *be committed in a systematic manner* meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act that was not committed as part of a broader plan or policy. The Nürnberg Charter did not include such a requirement. None the less the Nürnberg Tribunal emphasized that the inhumane acts were committed as part of the *policy of terror* and were "in many cases . . . organized and systematic" in considering whether such acts constituted crimes against humanity.
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> (4) The second alternative requires that the inhumane acts be *committed on a large scale* meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.

[146] *Report of the I.L.C. on the work of its Forty-ninth Session*, (1994) G.A.O.R., 49th sess., Supp. No. 10, U.N. Doc. A/49/10, p. 76, emphasis added.
[147] *Report of the International Law Commission on the Work of its Forty-third Session*, (1991) G.A.O.R., 46th sess. Supp. No. 10, U.N. Doc. A/46/10 ("I.L.C. 1991 Report"), at 265.

> The Nürnberg Charter did not include this second requirement either. None the less the Nürnberg Tribunal further emphasized that the policy of terror was "certainly carried out on a vast scale" in its consideration of inhumane acts as possible crimes against humanity. . . . The term "large scale" in the present text . . . is sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[148]

649. A related issue is whether a single act by a perpetrator can constitute a crime against humanity. A tangential issue, not at issue before this Trial Chamber, is whether a single act in and of itself can constitute a crime against humanity. This issue has been the subject of intense debate, with the jurisprudence immediately following the Second World War being mixed. The American tribunals generally supported the proposition that a massive nature was required[149], while the tribunals in the British Zone came to the opposite conclusion, finding that the mass element was not essential to the definition, in respect of either the number of acts or the number of victims and that "what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system, specifically, the Nazi regime"[150]. Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution"[151]. The decision of Trial Chamber I of the International Tribunal in the *Vukovar Hospital Decision* is a recent recognition of the fact that a single act by a perpetrator can constitute a crime against humanity. In that decision the Trial Chamber stated:

> 30. Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as

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[148] *I.L.C. Draft Code*, 94-95, *supra*.
[149] *See* the *Trial of Josef Altstötter and Others* ("*Justice* case"), Vol. VI, Law Reports of Trials of War Criminals (U.N. War Crimes Commission London, 1949) *("Law Reports")* 79-80 *and see* the *Trial of Fredrich Flick and Five Others* ("*Flick* case"), Vol. IX, *Law Reports*, 51, in which isolated cases of atrocities and persecution were held to be excluded from the definition of crimes against humanity.
[150] Report of I.L.C. Special Rapporteur D. Thiam, Ybk I.L.C. 1986, Vol. II, I.L.C. A/CN.4/466 ("*Report of the Special Rapporteur*"), para. 93, referring to the conclusion of Henri Meyrowitz.
[151] Henri Meyrowitz quoted in Report of Special Rapporteur, para. 89, *supra*.

> a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context identified above.[152]

Additional support is found in national cases adjudicating crimes arising from the Second World War where individual acts by perpetrators were held to constitute crimes against humanity[153].

b. The necessity of discriminatory intent

650. Another related issue is whether the widespread or systematic acts must be taken on, for example, racial, religious, ethnic or political grounds, thus requiring a discriminatory intent for all crimes against humanity and not only persecution. The law in this area is quite mixed. Many commentators and national courts have found that some form of discriminatory intent is inherent in the notion of crimes against humanity, and thus required for the "inhumane acts" group, as well as persecution, because the acts are taken against the individual as a result of his membership in a group that is for some reason targeted by the perpetrator[154].

651. This requirement of discrimination was not contained in the Nürnberg Charter, which clearly recognized two categories of crimes against humanity: those related to inhumane acts such as murder, extermination, enslavement and deportation; and persecution on political, racial or religious grounds. Nor can support for this position be found in Control Council Law No. 10, as well as cases taken on the basis of this law, such as those concerning medical experiments where criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and "asocial" persons were considered war crimes and crimes against humanity, as was the program of euthanasia for "incurables" which was extended to the Jews[155]. Likewise, the Tokyo Charter does not contain this requirement. The

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[152] *Vukovar Hospital Decision*, para. 30, *supra.*

[153] *See, e.g.*, cases 2, 4, 13, 14, 15, 18, 23, 25, 31 and 34 of Entscheidungen Des Obersten Gerichtshofes Für Die Britische Zone in Strafsachen, Vol. I.

[154] *See, e.g., Barbie* case *supra,* the *Final Report of the Commission of Experts*, para. 84, *supra,* J. Graven, *Les crimes contre l'humanité*, Receuil de Cours (1950) and Catherine Grynfogel, *Le concept de crime contre l'humanité: Hier, aujourd'hui et demain*, Revue de Droit Pénal et de Criminologie 13 (1994); *but see* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again,* 32 Colum. J. Trans. L. 289 (1994).

[155] *See* the Medical Case, Vol. II Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 181, 196-98 (Washington: US Govt. Printing Office 1950).

analysis of the Nürnberg Charter and Judgment prepared by the United Nations shortly after the trial of the major war criminals stated:

> It might perhaps be argued that the phrase "on political, racial or religious grounds" refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of "murder, extermination, enslavement, persecution on political racial or religious grounds". This interpretation, however, seems hardly to be warranted by the English wording and still less by the French text. . . . Moreover, in its statement with regard to von Schirach's guilt the Court designated the crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecutions on political, racial or religious grounds".[156]

652. Additionally this requirement is not contained in the Article on crimes against humanity in the I.L.C. Draft Code nor does the Defence challenge its exclusion in the Prosecution's definition of the offence. Significantly, discriminatory intent as an additional requirement for all crimes against humanity was not included in the Statute of this International Tribunal as it was in the Statute for the International Tribunal for Rwanda[157], the latter of which has, on this very point, recently been criticised[158]. Nevertheless, because the requirement of discriminatory intent on national, political, ethnic, racial or religious grounds for all crimes against humanity was included in the *Report of the Secretary-General*[159], and since several Security Council members stated that they interpreted Article 5 as referring to acts taken on a discriminatory basis[160], the Trial Chamber adopts the requirement of discriminatory intent for all crimes against humanity under Article 5. Factually, the inclusion of this additional requirement that the inhumane acts must be taken on discriminatory grounds is satisfied by the evidence discussed above that the attack on the civilian population was conducted against only the non-Serb portion of the population because they were non-Serbs.

c. The policy element

653. As mentioned above the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not

[156] Memorandum of the Secretary-General on the Charter and Judgment of the Nürnberg Tribunal, 67, *supra*.
[157] U.N. Doc. S/RES/955 (1994).
[158] Amnesty International, *The International Criminal Court: Making the Right Choices - Part I* 40 (1997).
[159] *Report of the Secretary-General*, para. 48, *supra*.
[160] *See* Provisional Verbatim Record, 11 (statement of France, listing national, ethnic, racial and religious grounds), 16 (statement of the United States, listing national, political, ethnic, racial, gender and religious grounds) and 45 (statement of the Russian Federation, listing national, political, ethnic, religious or other grounds), *supra*.

isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands *Hoge Raad* in *Public Prosecutor v. Menten*[161]:

> The concept of 'crimes against humanity' also requires - although this is not expressed in so many words in the above definition [Article 6(c) of the Nürnberg Charter] - that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.[162]

Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of a policy.

654. An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy "because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nürnberg Charter]"[163]. While this may have been the case during the Second World War, and thus the jurisprudence followed by courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case. As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular

[161] 75 I.L.R. 362-63 (1987).
[162] *See also Barbie* case, 137, *supra*.
[163] Bassiouni, 248-249, *supra*.

territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.

655. For example, Trial Chamber I of the International Tribunal stated in relation to crimes against humanity in its Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence in *Prosecutor v. Dragan Nikoli}*: "Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone."[164] The I.L.C. Draft Code is more explicit in this regard. It contains the requirement that in order to constitute a crime against humanity the enumerated acts must be "instigated or directed by a Government or by any organization or group". The commentary clarifies that by stating:

> This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. . . . The instigation or direction of a Government or *any* organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State.[165]

Thus, according to the International Law Commission, the acts do not even have to be directed or instigated by a group in permanent control of territory. It is important to keep in mind that the 1996 version of the I.L.C. Draft Code contains the final text of the article on crimes against humanity adopted by the International Law Commission[166], which was established pursuant to General Assembly resolution 174 (II) and whose members are elected by the General Assembly. Importantly, the commentary to the draft articles of the Draft Code prepared by the International Law Commission in 1991, which were transmitted to Governments for their comments and observations, acknowledges that non-State actors are also possible perpetrators of crimes against humanity. It states that

> [i]t is important to point out that the draft article does not confine possible perpetrators of the crimes [crimes against humanity] to public officials or representatives alone . . . the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or

[164] *The Prosecutor v. Dragan Nikoli}*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-94-2-R61, para. 26, T.Ch.I, 20 Oct. 1995.
[165] *I.L.C. Draft Code*, 94, *supra*.
[166] *Id.*, 13.

> groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code.[167]

Similarly, the United States Court of Appeals for the Second Circuit recently recognized that "non-state actors" could be liable for committing genocide, the most egregious form of crimes against humanity, as well as war crimes[168]. Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.

(c) Intent

656. As discussed above in relation to the nexus, the act must not be unrelated to the armed conflict. This contains two aspects. First, it is the occurrence of the act within the context of a widespread or systematic attack on a civilian population that makes the act a crime against humanity as opposed to simply a war crime or crime against national penal legislation, thus adding an additional element, and therefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs. Secondly, the act must not be taken for purely personal reasons unrelated to the armed conflict.

657. Regarding the first aspect, the knowledge by the accused of the wider context in which his act occurs, the approach taken by the majority in *R. v. Finta*[169] in Canada is instructive. In that case the majority decided that "[t]he mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his actions were inhumane."[170] While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances. Several cases arising under German penal law following the Second World War are relevant in this regard. In a case decided by the *Spruchgericht* at Stade, Germany, the accused, who had been stationed near the concentration camp at Buchenwald, was assumed to have known that numerous persons were deprived of their

[167] *I.L.C. 1991 Report*, 266.
[168] *Kadi} v. Karad`i}*, 70 F.3d 232 (2nd Cir. 1995), cert. denied, 64 U.S.L.W. 3832 (18 Jun. 1996).
[169] *R. v. Finta*, [1994] 1 R.C.S., 701.
[170] *Id*.

liberty there on political grounds[171]. In addition, it is not necessary that the perpetrator has knowledge of exactly what will happen to the victims and several German cases stressed the fact that denunciations, without more, constitute crimes against humanity[172]. One case in particular is relevant. In that case two accused in 1944 informed the police that the director of the company for which they both worked had criticised Hitler. After the denouncement the director was arrested, temporarily released and then arrested again and brought to a concentration camp. Both of the accused were acquitted due to a lack of "mens rea" as they had not had either a concrete idea of the consequences of their action or an "abominable attitude". However, the *Obersten Gerichthofes* ("OGH") remanded the case to the trial court, finding that a crime against humanity does not require either a concrete idea of the consequences or an "abominable attitude".[173]

658. As for the second aspect, that the act cannot be taken for purely personal reasons unrelated to the armed conflict, while personal motives may be present they should not be the sole motivation for the act. Again one of the German cases arising from the Second World War is relevant. In that case the accused had denounced his wife for her pro-Jewish, anti-Nazi remarks. The OGH found it sufficient that with the purpose of separating from his wife the accused had ensured that the Gestapo knew about her anti-Nazi remarks and that the connection between the action of the accused and the "despotism of the Nazi Regime" was established because the victim was denounced for her anti-Nazi attitude. The OGH found that he had committed a crime against humanity because his behaviour fitted into the plan of persecution against Jews in Germany and that although his intent was only to harm this one individual, it was closely related to the general mass persecution of the Jews[174].

659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must

[171] Case No 38, Annual Digest and Reports of Public International Law Cases for the Year 1947, 100-101 (Butterworth & Co., London 1951).
[172] *See, e.g.*, Vol. I Entscheidungen des Obersten Gerichtshofes Für Die Britische Zone in Strafsachen, case 2, 6-10; case 4, 19-25; case 23, 91-95; case 25, 105-110; case 31, 122-126; case 34, 141-143.
[173] *Id*. at case 16, 60-62.
[174] OGHBZ, Decision of the District Court (Landgericht) Hamburg of 11 Nov. 1948, STS 78/48, Justiz und NS-Verbrechen II, 1945-1966, 491, 499 (unofficial translation).

know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

3. Legal Findings

660. As discussed, this Trial Chamber has found that an armed conflict existed in the territory of op{tina Prijedor at the relevant time and that an aspect of this conflict was a policy to commit inhumane acts against the civilian population of the territory, in particular the non-Serb population, in the attempt to achieve the creation of a Greater Serbia. In furtherance of this policy these inhumane acts were committed against numerous victims and pursuant to a recognisable plan. As such the conditions of applicability for Article 5 are satisfied: the acts were directed against a civilian population on discriminatory grounds, they were committed on both a widespread basis and in a systematic fashion pursuant to a policy and they were committed in the context of, and related to, an armed conflict.

E. Individual Criminal Responsibility Under Article 7, Paragraph 1

661. The *Report of the Secretary-General* states that "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible."[175] Article 7 of the Statute, entitled *Individual criminal responsibility* incorporates this concept by providing that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."

662. Accordingly, the International Tribunal has jurisdiction to try a person who participates in crimes against humanity, grave breaches of the Geneva Conventions, violations of the laws or customs of war or genocide in any one of several capacities. However, this provision, which the International Tribunal has not yet interpreted, does not specify the necessary degree of participation but first the objective basis for such individual responsibility

[175] *Report of the Secretary-General*, para. 54.

as a matter of customary international law must be determined since the International Tribunal is only empowered to apply international humanitarian law that is "beyond any doubt customary law"[176].

1. The Customary Status of Article 7, Paragraph 1

663. Certain types of conduct during armed conflict have been criminalised by the international community since at least the fifteenth century[177]. In more modern times, the movement to abolish war that coalesced after the First World War resulted in the determination to reform the law of war and to make war conducted in contravention of international norms an international crime with a component of individual responsibility[178]. After the First World War, the Preliminary Peace Conference of Paris created a Commission to investigate the responsibility for the war. On 29 March 1919 this Commission submitted its findings in a report that was unanimously adopted, although with reservations by the American and Japanese representatives[179]. These findings included a provision addressing individual criminal responsibility for breaches of the laws and customs of war. The Commission recommended that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[180] This position was confirmed by several countries in the 1919 Paris Peace Treaty, which formally adopted the principle that any person could be tried and punished for violations of the laws of war by military courts of the adversary[181].

664. The concept that an individual actor can be held personally responsible and punished for violations of international humanitarian law was first enunciated by the Nürnberg and Tokyo trials after the Second World War. Article 6 of the 1945 Nürnberg Charter called for individual responsibility for crimes against peace, violations of the laws or customs of war, and crimes against humanity[182].

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[176] *Id.*, para. 34.
[177] *See* Georg Schwarzenberger, *The Law of Armed Conflict* 462-66.
[178] War Crimes Commission, 9, *supra.*
[179] *Id.*, 33-34.
[180] *Id.*, 38 (*citing* Report of the Commission on Responsibilities).
[181] *Id.*, 43-44 (*citing* Treaty of Versailles Art. 229).

665. Similarly, the Military Tribunals in occupied Germany enforced the Charter's principles under the terms of Article II, 2 of Control Council Law No. 10, which states:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was [sic] an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part there in or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime . . . .[183]

Noting that the fact "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized",[184] the court found punishment for individuals appropriate for violations of international law[185]. Moreover, it is well recognized that

> [t]he principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Nuremberg Charter and Judgement which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment.[186]

666. The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act also has a basis in customary international law. For example, Article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[187] uses the phrase "complicity or participation in torture", and Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid cites as criminally culpable those who "participate in, directly incite, or conspire in[, or] . . . [d]irectly abet, encourage or cooperate in the commission of the crime."[188] The prosecutions following the Second World War confirm this, revealing that participation in this way could entail culpability.

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[182] *Nürnberg Charter, supra.*
[183] Control Council Law No. 10, *supra*.
[184] *Nürnberg Judgment*, 52, *supra.*
[185] *Id.*, 26.
[186] *I.L.C. Draft Code*, 19, supra. *See also* Brownlie, *Principles of Public International Law* (4th ed. 1990) 562; Dinstein, *International Criminal Law*, 20 Israel L. Rev. 206 (1985); Oppenheim, *International Law* (8th ed. 1993); Röling, *Criminal Responsibility for Violations of the Laws of War*, 12 Belgian Rev. Int'l L. 8-26 (1976) (all in agreement that the principles of the Nürnberg Charter now form a part of the body of international law).
[187] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. resolution 39/46 (10 Dec. 1984).
[188] *Convention on Apartheid, supra*.

667. For example, in the French war crimes trials after the Second World War, complicity was a basis for criminal culpability. In the *Trial of Wagner and Six Others*, the *Acte d'Accusation* and the judgment state the relevance of the French penal code to the charge and the sentence. Article 59 of the *Code Pénal* applicable at that time stated that "[t]he accomplices to a crime or a delict shall be visited with the same punishment as the authors therefor, excepting where the law makes other provisions" and Article 60, defined as an accomplice:

> Any person who, by gifts, promises, threats, abuse of power or authority, or guilty machinations or devices, has instigated a crime or delict or given orders for the perpetration of a crime or delict; any person who has supplied the arms, tools or any other means that have been used in the commission of the crime or offence, knowing that they would be so used; or who has wittingly aided or assisted the author or authors of the crime or offence in any acts preparatory to, of facilitating its perpetration, or in its execution.

With one exception, all the accused in that trial were charged with complicity as opposed to primary involvement[189].

668. Likewise, in the *Trial of Martin Gottfried Weiss and 39 Others*, ("*Dachau* case"), the accused were charged with acting in "pursuance of a common design to commit acts hereinafter alleged as members of the staff of the Dachau Concentration Camp", and the allegation was that they did "wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations. . . ."[190] Finally, the Norwegian and the Netherlands war crimes laws explicitly made punishable complicity in war crimes and the British law also had such provisions[191].

669. The foregoing establishes the basis in customary international law for both individual responsibility and of participation in the various ways provided by Article 7 of the Statute. The International Tribunal accordingly has the competence to exercise the authority granted to it by the Security Council to make findings in this case regarding the guilt of the accused, whether as a principal or an accessory or otherwise as a participant.

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[189] *Trial of Wagner and Six Others*, Vol. III *Law Reports* 24, 40-42, 94-95.
[190] *Trial of Martin Gottfried Weiss and 39 Others* Vol. XI *Law Reports* 5.
[191] Vol. XI *Law Reports* 97-98; Vol. XV *Law Reports* 89; Vol. I *Law Reports* 43.

2. Parameters of Individual Responsibility

(a) Arguments of the parties

670. In the present case, the Prosecution argues that Article 7, paragraph 1, of the Statute draws the boundaries of individual responsibility very widely:

> The language of Article 7(1) and the Secretary-General's comments reflect the modern trend to move away from very technical definitions about the degree of culpability, and instead move us to focus on whether the accused's actions in any way incurred criminal liability . . . [T]he relative degree of culpability is a matter for sentencing should you reach findings of guilt.

Citing the *Mauthausen Concentration Camp Trail (Trial of Hans Alfuldisch and Six Others)* (*"Mauthausen* case"),[192] the Prosecution argues that any assistance, even as little as being involved in the operation of one of the camps, is sufficient for the Trial Chamber to find participation in a crime. The Prosecution urges the Trial Chamber to follow the example of the Australian common law, under which, the Prosecution asserts, the most marginal act of assistance or encouragement can amount to an act of complicity in the crime, and avers that "aiding and abetting includes all acts of assistance by words, by acts, by encouragement, support or again by presence". The Prosecution contends that, in regard to Count 1 charging persecution, the presence of the accused when viewed in light of the surrounding events is sufficient to find that he assisted in the various illegal acts given that "the accused's presence as a member of a group that is furthering the persecution of non-Serbs certainly assists and encourages that crime". In regard to the remaining counts, it argues that the accused is criminally responsible for the deaths of and other actions against the victims regardless of whether he directly committed any of the illegal acts or only aided and abetted, in this broad sense, their commission. The Prosecution also contends that the accused is liable if he took part in earlier acts and thereafter remained present, never withdrawing from the subsequent acts, since the continued presence of the accused gave both support and encouragement to the other members of his group and thereby aided them in the commission of the illegal acts.

671. The Defence argues that the term "participation" is used in the Indictment in two ways: as a basic fact, and as a qualification of the legal degree of involvement. According to the Defence, participation has not the almost unrestricted meaning given to it by the

[192] Vol. XI *Law Reports* 15.

Prosecution and it is erroneous to assert that contributing "in any manner whatsoever", regardless of one's specific role, to the commission of the illegal act makes one personally responsible. Instead, the Defence argues, one is only culpable if one participates by planning, instigating, ordering, committing or otherwise aiding and abetting in the execution. Specific to the accused in this case, the Defence asserts that physical involvement or inclusion with the Serb forces who committed crimes does not in itself establish the commission of the crime. The Defence also differentiates between the direct participation of a perpetrator and the less direct participation of an aider or abettor, stating that "furthering or facilitating a crime committed by someone else is not punishable if one does not realise that the other commits or will commit a crime, or if the [commission of the offence] was not a likely consequence of the [act] in which the accused participated". In response to the Prosecution's reliance on the *Mauthausen* case, the Defence says that because the court there held that the accused's involvement in the camp was proof of a direct and substantial contribution to the crimes committed, that case does not set any different standard.

672. The Defence further contends that physical presence without acting in concert is not aiding and abetting, and proof of an accused's presence near the scene of a crime without any further proof of involvement does not establish a criminal responsibility under Article 7. It notes that Australian law on aiding and abetting is not part of customary international law and that there is a definite distinction between culpability in the case of common crimes tried in national jurisdictions and culpability in an international jurisdiction for violations of international humanitarian law because such violations usually concern persons acting under abnormal circumstances such as war and in which the mere presence of an accused at the time of commission of a crime can and should be viewed differently. Accordingly, the Defence argues, presence should at least be proved to be significant to the commission of the crime, the evidence of the significance of presence should not be speculative but substantiated, and there must be a significant causal relation between the commission of the crime and the accused's presence deriving either from a prior agreement or because of the influence of his presence. The Defence argues that the Prosecution's position would require a finding of deliberate participation even if the only proof consisted of several sightings of an accused in the area of the commission of the crime even without any proof of involvement.

(b) Participation as a basis of liability

673. Where it is found in regard to the charges in the Indictment that the accused directly engaged in the actions alleged, the application of Article 7, paragraph 1, poses little problem. However, the Trial Chamber has found that, as to certain paragraphs of the Indictment, the accused did not directly commit some of the offences there charged but was present at the time of, or otherwise involved in, their commission. In regard to these instances, the Trial Chamber must determine whether the conduct of the accused that the Prosecution has proved beyond reasonable doubt sufficiently connects the accused to the crime such that he can be found criminally culpable pursuant to the Statute.

674. The most relevant sources for such a determination are the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.

(i) Intent

675. The requirement that there be intent before being held culpable for a criminal act is supported by the case of *Werner Rohde and Eight Others,* in which the British Military Court held that if an accused took part with another man with the knowledge that the other man was going to kill, then he was as guilty as the one doing the actual killing[193]. Again, in the *Trial of Joseph Altstötter and Others* ("*Justice* case"), the fact that the accused had specific knowledge was treated as essential. The judgment repeatedly confirmed this, stating that the various people charged knew or had knowledge, or must be assumed to have had knowledge, of the *Nacht und Nebel* plan, of Hitler and his associates' use of the German legal system, and of the plans or schemes for racial persecution. In several places, the judgment presumed knowledge on the part of an accused[194]. Similarly, in the *United States of America v. Wilhelm*

[193] *Trial of Werner Rohde and Eight Others,* Vol. XV *Law Reports* 51.
[194] ("*Justice* case"), Vol. VI *Law Reports* 88.

List ("*Hostage* case")[195], the court noted that to find the accused guilty, "we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, wilfully, and knowingly as charged in the Indictment."[196]

676. As noted in the *Justice* case, knowledge and intent can be inferred from the circumstances. In the *Mauthausen* case, the United States Military Tribunal, after finding all 61 accused guilty, stated in its special findings that the state of the camp where detainees were murdered *en masse* in gas chambers "was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, to be culpably and criminally responsible". This finding was based on the determination that "it was impossible for a governmental, military or civil official, a guard or a civilian employee, of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by-camps, at any time during its existence, without having acquired a definite knowledge of the criminal practices and activities therein existing."[197] Thus the court inferred knowledge on the part of the accused, and concluded that the staff of the concentration camp was guilty of the commission of a war crime based on this knowledge and their continued participation in the enterprise[198].

677. Although intent founded on inherent knowledge, proved or inferred, is required for a finding of guilt, the Trial Chamber need not find that there was a pre-arranged plan, to which the accused was a party, to engage in any specific conduct. In the *Justice* case, in regard to the defendant Joel who was not alleged to have been directly responsible for the death or ill-treatment of specified persons, the prosecution sought to prove that he was related to a scheme or system which had a criminal outcome. The tribunal saw as essential proof that he had knowledge of others' acts that were done in furtherance of the *Nacht und Nebel* plan, as

[195] *United States of America v. Wilhelm List, et al.,* 1948.
[196] Vol. XI Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 1261, *supra*.
[197] Vol. XI *Law Reports* 15.
[198] *Id*.

well as evidence of deliberate action[199]. However, it did not require proof that Joel was party to a prior arrangement or agreement to take part in any particular behaviour.

(ii) Direct contribution

678. As the *Justice* case reveals, intent involving requisite knowledge alone is not enough; there must also be a deliberate act if an accused is to be held criminally culpable and this deliberate act must directly affect the commission of the crime itself. In the Nürnberg Judgment on the charges against defendant Kaltenbrunner, the court declined to find the accused guilty of the charge of crimes against peace for waging aggressive war because the evidence against him did not "show his direct participation in any plan to wage such a war"[200]. The Judge-Advocate's statement in the *Trial of Franz Schonfeld and Nine Others* by a British Military Court explained the law of parties being "concerned" in the commission of a crime:

> Those who are present at the commission of an offence, and aid and abet its commissions, are principals in the second degree.
>
> The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or ear witness to the transaction; he is, in construction of law, present, aiding and abetting, with the intention of giving assistance, if he is near enough to afford it should occasion arise. . . . There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he . . . was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting.[201]

It is difficult to determine whether this statement, which relies heavily on English law, was adopted by the court given that the court did not state its reasons for deciding as it did. Despite this reliance on municipal law, the statement is instructive in this instance: "In the present state of vagueness prevailing in many branches of the law of nations, even given the

[199] Vol. VI *Law Reports* 84, 87.
[200] *Trial of the German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany*, Part 22 at 493 (London: His Majesty's Stationery Office 1950).
[201] *Trial of Franz Schonfeld and Nine Others*, Vol. XI *Law Reports* 69-70.

fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognized to be in amplification of, and not in substitution for, rules of International Law."[202]

679. Although the court in that case neither accepted nor rejected the Judge-Advocate's statement, other cases show that direct contribution does not necessarily require the participation in the physical commission of the illegal act. That participation in the commission of the crime does not require an actual physical presence or physical assistance appears to have been well accepted at the Nürnberg war crimes trials, as was the concept that mere presence at the scene of the crime without intent is not enough[203].

680. In the *Trial of Burn Tesch and Two Others* ("*Zyklon B* case"), in the British Military Court, the suppliers of poison gas, normally used to kill vermin but in fact used to kill inmates of concentration camps, were charged with a war crime. The charge stated that they "in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used" between 1941 and 1945[204]. It was the prosecution's contention that the accused put the means of committing the crime of extermination in the hands of the concentration camp officials, and thus they were also war criminals[205]. The Judge-Advocate summed up the necessary proofs as follows: "first, that Allied nationals had been gassed by means of Zyklon B; secondly, that this gas had been supplied by [the defendants]; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings."[206] The court ultimately sentenced the two people to death after finding that they arranged for the supply of lethal gas to concentration camps and were aware of the purpose for which it would be used[207]. The court necessarily must have made the determination that without the supply of gas the exterminations would not have occurred in that manner, and therefore that the actions of the accused directly assisted in the commission of the illegal act of mass extermination.

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[202] *Id.*, 72.
[203] *See Trial of Karl Adam Golkel and 13 Others*, British Military Court Wuppertal, Germany, 15-21 May 1946, Judge-Advocate's Summation, Vol. V *Law Reports* 53 ("it is quite clear that [concerned in the killing does] not mean that a man actually had to be present at the site of the shooting."), 45-47, 54-55 (defendants who only drove victims to woods to be killed there were found to have been "concerned in the killing"); *Trial of Max Wielen and 17 Others* (British Military Court, Hamburg, Germany 1 Jul. - 3 Sep. 1947 (not necessary that a person be present to be "concerned in a killing") Vol. XI *Law Reports* 43-44, 46.
[204] *Trial of Burn Tesch and Two Others,* (*Zyklon B* case) Vol. I *Law Reports* 93.
[205] *Id.*, 94.
[206] *Id.*, 101.

(iii) Required extent of participation

681. The remaining question for consideration is the amount of assistance that must be shown before one can be held culpable for involvement in a crime. As one commentator noted, mere presence seems not enough to constitute criminally culpable conduct, "[b]ut what further conduct would constitute aiding and abetting the commission of war crimes or some accessory responsibility is not known with sufficient exactitude for 'line-drawing' purposes"[208]. Again, a review of certain post-Second World War cases is instructive despite their failure to establish specific criteria.

682. In the *Dachau* case before the United States Military Tribunal, wherein the accused were charged with acting in pursuance of a common design to participate in the "subjection of" the inmates to "cruelties and mistreatments", the court noted that in order to prove the allegations against each accused, the prosecution had to prove: (1) a system of ill-treatment at the camp that included the crimes listed in the charges; (2) awareness on the part of each accused of the system; and (3) that each accused "encouraged, aided and abetted or participated" in enforcing this system[209]. The main issue of contention was as to the third element. Noting that the evidence was such that the conditions of the concentration camp were inevitably produced by the way in which it was run and since every accused was at one time a member of its staff, the court found each of them culpable, and sentenced 36 of the 40 defendants to death and the others to varying terms of hard labour.[210] The guilt of each accused was established either by showing that his duties in themselves were in execution or administration of the illegal system or that, although the duties in themselves were not illegal, the accused performed them in an illegal manner[211]. Thus, in this case, the court required a finding of direct involvement in what was determined to be the illegal act of participating in the running of the camp.

683. The *Mauthausen* case, also before the United States Military Tribunal, involved similar facts though with much higher casualty figures given the practice of mass extermination by use of a gas chamber. There the court made the determination previously quoted regarding knowledge of criminal practices and activities, and declared:

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[207] Vol. VII *Law Reports* 49 and fn 1.
[208] J. Paust, *My Lai and Vietnam*, 57 Mil L. Rev. 99, 168 (1972).
[209] Vol. XI *Law Reports* 13.
[210] *Id.*, 8, 12.
[211] *Id.*

> [t]hat any official, governmental, military or civil . . . or any guard or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognized laws, customs and practices of civilised nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished.[212]

The court thus found all 61 defendants charged guilty. While this finding suggests that the camp personnel were found guilty based upon the presumption that they had knowledge of the abhorrent conditions at the camp, *Mauthausen* and *Dachau* do not support the Prosecution's position. Unlike these cases, the accused has not been charged nor has the Prosecution proved, that the accused was engaged in the operation of the camps.

684. In another case focusing on poison gas, Robert Mulka, a camp commander at Auschwitz, was convicted of being an accessory in the murder of approximately 750 persons in the Auschwitz Trials before a German court[213]. This finding was based on the determination that he was involved in procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports. In this same trial, Karl Hocker, who succeeded Robert Mulka as adjutant camp commander, was convicted of complicity in joint murder by receiving and passing on teletypes detailing the imminent arrival of Hungarian prisoners to the camp, who were later killed there[214].

685. In the *Trial of Otto Sandrock and Three Others* ("*Almelo* case")[215], the defendants were charged with the commission of a war crime for killing a prisoner of war and a Dutch civilian. This trial, which was conducted by the British Military Court, invoked Regulation 8(ii) of the Royal Warrant of 14 June 1945 as amended by Royal Warrant of 4 August 1945, which provided:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime . . . .

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[212] *Id*., 15.
[213] Vol. II *War Crimes Reports* 418.
[214] *Id*., 419.
[215] *Trial of Otto Sandrock and Three Others*, Vol. I *Law Reports* 35, 43 (1947).

The Judge-Advocate ruled that each of the defendants knew that they were going to the woods for the purpose of killing the victims and that "[i]f people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law."[216] Based in part on this knowledge, the court found all concerned in each shooting guilty, including the one that stayed in the car to prevent strangers from disturbing the two who were engaged in killing the victims; presence, knowledge and intent to assist was sufficient to establish guilt.

686. Other examples include the following cases. In *United States v. Kurt Goebell et al ("Borkum Island* case"), civilians brutalised and killed United States pilots who were paraded through the streets in 1944. Some of the members of the German guard who stood by as civilians injured and killed the pilots were convicted along with the commander who ordered the parading of the troops, the Burgomeister, and the four civilians who took part in the event[217]. In this case, the lack of action on the part of the guards and commander amounted to a sufficient degree of participation for the purposes of criminal liability.

687. In *Gustav Becker, Wilhelm Weber and 18 Others*[218], tried before the French Permanent Military Tribunal, the two primary defendants were convicted for their conduct regarding illegal arrests and ill-treatment, and 17 of the remaining defendants were convicted as their accomplices. Each of the accused were found guilty of the death of victims on the basis of Article 309 of the French Penal Code "caus[ing] death without intent to inflict it", even though their treatment of the victims occurred in France and the ultimate deaths occurred in Germany. The French war crimes trials contain other examples of complicity including an accused, *Ferrarese*, who was condemned to death on the charge of having caused the arrest, detention and torture of innocent French inhabitants by virtue of his denouncing several French citizens involved in the resistance movement whom were later arrested and tortured, and some of who were deported[219]. Similarly, a Nazi party administrator, who created and submitted lists to arresting authorities and reported French youths who rejected his attempts to get them to join the German army and who were then arrested, interned and forcibly drafted, with their families deported to Germany, was convicted and given five years imprisonment for aiding

[216] *Id.*, 43.
[217] Case. no. 12-489, *United States v. Kurt Goebell et al*, Report, Survey of the Trials of War Crimes Held at Dachau,Germany, 2-3 (15 Sept. 1948).
[218] *Gustav Becker, Wilhelm Weber and 18 Others,* Vol. VII *Law Reports* 67, 70.
[219] *Id.*, 71.

and assisting in the arrest and deportation. Denunciation in and of itself was not a war crime unless, by giving information, the informant became a party to or an accomplice in the commission of a war crime: "This condition is fulfilled if circumstances constituting complicity are present, e.g. if the informer knew that his action would lead to the commission of a war crime and either intended to bring about this consequence or was recklessly indifferent with regard to it. This decision was applied by the War Crimes Commission in numerous instances."[220] Thus not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced.

3. Legal Findings

688. The I.L.C. Draft Code draws on these cases from the Nürnberg war crimes trials and other customary law, and concludes that an accused may be found culpable if it is proved that he "intentionally commits such a crime" or, *inter alia*, if he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime . . . ."[221] The commentary to the I.L.C. Draft Code provides that the "accomplice must knowingly provide assistance to the perpetrator of the crime. Thus, an individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable."[222] In addition, the commentary notes that:

> the accomplice must provide the kind of assistance which contributes *directly* and *substantially* to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. Thus, the form of participation of an accomplice must entail assistance which facilitates the commission of a crime in some significant way.[223]

While there is no definition of "substantially", it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed. For example, if there

[220] *Id.*
[221] I.L.C. Draft Code Art. 2(3)(a) & (d) (emphasis added).
[222] *Id.*, 24 (emphasis in original).
[223] I.L.C. Draft Code, 24 (emphasis in original).

had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner. The same analysis applies to the cases where the men were prosecuted for providing lists of names to German authorities. Even in these cases, where the act in complicity was significantly removed from the ultimate illegal result, it was clear that the actions of the accused had a substantial and direct effect on the commission of the illegal act, and that they generally had knowledge of the likely effect of their actions.

689. The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, presence alone is not sufficient if it is an ignorant or unwilling presence. However, if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it.

690. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. This is assuming that the accused has not actively withdrawn from the group or spoken out against the conduct of the group.

691. However, actual physical presence when the crime is committed is not necessary; just as with the defendants who only drove victims to the woods to be killed, an accused can be considered to have participated in the commission of a crime based on the precedent of the Nürnberg war crimes trials if he is found to be "concerned with the killing". However, the acts of the accused must be direct and substantial.

692. In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

VII. LEGAL FINDINGS

693. The Trial Chamber has held, by a majority, that the Prosecution has failed to prove beyond reasonable doubt that the victims of the acts alleged in the Indictment were protected persons under the provisions of the Geneva Conventions. Accordingly, as found by the Appeals Chamber, Article 2 of the Statute proscribing grave breaches of those Conventions is inapplicable; therefore, the evidence will be assessed by considering Article 3 of the Statute and its invocation of Common Article 3 of the Geneva Conventions, and Articles 5 and 7, paragraph 1 of the Statute. The Trial Chamber now turns to the application of that law, much of which has already been discussed, and to the facts as already found, dealing with each count in turn.

A. Paragraph 4

1. Persecution as a Crime against Humanity

(a) Definition of persecution

694. In Count 1 the Prosecution charges that the accused committed the crime of persecution. As discussed in Section VI. D above, one of the categories of crimes against humanity recognized by the Nürnberg Charter was persecution on political, racial or religious grounds, the other category being crimes of the murder type, namely murder, extermination, enslavement and deportation. In order to constitute persecution there must be a persecutory act or omission, and that act or omission must be based on one of the listed grounds. Unfortunately, although often used, the term has never been clearly defined in international criminal law nor is persecution known as such in the world's major criminal justice systems[224]. As explained by one expert: "While the first category [crimes of the murder type] is composed of acts which will be found more or less in the criminal code of all civilised states, the second category [crimes of the persecution type] is composed of acts that may be punishable by domestic criminal law but which are not necessarily all punishable nor

[224] *See* Bassiouni, 318, *supra*.

everywhere."[225] Although there has been an attempt to define the concept in the context of asylum and refugee law[226] this is a distinct area of municipal and international law and thus its norms cannot readily be applied to customary international criminal law entailing individual criminal responsibility.

695. M. Cherif Bassiouni attempts to fill this definitional *lacuna* when he writes:

> Throughout history . . . the terms "persecute" and "persecution" have come to be understood to refer to discriminatory practice resulting in physical or mental harm, economic harm, or all of the above. . . . The words "persecute" and the act of "persecution" have come to acquire a universally accepted meaning for which a proposed definition is: State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.[227]

696. Another possible definition of persecution was originally offered for crimes against humanity in general. M. Le Gunehec of the *Cour de Cassation* in the *Barbie* case wrote:

> above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one's own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.[228]

As Antonio Cassese noted, this is "a definition of crimes against humanity that is both acceptable and effective, so long as we take it in its broader meaning. In other words, it must be interpreted as also covering inhumane acts directed against enemy civilians not because they are Jewish, partisans or political opponents but only because they belong to the enemy."[229] As such, this is a definition of crimes against humanity that addresses the

[225] Henri Meyrowitz, 250, *supra.*
[226] *See* Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining Refugee Status* (1992); *see also* Guy S. Goodwin-Gill, *The Refugee in International Law* 66-68 (Clarendon Press: Oxford, 2nd. ed. 1996).
[227] Bassiouni, 317, *supra*.
[228] Report of Counsellor Le Gunehec, 24, quoted in Cassese, *Violence and Law in the Modern Age*, 112, *supra.*
[229] *Id*.

"persecution type" of crimes against humanity[230] and is thus useful as a definition of persecution within the meaning of Article 5(h).

697. From the above it is evident that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics. Because the "persecution type" is separate from the "murder type" of crimes against humanity it is not necessary to have a separate act of an inhumane nature to constitute persecution; the discrimination itself makes the act inhumane[231]. The commentary to the I.L.C. Draft Code speaks of a denial of human rights and fundamental freedoms to which individuals are entitled without distinction, and refers to articles of the Charter of the United Nations and the International Covenant on Civil and Political Rights which address the right to non-discrimination[232]. It also discusses the relationship between the crime of "persecution on political, racial, religious or ethnic grounds" and that of "institutionalized discrimination on racial, ethnic, or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population", noting that they both involve "the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion", although in the case of the latter the discriminatory plan or policy must be institutionalised[233]. It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution under the Statute.

698. The parties, for the most part, agree with this definition. The Prosecution in its pre-trial brief asserts that the elements of persecution are that: (1) the accused committed a specified act or omission against the victim; and (2) the specified act or omission was intended by the accused to harass, cause suffering, or otherwise discriminate against the victim based on political, racial or religious grounds. The Defence, while not challenging the elements listed by the Prosecution, nevertheless expressed concern about the lack of definition of the specified acts. This concern is shared by the Ad Hoc Committee on the Establishment

[230] *See id.*, 110.
[231] *See, e.g.*, the *Barbie* case, 143, *supra*.
[232] I.L.C. Draft Code, 98, *supra*.
[233] *Id.*, 99.

of a Permanent International Criminal Court[234]. The Defence's concern raises the question of whether acts which fall under other paragraphs of Article 5, as well as other Articles of the Statute, can also constitute persecution and in that regard the Defence argues that the lack of definition in customary law does not justify the direct application of definitions derived from other sources, such as the Geneva Conventions.

(b) The acts encompassed by the crime of persecution

(i) Acts enumerated elsewhere in the Statute

699. The Prosecution asserts that the crime of persecution encompasses any acts of an inhumane nature directed against a civilian population when committed with discriminatory intent on the specified grounds. In support, reference is made to Article 6 of the Nürnberg Charter which contained, as explained above, two categories of crimes against humanity, as well as the Nürenberg Principles[235] which maintained this distinction. The Prosecution thereby concludes that at Nürnberg "persecutions were distinguished from the other inhumane acts based on a requirement of discriminatory intent on the specified grounds" and as such, "in addition to the criminal liability which attaches to enumerated inhumane acts, there is an additional element of culpability when such acts are committed with discriminatory intent." Statements of the Nürnberg Tribunal relating to persecution[236] are offered as support for this conclusion, as well as the decision of the Israeli District Court in the *Attorney General of Israel v. Eichmann* ("*Eichmann* case") which held that all that the accused did "with the object of exterminating the Jewish People also amounts *ipso facto* to persecution of Jews on national, racial, religious and political grounds"[237].

700. As noted above, the Defence's primary concern regarding persecution under the Statute is the lack of definition regarding the specified acts "other than the ones explicitly dealt with . . . [in] the Prosecutor's brief" and thus it does not in principle challenge the Prosecution's conclusion that persecution under Article 5(h) can encompass inhumane acts enumerated elsewhere in the Statute. This Trial Chamber accepts this conclusion, which is supported, *inter alia*, by the sources offered by the Prosecution. As such, crimes enumerated

[234] *Report of the Ad Hoc Committee*, 17, *supra*.
[235] Nürnberg Principles, para. 120, *supra*.
[236] Nürnberg Judgment, 247-253, *supra*.
[237] *Attorney General of Israel v. Eichmann*, 36 International Law Reports 5, 239 (1968).

in Articles 2 and 3 of the Statute which also fulfil the elements of persecution, including the common elements of crimes against humanity, can be encompassed in a finding of persecution under Article 5(h) of the Statute. As pointed out by a United States Military Tribunal in the *Justice* case, the definition of crimes against humanity in Control Council Law No. 10 prohibited "not only war crimes, but also acts not included in the preceding definition of war crimes"[238]. The commentary to this case states that "it is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime."[239]

701. This is also the approach followed by the Nürnberg Tribunal. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that "[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity."[240] Subsequently, in its ruling on individual defendants, the Nürnberg Tribunal grouped war crimes and crimes against humanity together. Similar statements occur in other cases tried on the basis of Control Council Law No. 10, for example, the *Trial of Otto Ohlendorf and Others* ("*Einsatzgruppen* case")[241] and the *Pohl* case[242]. In the *Pohl* case the court found that for his actions as administrative head of the concentration camps, Pohl was guilty of direct participation in a war crime and a crime against humanity, and that Heinz Karl Fanslau[243], Hans Loerner[244], and Erwin Tschentscher[245] had committed war crimes and crimes against humanity because of their association with the slavery and slave labour programme operating in the concentration camps[246]. National cases also support this finding, such as *Quinn v. Robinson*[247], both the District Court and the Supreme Court decisions in *Eichmann*[248], and the *Barbie* case[249]. As such, acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution.

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[238] *Justice* case, Vol. VI Law Reports, 39, *supra* (emphasis added).
[239] Notes on the *Justice* case, *id*., 79.
[240] Nürnberg Judgment, 237, *supra*.
[241] *See* Vol. XV Law Reports 135.
[242] Vol. V Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 984, *supra*.
[243] *Id*., 997, 998.
[244] *Id*., 999, 1001.
[245] *Id*., 1010, 1015.
[246] *See also* Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, 64-65 (1949).
[247] *Quinn v. Robinson*, 783 F.2d 776, 799-801 (9th Cir. 1986).
[248] *Eichmann* case, 277-278, 287-289, *supra*.
[249] *Barbie* case, *supra*.

702. The residual issue is whether acts which constitute crimes against humanity under different heads of Article 5 can also constitute persecution under Article 5(h) if the necessary discriminatory intent is present. Given the fact, as discussed above, that the Nürnberg Charter clearly defined two types of crimes against humanity, of which only the persecution type requires discriminatory intent, there would seem to be no difficulty in attaching additional culpability to acts which fall within the "inhumane act" category of crimes against humanity if motivated by discrimination. Nevertheless, because the Trial Chamber has incorporated the requirement included in the *Report of the Secretary-General* and in the interpretation of various Security Council members that discriminatory intent is required for all crimes against humanity, acts that are found to be crimes against humanity under other heads of Article 5 will not be included in the consideration of persecution as a separate offence under Article 5(h) of the Statute.

(ii) Acts not enumerated elsewhere in the Statute

703. In addition to the acts enumerated elsewhere in the Statute persecution may also encompass other acts if they "seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied"[250]. The commentary to the I.L.C. 1991 Report, in an attempt to catalogue the scope of persecutory acts within the meaning of crimes against humanity, notes that these acts include:

> a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts would come within the scope of this article when committed in a systematic manner or on a mass scale.[251]

In the 1996 I.L.C. Draft Code this enumeration was replaced with a recognition that "the inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognized in the Charter of the United Nations (Articles 1 and 55) and

[250] I.L.C. 1991 Report, 236, *supra*.
[251] *Id*., 268.

the International Covenant on Civil and Political Rights (article 2)"[252]. One expert, after noting that the plain meaning of the term persecution is oppression, harassment or the imposition of mental or physical harm based on discrimination, provides additional examples of persecutory acts: "murder; manslaughter; rape; assault; battery; theft; robbery; destruction of property and a variety of crimes related to unlawful interference with fundamental legal rights"[253].

704. Thus the crime of persecution encompasses acts of varying severity, from killing to a limitation on the type of professions open to the targeted group. The Nürnberg Judgment considered the following acts, amongst others, in its finding of persecution: discriminatory laws limiting the offices and professions open to Jews; restrictions placed on their family life and their rights of citizenship; the creation of ghettos; the plunder of their property and the imposition of a collective fine[254].

705. As the International Tribunal's closest historical precedent, the statements of the Nürnberg Tribunal on persecution are informative and succinctly encapsulate the essence of the norm of persecution. In the section of the discussion portion of the Nürnberg Judgment entitled "Persecution of the Jews", the Nürnberg Judgment, in an often quoted statement, notes that:

> The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. . . . With the seizure of power, the persecution of the Jews was intensified. A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organised, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorised, the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of the ghettos was carried out on an extensive scale,

[252] *Id.*, 98.
[253] Bassiouni, 282, *supra*.
[254] *See* Nürnberg Judgment, 248-249, *supra;* the *Funk* case, *id.*, 305-307 (regarding the role of economic discrimination as persecution); *see also United States of America v. Ernst von Weizaecker et al.*, Vol. XIV Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, 676-678, *supra.*

> and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.[255]

In a discussion of the facts the Nürnberg Judgment stated that:

> With the coming of the Nazis into power in 1933, persecution of the Jews became official state policy. On 1 April 1933, a boycott of Jewish enterprises was approved by the Nazi Reich Cabinet, and during the following years a series of anti-Semitic laws were passed, restricting the activities of Jews in the civil service, in the legal profession, in journalism, and in the armed forces. In September 1935, the so-called Nuremberg Laws were passed, the most important effect of which was to deprive Jews of German citizenship.[256]

706. Several statements about persecution are contained in the Nürnberg Judgment concerning individual defendants. Regarding defendant Bormann the Nürnberg Tribunal found that

> Bormann was extremely active in the persecution of the Jews, not only in Germany but also in the absorbed and conquered countries. He took part in the discussions which led to the removal of 60,000 Jews from Vienna to Poland in cooperation with the SS and the Gestapo. He signed the decree of 31 May 1941 extending the Nürnberg Laws to the annexed Eastern territories. . . . On 1 July 1943 he signed an ordinance withdrawing Jews from the protection of the laws and placing them under the exclusive jurisdiction of Himmler's Gestapo.[257]

Regarding defendant Frank the Nürnberg Tribunal found: "The persecution of the Jews was immediately begun in the General Government. The area originally contained from 2½ million to 3½ million Jews. They were forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated."[258] Additionally, in dealing with the question of Frick's guilt for war crimes and crimes against humanity, the Nürnberg Tribunal focused on anti-Semitic laws drafted, signed and administered by Frick designed to exclude Jews from the German life and economy[259]. These led up to a final decree placing Jews "outside the law" and handing them over to the Gestapo, all of which "paved the way for the 'final solution'"[260]. Likewise, in the case of Funk, as well as Seyss-Inquart, anti-Semitic economic discrimination was cited as "one of several factors from which it is concluded that he was a war criminal"[261].

[255] Nürnberg Judgment, 247-249, *supra*.
[256] *Id*., 180-181.
[257] *Id*., 339-40.
[258] *Id*., 297-298.
[259] *Id*., 300.
[260] *Id*., 300.
[261] *Flick* Trial, 27, *supra.*

707. Thus, as illustrated by these findings and as the International Law Commission noted, persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element. There is, however, a limit to the acts which can constitute persecution within the meaning of crimes against humanity. For example, in the *Flick* trial, the court determined that offences against industrial property could not constitute crimes against humanity, although it made a distinction between industrial property and the "dwellings, household furnishings and food supplies of persecuted people"[262] and thus "left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity"[263]. The Rebuttal statement of the prosecution before the Nürnberg Tribunal has been interpreted to refer to economic deprivation of this more personal type[264] and the finding of the Nürnberg Tribunal characterizing certain acts of economic discrimination as persecution support the conclusion that economic measures of a personal, as opposed to an industrial type, can constitute persecutory acts[265]. The finding in the *Eichmann* case also supports this conclusion. Count 6 of the indictment against Adolf Eichmann alleged persecution of Jews on national, racial, religious and political grounds and Count 7 concerned property[266]. He was convicted of crimes against humanity (Counts 5 to 7) for his activities in the Emigration Centres, deportations and the "final solution". The plunder of property of those Jews who were forced to emigrate or who were deported was found to be a crime against humanity when committed "by means of terror or linked with other acts of violence as defined in the Law[267], or when it was a result of those acts, so that it was part of a comprehensive process, as was the plunder by the Centres for Jewish Emigration of those who were deported and exterminated"[268].

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[262] *Id*., 26.
[263] Notes on the *Flick* Trial, *id*., 50.
[264] British Command Paper, Cmd. 6964, 85, *quoted in* Notes on the *Flick* Trial, 51, *supra.*
[265] *See, e.g*., the Nürnberg Tribunal's statements in the *Leadership Corps of the Nazi Party* case, Nürnberg Judgment, *supra* at 259; the *Seyss-Inquart* case, *id*., 328, 329; the *Funk* case, *id*., 305; the *Frick* case, *id*., 300; and the *Goering* case, *id*., 282.
[266] *Eichmann* case, *supra*.
[267] Nazi and Nazi Collaborators (Punishment) Law, 5710/1950.
[268] Summary of Eichmann case, *id.* at 14.

708. In addition to economic measures a variety of other acts can constitute persecution if done with the requisite discriminatory intent. The Nürnberg Tribunal's decision regarding defendant Streicher is useful in considering the varying manifestations of persecutory acts. Streicher was convicted of crimes against humanity because through his speaking, writing and preaching hatred of the Jews he "infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution" in Germany as well as elsewhere[269]. Thus his "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes as defined in the Charter and constitutes a Crime Against Humanity"[270].

709. The *Justice* case, in which the accused were former German judges, prosecutors or officials in the Reich Ministry of Justice, is also relevant in regard to the variety of acts which can constitute persecution. The trial considered the legal aspects of the part played in furthering the persecution of Jews and Poles and other aspects of the Nazi policy by various of the accused acting in their official or judicial capacity[271] but, it continued, "all of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the court enforced them by arbitrary and brutal means, shocking the conscience of mankind and punishable here"[272]. The commentary to the case stresses that

> it seems safe to say that Rothaug and Oeschey were found guilty of crimes against humanity not merely because arbitrary behaviour in court was proved but because it had been shown that such behaviour amounted to a participation in a persecution on political, racial or religious grounds. . . . In other words, it is probably true to say that the Tribunal regarded as constituting crimes against humanity not merely a series of changes made in the legal system of Germany but a series of such alterations as involved or were pursuant to persecutions on political, racial or religious grounds, or (perhaps) such as led to the commission of "Atrocities and offences".[273]

710. The *Eichmann* case also discusses the variety of acts which constitute persecution. Noting that paragraph 4 of the Programme of the National Socialist Party declares that Jews

[269] Nürnberg Judgment, 302, *supra*.
[270] *Id*., 304.
[271] *Justice* case, *supra*, 1; *see also id.*, 51-52 (United States Military Tribunal applying Control Council Law No. 10 explained that there were four types of laws the enforcement of which it would not normally regard as being illegal).
[272] *Id*., 52.
[273] Notes on Judgment, 81, 83, *supra*.

cannot be citizens of the German state, since they do not belong to the German people and that paragraph 8 demands that all those who are not Germans and immigrated to Germany after 2 August 1914 leave Reich territory immediately[274], the court stated that

> [w]ith the rise of Hitler to power, the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the Government of the Reich in accordance with legislative powers delegated to it by the Reichstag on March 24, 1933 (Session 14, p. 71) and of direct acts of violence organised by the régime against the persons and property of Jews . . . . The purpose of these acts carried out in the first stage was to deprive the Jews of citizen rights, to degrade them and strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State and to close to them the sources of livelihood. These trends became sharper as the years went by, until the outbreak of the war. Even before German Jewry suffered its first general shock on April 1, 1933, when Jewish businesses were boycotted, the arrest of Jews and their dispatch to concentration camps had begun . . . . On November 7, 1938, Hirsch Grynschpan shot the Counsellor of the German Embassy in Paris, vom Rath. After this act, the wave of persecution swelled up against the Jews in Germany".[275]

Thus, the crime of persecution encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights.

(c) The acts must be taken on the basis of one of the listed discriminatory grounds

711. There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments. The grounds in the Statute are based on the Nürnberg Charter which included race, religion and politics as the three grounds, as did Control Council Law No. 10, both of which were drafted to address the European situation. In contrast the Tokyo Charter excluded religion as a basis for persecution, given its inapplicability to the Pacific theatre of operation while, alternatively, the Convention on the Prevention and Punishment of the Crime of Genocide[276] contains the additional ground of ethnicity as do the 1991 and 1996 versions of the I.L.C. Draft Code, whereas the original 1954 Draft Code included culture as a basis for

[274] *Id*., para. 56, referencing T/1403.
[275] *Id*., paras. 56, 57.
[276] Genocide Convention, *supra*.

persecution[277]. The possible discriminatory bases which the International Tribunal is empowered to consider are limited by the Statute to persecutions undertaken on the basis of race, religion and politics.

712. Although there is no definitive list of persecutory grounds in customary international law, it is a common feature that whatever grounds are listed are alternatives, one only is sufficient to constitute persecution. Aside from the Statute of the International Tribunal and the Statute of the International Tribunal for Rwanda, all other international instruments addressing persecution make this explicit through the use of the word "or"[278]. Thus it is evident that under customary international law the bases for persecution are alternatives and it is sufficient if one discriminatory basis is present.

713. In contrast, the Statute contains the conjunctive "and" between the various listed bases, thus seemingly implying that the discrimination must be based on all of these grounds (*i.e.*, race, religion and politics) in order to constitute persecution under the Statute. If this implication is correct it deviates greatly from customary international law. While it is not impossible that such a deviation was intended, given that the Statute in several instances deviates from custom by being more restrictive than required, in all other instances this has been explicitly noted by the Secretary-General. A ready example is the requirement in the Statute discussed above that crimes against humanity are only justiciable by the International Tribunal if committed in armed conflict, where the Secretary-General noted that crimes against humanity are prohibited regardless of whether they are committed in armed conflict[279]. No such clear intention to deviate from custom, or for that matter from the Nürnberg Charter and Control Council Law No. 10, both of which require that persecutions be committed "on political, racial or religious grounds" and on which Article 5 is based, is evident in regard to the conjunctiveness of the grounds. The use of the word "and" most likely results from the fact that the Statute attempts to define, in a cumulative sense, the International Tribunal's adjudicatory powers under Article 5. Thus to use the word "and" is not illogical and, since there is no clear indication of an intention to deviate from customary international law, it is highly unlikely that the Statute's drafters intended the word "and" to

[277] I.L.C. Draft Code of Crimes against the Peace and Security of Mankind, Ybk ILC, 1954, Vol. II, 150-152, U.N. Doc. A/2673.

[278] *See, e.g.*, the Genocide Convention, Art. II, *supra;* the Nürnberg Charter, Art. 6(c), *supra;* the Tokyo Charter, Art. 5(c), *supra;* Control Council Law No. 10, Art. 2(c), *supra*; the 1996 I.L.C. Draft Code, Art. 18(e), *supra*; and the Nürnberg Principles, Principle IV.c, *supra.*

require all three grounds to be present. The Statute should therefore be read in accordance with custom whereby each of the three grounds in and of itself is a sufficient basis for persecution. Both the Prosecution and the Defence agree with this interpretation. Although the Prosecution in its pre-trial brief does not explicitly advocate this position, it does so implicitly through the entitlement of its heading on persecution: "(C) Persecution on political, racial or religious grounds" (emphasis added). In contrast, the Defence explicitly states that it "has no problem with the general elements of the offence, as described by the Prosecutor (such as discriminatory intent on political racial or religious grounds)" (emphasis added). Thus even the party against whom it works agrees that the discriminatory bases should be read independently of each other.

2. Legal Findings as to Count 1

714. The Trial Chamber has found that the accused committed a number of acts described in paragraph 4 of the Indictment and specified in the various subparagraphs. In particular, the evidence satisfies the Trial Chamber beyond reasonable doubt that the accused participated in the attack on Kozarac and the surrounding areas and in the collection and forced transfer of civilians to detention camps; participated in the calling-out of four Muslim men from a column of civilians as will be described in paragraph 11 and the beatings, calling-out, separation and forced transfer of non-Serb civilians as will be described in paragraph 12; participated in the beating of a Muslim policeman in Kozarac; kicked one Muslim prisoner and beat another while they were held at the Prijedor military barracks; and killed two Muslim policemen in Kozarac, as charged in subparagraph 4.1. The Trial Chamber has also found that he participated in beatings at various locations within the Omarska camp; participated in the beatings of prisoners at the Keraterm camp and was present at the Trnopolje camp as charged in subparagraph 4.2, as well as participating in the transfer of non-Serbs to, and their initial confinement in, camps generally and the Trnopolje camp in particular, as charged in subparagraph 4.3. Finally, the Trial Chamber has found that while participating in the seizure, selection and transfer of non-Serbs to various camps the accused was aware that the majority of surviving detainees would be deported from Bosnia and Herzegovina, as charged in subparagraph 4.4. Additionally, the Trial Chamber has found that the accused committed all of these acts against non-Serbs with the intent of furthering the establishment of a Greater

[279] *Report of the Secretary-General*, para. 47, *supra*.

Serbia and that he shared the concept that non-Serbs should forcibly be removed from the territory, thereby exhibiting a discriminatory basis for his actions and that this discrimination was on religious and political grounds.

715. In Count 1 the Prosecution charges that by his participation in these acts the accused committed the crime of persecution as recognized in Article 5(h) of the Statute. The elements of the crime of persecution are the occurrence of a persecutory act or omission and a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion or politics. As discussed above, the persecutory act must be intended to cause, and result in, an infringement on an individual's enjoyment of a basic or fundamental right. The notion of persecutory act provides broad coverage, including acts mentioned elsewhere in the Statute as well as acts which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken.

716. The requirements for the crime of persecution are additional to the conditions of applicability for crimes against humanity, which must also be satisfied. The requirements for crimes against humanity under the Statute are, apart from the existence of an armed conflict, that the acts be taken against a civilian population on a widespread or systematic basis in furtherance of a policy to commit these acts and that the perpetrator has knowledge of the wider context in which his act occurs. Additionally, because of the interpretation of Article 5 proffered by the Secretary-General as well as several members of the Security Council, the Trial Chamber has incorporated the additional element that the act must be taken on discriminatory grounds. Whereas under the conditions of applicability for crimes against humanity as they stand under customary international law, inhumane acts that are committed with discriminatory intent incur a basis for culpability in addition to other crimes charged under the Statute, the inclusion of the requirement of discriminatory intent for all crimes against humanity negates this additional basis. As such the Trial Chamber, in making its determination of the accused's guilt or innocence of the crime of persecution, will not consider acts for which the accused is elsewhere in this Opinion and Judgment held culpable. Further, the accused's mere presence at the Trnopolje camp, as established in subparagraph 4.2, does not constitute persecution.

717. With respect to the remaining charges of paragraph 4 of the Indictment, the evidence supports a finding that the acts of the accused constitute persecution. The accused's role in,

inter alia, the attack on Kozarac and the surrounding areas, as well as the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings described above clearly constituted an infringement of the victims' enjoyment of their fundamental rights and these acts were taken against non-Serbs on the basis of religious and political discrimination. Further, these acts occurred during an armed conflict, were taken against civilians as part of a widespread or systematic attack on the civilian population in furtherance of a policy to commit these acts, and the accused had knowledge of the wider context in which his acts occurred.

718. Accordingly, the Trial Chamber finds beyond reasonable doubt that the accused is guilty of the crime of persecution as charged in Count 1.

B. Paragraph 6

719. This paragraph of the Indictment is concerned with a number of incidents involving assaults of various kinds upon numerous prisoners in the hangar building in the Omarska camp. It is alleged that by his participation in these assaults the accused committed the offences charged in Counts 5 to 11 of the Indictment.

720. Counts 5, 8 and 9 of the Indictment charge grave breaches recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber, by a majority, finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 5, Count 6 and Count 8 because the Prosecution has failed to prove beyond reasonable doubt that the victims were protected persons, which is an element of the offences.

721. Counts 6 and 7 of the Indictment charge that the accused by his participation in the acts alleged committed, in the case of Count 6, a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (murder) of the Geneva Conventions and, in the case of Count 7, a crime against humanity (murder) recognized by Article 5(a) and Article 7, paragraph 1, of the Statute. As earlier discussed, the Trial Chamber finds the accused not guilty as charged in Count 6 and Count 7

because the requisite elements for these offences have not been established beyond reasonable doubt.

722. Count 10 of the Indictment charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

723. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute. It reads:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> . . . .

According to this Article the prohibition against cruel treatment is a means to an end, the end being that of ensuring that persons taking no active part in the hostilities shall in all circumstances be treated humanely. In Article 7 of the International Covenant on Civil and Political Rights cruel treatment is very closely related to inhuman treatment. An almost identical provision appears in Article 5 of the American Convention on Human Rights where cruel treatment is dealt with under the heading "Right to humane treatment".

724. No international instrument defines cruel treatment because, according to two prominent commentators, "it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation".[280]

725. However, guidance is given by the form taken by Article 4 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) which provides that what is prohibited is

"violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment". These instances of cruel treatment, and the inclusion of "any form of corporal punishment", demonstrate that no narrow or special meaning is there being given to the phrase "cruel treatment".

726. Treating cruel treatment then, as J. H. Burger and H. Danelius describe it, as a "general concept", the relevant findings of fact as stated earlier in this Opinion and Judgment are that the accused took part in beatings of great severity and other grievous acts of violence inflicted on Enver Ali}, Emir Karaba{i}, Jasko Hrni}, Senad Muslimovi}, Fikret Haramba{i} and Emir Beganovi}, none of whom were taking any active part in the hostilities. The Trial Chamber finds beyond reasonable doubt that those beatings and other acts which each of those Muslim victims suffered were committed in the context of an armed conflict and in close connection to that conflict, that they constitute violence to their persons and that the perpetrators intended to inflict such suffering. The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them as provided by Article 7, paragraph 1, of the Statute. The Trial Chamber accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 10 of the Indictment in respect of each of those six victims.

727. Count 11 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

728. Article 5 of the Statute has already been discussed in detail. Its enumeration of nine crimes which it proscribes when committed in armed conflict and directed against any civilian population suggests that, as a minimum, the last of these crimes, "other inhumane acts", must consist of acts inflicted upon a human being and must be of a serious nature.

729. This is confirmed by the terms of Article 18(k) of the I.L.C. Draft Code, which includes as crimes against humanity, "other inhumane acts which severely damage physical or

[280] J.H. Burger, H. Danelius, *The United Nations Convention Against Torture*, 122.

mental integrity, health or human dignity, such as mutilation and severe bodily harm". In its commentary the International Law Commission notes that "the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity."[281] Mutilation and other types of severe bodily harm are the two examples of such "other inhumane acts" mentioned in Article 18(k) of the I.L.C. Draft Code.

730. The findings of fact about the acts of the accused relevant to this count are those concerning beatings and acts of violence referred to in dealing with Count 10. The Trial Chamber finds beyond reasonable doubt that those beatings and other acts of violence which were suffered by the six victims there named, who are Muslims, constitute inhumane acts and are crimes against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that the accused intended for discriminatory reasons to inflict severe damage to the victims' physical integrity and human dignity. The Trial Chamber further finds that the accused in some instances was himself the perpetrator and in others intentionally assisted directly and substantially in the common purpose of inflicting physical suffering upon them and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them as provided by Article 7, paragraph 1, of the Statute. The Trial Chamber accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 11 of the Indictment in respect of each of those six victims.

C. Paragraph 7

731. This paragraph of the Indictment is concerned with an incident involving the beating of [efik Sivac by a group of Serbs and the throwing of his body into a room in the white house at the Omarska camp. It is alleged that by his participation in these acts the accused committed the offences charged in Counts 12, 13 and 14 of the Indictment.

732. Count 12 of the Indictment charges a grave breach recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber, by a majority, finds to be

[281] I.L.C. Draft Code, 103, *supra.*

inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 12 because the Prosecution has failed to prove beyond reasonable doubt that the victim was a protected person, which is an element of the offence.

733. Count 13 of the Indictment charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

734. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute and has been discussed above. The Trial Chamber finds beyond reasonable doubt that the victim, [efik Sivac, a Muslim, was, at the time of his beating, held as a prisoner at the Omarska camp and was taking no active part in the hostilities. The findings of fact for paragraph 7 demonstrate the severity of the beating of [efik Sivac which resulted in violence to his person. The Trial Chamber finds beyond reasonable doubt that the beating constitutes cruel treatment and that the group of Serbs intended to inflict upon [efik Sivac such suffering. This beating was committed in the context of an armed conflict and in close connection to that conflict.

735. Since there is no direct evidence that the accused was present when [efik Sivac was beaten, the accused's culpability depends on the application of Article 7, paragraph 1, of the Statute. On the night that [efik Sivac was thrown into his room by the accused, Hase Ici} testified that he first heard the accused curse as he approached and then heard the accused say as he saw him throw the beaten [efik Sivac into the room: "You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb." Even though there is no direct evidence that the accused physically participated in the beating of [efik Sivac, by these acts, the accused intentionally assisted directly and substantially in the common purpose of the group to inflict severe physical suffering upon [efik Sivac. By this participation, the Trial Chamber finds beyond reasonable doubt that the accused aided and abetted in the commission of the crime and is, therefore, individually responsible for this crime as provided by Article 7, paragraph 1, of the Statute. Accordingly, the Trial Chamber finds beyond reasonable doubt that the accused is guilty as charged in Count 13 of the Indictment.

736. Count 14 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

737. The content of crimes against humanity has already discussed. The Trial Chamber finds beyond reasonable doubt that the severe beating of [efik Sivac constitutes an inhumane act and is a crime against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that it was intended, for discriminatory reasons, to inflict severe damage to the victim's physical integrity and human dignity.

738. Even though there is no direct evidence that the accused physically participated in the beating of [efik Sivac, the accused intentionally assisted directly and substantially in the common purpose of the group to inflict this suffering upon [efik Sivac. By this participation, the Trial Chamber finds beyond reasonable doubt that the accused aided and abetted in the commission of the crime and is therefore individually responsible for this crime as provided by Article 7, paragraph 1, of the Statute. Accordingly, the Trial Chamber finds beyond reasonable doubt that the accused is guilty as charged in Count 14 of the Indictment.

D. Paragraph 8

739. This paragraph of the Indictment is concerned with an incident involving assaults upon prisoners behind the white house in the Omarska camp. It is alleged that by his participation in these assaults the accused committed the offences charged in Counts 15, 16 and 17 of the Indictment.

740. Count 15 of the Indictment charges a grave breach recognized by Article 2 of the Statute which, for the reasons stated earlier, the Trial Chamber, by a majority, finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 15 because the Prosecution has failed to prove beyond reasonable doubt that the victims were protected persons, which is an element of the offence.

741. Count 16 of the Indictment charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

742. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute and has been discussed above. The Trial Chamber finds beyond reasonable doubt that the severe beatings which Hakija Elezovi} and Salih Elezovi}, both Muslims and neither of whom were taking active part in the hostilities, suffered were inflicted by the accused, were committed in an armed conflict and in close connection to that conflict and that they constitute violence to their persons and that the accused intended to inflict such suffering. The Trial Chamber accordingly finds the accused guilty as charged in Count 16 of the Indictment in respect of each of these two victims.

743. Count 17 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(1) (inhumane acts) and Article 7, paragraph 1, of the Statute.

744. The Trial Chamber finds beyond reasonable doubt that the severe beatings which were suffered by Hakija Elezovi} and Salih Elezovi} constitute inhumane acts and are crimes against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that the accused intended for discriminatory reasons to inflict severe damage to the two victims' physical integrity and human dignity. The Trial Chamber accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 17 of the Indictment in respect of each of those two victims.

E. Paragraph 9

745. This paragraph of the Indictment is concerned with the physical abuse of prisoners near the white house at the Omarska camp. It is alleged that by his participation in these acts the accused committed the offences charged in Counts 18, 19 and 20 of the Indictment.

746. Count 18 of the Indictment charges a grave breach recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber by a majority finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 18 because the Prosecution has failed to prove beyond reasonable doubt that the victims were protected persons, which is an element of the offence.

747. Count 19 charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions. In relation to the participation of the accused in the physical abuse of the assembled inmates in front of the white house, no conclusive evidence has been presented linking the accused to the related acts. Further, it cannot be inferred from the accused's mere following of a victim of a beating that the accused directly and substantially participated in the beating within the meaning of Article 7, paragraph 1, as interpreted by this Trial Chamber. The Prosecution's sole witness, Elvir Grozdani}, merely stated that the man had been beaten in front of the white house but it is clear that he did not see the man being physically abused and that he only came across the man after he had already been placed in the barrow. This Trial Chamber is therefore not satisfied on the evidence that the man in the barrow was necessarily a victim of the beatings in front of the white house nor that the accused participated in the beatings within the meaning of Article 7, paragraph 1. As to the fire extinguisher incident, as mentioned, no evidence was presented that the fire extinguisher was actually discharged nor was conclusive evidence presented that the victim was alive. The Prosecution quite correctly concedes that if the victim were dead then the offence of cruel treatment under Article 3 as charged in Count 19 cannot stand and that disposes of this count. The Trial Chamber, accordingly, finds the accused not guilty as charged in Count 19.

748. Count 20 charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute. The Prosecution argues that the discharging of the contents of the fire extinguisher into a dead body can constitute an inhumane act under Article 5(i) as charged in Count 20. Although, as already stated, no evidence was produced as to the actual discharge of the fire extinguisher, the Prosecution in its closing arguments submits that "because of philosophical attitudes towards what happens to you when you die, and also because of the standards we expect of respect for human beings even after the moment that they cease to

live", an inhumane act can be committed against a corpse. This Trial Chamber notes that certain acts against dead bodies have been punished as war crimes though these relate in principle to cannibalism and the mutilation of, and the failure to bury, dead bodies in breach of specific provisions of the laws and usages of war relating to the mistreatment of the war dead[282]. It also appreciates that the victim of an "inhumane act", in the ordinary sense of the word, need not necessarily be a living member of humanity and subscribes to the view submitted by the Prosecution that certain acts against a dead body do offend some philosophical and indeed religious notions of respect for the human being upon death. However, the Trial Chamber takes the view, having regard to the inhumane acts specifically listed under Article 5(a) to (h) of the Statute, that the inhumane act contemplated in Article 5(i) must be one which has to be inflicted on a living individual if it is not to offend the *ejusdem generis* rule. There being no evidence that the person in the barrow was alive, this Trial Chamber finds the accused not guilty as charged in Count 20. Even if there were evidence that the person in the barrow was alive, the Trial Chamber does not consider that the mere insertion of the hose into the mouth of that person without discharge of the contents of the fire extinguisher is of a nature serious enough to amount to an inhumane act within the meaning of Article 5 of the Statute.

F. Paragraph 10

749. This paragraph of the Indictment is concerned with an incident involving the beating and kicking of Hase [ici] in a room in the white house at the Omarska camp. It is alleged that by his participation in these acts the accused committed the offences charged in Counts 21, 22 and 23 of the Indictment.

750. Count 21 of the Indictment charges a grave breach recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber, by a majority, finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 21 because the Prosecution has failed to prove beyond reasonable doubt that the victim was a protected person, which is an element of the offence.

[282] *See Trial of Max Schmid*, Vol. XIII Law Reports, 151-152 and notes thereto, *supra*.

751. Count 22 of the Indictment charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

752. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute and has been discussed above. The Trial Chamber finds beyond reasonable doubt that the victim, Hase Ici}, a Muslim, was at the time of his beating, held as a prisoner at the Omarska camp and was taking no active part in the hostilities. The findings of fact for paragraph 10 demonstrate the severity of the beating and kicking of Hase Ici} which resulted in violence to his person. The Trial Chamber finds beyond reasonable doubt that the beating and kicking by the accused and a group of Serbs from outside the camp constitutes cruel treatment and that the accused intended to inflict such suffering. This beating was committed in the context of the armed conflict and in close connection to that conflict. The Trial Chamber, accordingly, finds beyond reasonable doubt that the accused is guilty as charged in Count 22 of the Indictment.

753. Count 23 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute.

754. The content of crimes against humanity has already been discussed. The Trial Chamber finds beyond reasonable doubt that the severe beating and kicking of Hase Ici} constitutes an inhumane act and is a crime against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that the accused intended for discriminatory reasons to inflict severe damage to the victim's physical integrity and human dignity. Accordingly, the Trial Chamber finds beyond reasonable doubt that the accused is guilty as charged in Count 23.

G. Paragraph 11

755. This paragraph of the Indictment is concerned with the alleged killing of four persons in Kozarac when people were marched in columns to assembly points for transfer to camps.

It is alleged that by his participation in these acts the accused committed the offences charged in Counts 24, 25 and 26 or, alternatively, in Counts 27 and 28 of the Indictment.

756. Counts 24 and 27 of the Indictment charge a grave breach recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber, by a majority, finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 24 and Count 27 because the Prosecution has failed to prove beyond reasonable doubt that the victims were protected persons, which is an element of the offences.

757. Counts 25 and 26 charge that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (murder) of the Geneva Conventions and a crime against humanity recognized by Article 5(a) (murder) and Article 7, paragraph 1, of the Statute respectively. In considering the testimony of the three principal witnesses, Salko Karaba{i}, Ferid Muj~i} and Sulejman Be{i}, and in rejecting Sulejman Be{i}'s evidence when it is reviewed alongside that of Salko Karaba{i} and Ferid Muj~i}, this Trial Chamber is not satisfied beyond reasonable doubt that the four persons named were murdered. The Trial Chamber, accordingly, finds the accused not guilty as charged in Counts 25 and 26.

758. Count 28 charges, alternatively, that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute. Although this Trial Chamber is convinced of the accused's participation in the calling-out of the people from the column passing down Mar{ala Tita Street in the vicinity of the kiosk, such participation *per se*, in the Trial Chamber's view, cannot patently constitute an inhumane act within the meaning of Article 5 of the Statute. The Trial Chamber, accordingly, finds the accused not guilty as charged in Count 28.

H. Paragraph 12

759. This paragraph of the Indic tment is concerned with incidents involving the calling-out of residents from their houses and the separating of men from women and children in the villages of Jaski}i and Sivci in op{tina Prijedor, assaults upon the men in Jaski}i, the killing of

some of them and the taking of others to an unknown location. It is alleged that by his participation in these acts the accused committed the offences charged in Counts 29 to 34 of the Indictment.

760. Counts 29 and 32 of the Indictment charge grave breaches recognized by Article 2 of the Statute which, for the reasons stated above, the Trial Chamber, by a majority, finds to be inapplicable. It follows that the Trial Chamber finds the accused not guilty as charged in Count 29 and Count 32 because the Prosecution has failed to prove beyond reasonable doubt that the victims were protected persons, which is an element of the offence.

761. Counts 30 and 31 of the Indictment charge that the accused by his participation in the acts alleged committed, in the case of Count 30, a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (murder) of the Geneva Conventions and, in the case of Count 31, a crime against humanity recognized by Article 5(a) (murder) and Article 7, paragraph 1, of the Statute. As earlier discussed, the Trial Chamber finds the accused not guilty as charged on Count 30 and Count 31 because the requisite elements for these offences have not been established beyond reasonable doubt.

762. Count 33 of the Indictment charges that the accused by his participation in the acts alleged committed a violation of the laws or customs of war recognized by Article 3 and Article 7, paragraph 1, of the Statute and Common Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

763. Common Article 3(1) of the Geneva Conventions provides the basis for the inclusion of cruel treatment under Article 3 of the Statute and has been discussed above. The Trial Chamber finds beyond reasonable doubt that the beating which Beido Bali}, [efik Bali}, Ismet Jaski} and Salko Jaski}, who are Muslims, each suffered in the village of Jaski}i, followed then by their forcible removal from their families and homes to a location then unknown to them were acts committed in the context of an armed conflict and in close connection to that conflict and that they resulted in violence to their persons. The Trial Chamber finds beyond reasonable doubt that the beating and forced removal constitutes cruel treatment and that the accused intended to inflict such suffering. The Trial Chamber also finds beyond reasonable doubt that the four were taking no active part in the hostilities. The

Trial Chamber, accordingly, finds beyond reasonable doubt that the accused is guilty as charged in Count 33 of the Indictment in respect of each of these four victims.

764. Count 34 of the Indictment charges that the accused by his participation in the acts alleged committed a crime against humanity recognized by Article 5(i) (inhumane acts) and Article 7, paragraph 1, of the Statute. The Trial Chamber finds beyond reasonable doubt that the beatings and forcible removals earlier referred to of Beido Bali}, [efik Bali}, Ismet Jaski} and Salko Jaski}, who are Muslims, constitute inhumane acts and are crimes against humanity committed during an armed conflict as part of a widespread or systematic attack on a civilian population and that the accused intended thereby for discriminatory reasons to inflict severe damage to the physical integrity and human dignity of these four victims. The Trial Chamber, accordingly finds beyond reasonable doubt that the accused is guilty as charged in Count 34 of the Indictment in respect of each of those four victims.

765. Counts 33 and 34 of the Indictment, in the case of Ilijas Elkasovi} and Nijas Elkasovi}, who are Muslims, also charge as mentioned above and the Trial Chamber is satisfied beyond reasonable doubt that they were called out, separated from women and children and taken out of the village. However, in the absence of any evidence of their being beaten or otherwise mistreated, the Trial Chamber finds the accused not guilty as charged in Count 33 and Count 34 in respect of each of these two persons. In the case of Meho Kenjar and Adam Jakupovi}, in respect of whom the accused is also charged under two counts, in the absence of any evidence regarding them, the Trial Chamber finds the accused not guilty as charged in Count 33 and Count 34 in respect of each of these two persons. In the case of unnamed male residents of Sivci, the Trial Chamber is satisfied beyond reasonable doubt that many of them, including the witness Sakib Sivac, were called out, separated from the women and children, beaten and taken out of that village. However, it is not charged that they were beaten or otherwise mistreated and what is charged does not of itself constitute offences under Counts 33 or 34 and, accordingly, the Trial Chamber finds the accused not guilty as charged in Count 33 and Count 34 in respect of those unnamed male residents of Sivci, including Sakib Sivac.

VIII. JUDGMENT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE TRIAL CHAMBER finds as follows:

(1) By a majority, Judge McDonald dissenting,

Decides that the charges brought under Article 2 of the Statute of the International Tribunal were, in the present case, inapplicable at the time in op{tina Prijedor because it has not been proved that the victims were protected persons, which is an element of those offences charged, and therefore finds the accused, Du{ko Tadi}, not guilty on counts 5, 8, 9, 12, 15, 18, 21, 24 and the alternative charge under count 27, counts 29 and 32;

(2) Unanimously finds on the remaining charges as follows:

Count 1: Guilty
Count 6: Not guilty
Count 7: Not guilty
Count 10: Guilty
Count 11: Guilty
Count 13: Guilty
Count 14: Guilty
Count 16: Guilty
Count 17: Guilty
Count 19: Not guilty
Count 20: Not guilty
Count 22: Guilty
Count 23: Guilty
Count 25: Not guilty
Count 26 and the alternative charge under count 28: Not guilty
Count 30: Not guilty
Count 31: Not guilty

Count 33: Guilty in respect of Beido Bali}, Sefik Bali}, Ismet Jaski} and Salko Jaski}, Not Guilty as to Ilijas Elkasovi}, Nijas Elkasovi}, Meho Kenjar and Adam Jakupovi}.

Count 34: Guilty in respect of Beido Bali}, Sefik Bali}, Ismet Jaski} and Salko Jaski}, Not Guilty as to Ilijas Elkasovi}, Nijas Elkasovi}, Meho Kenjar and Adam Jakupovi}.

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

Gabrielle Kirk McDonald
Presiding

Ninian Stephen

Lal Chand Vohrah

Judge McDonald appends a Separate and Dissenting Opinion to this Opinion and Judgment.

Dated this seventh day of May 1997
The Hague
The Netherlands

[Seal of the Tribunal]

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-94-1-T

Date: 7 May 1997

Original: English

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Opinion and Judgment of: 7 May 1997

PROSECUTOR

v.

DUSKO TADIC a/k/a/ "DULE"

SEPARATE AND DISSENTING OPINION OF JUDGE MCDONALD
REGARDING THE APPLICABILITY OF ARTICLE 2 OF THE STATUTE

The Office of the Prosecutor:

Mr. Grant Niemann Ms. Brenda Hollis Mr. Alan Tieger
Mr. William Fenrick Mr. Michael Keegan
Counsel for the Accused:

Mr. Michaïl Wladimiroff Mr. Steven Kay Mr. Milan Vujin
Mr. Alphons Orie Ms. Sylvia de Bertodano Mr. Nikola Kostic

I completely agree with and share in the Opinion and Judgment

with the exception of the determination that Article 2 of the Statute is inapplicable to the charges against the accused. I find that at all times relevant to the Indictment, the armed conflict in opstina Prijedor was international in character and that the victims of the accused were persons protected by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"). Thus, I consider that the Trial Chamber should apply the grave breaches regime to the offences charged in the Indictment under Article 2 of the Statute.

The majority opinion correctly concludes that those alleged to have been victims of the accused in this case were in the hands of a party to the conflict or occupying power. However, for the reasons stated hereafter, I disagree with the majority's finding that the Prosecution has failed to prove that the victims were not nationals of the party or occupying power in whose hands they were. The majority characterizes the issue before the Trial Chamber as

whether, after 19 May 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina, and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS that those forces could not be regarded as de facto organs or agents of the VJ and hence of the Federal Republic of Yugoslavia (Serbia and Montenegro).

In considering this question, the majority defines the test as requiring dependency on one side and "such a relationship of control on the other that, on the facts of the instant case, the acts of the VRS, including its occupation of opstina Prijedor, can be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)". The majority finds the Judgment of the International Court of Justice ("I.C.J.") in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States (Merits) ("Nicaragua") to be instructive and states that it is applying "the essence of the test". The standard crafted by the majority, however, departs from Nicaragua, and it provides that "it is neither necessary nor sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) for the necessities of war. It must be shown that the VJ and the Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control", which the majority construes to be "effective control". Although the majority acknowledges that Nicaragua established a "particularly high threshold test", the standard the majority has created is even more demanding. The exercise of this effective control is required after 19 May 1992, according to the majority, to establish that the VRS was an agent or organ of the Federal Republic of Yugoslavia (Serbia and Montenegro).

I conclude in Section I of this Opinion that the evidence presented to the Trial Chamber supports a finding of effective control of the VRS by the Federal Republic of Yugoslavia (Serbia and Montenegro) in opstina Prijedor at all times relevant to the charges in the Indictment. However, as I discuss in Section II, the appropriate test of agency from Nicaragua is one of 'dependency and control' and a showing of effective control is not required.

I. THE FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA AND MONTENEGRO) EFFECTIVELY CONTROLLED VRS

> The JNA's direct involvement in the armed conflict at various locations in Bosnia and Herzegovina including opstina Prijedor on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) prior to 19 May 1992 rendered the conflict international at least in that opstina. International humanitarian law applicable to conflicts of an international character continues to apply until a general conclusion of peace is reached. The majority agrees that "from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina". After that date, the majority states that SwChile the forces of the VJ continued to be involved in the armed conflict . . . , the character of the relationship between the VJ and the Bosnian Serb forces from that date, and hence the nature of the conflict in the areas with which this case is concerned, is discussed in the consideration of Article 2 of the Statute.

In the discussion referred to, the majority concludes that only if effective command and control of the VRS forces continued after 19 May through the times relevant to the charges in the Indictment in opstina Prijedor would the victims be protected persons. While the majority makes no clear finding regarding the character of the conflict after 19 May 1992, this statement implicitly establishes a requirement of effective command and control of the VRS in opstina Prijedor by the Federal Republic of Yugoslavia (Serbia and Montenegro) or VJ for a finding that the conflict was international. This standard is not required by the Appeals Chamber Decision, which holds that the conflict in Bosnia and Herzegovina was rendered international by the involvement of the JNA and that a conflict can become internationalized by external support. A review of the background of the division of the JNA and the re-designation of the armed forces in Bosnia and Herzegovina in response to the 15 May 1992 Security Council resolution 752, demanding that the JNA cease all interference in Bosnia and Herzegovina, demonstrates that the victims of the offences charged in the Indictment are protected persons.

> The purported withdrawal of the JNA from Bosnia and Herzegovina took place on 19 May 1992, on which date the VRS was created. However, the withdrawal was not immediately successful as several Serbian Serbs remained in the military organisation of Bosnia and Herzegovina until at least early June 1992. Those remaining included many officers, commissioned and non-commissioned, who were not of Bosnian extraction, and the Federal Republic of Yugoslavia (Serbia and Montenegro) continued to pay all salaries and pensions of the VRS.
> The evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same: to create an ethnically pure Serb State by uniting Serbs in Bosnia and Herzegovina and extending that State from the Federal Republic

of Yugoslavia (Serbia and Montenegro) to the Croatian Krajina along the important logistics and supply line that went through opstina Prijedor, thereby necessitating the expulsion of the non-Serb population of the opstina.

Although there is little evidence that the VRS was formally under the command of Belgrade after 19 May 1992, the VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. This finding is supported by evidence that every VRS unit had been a unit in the JNA, the command and staffs remaining virtually the same after the re-designation. The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. Colonel Selak, commander of the logistics platoon that provided logistical support to units in the Banja Luka area (both before and after 19 May 1992), stated: "Some officers had been given direct StelephoneC lines, Belgrade/Pale. There was a link there and it was used in everyday communication because there was a need for direct communication between the Chief of Staff of the Army of Republika Srpska with the Army of Yugoslavia." Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade. The ties between the military in Bosnia and Herzegovina and the SDS political party, which advocated a Greater Serbia, similarly remained unchanged after the re-designation.

In addition, the evidence establishes that the VRS, in continuing the JNA operation to take over opstina Prijedor, executed the military operation for the benefit of the Federal Republic of Yugoslavia (Serbia and Montenegro). Lieutenant-General Talic, whose actions the majority presumed were those of a "disciplined general officer" acting in accordance with orders of his superiors, was responsible for carrying out the JNA plan before 19 May 1992. When the Federal Republic of Yugoslavia (Serbia and Montenegro) purported to withdraw, it is only reasonable to expect that this disciplined military officer would carry out his orders as they had been given to him by the very State which continued to pay his salary. Certainly there is no requirement for direct evidence that these specific orders were reiterated by Belgrade some three days after the "withdrawal", when the blockade of Kozarac began and other operations preliminary to the attack took place. That the attack on Kozarac was part of a pre-arranged military operation is confirmed by the testimony of witness Kemal Susic that the accused told him in mid-May, prior to the re-designation of the JNA, that "Kozarac will be shelled". Around this same time, Simo Miskovic, President of the SDS, said to him in reference to ongoing negotiations for peace: "Kemal, what you are doing SisC of no use, nothing can save Kozarac." Thus, in carrying out the attack on Kozarac and more generally in opstina Prijedor after the re-designation, the VRS was acting on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro).

All of this, including the evidence referred to by the majority, makes obvious that the re-designation was motivated only by the desire of the Federal Republic of Yugoslavia (Serbia and Montenegro) to avoid offending the international community by violating the Security Council resolution ordering the JNA to

> cease involvement in Bosnia and Herzegovina. The majority recognizes this, but reaches an opposite result:
>
> It is of course possible, on or in spite of the evidence presented,
>
> to view the acts of the JNA and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) on or about 19 May 1992 as nothing more than a cynical and intentional creation of the objective factors necessary to distance themselves from direct legal responsibility for the acts of the armed forces of the Republika Srpska, while doing everything to ensure that the material factors necessary to ensure the successful continuation of the armed conflict to achieve the same military and political goals were kept in place. Even if the legal effect of creating such objective factors, which caused no small amount of difficulty to the JNA and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), could be vitiated by reason of some fraudulent intention, which this Trial Chamber doubts, that is not the only nor the most reasonable conclusion open on the evidence presented.
>
> To the contrary, the actions of the Federal Republic of Yugoslavia (Serbia and Montenegro) were indeed calculated to make a showing of compliance while assuring that the military operations it began were successfully continued. Rather than being cynical, it would perhaps be naive not to recognize that the creation of the VRS, which coincided with the announced withdrawal by the JNA, was in fact nothing more than a ruse. Certainly the purported withdrawal was not voluntary. Formally established in January 1992, Republika Srpska had no army until the JNA division and re-designation, and had no need of one, for the Federal Republic of Yugoslavia (Serbia and Montenegro) was conducting the military operations necessary for the establishment of a Greater Serbia. Only after the Security Council demanded that the Federal Republic of Yugoslavia (Serbia and Montenegro) cease all interference in Bosnia and Herzegovina, was the VRS created. However, this was nothing more than a shift of military power and was well worth the 'difficulty', as the majority characterizes it. Indeed, these actions were taken as a necessary response to the Security Council's resolution.
>
> The Security Council recognized the non-compliance of the Federal Republic of Yugoslavia (Serbia and Montenegro) in resolution 757 of 30 May 1992 when it stated that it "deplored" that the following demands of resolution 752 (1992) had not been complied with as of 30 May 1992:
>
> that all forms of interference from outside Bosnia and Herzegovina
>
> cease immediately, that Bosnia and Herzegovina's neighbors take swift action to end all interference and respect the territorial integrity of Bosnia and Herzegovina, that action be taken as regards units of the Yugoslav People's Army (JNA) in Bosnia and Herzegovina, including the disbanding and disarming with weapons placed under effective international monitoring of any units that are neither withdrawn nor placed under the authority of the Government of Bosnia and Herzegovina . . . .
>
> In this resolution, the Security Council also "condemnSedC the failure of the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), including the Yugoslav People's Army (JNA), to take effective measures to fulfil the requirements of resolution 752 (1992)". As this resolution reveals, despite the purported JNA withdrawal from Bosnia and Herzegovina on 19 May 1992, active elements of what had been the JNA and was now re-christened as the

VJ operated in tandem with the VRS in Bosnia and Herzegovina. In particular, VJ air crew and aircraft remained in Bosnia and Herzegovina after the purported May withdrawal and worked with the VRS throughout 1992 and 1993. This and other evidence received at trial proves that there was no material change in the armed forces in opstina Prijedor, and the conflict remained international after 19 May 1992, with the Federal Republic of Yugoslavia (Serbia and Montenegro) exercising effective control of the operations of the VRS in opstina Prijedor.

The majority's reference to the limited direct evidence regarding the daily control of VRS commander General Ratko Mladic by the VJ Main Staff in Belgrade does not affect this determination. It is enough that General Mladic, who had been a commander in the JNA, continued to carry out his orders which were issued by the Federal Republic of Yugoslavia (Serbia and Montenegro) before 19 May 1992, considering the evidence that establishes that there was direct communication between his office and Belgrade.

Nor can I agree with the majority's conclusion that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VRS were allies, and thus, there was no effective control. They can be considered allied to the extent that they were united in allegiance to the Federal Republic of Yugoslavia (Serbia and Montenegro), but this supports, rather than vitiates, the status of the VRS as an agent.

Moreover, the Federal Republic of Yugoslavia (Serbia and Montenegro) essentially depleted its own army to establish the VRS to carry out effectively the war effort in Bosnia and Herzegovina without significant overt involvement of the Federal Republic of Yugoslavia (Serbia and Montenegro). This adjustment enabled the Federal Republic of Yugoslavia (Serbia and Montenegro) to achieve its military objective and at the same time feign compliance with the Security Council resolution. Yet the Security Council was not misled and it imposed a series of economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) for non-compliance which remained in place at all times relevant to the Indictment.

The continuity between the JNA and the VRS particularly as it relates to the military operations in the opstina Prijedor area, the presence of significant numbers of non-Bosnian former JNA officers in the VRS, the continued payment of salaries and pensions by Belgrade, the close proximity in time between the attack on Prijedor town and the attacks on Kozarac, Jaskici and Sivci and the establishment of camps, and the relationship between the VRS and the VJ forces, taken together, establish that the change was in name only. Thus, if effective control is the degree of proof required to establish agency under Nicaragua, I conclude that this standard has been met. Therefore, the victims of the accused were in the hands of a party to which they were not nationals and Article 2 of the Statute is applicable to the offences in the Indictment.

II. EFFECTIVE CONTROL: AN IMPROPER STANDARD FOR AGENCY DETERMINATION IN THIS CASE

Despite this conclusion, I find that the majority's requirement of effective control for making a determination of agency is founded on a misreading of the findings in Nicaragua and a misapplication of those findings to the facts of the case before the Trial Chamber. I would conclude that the effective control standard was never intended to describe the degree of proof

> necessary for a determination of agency founded on dependency and control as articulated in paragraph 109 of Nicaragua. However, if Nicaragua did set the standard of proof required for agency as that of effective control, that finding should be limited to the specific facts of that case and is not applicable to the issues presented to the Trial Chamber.
> In considering whether the victims of the accused were protected persons at the times relevant to the Indictment, the majority states that, upon re-designation of the JNA in Bosnia and Herzegovina as the VRS, the key question was whether the requisite degree of command and control by the VJ, and hence the Federal Republic of Yugoslavia (Serbia and Montenegro), over the VRS is established for the purposes of imputing the acts of those forces operating in opstina Prijedor or the VRS as a whole to the Federal Republic of Yugoslavia (Serbia and Montenegro), Ssuch thatC those persons can still be said to be in the hands of a party to the conflict of which they are not nationals within the meaning of Article 4 of Geneva Convention IV . . . .
>
> The majority indicates that this determination may be made on the following basis:
> as a rule of customary international law, the acts of persons, groups, or organisations may be imputed to a State where they act as de facto organs or agents of that State. One may speak of imputability as "the result of the intellectual operation necessary to bridge the gap between the delinquency of the organ or official, and the attribution of breach and liability to the State". SCitation omitted.C
>
> The majority then turns to the Nicaragua case for guidance in determining whether the Bosnian Serb forces, in the hands of whom the victims of the accused were, acted as agents of a party other than the Republic of Bosnia and Herzegovina on or after 19 May 1992.
>
> In Nicaragua, the International Court of Justice framed the issue as being whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the Untied States Government, or as acting on behalf of that Government.
>
> Recognizing that the ultimate question in the case before the Trial Chamber is whether the acts of the VRS can be equated, for legal purposes, with the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) by reason of its status as a de facto organ or agent of that Government, the majority finds that Nicaragua mandates dependency on the one side and control of the Federal Republic of Yugoslavia (Serbia and Montenegro) over the VRS on the other for a showing of agency. In support of this conclusion, the majority also cites paragraph 115 of Nicaragua, which states that in order for the participation of the United States in "funding, organizing, training, supplying and equipping" the contras "to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed". The majority concludes that the appropriate test is whether, even if there was great dependency, it was also shown that "the VJ and the Federal Republic of Yugoslavia

(Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the Federal Republic of Yugoslavia (Serbia and Montenegro)".

The majority acknowledges some of the very different factual circumstances here from those in Nicaragua, including first, that the VRS was an occupying force rather than an raiding army. The second point noted by the majority-that the VRS was birthed from the ranks of the JNA-deserves significant attention. Whereas in Nicaragua,

the Court considered whether the contra forces had, over time, fallen into such a sufficient state of dependency and control vis-à-vis the Untied States that the acts of one could be imputed to another, the question for this Trial Chamber is whether, after 19 May 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro),

had "sufficiently distanced itself from the VRS". However, it appears that the majority ultimately finds these differences to be of no consequence in determining the appropriate test for a finding of agency, and applies the effective control standard employed in Nicaragua. By failing to consider the context in which the Nicaragua test of agency was determined, the majority erroneously imports the requirement of effective control to an agency determination.

The majority also imports a test of effective control to determine when particular victims can be considered protected persons. I disagree with this approach. While it is correct that the law of belligerent occupation comes into effect only upon the establishment of effective control of territory, this is not decisive of whether and when a person is protected by Geneva Convention IV. Article 4 of this Convention defines protected persons in terms which include those who are living in occupied territory, but does not so restrict them. It is well established that the Convention as a whole comes into effect upon the commencement of hostilities and, therefore, a civilian could be a protected person if he or she lives in an area which has been invaded by foreign forces, even where those forces have not yet established effective control. Thus, it would be a grave breach of the Convention for such forces, for example, to detain that civilian and summarily execute him. Illustrative in this regard is the commentary to Article 6 of Geneva Convention IV, which states:

The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. . . The convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.

As previously discussed, the majority seemingly would also require that a foreign power have effective control of an area for the conflict to be rendered international. By importing the standard of effective control which was designed to determine State imputability in Nicaragua to determine both whether a victim is a protected person and for the purpose of characterising the nature of an armed conflict, the majority has

expanded the reach of the holding of Nicaragua in a way that is incompatible with international humanitarian law.

A. Nicaragua Establishes Two Distinct Tests for Attributability

As a careful review of the I.C.J.'s decision in Nicaragua reveals, the requirement of effective control was not mentioned until after the I.C.J. determined that there was no agency relationship, indicating that the showing of effective control is a separate and distinct basis for determining State responsibility for the conduct of others.

Prior to declaring in paragraph 109 of Nicaragua the test relied upon here by the majority, the I.C.J. noted, in relevant part, that

the Court is not satisfied that all the operations launched by the

contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States . . . .

. . .

Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State "created" the contra force in Nicaragua. . . . Nor does the evidence warrant a finding that the United States gave "direct and critical combat support", at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all contra operations reflected strategy and tactics wholly devised by the United States.

The court then states, in paragraph 109:

What the Court has to determine at this point is whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.

In paragraph 110, the I.C.J. concludes that there was not complete dependence by the contras, after the initial years, on United States aid and that there was insufficient evidence to reach a finding "on the extent to which the United States made use of the potential for control inherent in that dependence". It found that it could not equate the contra force with the United States for legal purposes, implicitly concluding that the contras were not agents of the United States. Importantly, the court found that this determination did not end the question of the responsibility of the United States.

The I.C.J. thereafter notes that the United States could also be liable for its assistance to the contras, seemingly where there is no finding of agency, with "StChe question of the degree of control of the contras by the United States Government SbeingC relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the contras whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua". The court there finds that the forms of participation by the United States including even the general control of the contra force would not mean, without further evidence, that the United States "directed or enforced the perpetration" of the unlawful acts, and concludes that for the

United States to be legally responsible, "it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".
The separate opinion of Judge Ago, also cited by the majority, explains lucidly the concept that a State can be found legally responsible even where there is no finding of agency. He states:

STChe negative answer returned by the Court to the Applicant's suggestion that the misdeeds committed by some members of the contra forces should be considered as acts imputable to the United States of America is likewise in conformity with the provisions of the International Law Commission's draft. It would indeed be inconsistent with the principles governing the question to regard members of the contra forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or to carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them. Only in such instances does international law recognize, as a rare exception to the rule, that the conduct of persons or groups which are neither agents nor organs of a State, nor members of its apparatus even in the broadest acceptation of that term, may be held to be acts of that State. The Judgment, accordingly, takes a correct view when, referring in particular to the atrocities, acts of violence or terrorism and other inhuman actions that Nicaragua alleges to have been committed by the contras against the persons and property of civilian populations, it holds that the perpetrators of these misdeeds may not be considered as having been specifically charged by United States authorities to commit them unless, in certain concrete cases, unchallengeable proof to the contrary has been supplied.
Therefore it appears that there are two bases on which the acts of the VRS could be attributed to the Federal Republic of Yugoslavia (Serbia and Montenegro): where the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro), which could be established by a finding of dependency on the one side and control on the other; or where the VRS was specifically charged by the Federal Republic of Yugoslavia (Serbia and Montenegro) to carry out a particular act on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro) thereby making the act itself attributable to the Federal Republic of Yugoslavia (Serbia and Montenegro). In Nicaragua, the court required a showing of effective control for this latter determination.

B. Effective Control as a Standard of Proof for Agency Determination

However, if the standard of proof required in Nicaragua for a determination of agency was that of effective control, I conclude that this finding should be limited to the facts of Nicaragua and that, on our facts, such degree of proof is not required. Because this conflict was rendered international by the involvement of the Federal Republic of Yugoslavia (Serbia and Montenegro), unlike in Nicaragua where the conflict was found to be internal as between the contras and the Nicaraguan government, that which would constitute equating the VRS for legal purposes with the VJ or the Federal Republic of Yugoslavia (Serbia and Montenegro) should be analysed differently.
In coming to its ultimate conclusion, the majority opinion fails to give appropriate weight to the unique circumstances the Trial

Chamber is faced with given its position as an international criminal tribunal determining individual-as opposed to State-responsibility. This problem permeates the entire analysis, beginning with the manner in which the issue is initially framed as one of 'imputability', which the majority clearly notes relates to 'delinquency' and the 'attribution of breach and liability' to a State. A determination of imputability was appropriate in Nicaragua, where the moving party sought to determine fault and liability of a State for the acts of the contras as against the United States, but is not suitable here, where the issue of responsibility is solely for the purpose of identifying the occupying power. This is recognized even by the majority, which notes that Nicaragua "was concerned ultimately with the responsibility of a State for the breach, inter alia, of rules of international humanitarian law, while the instant case is concerned ultimately with the responsibility of an individual for the breach of such rules". The primary issue in Nicaragua was whether the acts of the contras could be imputed so as to impose legal responsibility for monetary damages on the United States. Although the court ultimately determined that the conflict there was not in all respects international, the essence of its Judgment is inapplicable to the facts of this case, where the relevant issue is whether the Federal Republic of Yugoslavia (Serbia and Montenegro) "had sufficiently distanced itself from the VRS" and legal responsibility for monetary damages against a State is not in issue.

Further, in Nicaragua, the contras were not United States nationals and there was no attempt or desire to annex Nicaragua to the United States. Moreover, the contras did not have the goal of cleansing all non-United States citizens or non-contras from the country. In contrast, Bosnian Serbs loyal to Republika Srpska, who comprised the VRS, acted in furtherance of the goal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to annex parts of Bosnia and Herzegovina to the Federal Republic of Yugoslavia (Serbia and Montenegro). Also notable, although not dispositive, is that in Nicaragua the actual nationality of the contras was not in dispute. Here, the Bosnian Serbs active in the conflict attempted to withdraw themselves from status as nationals of Bosnia and Herzegovina and aligned themselves with the Federal Republic of Yugoslavia (Serbia and Montenegro), which, in turn, provided to all citizens of the former Yugoslavia consular protection until the question of nationality was ultimately settled.

The I.C.J. found further in Nicaragua that, although the size of the contra force increased dramatically once the United States began to assist it, the United States did not create the armed opposition; that the contras were never a part of the regular armed forces of the United States; and that the contras had an existing structure separate from the United States military. Here, as previously noted, it is undisputed that the VRS was created by the Federal Republic of Yugoslavia (Serbia and Montenegro) and that its components were part of the military organisation of the Federal Republic of Yugoslavia (Serbia and Montenegro) prior to its re-designation.

Similarly, in Nicaragua it was found that "SiCn light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States". To the contrary, the attack on Kozarac and its surrounds was undoubtedly based on the

> strategy and tactics devised by the JNA since the attack began, with the cutting of telephone lines and the institution of a blockade, only three days after the purported withdrawal of the JNA troops from Bosnia and Herzegovina, and the shelling began a mere two days thereafter on 24 May. Moreover, the similarity between the attacks in this area and others throughout Bosnia and Herzegovina launched by the JNA supports the conclusion that the tactics and strategy employed were indeed devised by the JNA. This is confirmed by the fact that the same commanders and virtually all of the same officers remained in place after 19 May 1992 despite the alleged change in the military structure. It is irrational to believe that all of the operations were planned only after 18 May 1992, given the substantial evidence showing that this operation was wholly planned and arranged by the JNA, noting especially the testimony that SDS leaders knew of the attack well before the re-designation, even though it was carried out by forces designated as the VRS after 19 May 1992. Given these considerations, it becomes obvious that, as the majority recognizes,
>
> there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the Republika Srpska and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies could coordinate their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued.

Taking this into account, I question why there should be a requirement that effective control was in fact exercised when the Federal Republic of Yugoslavia (Serbia and Montenegro) was assured that, having transferred officers and enlisted men and provided the matériel, thereby depleting its forces, its plan would be executed. State responsibility for the acts of individuals hinges on such control and it must therefore be established, but here that is not an issue. The occupation of opstina Prijedor could be accomplished only after the JNA, on behalf of the Federal Republic of Yugoslavia (Serbia and Montenegro), set it in motion and gave the VRS the wherewithal to accomplish it. Under such circumstances there was no need for effective control, however, because the very establishment and continued existence of the VRS is evidence of such control. The inapplicability of the Nicaragua standard of effective control is patent; it was neither designed for these factual circumstances nor is it an appropriate consideration.

The commentary to Article 29 of Geneva Convention IV gives better guidance for the issues the Trial Chamber is considering. It states:

> The decision to limit the responsibility of the State to its agents was the subject of criticism at the Diplomatic Conference. Various delegations pointed out that an Occupying Power might have certain of its decisions carried out by the local authorities, or it might set up a puppet government, in order to throw responsibility for crimes, of which it was the instigator, upon authorities which were regarded as being independent of it. In order to remove this difficulty, it is necessary to disregard all formal criteria. It

does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given.

In this case, we have exactly the situation with which certain delegates were concerned, for, in fact, the Federal Republic of Yugoslavia (Serbia and Montenegro) established what is essentially a puppet regime in the VRS, which was charged with the responsibility for executing the military operations of the Federal Republic of Yugoslavia (Serbia and Montenegro) in Bosnia and Herzegovina. The Trial Chamber should not import the Nicaragua requirement of effective control but should instead, as this Commentary states, disregard the formal criteria of the military structure. The key issue here is whether the VRS was indeed dependent on and controlled by the Federal Republic of Yugoslavia (Serbia and Montenegro). As noted above, the evidence is more than sufficient to make such a determination.

In summary, the evidence supports a finding beyond reasonable doubt that the VRS acted as an agent of the Federal Republic of Yugoslavia (Serbia and Montenegro) in regard to the attack and occupation of opstina Prijedor during the times relevant to the charges in the Indictment and the victims are thus protected persons. The dependency of the VRS on and the exercise of control by the Federal Republic of Yugoslavia (Serbia and Montenegro) support this finding of agency under either the majority's standard of effective control or under the more general test of dependency and control. However, a close reading of Nicaragua leads me to conclude that the effective control standard supports a distinct and separate basis for the attribution of the conduct of non-agents to a State, and that it is not a necessary element for a finding of an agency relationship. For these reasons, I respectfully submit this Separate and Dissenting Opinion.

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

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Gabrielle Kirk McDonald
Presiding Judge

Dated this seventh day of May 1997
At The Hague
The Netherlands

[Seal of the Tribunal]