

HOW DOES LAW PROTECT IN WAR?

Cases, Documents and Teaching Materials
on Contemporary Practice
in International Humanitarian Law

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ICRC

Case No. 191, Argentina/United Kingdom, The Red Cross Box

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CHAPTER III:**THE WOUNDED, SICK AND SHIPWRECKED**

[...]

3. METHODS OF ACTION

Respect by the parties for the obligations to protect and assist the wounded, sick and shipwrecked depends of course on the instructions received by the officers responsible and other ranks, but above all on the measures taken to organize relief and assistance. The circumstances and the nature of the armed clashes during the conflict in the South Atlantic gave vital importance to medical transports, in particular to ships and helicopters.

Indeed, not only did the hostilities partly take place at sea, but the geographical distance of the British fleet from its home port meant that soldiers wounded in the archipelago had to be treated on hospital ships.

[...]

3.1.3 A neutral zone on the high seas: the Red Cross Box

[Article 30 of Convention II] stipulates that *"such vessels shall in no way hamper the movements of the combatants"*.

At Britain's suggestion, and without any special agreement in writing, the parties to the conflict established a neutral zone at sea. This zone, called the Red Cross Box, with a diameter of approximately twenty nautical miles, was located on the high seas to the north of the islands. Without hampering military operations, it enabled hospital ships to hold position [...], and exchange British and Argentine wounded.

Such an arrangement, for which no provision is made in the Second Convention, is perfectly in keeping with the spirit of this Convention and shows that international humanitarian law must not claim to be exhaustive. When the desire to respect the obligations of protection is present, such measures as the establishment of this neutral zone at sea can be improvised as circumstances permit and require, and a certain flexibility remains in the application of the law. Inside the Red Cross Box, and between the hospital ships in general, radiocommunications were an important factor in efficiency and good functioning: on one hand [*sic*], the classical use of radiocommunications between the ships and, on the other, the use by the British – for the first time in the history of medical transports – of radiocommunications by satellite.

For whereas the Argentine hospital ships were able to use coastal radio stations on the Argentine shore, the British had no similar facilities, but instead established radiocommunications between their hospital ships and with their bases in Britain via the INMARSAT satellite system. [...]

It must be stressed here that the Second Convention forbids hospital ships to use a secret code for their transmissions. The use of secret codes is considered an act harmful to the enemy and can deprive a hospital ship of protection (Article 34). This amounts to forbidding a hospital ship to communicate with the military fleet of the party to which it belongs, because if it communicates in clear, the incoming messages would reveal the position of the vessels of its own fleet.

This ban has humanitarian consequences, however, since it prevents a hospital ship from being notified of the arrival of a contingent of wounded and does not enable it to prepare to receive them. [...]

DISCUSSION

1. a. Can any ship be used as a hospital ship? Is a ship considered a hospital ship from the moment it begins transporting wounded? Are the criteria necessary for protected status the same in an emergency situation? (GC II, Arts 22, 33 and 43; P I, Art. 22) Can a hospital ship lose its protected status? (GC II, Arts 34 and 35; P I, Art. 23)
- b. Under IHL, do means exist to ensure that the enemy does not use a hospital ship for purposes that are not purely medical? (GC II, Art. 31(4))
2. a. May hospital ships navigate in the centre of a combat zone? (GC II, Art. 30) Does this explain the need for the Red Cross Box? Which conventional provisions provide for the establishment of such a zone?
- b. For the creation of which zones does IHL provide? Which persons are those zones designed to protect? (GC I-IV, Art. 3(3); GC I, Art. 23; GC IV, Arts 14 and 15; P I, Arts 59 and 60) Was the Red Cross Box established by analogy to the provisions of the law of land warfare? If so, to which?
- c. How does one accurately assess whether such an innovation is in keeping with the spirit of the Convention? Does the Red Cross Box not merely demonstrate the flexibility of IHL but also its inadequacy? Yet do not the Conventions provide for and actually encourage special agreements between parties to conflict regarding protected zones? (GC I and GC IV, Annex I)
3. Should the prohibition of the use of secret codes by hospital ships be considered as obsolete due to technical developments? Or should it be respected despite such developments? What new regulation would you suggest for this problem? (GC II, Art. 34(2))

Case No. 192, Inter-American Commission on Human Rights, Tablada

[Source: *Inter-American Commission on Human Rights*, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, Doc. 38, December 6 rev., 1997; footnotes partially omitted. Available on <http://www.cidh.org>]

[...]

CDH/3398

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
Approved by the Commission on November 18, 1997

[...]

IV. ANALYSIS

146. In order to facilitate the analysis of key events and issues raised in this case, this report will examine those events and issues under the following three headings: the attack on and the recovery of the military base; the events that followed the surrender of the attackers and the arrest of their alleged accomplices; and the trial of those same persons for the crime of rebellion in the *Abella* case.

A. THE ATTACK AND RECAPTURE OF THE MILITARY BASE

147. In their complaint, petitioners invoke various rules of International Humanitarian Law, i.e. the law of armed conflict, in support of their allegations that state agents used excessive force and illegal means in their efforts to recapture the Tablada military base. For its part, the Argentine State, while rejecting the applicability of interstate armed conflict rules to the events in question, nonetheless have in their submissions to the Commission characterized the decision to retake the Tablada base by force as a military operation. The State also has cited the use of arms by the attackers to justify their prosecution for the crime of rebellion as defined in Law 23.077. Both the Argentine State and petitioners are in agreement that on the 23 and 24 of January 1989 an armed confrontation took place at the Tablada base between attackers and Argentine armed forces for approximately 30 hours.
148. The Commission believes that before it can properly evaluate the merits of petitioners claims concerning the recapture of the Tablada base by the Argentine military, it must first determine whether the armed confrontation at the base was merely an example of an internal disturbance or tensions or whether it constituted a non-international or internal armed conflict within the meaning of Article 3 common to the four 1949 Geneva conventions (Common Article 3). Because the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions, a proper characterization of the events at the Tablada military base on January 23 and 24, 1989 is necessary to determine the sources of applicable law. This, in turn, requires the Commission to examine the characteristics that differentiate such

situations from Common Article 3 armed conflicts in light of the particular circumstances surrounding the incident at the Tablada base.

i. Internal disturbances and tensions

149. The notion of internal disturbances and tensions has been studied and elaborated on most particularly by the International Committee of the Red Cross (ICRC). In its 1973 Commentary on the Draft Additional Protocols to the Geneva Conventions, the ICRC defined, albeit not exhaustively, such situations by way of the following three examples:
 - riots, that is to say, all disturbances *which from the start are not directed by a leader and have no concerted intent*;
 - isolated and sporadic acts of violence, as *distinct from military operations carried out by armed forces or organized armed groups*;
 - other acts of a similar nature which incur, in particular, mass arrests of persons because of their behavior or political opinion (Emphasis supplied.)
150. According to the ICRC, what principally distinguishes situations of serious tension from internal disturbances is the level of violence involved. While tensions can be sequels of an armed conflict or internal disturbance, the latter are

... situations in which there is no non-international armed conflict as such, but there exists a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence. . . In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.
151. Situations of internal disturbances and tensions are expressly excluded from the scope of international humanitarian law as not being armed conflicts. Instead, they are governed by domestic law and relevant rules of international human rights law.

ii. Non-international armed conflicts under humanitarian law

152. In contrast to these situations of domestic violence, the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. In this regard, Common Article 3 simply refers to, but does not actually define an armed conflict of a non-international character. However, Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state. [Footnote 16 reads: A Commission of Experts convened by the International Committee of the Red Cross made the following pertinent observation: "The existence of an armed conflict is undeniable, in the sense of Article 3, if hostile action against a lawful government assumes a collective character and a minimum of organization." See, ICRC, Reaffirmation and Development

of the Laws and Customs Applicable in Armed Conflict: Report Submitted to the XXIst Conference of the Red Cross, Istanbul at p.99 (1969).] Thus, Common Article 3 does not apply to riots, mere acts of banditry or an *unorganized* and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory. The Commission notes that the ICRCs authoritative Commentary on the 1949 Geneva Conventions, indicates that, despite the ambiguity in its threshold of application, Common Article 3 should be applied as widely as possible.

153. The most difficult problem regarding the application of Common Article 3 is not at the upper end of the spectrum of domestic violence, but rather at the lower end. The line separating an especially violent situation of internal disturbances from the lowest level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined. When faced with making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case.

iii. Characterization of the events at the Tablada base

154. Based on a careful appreciation of the facts, the Commission does not believe that the violent acts at the Tablada military base on January 23 and 24, 1989 can be properly characterized as a situation of internal disturbances. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons – all forms of domestic violence not qualifying as armed conflicts.
155. What differentiates the events at the Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective – a military base. The officer in charge of the Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.
156. The Commission concludes therefore that, despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.

iv. The Commission's competence to apply international humanitarian law

157. Before addressing petitioners specific claims, the Commission thinks it useful to clarify the reasons why it has deemed it necessary at times to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the American Convention by reference to these rules. A basic understanding of the interrelationship of these two branches of international law – human rights and humanitarian law – is instructive in this regard.
158. The American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity. These human rights treaties apply both in peacetime, and during situations of armed conflict. Although one of their purposes is to prevent warfare, none of these human rights instruments was designed to regulate such situations and, thus, they contain no rules governing the means and methods of warfare.
159. In contrast, international humanitarian law generally does not apply in peacetime, and its fundamental purpose is to place restraints on the conduct of warfare in order to diminish the effects of hostilities. It is understandable therefore that the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments.
160. It is, moreover, during situations of internal armed conflict that these two branches of international law most converge and reinforce each other. Indeed, the authors of one of the authoritative commentaries on the two 1977 Protocols Additional to the 1949 Geneva Conventions state in this regard:

Though it is true that every legal instrument specifies its own field of application, it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law. [Footnote 21 reads: M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, 619 (1982) [hereinafter "New Rules"].]

161. For example, both Common Article 3 and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to state agents are clearly within the Commissions jurisdiction. But the Commissions ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and

apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by state agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.

162. Apart from these considerations, the Commissions competence to apply humanitarian law rules is supported by the text of the American Convention, by its own case law, as well as the jurisprudence of the Inter-American Court of Human Rights. Virtually every OAS member state that is a State Party to The American Convention has also ratified one or more of the 1949 Geneva Conventions and/or other humanitarian law instruments. As States Parties to the Geneva Conventions, they are obliged as a matter of customary international law to observe these treaties in good faith and to bring their domestic law into compliance with these instruments. Moreover, they have assumed a solemn duty to respect and to ensure respect of these Conventions in all circumstances, most particularly, during situations of interstate or internal hostilities.
163. In addition, as States Parties to the American Convention, these same states are also expressly required under Article 25 of the American Convention to provide an internal legal remedy to persons for violations by state agents of their fundamental rights recognized by *the constitution or laws* of the state concerned or by this Convention (emphasis supplied). Thus, when the claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the State Party concerned has made operative as domestic law, a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention. Thus, the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25.
164. The Commission believes that in those situations where the American Convention and humanitarian law instruments apply concurrently, Article 29(b) of the American Convention necessarily require it to take due notice of and, where appropriate, give legal effect to applicable humanitarian law rules. Article 29(b) – the so-called “most-favorable-to-the-individual-clause” – provides that no provision of the American Convention shall be interpreted as “restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party of another convention which one of the said states is a party.”
165. The purpose of this Article is to prevent States Parties from relying on the American Convention as a ground for limiting more favorable or less restrictive rights to which an individual is otherwise entitled under either national or international law. Thus, where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law

instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.

166. Properly viewed, the close interrelationship between human rights law and humanitarian law also supports the Commission's authority under Article 29(b) to apply humanitarian law, where it is relevant. In this regard, the authors of the New Rules make the following pertinent point regarding the reciprocal relationship between Protocol II and the Covenant on Civil and Political Rights:

Protocol II should not be interpreted as remaining behind the basic standard established in the Covenant. On the contrary, when Protocol II in its more detailed provisions establishes a higher standard than the Covenant, this higher standard prevails, on the basis of the fact that the Protocol is "*lex specialis*" in relation to the Covenant. On the other hand, provisions of the Covenant which have not been reproduced in the Protocol which provide for a higher standard of protection than the Protocol should be regarded as applicable irrespective of the relative times at which the two instruments came into force for the respective State. It is a general rule for the application of concurrent instruments of Human Rights – and Part II "Humane Treatment" [of Protocol II] is such an instrument – that they implement and complete each other instead of forming a basis for limitations.

167. Their point is equally valid concerning the mutual relationship between the American Convention and Protocol II and other relevant sources of humanitarian law, such as Common Article 3.
168. In addition, the Commission believes that a proper understanding of the relationship between applicable humanitarian law treaties and Article 27(1), the derogation clause of the American Convention, is relevant to this discussion. This Article permits a State Party to the American Convention to temporarily derogate, i.e., suspend, certain Convention based guarantees during genuine emergency situations. But, Article 27(1) requires that any suspension of guarantees not be "inconsistent with that state's other obligations under international law". Thus, while it cannot be interpreted as incorporating by reference into the American Convention all of a state's other international legal obligations, Article 27(1) does prevent a state from adopting derogation measures that would violate its other obligations under conventional or customary international law. [...]
170. [...] [W]hen reviewing the legality of derogation measures taken by a State Party to the American Convention by virtue of the existence of an armed conflict to which both the American Convention and humanitarian law treaties apply, the Commission should not resolve this question solely by reference to the text of Article 27 of the American Convention. Rather, it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties. If it finds that the rights in question are not subject to

suspension under these humanitarian law instruments, the Commission should conclude that these derogation measures are in violation of the State Parties obligations under both the American Convention and the humanitarian law treaties concerned. [...]

v. Petitioners' claims

172. Petitioners do not dispute the fact that some MTP members planned, initiated and participated in the attack on the military base. They contend, however, that the reason or motive for the attack – to stop a rumored military coup against the Alfonsín government – was legally justified by Article 21 of the National Constitution which obliged citizens to take up arms in defense of the Constitution. Consequently, they assert that their prosecutions for the crime of rebellion was violative of the American Convention. In addition, petitioners argue that because their cause was just and lawful, the State, by virtue of its excessive and unlawful use of force in retaking the military base, must bear full legal and moral responsibility for *all* the loss of life and material damage occasioned by its actions.

173. The Commission believes that petitioners arguments reflect certain fundamental misconceptions concerning the nature of international humanitarian law. It should be understood that neither application of Common Article 3, nor of any other humanitarian law rules relevant to the hostilities at the Tablada base, can be interpreted as recognizing the legitimacy of the reasons or the cause for which the members of the MTP took up arms. Most importantly, application of the law is not conditioned by the causes of the conflict. This basic tenant of humanitarian law is enshrined in the preamble of Additional Protocol I which states in pertinent part:

Reaffirming further that the provisions of the Geneva Conventions of August 12, 1949 . . . must be fully applied in all circumstances . . . *without* any adverse distinction *based on the nature or origin off [sic] the armed conflict or on the causes espoused by or attributed to the Parties of the Conflict.* (Emphasis supplied)

174. Unlike human rights law which generally restrains only the abusive practices of state agents, Common Article 3's mandatory provisions expressly bind and apply *equally* to both parties to internal conflicts, i.e., government and dissident forces. Moreover, the obligation to apply Common Article 3 is absolute for both parties and independent of the obligation of the other. [Footnote 27 reads: A breach of Article 3 by one party, such as an illegal method of combat, could not be invoked by the other party as a ground for its non-compliance with the Article's obligatory provisions. See generally, Vienna Convention on the Law of Treaties, Art. 60.] Therefore, both the MTP attackers and the Argentine armed forces had the same duties under humanitarian law, and neither party could be held responsible for the acts of the other.

[...]

vi. Application of Humanitarian Law

176. Common Article 3's basic purpose is to have certain minimum legal rules apply during hostilities for the protection of persons who do *not* or *no longer* take a *direct or active* part in the hostilities. Persons entitled to Common Article 3's mandatory protection include members of both State and dissident forces who surrender, are captured or are *hors de combat*. Individual civilians are similarly covered by Common Article 3's safeguards when they are captured by or otherwise subjected to the power of an adverse party, even if they had fought for the opposing party.
177. In addition to Common Article 3, customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives. [Footnote 29 reads: These principles are set forth in U.N. General Assembly Resolution 2444, "Respect for Human Rights in Armed Conflicts," 23 U.N. GAOR Supp. (No. 18) at 164, which states in pertinent part: [T]he following principles for observance by all governmental and other authorities for action in armed conflicts:
 - (a) That the right of the parties to a conflict to adopt means of injuring the enemy in [sic] not unlimited;
 - (b) That it is prohibited to launch attacks against the civilian population as such;
 - (c) That distinction must be made at all time between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible...
 See also U.N. General Assembly Resolution 2675, U.N. GAOR Supp. No. 28 U.N. Doc. A/8028 (1970) which elaborates on and strengthens the principles in Resolution 2444.] In order to spare civilians from the effects of hostilities, other customary law principles require the attacking party to take precautions so as to avoid or minimize loss of civilian life or damage to civilian property incidental or collateral to attacks on military targets.
178. The Commission believes that petitioners misperceive the practical and legal consequences that ensued with respect to the application of these rules to those MTP members who participated in the Tablada attack. Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack *to the same extent as combatants*. Thus, by virtue of their hostile acts, the Tablada attackers *lost* the benefits of the above-mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to *peaceable* civilians. In contrast, these humanitarian law rules continued to apply in full force with respect to those peaceable civilians present or living in the vicinity of the Tablada base at the time of the hostilities. The Commission notes parenthetically that it has received no petition lodged by any such persons against the state of Argentina alleging that they or their property sustained damage as a result of the hostilities at the base.
179. When they attacked the Tablada base, those persons involved clearly assumed the risk of a military response by the state. The fact that the Argentine military had superior numbers and fire power and brought them to bear against the attackers cannot be regarded in and of itself as a violation of any rule of humanitarian law.

This does not mean, however, that either the Argentine Military or the attackers had unlimited discretion in their choice of means of injuring the other. Rather, both parties were required to conduct their military operations within the restraints and prohibitions imposed by applicable humanitarian law rules.

180. In this connection, petitioners in essence allege that the Argentine military violated two specific prohibitions applicable in armed conflicts, namely:
 - a) a refusal by the Argentine military to accept the attackers offer to surrender, tantamount to a denial of quarter; and
 - b) the use of weapons of a nature to cause superfluous injury or unnecessary suffering, specifically, incendiary weapons.
181. In evaluating petitioners claims, the Commission is mindful that because of the peculiar and confusing conditions frequently attending combat, the ascertainment of crucial facts frequently cannot be made with clinical certainty. The Commission believes that the appropriate standard for judging the actions of those engaged in hostilities must be based on a reasonable and honest appreciation of the overall situation prevailing at the time the action occurred and not on the basis of speculation or hindsight.
182. With regard to their first allegation, petitioners charge that the Argentine military deliberately ignored the attempt of the attackers to surrender some four hours after the hostilities began on January 23, 1989 which unnecessarily prolonged the fighting an additional twenty-six hours and thereby resulted in needless deaths and suffering on both sides. Apart from the testimony of the MTP survivors, petitioners rely on a video tape, which they submitted to the Commission, to substantiate their claims. The video tape is a compilation of news programs broadcast by channels [...] of Argentina on the day of the attack, as well as subsequent documentaries by the same stations and other footage that the petitioners considered relevant to their case. While the tape is an important aid to its understanding of the events in question, the Commission believes that its probative value is nonetheless questionable. For example, the tape does not provide a sequential and uninterrupted documentation of the 30 hours of combat at the base. Rather, it is an edited depiction of certain events which were compiled by a private producer at the request of the petitioners, for the specific purpose of presentation to the Commission.
183. The Commission carefully viewed the above mentioned video tape, and identified two different scenes which supposedly depict the attempted surrender. The first of them, in which the image is not very clear, shows a very brief scene of a white flag being waved from a window. This first scene, however, is not connected to any of the others on the video, nor is there any indication of the precise moment when it took place. The second scene shows a larger image of one of the buildings inside the military base, which is being hit by a volley of gunfire, presumably from Argentine forces. Upon repeated viewings and careful scrutiny of this second scene, the Commission was not able to see the white flag which supposedly was being waved from within the building by the MTP attackers.

184. The tape is also notable for what it does not show. In fact, it does not identify the precise time or day of the putative surrender attempt. Nor does it show what was happening at the same time in other parts of the base where other attackers were located. If these persons, for whatever reason, continued to fire or commit other hostile acts, the Argentine military might not unreasonably have believed that the white flag was an attempt to deceive or divert them.
185. Thus, because of the incomplete nature of the evidence, the Commission is not in a position to conclude that the Argentine armed forces purposefully rejected a surrender attempt by the attackers at 9:00 am on the 23rd of January. The Commission does note, however, that the fact that there were survivors among them tends to belie any intimation that an order of no quarter was actually given.
186. The video tape is even less probative of petitioners' claim that the Argentine military used incendiary weapons against the attackers. The video does show a fiery explosion in a structure presumably occupied by some of the attackers. But the precise nature of the weapon used that caused the explosion is not revealed by the tape. The reason for the explosion could be attributed to a weapon other than an incendiary device. For example, it might have been caused by a munition designed to pierce installations or facilities where the incendiary effect was *not specifically designed* to cause burn injury to persons, or as the result of a direct hit by an artillery shell that exploded munitions located within or near the attackers defensive position. Without the benefit of testimony from munitions experts or forensic evidence establishing a likely causal connection between the explosion and the use of an incendiary weapon, the Commission simply cannot conclude that the Argentine military employed such a device against the attackers.
187. The Commission must note that even if it were proved that the Argentine military had used such weapons, it cannot be said that their use in *January 1989* violated an *explicit* prohibition applicable to the conduct of *internal* armed conflicts at that time. In this connection, the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons annexed to the 1981 United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious and to Have Indiscriminate Effects (Weapons Convention), cited by petitioners, was not ratified by Argentina until 1995. Moreover and most pertinently, Article 1 of the Weapons Convention states that the Incendiary Weapons Protocol applies only to interstate armed conflicts and to a limited class of national liberation wars. As such, this instrument did not directly apply to the internal hostilities at the Tablada. In addition, the Protocol does not make the use of such weapons *per se* unlawful. Although it prohibits their direct use against peaceable civilians, it does not ban their deployment against lawful military targets, which include *civilians who directly participate in combat*.
188. Because of the lack of sufficient evidence establishing that state agents used illegal methods and means of combat, the Commission must conclude that the killing or wounding of the attackers which occurred *prior to the cessation of combat on January 24, 1989* were legitimately combat related and, thus, did not

constitute violations of the American Convention or applicable humanitarian law rules.

189. The Commission wishes to emphasize, however, that the persons who participated in the attack on the military base were legitimate military targets only *for such time as they actively participated in the fighting*. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth in both common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.

[Footnote 32 reads: The Commission notes parenthetically in this regard that the War Crimes Tribunal for the former Yugoslavia has found such violations of common Article 3 to entail the individual criminal responsibility of the perpetrator(s) [...]]

[...]

DISCUSSION

1. (*Paras 149-156*) What distinguishes a non-international armed conflict from internal disturbances and tensions? Is Art. 3 common to the Conventions applicable to the attack on the Tablada military base? Is Protocol II applicable? (GC I-IV, Art. 3; P I, Art. 1)
2. (*Paras 157-171*) Why can the Inter-American Commission apply IHL? Because it is part of international law? Because it is part of Argentine law? Because it defines with greater precision, in relation to armed conflicts, the right to life protected in the American Convention? Because under Art. 29 of the American Convention, the Commission has to apply any rules offering better protection than the Inter-American Convention? Because derogations from the rights protected by the American Convention are only admissible, under the American Convention, if they do not violate other obligations of the State concerned? (*See American Convention on Human Rights*, available on <http://www.cidh.org>)
3. (*Paras 173, 174*) If the petitioners' attack was justified under Argentine law, would that have changed anything from the point of view of IHL? Is there a distinction between *jus ad bellum* and *jus in bello* in non-international armed conflicts?
4. (*Paras 177-179*) Do civilians taking a direct part in hostilities lose the protection of common Art. 3? Of the whole IHL of non-international armed conflict? Of the rules on the protection of the civilian population against the effects of hostilities? If so, for how long? (P II, Art. 13(3)) [*See Document No. 51*, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
5. (*Paras 181-185, 189*) Is the denial of quarter prohibited in non-international armed conflicts? Why? Because it is prohibited in international armed conflicts and there is no relevant difference on that point between non-international and international conflicts? Because it would violate common Art. 3? Is it justified to deny quarter to one surrendering member of a group of combatants as long as other members of the group continue to fight?

6. (*Paras 186-188*)

- a. Is the use of incendiary weapons prohibited in international armed conflicts? Are there limitations? Do those limitations simply prohibit attacks with incendiary weapons on civilians? What do the prohibitions of Protocol III to the 1980 Weapons Convention add to the prohibitions applicable to the use of all weapons? [See **Document No. 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention), and **Document No. 11**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons]
- b. Are the limitations on the use of incendiary weapons also applicable in non-international armed conflicts? Why? Because on this point too there is no relevant difference between non-international and international conflicts? Because a use of incendiary weapons beyond that permitted by the IHL of international armed conflicts would violate common Art. 3? Because no State can claim the right to use against its own citizens methods and means of combat which it has agreed not to use against a foreign enemy in an international armed conflict? If they are not applicable, where does the difference lie between the prohibition of the denial of quarter and the limitations on the use of incendiary weapons?

**Document No. 193, ICRC, Request to Visit Gravesites
in the Falklands/Malvinas**

[Source: ICRC Annual Report 1991, Geneva, ICRC, p. 57]

ARGENTINA - Following a joint request by the Argentine and British governments in 1990, the ICRC, acting as a neutral intermediary, arranged for a group of 358 family members to visit the graves in the Falklands/Malvinas Islands of Argentine soldiers killed in action during the Falklands/Malvinas conflict. The visit, which took place on 18 March 1991, was carried out in accordance with joint statements issued in Madrid by the two governments and with the rules of international humanitarian law providing that families must be given access to gravesites as soon as circumstances allow.

Case No. 194, Sri Lanka, Jaffna Hospital Zone**A. Reuters dispatch of September 26, 1990**

[Source: De Silva, D., *Reuters Dispatch*, Colombo, September 26, 1990]

SRI LANKAN ARMY VACATES GARRISON AND OFFERS IT TO RED CROSS

COLOMBO, Sept 26, Reuters – Sri Lankan troops who battled their way into a colonial fort in the heart of rebel territory less than two weeks ago abandoned it on Wednesday and requested that the International Red Cross take it over, a government minister said.

Deputy Defence Minister Ranjan Wijeratne said the move would allow a major hospital to reopen less than one mile [...] from the fort.

But the Liberation Tigers of Tamil Eelam (LTTE), the main guerrilla group fighting for a separate Tamil homeland, said the troops had retreated from the fort after heavy fighting.

“Contrary to the government’s claim that they evacuated voluntarily, the fort fell into LTTE hands after heavy fighting that started at two o’clock this morning”, Lawrence Thilakar, LTTE spokesman in Paris, told Reuters by telephone.

He said the Tigers now occupied the fort and had recovered heavy weapons and vehicles from it.

The Tigers had pounded troops in the 350-year-old Dutch fort in Jaffna with mortars and rocket-propelled grenades since they launched an offensive in June.

The hospital, with about 1,500 beds, had been shut since June because it was near the fighting.

Wijeratne said he told Philippe Comtesse, head of the International Committee of the Red Cross (ICRC) in Sri Lanka, to take over the fort and resume operations at the hospital. He was awaiting a response.

“Even if the ICRC does not take it, we will not go back to the fort so that we can avoid bombing the area,” Wijeratne told a news conference. [...]

Wijeratne said withdrawal from the fort did not mean that the government had abandoned the fight against the rebels in their stronghold of Jaffna. He warned that if the Tigers attempted to move into the vacated base “effective action” would be taken against them.

Military analysts said the fort was not of any strategic importance to the government or the rebels. But since it was located in the heart of the minority Tamil community, it had become a focus of the independence struggle.

Hundreds of government troops fought their way into the garrison two weeks ago and relieved soldiers and policemen who had been trapped there by the rebel siege.

The Tigers launched the June offensive in the north and east after abandoning 14 months of peace talks with the government.

Tamils, who form 13 per cent of the island's 16 million population, say they have been discriminated against by the majority Sinhalese-dominated government since independence from Britain in 1948.

B. ICRC press release of November 6, 1990

[Source: ICRC Press Release, Delegation in Sri Lanka, November 6, 1990]

In order to allow the early reopening of Jaffna Teaching Hospital, which was badly damaged during the fightings in Jaffna, the International Committee of the Red Cross (ICRC) set up a number of rules to be respected by all parties involved. These provisions are in line with universally recognised practices in situations of conflict. They intend to provide in the future security from the fighting to the patients and the staff of the hospital. These rules have been notified by ICRC to both the Sri Lanka Government and the LTTE, and are to be implemented as of November 6, 1990.

These rules are as follows:

- The premises of Jaffna Hospital are placed under ICRC protection. They will be regarded by the Parties as a *Hospital zone*:
 - the compound will be clearly marked with red crosses for easy identification from the ground and the air
 - no armed personnel will be allowed within the compound;
 - no military vehicle will be stationed at the entrance of the Hospital Compound;
 - no vehicle other than those of the hospital, the Sri Lanka Red Cross and the ICRC will be admitted into the compound;
- Around the Hospital, a safety area is established. The rules governing this safety area (which includes the hospital compound) are:
 - the area will be clearly marked in such a way that it can be easily identified both from the ground and from the air
 - the area will remain void of any military or political installation;
 - no military action will be undertaken either from or against the safety area;
 - no military base, installation or position of any kind will be established or maintained within the area;
 - no military personnel will be stationed and no military equipment will be stored at any time within the said area;

- no weapon will be activated within the area, either from the air or from the ground;
- no weapon will be activated from outside the safety area against persons or buildings located within the safety area.

In case of severe or persistent violation of these rules, the ICRC may unilaterally withdraw its protection of the hospital.

The ICRC trusts that the parties concerned will strictly observe the above-mentioned rules as it is on this sole condition that the Jaffna Teaching Hospital will be able to resume, and keep on carrying out thereafter, its much needed humanitarian tasks in favour of the sick and wounded of the Northern Province.

Colombo, November 6, 1990

DISCUSSION

1. Is the conflict in Sri Lanka an international or a non-international armed conflict? Is any kind of protected zone provided for in the law of non-international armed conflict? On which legal basis could such a zone be established? (GC I-IV, Art. 3)
2. What is the aim of the hospital zone? Of the safety area around it?
3. Which of the rules listed in the ICRC press release would apply anyway under IHL even if no hospital zone or safety area were established? (GC I-IV, Art. 3)
4. To which kind of zone provided for in the IHL of international armed conflicts does the hospital zone described in the ICRC press release correspond? To which does the safety area correspond? How can its rules become binding for parties to a non-international armed conflict? (GC I-IV, Art. 3; GC I, Art. 23; GC IV, Arts 14 and 15)
5. Why does the Sri Lankan government want the ICRC to take over the fort in Jaffna? What arguments exist for the ICRC in favour of and against accepting that task? Under what conditions would you accept if you were the ICRC?
6.
 - a. If the IHL of international armed conflict is applied, may the emblem be used for the hospital compound? Why, according to the rules, is only the hospital zone to be clearly marked with red crosses for easy identification from the ground and the air? May the safety zone also be so marked? Why/why not? (GC I and GC II, Art. 44; GC IV, Annex I, Art. 6; P I, Art. 18).
 - b. In non-international armed conflicts, when can the emblem be used? By whom? Under what conditions? Could the emblem be used if the zones were not under ICRC control? (GC I and GC II, Art. 44; P II, Art. 12)
7. Why does the ICRC plan to withdraw if the rules are violated? Do the wounded and sick not need the presence of the ICRC most urgently when the rules are violated?

Case No. 195, Canada, Sivakumar v. Canada

[Source: *Sivakumar v. Canada (Minister of Employment and Immigration)* (C.A.), [1994] 1 F.C. 433, 1993-11-0; available on <http://www.canlii.org/ca/cas/fca/1993/1993fca10048.html>; the order of the paragraphs has been modified to facilitate understanding of the case.]

[...] The appellant, Thalayasingam Sivakumar, is a Tamil and a citizen of Sri Lanka. Even though he was found by the Refugee Division to have had a well-founded fear of persecution at the hands of the Sri Lankan government on the basis of his political opinion, the Refugee Division decided to exclude him on the basis of section F(a) of Article 1 of the United Nations Convention Relating to the Status of Refugees [See Case No. 155, Canada, Ramirez v. Canada] as someone who had committed crimes against humanity [...]. The issue on this appeal is whether the appellant was properly held responsible for crimes against humanity alleged to have been committed by the Liberation Tigers of Tamil Eelam (LTTE) even though he was not personally involved in the actual commission of the criminal acts. [...]

The standard of proof in section F(a) of Article 1 of the Convention is whether the Crown has demonstrated that there are serious reasons for considering that the claimant has committed crimes against humanity. [...] This shows that the international community was willing to lower the usual standard of proof in order to ensure that war criminals were denied safe havens. When the tables are turned on persecutors, who suddenly become the persecuted, they cannot claim refugee status. International criminals, on all sides of the conflicts, are rightly unable to claim refugee status. [...]

He [the appellant] became involved with the LTTE in 1978, shortly after the LTTE was banned by the Sri Lankan government. While he was at university, the appellant used his office as a student leader to promote the LTTE. [...]

The appellant testified that between 1983 and 1985, he was made aware that the LTTE was naming people working against the LTTE as traitors and killing those people as punishment [...]. The leader of the LTTE, Prabaharan [sic], discussed these killings with the appellant, who testified that, while he never had any direct connection with these killings, he “accepted” what the leader of the LTTE told him. [...]

The appellant remained in India until 1985 when he returned to Sri Lanka. In the intervening years, the appellant had been approached by the LTTE leader. As a result, the appellant rejoined the LTTE as military advisor. He established a Military Research and Study Centre in Madras where he lectured LTTE recruits on guerrilla warfare. The appellant testified that he instructed recruits on proper relations with the civilian population in order to gain popular support and that the recruits were told to observe the Geneva Convention.

In 1985, the appellant took part in negotiations (organized by the Indian government) between the Sri Lankan government and the five main rebel groups. These talks broke down when 40 Tamil civilians were killed by Sri Lankan forces.

In 1986, the appellant returned to Sri Lanka to visit his family. He resigned his position at the LTTE's military training college as a result of a dispute over military strategy

with another member of the LTTE, and turned his attention to developing an anti-tank weapon. In 1987, he went back to India to mass-produce this weapon.

The appellant then returned once more to Sri Lanka with instructions to develop a military and intelligence division for the LTTE to gather information, prepare military maps and recruit new members. At that time, he was appointed to the rank of major within the LTTE.

Hostilities between the Sri Lankan and LTTE forces broke out in early 1987, but these were brought to an end by a peace accord signed in July of 1987. This accord allowed the Tamils to form a Tamil police force in the northern and eastern provinces, and the appellant was instructed to convert the military and intelligence centre into a police academy. However, the accord broke down and the police academy was never established.

The appellant testified that, in 1987, one commander of the LTTE, Aruna, went to a prison under their control and shot about forty unarmed members of other rival Tamil groups with a machine gun, after an assassination attempt by another Tamil group on a high-ranking officer of the LTTE. The appellant testified that, when he learned about the killing, he went to Prabakaran to demand public punishment, which he said he would do. However, little was done to Aruna, except that he lost his rank and was detained for a while. The appellant complained again, but nothing further was done. Aruna was later killed in action. Despite this, the appellant remained in the LTTE.

When a military commander in Jaffna died, the appellant was ordered to take charge of the defence of Jaffna Town. The appellant held the town for 15 days before he and his soldiers were driven into the jungle where they carried on guerrilla attacks. Subsequently, the appellant was ordered to return to India because of a dispute between him and the LTTE's second-in-command. The appellant testified that this dispute arose from his strong conviction that negotiations with Sri Lanka should proceed without pre-condition. Although the appellant participated in peace talks with the Sri Lankan government, the talks were doomed to failure because of the leader of the LTTE's intractable position and confrontational style.

Eventually, the appellant voiced his frustrations with the inability of the LTTE to conduct itself properly in peace talks, and was consequently expelled from the LTTE in December of 1988. The claimant remained underground in India until January of 1989 when he travelled to Canada on a false Malaysian passport via Singapore and the United States.

The evidence clearly shows that the appellant held positions of importance within the LTTE. In particular, the appellant was at various times responsible for the military training of LTTE recruits, for internationally organized peace talks between the LTTE and the Sri Lankan government, for the military command of an LTTE military base, for developing weapons, and, perhaps most importantly, for the intelligence division of the LTTE. It cannot be said that the appellant was a mere member of the LTTE. In fact, he occupied several positions of leadership within the LTTE including acting as the head of the LTTE's intelligence service. Given the nature of the appellant's important

role within the LTTE, an inference can be drawn that he knew of crimes committed by the LTTE and shared the organization's purpose in committing those crimes. [...]

It is incontrovertible that the appellant knew about the crimes against humanity committed by the LTTE. The appellant testified before the Refugee Division that he knew that the LTTE was interrogating and killing people deemed to be traitors to the LTTE. [...]

The appellant's testimony must also be placed against the back-drop of the voluminous documentary evidence submitted to the Refugee Division. The various newspaper articles indicate that Tamil militant groups are responsible for wide-spread bloodshed amongst civilians and members of rival groups. In many of these articles, the LTTE are blamed for the violence by spokespeople for the Sri Lankan government. The Amnesty International Reports indicate that various Tamil groups are responsible for violence against civilians, but are not specific about incidents involving the LTTE. [...]

It is clear that if someone personally commits physical acts that amount to a war crime or a crime against humanity, that person is responsible. However, it is also possible to be liable for such crimes "to "commit" them" as an accomplice, even though one has not personally done the acts amounting to the crime [...] the starting point for complicity in an international crime was "personal and knowing participation."

This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted. It is evident that mere by-standers or on-lookers are not accomplices. [...]

However, a person who aids in or encourages the commission of a crime, or a person who willingly stands guard while it is being committed, is usually responsible. Again, this will depend on the facts in each case. [...]

Moreover, those involved in planning or conspiring to commit a crime, even though not personally present at the scene, might also be accomplices, depending on the facts of the case. Additionally, a commander may be responsible for international crimes committed by those under his command, but only if there is knowledge or reason to know about them. [...]

Another type of complicity, particularly relevant to this case is complicity through association. In other words, individuals may be rendered responsible for the acts of others because of their close association with the principal actors. This is not a case merely of being "known by the company one keeps." Nor is it a case of mere membership in an organization making one responsible for all the international crimes that organization commits. Neither of these by themselves is normally enough, unless the particular goal of the organization is the commission of international crimes. It should be noted, however, as MacGuigan J.A. observed: "someone who is an associate of the principal offenders can never, in my view, be said to be a mere on-looker. Members of a participating group may be rightly considered to be personal and knowing participants, depending on the facts". [...]

In my view, the case for an individual's complicity in international crimes committed by his or her organization is stronger if the individual member in question holds a

position of importance within the organization. Bearing in mind that each case must be decided on its facts, the closer one is to being a leader rather than an ordinary member, the more likely it is that an inference will be drawn that one knew of the crime and shared the organization's purpose in committing that crime. Thus, remaining in an organization in a leadership position with knowledge that the organization was responsible for crimes against humanity may constitute complicity. [...]

In such circumstances, an important factor to consider is evidence that the individual protested against the crime or tried to stop its commission or attempted to withdraw from the organization. [...]

Of course, as Mr. Justice MacGuigan has written, "law does not function at the level of heroism" [...]. Thus, people cannot be required, in order to avoid a charge of complicity by reason of association with the principal actors, to encounter grave risk to life or personal security in order to extricate themselves from a situation or organization. But neither can they act as amoral robots.

This view of leadership within an organization constituting a possible basis for complicity in international crimes committed by the organization is supported by Article 6 of the Charter of the International Military Tribunal. [...]

This principle was applied to those in positions of leadership in Nazi Germany during the Nuremberg Trials, as long as they had some knowledge of the crimes being committed by others within the organization. [...]

It should be noted that, in refugee law, if state authorities tolerate acts of persecution by the local population, those acts may be treated as acts of the state [...]. Similarly, if the criminal acts of part of a paramilitary or revolutionary non-state organization are knowingly tolerated by the leaders, those leaders may be equally responsible for those acts. [...]

To sum up, association with a person or organization responsible for international crimes may constitute complicity if there is personal and knowing participation or toleration of the crimes. Mere membership in a group responsible for international crimes, unless it is an organization that has a "limited, brutal purpose", is not enough [...]. Moreover, the closer one is to a position of leadership or command within an organization, the easier it will be to draw an inference of awareness of the crimes and participation in the plan to commit the crimes. [...]

As one Canadian commentator, Joseph Rikhof, ["War Crimes, Crimes Against Humanity and Immigration Law" (1993), 19 Imm.L.R. (2d) 18], at page 30 has noted:

[...] This requirement does not mean that a crime against humanity cannot be committed against one person, but in order to elevate a domestic crime such as murder or assault to the realm of international law an additional element will have to be found. This element is that the person who has been victimized is a member of a group which has been targeted systematically and in a widespread manner for one of the crimes mentioned [...]

Another historic requirement of a crime against humanity has been that it be committed against a country's own nationals. This is a feature that helped to distinguish a crime against humanity from a war crime in the past. [...] While I have some doubt about the continuing advisability of this requirement in the light of the changing conditions of international conflict, writers still voice the view that they "are still generally accepted as essential thresholds to consider a crime worthy of attention by international law" [...].

There appears to be some dispute among academics and judges as to whether or not state action or policy is a required element of crimes against humanity in order to transform ordinary crimes into international crimes. The cases decided in Canada to date on the issue of crimes against humanity all involved members of the state, in that each of the individuals was a member of a military organization associated with the government [...]. One author, Bassiouni, [*Crimes against Humanity in International Criminal Law*, Dordrecht: M. Nijhoff, 1992], states that the required international element of crimes against humanity is state action or policy [...]. Similarly, the *Justice Trial* [...], was quite clear in interpreting Control Council Law No. 10 (basically identical in terms to Article 6 of the Charter of the International Military Tribunal) to mean that there must be a governmental element to crimes against humanity [...].

Other commentators and courts take a different approach [...]. Based on these latter authorities, therefore, it can no longer be said that individuals without any connection to the state, especially those involved in paramilitary or armed revolutionary movements, can be immune from the reach of international criminal law. On the contrary, they are now governed by it. [...]

As for the requirement of complicity by way of a shared common purpose, I have already found that the appellant held several positions of importance within the LTTE (including head of the LTTE's intelligence service) from which it can be inferred that he tolerated the killings as a necessary, though perhaps unpleasant, aspect of reaching the LTTE's goal of Tamil liberation. Although the appellant complained about these deaths and spoke out when they occurred, he did not leave the LTTE even though he had several chances to do so. No evidence was presented that the appellant would have suffered any risk to himself had he chosen to withdraw from the LTTE. The panel's finding that there was no serious possibility that the appellant would be persecuted by the LTTE supports the conclusion that the appellant could have withdrawn from the LTTE and failed to do so. I conclude that the evidence discloses that the appellant failed to withdraw from the LTTE, when he could have easily done so, and instead remained in the organization in his various positions of leadership with the knowledge that the LTTE was killing civilians and members of other Tamil groups. No tribunal could have concluded on this evidence that there were no serious reasons for considering that the appellant was, therefore, a knowing participant and, hence, an accomplice in these killings.

Finally, did these killings constitute crimes against humanity? That is, were the killings part of a systematic attack on a particular group and (subject to my reservations expressed above) were they committed against Sri Lankan nationals? Clearly, no other conclusion is possible other than that the civilians killed by the LTTE were members

of groups being systematically attacked by the LTTE in the course of the LTTE's fight for control of the northern portion of Sri Lanka. These groups included both Tamils unsympathetic to the LTTE and the Sinhalese population. It is also obvious that these groups are all nationals of Sri Lanka, if that is still a requirement.

DECISION

I conclude that, given the appellant's own testimony as to his knowledge of the crimes against humanity committed by the LTTE, coupled with the appellant's position of importance within the LTTE and his failure to withdraw from the LTTE when he had ample opportunities to do so, there are serious reasons for considering that the appellant was an accomplice in crimes against humanity committed by the LTTE. The evidence, both the appellant's testimony and the documentary evidence, is such that no properly instructed tribunal could reach a different conclusion. Accordingly, I would dismiss the appeal.

DISCUSSION

1. Is the appellant accused of having committed crimes against humanity, war crimes or both? Does the distinction between these two crimes lie in the nationality of the victims? (GC I-IV, Art. 3(1); GC I-IV, Arts 50/51/130/147 respectively; P II, Art. 4(2); ICC Statute, Arts 7 and 8 [See **Case No. 23**, The International Criminal Court])
2. In order to commit a crime against humanity, must the perpetrator be acting on behalf of a State? In order to commit a grave breach of international humanitarian law (IHL)? A war crime? (GC I-IV, Arts 50/51/130/147 respectively; P II, Art. 4(2); ICC Statute, Arts 7 and 8.)
3. Which "Geneva Convention" should the appellant have been teaching the LTTE recruits to respect?
4. What obligations did the appellant and Mr Prabakaran have with regard to Mr Aruna's acts? Did they fulfil them? (P I, Art. 86(2); ICC Statute, Art. 28)
5. When the LTTE executes its members accused of treason, is it violating the rules of IHL applicable to non-international armed conflicts? Does that act constitute a crime against humanity? What elements are necessary for this to be the case? (GC I-IV, Art. 3(1)(a); P II, Art. 4(2); ICC Statute, Art. 7)
6.
 - a. Why is the appellant an accomplice to the crimes committed by the LTTE? Is the fact that he knew they were being committed and nevertheless remained in a position of leadership sufficient for him to be held as an accomplice? Even if the crimes were not committed by his subordinates? (P I, Art. 86(2); ICC Statute, Arts 25(3)(d) and 28)
 - b. Should the court's requirements be the same if the appellant were a high-ranking officer in the Sri Lankan armed forces?
 - c. Is a member of an armed force who knows that it commits war crimes but does not leave it – despite having the possibility to do so – an accomplice to its crimes?
 - d. In which case may mere membership of an armed force lead to criminal responsibility for all acts committed by the group? (ICC Statute, Art. 25)
 - e. According to IHL and your country's criminal law, is the individual who stands guard while others commit war crimes responsible for those crimes?

7. Should Canada have prosecuted the appellant instead of refusing him refugee status? How may it be justified in not prosecuting him while refusing him refugee status? (GC I-IV, Arts 49/50/129/146 respectively)
8.
 - a. Does Canada have the right to refuse him refugee status on the basis that he might have committed war crimes or crimes against humanity? Even if he might be persecuted in Sri Lanka?
 - b. Since the appellant committed war crimes or crimes against humanity, may he be forcibly returned to Sri Lanka, even if he risks persecution there?

Case No. 196, Sri Lanka, Conflict in the Vanni

[N.B.: In May 2009, Sri Lankan governmental forces defeated the LTTE, ending the conflict after 25 years. However, the situation of the internally displaced persons, described in this report, did not change after the conflict, and thousands of Sri Lankans were still living in IDP camps at the end of 2009, awaiting resettlement.]

[Source: Human Rights Watch, "War on the Displaced, Sri Lankan Army and LTTE Abuses against Civilians in the Vanni," Report, February 2009, available at www.hrw.org. Footnotes omitted]

War on the Displaced**Sri Lankan Army and LTTE Abuses against Civilians in the Vanni**

[...]

February 2009

[...]

- [1] After 25 years, the armed conflict between the Sri Lankan government and the separatist Liberation Tigers of Tamil Eelam (LTTE) may be nearing its conclusion. But for the quarter of a million civilians trapped or displaced by the fighting, the tragedy has intensified.

[...]

III. Violations of the Laws of War

- [2] During the ongoing fighting in the Vanni, both the Sri Lankan armed forces and the LTTE have committed serious violations of international humanitarian law with respect to the conduct of hostilities. The high civilian casualties of the past months can be directly attributable to these violations. [...]

Violations by the LTTE*Preventing Civilians from Fleeing the Conflict Zone*

- [3] The LTTE has deliberately prevented civilians under its effective control from fleeing to areas away from the fighting, unnecessarily and unlawfully placing their lives at grave risk. As the LTTE has retreated in the face of SLA [Sri Lankan Army] offensive operations, it has forced civilians to retreat with it, not only prolonging the danger they face, but moving them further and further away from desperately needed humanitarian assistance. And as the area that the LTTE controls shrinks, the trapped civilian population has become concentrated, increasing the risk of high casualties in the event of attack and placing greater strains on their living conditions.
- [4] More than 200,000 civilians, some already displaced more than 10 times, are believed to be trapped inside the Vanni war zone. Among those trapped are more than 250 national staff members of international organizations, most of whom currently serve as volunteers for local government agents.

- [5] The LTTE has long placed restrictions on freedom of movement of those living in LTTE controlled areas. Movement in and out has been sharply regulated, not only for security, but as part of forced recruitment efforts and for “taxation” purposes. Since 2008, the LTTE pass regime granting permission to individuals to leave the Vanni has grown increasingly strict. [...]
- [6] As civilians have become more desperate and the LTTE has increasingly lost control, more and more people have tried to flee LTTE-controlled areas. The LTTE has forcibly tried to block these efforts, including by deliberately firing on civilians. [...]
- [7] In several cases, the LTTE has deliberately attacked civilians in an effort to prevent them from fleeing. [...]
- [8] Displaced persons in Pampaimadu camp in Vavuniya reported that because the government declared “safe zone” was no longer safe and SLA forces were advancing, on February 6 a group of about 80 people began walking towards the front line in Visuamadu. The LTTE did not have any fortified positions in Visuamadu, just a few hundred meters from the government lines, but there were several LTTE cadres there. When the group tried to cross, the LTTE cadres opened fire, wounding one or two people. And on February 4 and 5, LTTE cadres fired upon civilians who tried to cross the front line in the Moongilaaru area.
- [...]

Putting Civilians at Unnecessary Risk

- [9] The LTTE practice of forcing civilians to retreat with its forces, rather than allowing them to flee to safer areas, has meant that LTTE forces are increasingly deployed near civilians in violation of the laws of war. When military forces deliberately use civilians to protect their positions from attack, it is considered to be “human shielding,” which is a war crime.
- [...]
- [10] The LTTE has also continued to place civilians at serious risk by forcibly recruiting civilians for untrained military duty and for labor in combat zones. The LTTE also has a long history of using children under 18 in their forces, including in armed combat, and the UN has reported that it continues to do so. These practices violate international humanitarian law. Since September 2008, the LTTE has increasingly forced people with no prior military experience to fight or perform supportive functions on the front lines, a practice which has led to many casualties. [...]
- [11] On February 17, the UN Children’s Fund, UNICEF, issued a statement expressing grave concern for the safety of children in conflict areas. “We have clear indications that the LTTE has intensified forcible recruitment of civilians and that children as young as 14 years old are now being targeted,” said Philippe Duamelle, UNICEF’s representative in Sri Lanka. “These children are facing immediate danger and their lives are at great risk. Their recruitment is intolerable.”

Violations by the Sri Lankan Armed Forces

[...]

Attacks on the “Safe Zone”

[12] Many of the civilian deaths reported in the past month have occurred in an area that the Sri Lankan government has declared to be a “safe zone.” On January 21, the Sri Lankan armed forces unilaterally declared a 35-square-kilometer “safe zone” for civilians north of the A35 road [...]. The Sri Lankan Air Force dropped leaflets appealing to civilians to move into the safe zone as soon as possible.

[13] During the next days, several thousand people gathered in a large playground located just north of the A35 in the safe zone. The playground also functioned as a food distribution center for the local government agent (GA) and international organizations. Several people located in or around the GA food distribution center told Human Rights Watch that, despite the army declaration of a safe zone in the area, the area was subjected to heavy shelling from SLA positions in the period January 22-29, which killed and injured hundreds of people.

[14] Around 11:45 a.m. on January 22, “Premkumar P.” was traveling on his bike on the road parallel to the playground when shelling started. He told Human Rights Watch:

[...]

We could hear where the shelling was coming from. It was coming from the other side of the A35 road [from the area where government forces were located]. We also heard shelling from behind us, but these did not land in the safe zone. They landed on government forces. The LTTE positions were too close to the distribution center. It was impossible for shells from these [LTTE] positions to land in the safe zone. [...]

[15] It is not a violation of international humanitarian law for LTTE forces to enter safe zones unilaterally declared by the Sri Lankan government. (Because the “safe zones” were not established by agreement with the LTTE, they cannot be formally considered as “protected zones” as set out in the First and Fourth Geneva Conventions, Protocol I, and in customary humanitarian law.) Several sources told Human Rights Watch that LTTE forces maintained positions in the safe zone (although about two to four kilometers north of the playground), from which they fired on SLA positions. And as LTTE forces retreated, they moved heavy artillery eastward through the northern part of the safe zone.

[16] The SLA is not prohibited from attacking LTTE forces inside a safe zone. At the same time, having declared the area a safe zone for civilians, the SLA encouraged civilians to go to the area, increasing the vulnerability of civilians in the event of an attack. By creating the zone, government forces took on a greater obligation to ensure that they spared civilians from the effects of attacks. Given this civilian presence, attacks on valid military targets in the safe zone should only have been carried out after issuing an effective advance warning that the area was no longer a zone protected from attack.

Attacks on Hospitals

[17] During the fighting in 2009, the few hospitals that exist in LTTE-controlled areas have repeatedly come under artillery attack. [...]

[18] Human Rights Watch has gathered information from aid agencies and eyewitnesses on more than two dozen incidents of artillery shelling or aerial bombardments on or near hospitals. Hospitals are specially protected under international humanitarian law. Like other civilian objects, they may not be targeted. But under the Geneva Conventions, hospitals remain protected unless they are “used to commit hostile acts” outside their humanitarian function. Even then, they are only subject to attack after a sufficient warning has been given, and after the warning has gone unheeded.

[19] A witness to a PTK hospital attack in mid-January expressed to Human Rights Watch a broader belief that a perceived LTTE presence explained the attack:

When I was in PTK, waiting for the bus to get out – on January 14 or 15, I saw heavy shelling in the hospital area. The bus stop was nearby and I could see shells landing there. People were saying that the SLA was shelling the hospital because there were some LTTE cadres there.

[20] The presence of wounded combatants in hospitals does not turn them into legitimate targets. Deliberately attacking a hospital is a war crime.

[...]

[21] After PTK hospital had been shelled over several days in February, its patients were transferred to a makeshift hospital in a school and community center in Putumattalan village, on the coast. [...]

[22] The International Committee of the Red Cross (ICRC) reported that even this makeshift hospital had repeatedly come under artillery attack. ICRC spokeswoman Sophie Romanens said, “They say shelling is coming close and there are some patients dead because the place was hit by shells on Monday [February 9].”

[...]

IV. Humanitarian Access

[...]

[23] International aid agencies have had very limited access to the Vanni since the Sri Lankan government ordered the UN to leave the region in September 2008. The government has permitted food relief to be delivered, but it has not allowed international aid workers to remain on the ground to ensure that the aid is reaching the population at risk. [...]

[24] A source indicated to Human Rights Watch that one of the main reasons for the difficulty in organizing convoys in and out of the Vanni was that the SLA and the LTTE were unable to agree on the route to be used. Seeking to use the humanitarian

convoys to advance their military positions, both sides insisted on different routes, blocking the delivery of much-needed aid to thousands of civilians.

We got to the last SLA checkpoint near Oddusuddan from where the ICRC was supposed to accompany us through no-man's land to the LTTE checkpoint 13 kilometers south of PTK. As soon as we passed the SLA checkpoint, military vehicles joined the convoy and followed the convoy on both sides. LTTE saw it and started firing. The army returned fire and the convoy had to stop for one hour. At this time nobody was injured, but when the same thing happened to the GA [government] convoy the next day, their driver was injured in crossfire.

[...]

- [25] Similar problems have prevented international organizations from evacuating patients and medical staff from the war zone. This has included evacuating patients from the PTK hospital, which came under repeated shelling from Sri Lankan forces. [...]
- [26] The ICRC was finally able to escort 226 sick and wounded patients requiring urgent medical attention from PTK hospital on January 29. Despite repeated requests from the ICRC, government forces and the LTTE did not grant safe passage to evacuate additional patients and medical staff for nearly two weeks, forcing patients and medical staff to evacuate to the Putumattalan make-shift hospital on February 4. Finally, on February 10 and 12, the ICRC evacuated more than 600 patients by boat from Putumattalan to the district capital of Trincomalee, far away from the fighting.
- [27] Under international humanitarian law, the government is responsible for meeting the humanitarian needs of the war-affected population. Parties to an internal armed conflict – in this case the Sri Lankan government and the LTTE – must allow humanitarian relief to reach civilian populations that are in need of food, medicine, and other items essential to their survival. If the government is unable to fully meet this obligation, it must allow the humanitarian community to do so on its behalf. Parties to a conflict must ensure the freedom of movement of impartial humanitarian relief personnel – only in cases of military necessity may their activities or movements be temporarily restricted.
- [28] The UN Guiding Principles on Internal Displacement provide authoritative standards on the obligations of governments to internally displaced persons. Under the principles, the authorities are to provide displaced persons “at a minimum” with safe access to essential food and potable water, basic shelter and housing, appropriate clothing, and essential medical services and sanitation. [...]

V. Plight of the Internally Displaced

[...]

[29]The government has arbitrarily detained people during screening procedures; subjected all internally displaced persons, including entire families, to indefinite confinement in military-controlled camps; and failed to provide adequate medical and other assistance to displaced persons. The government has directly restricted the efforts of relief agencies seeking to meet emergency needs, and has deterred agencies from offering greater support through policies that the agencies rightly perceive as unlawful.

[30]The LTTE's attempts to prevent civilians from fleeing the conflict zone remain the main reason why tens of thousands of people remain trapped. Various sources told Human Rights Watch, however, that many civilians who are able to flee have been reluctant to cross over to the government side because they fear for their life and safety in the hands of the government forces. [...]

Screening procedures and unknown fate of the detainees

[31] Sri Lankan security forces subject people fleeing from LTTE-controlled areas to several stages of screening, ostensibly to separate those affiliated with the LTTE from displaced civilians. While the government has legitimate security reasons for screening displaced persons to identify and apprehend LTTE cadres, the screening procedures need to be transparent and comply with the requirements of international humanitarian and human rights law. So far, none of these requirements have been met and dozens of individuals, perhaps many more, have been detained during the screening process. The fate of such detainees remains unknown, raising fears of possible enforced disappearances and extrajudicial killings.

[32][...] Most displaced persons are initially screened during their first encounter with military forces after they have crossed the front line. The army currently transports the displaced persons to one of the hospitals in Kilinochchi where they spend up to 36 hours, being questioned by the security forces. In Kilinochchi, the security forces encourage people to reveal any affiliation that they have with the LTTE voluntarily.

[33]According to several sources, at the Omanthai checkpoint, the main screening point for displaced persons on the main A9 roadway before their arrival in camps in Vavuniya, the army conducts a more thorough screening process. During this screening process, the army has separated dozens of men and women aged 18 to 35, as well as some teenage children, from their families, allegedly for further questioning.

[34]Very little information is available regarding the first two stages of screening and it is not possible to verify whether and to what extent detentions occur in these locations. The government provides no information on who has been arrested. [...]

- [35][...] The government initially agreed to allow the ICRC and the UN High Commissioner on Refugees to monitor the screening process there. In practice only the ICRC was allowed at the checkpoint, and since February 7, 2009, it too has been barred from monitoring the screening procedure. [...]
- [36] Meanwhile, dozens if not hundreds of people – mostly young men and women – appear to have been detained at the Omanthai checkpoint as of early February 2009. Some have been released within days and transferred to the IDP camps in Vanunya, but the fate of numerous others remains unknown.
- [...]

Confinement in internment camps

- [37] Upon arrival in Vavuniya, all displaced persons apparently without exception are subjected to indefinite confinement in *de facto* internment camps, which the government calls transit sites, “welfare centers,” or “welfare villages.” Those requiring immediate medical attention are first taken to the hospital, and then to one of the camps [...].
- [38][...] Local authorities were not prepared for the large influx of displaced persons and did not allow international agencies to adequately prepare the sites. As a result, the government started putting newly arriving displaced persons into schools and colleges, interrupting the educational process for hundreds of schoolchildren and students, many of whom had to vacate the facilities.
- [39] At the same time, relief agencies were struggling to set up additional shelter, water, and sanitation facilities at the last moment, as the displaced persons were being brought to the sites.
- [40] Sri Lankan authorities have ignored calls from the international community to ensure the civilian nature of the camps. The perimeters of the sites are secured with coils of barbed wire, sandbags, and machine-gun nests. There is a large military presence inside and around the camps.
- [...]
- [41] Several sources reported to Human Rights Watch the presence of plainclothes military intelligence and paramilitaries in the camps. A UN official in Vavuniya told Human Rights Watch that she and colleagues have seen members of paramilitary groups in different camps. In particular, local staff members recognized several members of the People’s Liberation Organization of Tamil Eelam (PLOTE), a pro-government Tamil paramilitary organization long implicated in abuses, present at one of the camps.
- [42] While officially the camps are run by civilian authorities, in reality the military remains in full control, ensuring, as one relief worker put it, that “nobody gets in or out.” [...]

[43] Displaced persons confined in the camps enjoy no freedom of movement and are not allowed any contact with the outside world. [...]

[44] Several relief workers working with displaced persons told Human Rights Watch that many are devastated because they have been separated from their family members and have no information about their relatives [...]. International agencies have been trying to assist with family reunification at least for those who made it to Vavuniya, but since the authorities have not provided them with IDP registration lists from different camps, so far it has been virtually impossible.

[...]

[45] Sri Lankan authorities maintain that detention at the camps is a security measure to protect displaced persons from possible LTTE reprisals. While the government has an obligation to protect internally displaced persons, it cannot do so at the expense of their lawful rights to liberty and freedom of movement.

[46] The Sri Lankan government's treatment of displaced persons violates their fundamental rights under international law. International human rights and humanitarian law during internal armed conflicts prohibit arbitrary detention. The UN Guiding Principles on Internal Displacement, an authoritative framework for the protection of displaced persons derived from international law, provides that, consistent with the right to liberty, internally displaced persons "shall not be interned in or confined to a camp." The principles recognize that "exceptional circumstances" may permit confinement only for so long as it is "absolutely necessary," but the Sri Lankan government has not demonstrated that such circumstances exist.

[...]

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DISCUSSION

1. What was the nature of the conflict between the Sri Lankan Army (SLA) and the LTTE? Did IHL still apply after May 2009, when the LTTE was officially defeated? Does IHL stop applying as soon as the hostilities end? In the present case, did IHL still apply to the persons displaced as a result of the conflict? (P II, Art. 2(2))
2. (*Paras [3]-[9]*) Which rules of IHL does the LTTE violate when it prevents civilians from fleeing the conflict? Which rules of IHL does it violate when it forces civilians to retreat with it? May this be equated to deportation or forcible transfer? Do you agree with Human Rights Watch that the LTTE is thereby using civilians as human shields? (GC I-IV, Art. 3; P II, Art. 17; CIHL, Rules 15, 22-24 and 97)
3. (*Para. [5]*) Under IHL, is the LTTE allowed to restrict the freedom of movement of persons living in LTTE-controlled areas? May it do so for security reasons? Is it really safer for civilians to be forced to stay among LTTE members?
4. (*Paras [10]-[11]*)
 - a. Is the forced recruitment of civilians prohibited by the IHL of non-international armed conflict? If the recruited persons are above 18 years of age? If they are between 18 and 15? If they are below 15? (GC I-IV, Art. 3; P II, Art. 4(3)(c); CIHL, Rules 136 and 137; UN Guiding Principles

on Internal Displacement, Principle 13 [See **Document No. 56**, UN, Guiding Principles on Internal Displacement])

- b. Is there an obligation under IHL to give new recruits military training before sending them into combat?
5. (*Paras [12]-[16]*)
- a. What was the purpose of the safe zone declared by the Sri Lankan government? Does the applicable IHL provide a legal basis for the establishment of such a zone? What is the difference between the safe zone established by the Sri Lankan government and the protected zones described in IHL? (GC IV, Art. 15; P I, Arts 59-60)
 - b. Does the fact that the safe zone was declared unilaterally entitle the LTTE not to respect it? Do you agree with Human Rights Watch that the LTTE was thus allowed to enter the safe zone? Even though it knew that civilians had gathered there in order to be protected? Is not its entry there a violation of the provision not to locate military targets in densely populated areas? Is the LTTE bound by this provision? (GC I-IV, Art. 3; GC IV, Art. 15; P I, Arts 58(b), 59 and 60; CIHL, Rule 23)
 - c. Did the SLA violate IHL when they shelled the safe zone? Was the SLA under the obligation to respect the safe zone that it had unilaterally declared? Do you agree with Human Rights Watch that the SLA was not prohibited from attacking LTTE forces inside a safe zone? Shouldn't it first have rescinded its declaration of a safe zone? In the present case, assuming that LTTE forces were present in the safe zone, how do you assess the legality of the shelling? (GC I-IV, Art. 3; GC IV, Art. 15; P I, Arts 51(5)(b), 52, 57, 59 and 60; CIHL, Rules 1, 11-12, 14-19)
6. (*Paras [17]-[22]*) Are hospitals protected against attacks during non-international armed conflict? Do you agree with Human Rights Watch that the presence of wounded LTTE members did not turn the hospitals into legitimate targets? Would the presence of LTTE members have turned a hospital into a legitimate target if they had not been wounded but were using it for military purposes? Is it a war crime to attack a hospital during a non-international armed conflict? (P II, Art. 11; CIHL, Rule 28; ICC Statute, Art. 8(2)(e)(ii))
7. a. (*Paras [23], [27] and [28]*) Was Sri Lanka under an obligation to allow access by international aid organizations to all those in need? Is there an obligation to allow access at least to displaced persons? To allow access by the ICRC? To allow access to international aid organizations when the government is not able to meet the humanitarian needs of the population? (GC I-IV, Art. 3; P II, Art. 18(2); CIHL, Rule 55; UN Guiding Principles on Internal Displacement, Principles 3 and 24-27 [See **Document No. 56**, UN, Guiding Principles on Internal Displacement])
- b. (*Para. [24]*) May Sri Lanka restrict the movement of relief agencies? May armed Sri Lankan military personnel accompany them? May the LTTE fire at SLA vehicles accompanying humanitarian convoys? (GC I-IV, Art. 3; P II, Art. 18; CIHL, Rules 55-56)
 - c. (*Paras [25] and [26]*) Were the parties to the conflict under an obligation to ensure the safe passage of relief agencies when they are evacuating wounded and sick? If safe passage is not ensured, should the parties take into account the fact that wounded and sick are being evacuated? (GC I-IV, Art. 3; P II, Arts 7 and 18; CIHL, Rules 56 and 109-110)
8. (*Paras [29]-[46]*) When may civilians be held in confinement during a non-international armed conflict? Does the applicable IHL give any indication as to when a person may be confined? If IHL is unclear on the matter, how should confinement be regulated? May displaced persons be confined indefinitely? Would their need to be protected against LTTE reprisals be a valid ground

for their confinement? (UN Guiding Principles on Internal Displacement, Principle 12 [See **Document No. 56**, UN, Guiding Principles on Internal Displacement])

9. (*Paras [39]-[48]*) May displaced persons be confined in camps under military control? May they be prevented from leaving the camps? May families be separated? (UN Guiding Principles on Internal Displacement, Principles 14 and 17 [See **Document No. 56**, UN, Guiding Principles on Internal Displacement])
10. (*Paras [31]-[36]*)
 - a. Which rules of IHL is Human Rights Watch referring to when it says that the screening procedures need to comply with the requirements of IHL (*para. [33]*)? Do the screening processes as described by Human Rights Watch violate IHL? Does IHL apply to the screenings carried out after May 2009? (P II, Art. 2(2))
 - b. Does the ICRC have a right of access to those being screened? Did Sri Lanka violate IHL when it barred the ICRC from monitoring the procedure? (GC I-IV, Art. 3)

Case No. 197, UN, UN Forces in Somalia

A. Security Council Resolution 794 (1992)

[Source: UN Doc. S/RES/794 (December 3, 1992). Available on <http://www.un.org/documents/>]

The Security Council,

[...]

Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security,

Gravely alarmed by the deterioration of the humanitarian situation in Somalia and underlining the urgent need for the quick delivery of humanitarian assistance in the whole country, [...]

Responding to the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance in Somalia,

Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities; deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population,

Dismayed by the continuation of conditions that impede the delivery of humanitarian supplies to destinations within Somalia, and in particular reports of looting of relief supplies destined for starving people, attacks on aircraft and ships bringing in humanitarian relief supplies, and attacks on the Pakistani UNOSOM contingent in Mogadishu, [...]

Sharing the Secretary-General's assessment that the situation in Somalia is intolerable and that it has become necessary to review the basic premises and principles of the United Nations effort in Somalia, and that UNOSOM's existing course would not in present circumstances be an adequate response to the tragedy in Somalia,

Determined to establish as soon as possible the necessary conditions for the delivery of humanitarian assistance wherever needed in Somalia [...],

[...]

Determined further to restore peace, stability and law and order with a view to facilitating the process of a political settlement under the auspices of the United Nations, aimed at national reconciliation in Somalia, and encouraging the Secretary-General and his Special Representative to continue and intensify their work at the national and regional levels to promote these objectives, [...]

1. *Reaffirms* its demand that all parties, movements and factions in Somalia immediately cease hostilities, maintain a cease-fire throughout the country, and cooperate with the Special Representative of the Secretary-General as well as with the military forces to be established pursuant to the authorization given in paragraph 10 below in order to promote the process of relief distribution, reconciliation and political settlement in Somalia;
2. *Demands* that all parties, movements and factions in Somalia take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia;
3. *Also demands* that all parties, movements and factions in Somalia take all measures necessary to ensure the safety of United Nations and all other personnel engaged in the delivery of humanitarian assistance, including the military forces to be established pursuant to the authorization given in paragraph 10 below;
4. *Further demands* that all parties, movements and factions in Somalia immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above;
5. *Strongly condemns* all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts;
6. *Decides* that the operations and the further deployment of the 3,500 personnel of the United Nations Operation in Somalia (UNOSOM) authorized by [...] resolution 775 (1992) should proceed at the discretion of the Secretary-General in the light of his assessment of conditions on the ground [...];
7. *Endorses* the recommendation by the Secretary-General [...] that action under Chapter VII of the Charter of the United Nations should be taken in order to establish a secure environment for humanitarian relief operations in Somalia as soon as possible;
8. *Welcomes* the offer by a Member State described in the Secretary-General's letter to the Council of November 29, 1992 (S/24868) concerning the establishment of an operation to create such a secure environment; [...]
10. *Acting* under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia; [...]

B. Security Council Resolution 814 (1993)

[Source: UN Doc.S/RES/814 (March 26, 1993). Available on <http://www.un.org/documents/>]

The Security Council,

[...]

Commending the efforts of Member States acting pursuant to resolution 794 (1992) to establish a secure environment for humanitarian relief operations in Somalia,

Acknowledging the need for a prompt, smooth and phased transition from the Unified Task Force (UNITAF) to the expanded United Nations Operation in Somalia (UNOSOM II),

Regretting the continuing incidents of violence in Somalia and the threat they pose to the reconciliation process, [...]

Noting with deep regret and concern the continuing reports of widespread violations of international humanitarian law and the general absence of the rule of law in Somalia, [...]

Acknowledging the fundamental importance of a comprehensive and effective programme for disarming Somali parties, including movements and factions, [...]

Determining that the situation in Somalia continues to threaten peace and security in the region, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

5. *Decides* to expand the size of the UNOSOM force and its mandate [UNOSOM II]
[...]
7. *Emphasizes* the crucial importance of disarmament and the urgent need to build on the efforts of UNITAF [...];
9. *Further demands* that all Somali parties, including movements and factions, take all measures to ensure the safety of the personnel of the United Nations and its agencies as well as the staff of the International Committee of the Red Cross (ICRC), intergovernmental organizations and non-governmental organizations engaged in providing humanitarian and other assistance to the people of Somalia in rehabilitating their political institutions and economy and promoting political settlement and national reconciliation; [...]
12. *Requests* the Secretary-General to provide security, as appropriate, to assist in the repatriation of refugees and the assisted resettlement of displaced persons, utilizing UNOSOM II forces, paying particular attention to those areas where major instability continues to threaten peace and security in the region;
13. *Reiterates* its demand that all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law and *reaffirms* that those responsible for such acts be held individually accountable;

14. *Requests* the Secretary-General, through his Special Representative, to direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia, taking account of the particular circumstances in each locality, on an expedited basis in accordance with the recommendations contained in his report of March 3, 1993, and in this regard to organize a prompt, smooth and phased transition from UNITAF to UNOSOM II; [...]

DISCUSSION

1. a. Are the demands made by the resolutions on the protection of humanitarian convoys in line with the pertinent rules of IHL? Does IHL provide a right to humanitarian aid? If so, for whom? Only for civilians? Also in non-international armed conflicts? (GC IV, Arts 23, 59 and 142, P I, Arts 69, 70 and 81; P II, Art. 18)
- b. Does the UN's recent practice, as part of its peacekeeping mandate, of sending troops to ensure effective provision of humanitarian relief reaffirm the right to humanitarian assistance? (Security Council Resolutions 794, para. 10, and 814, para. 14)
- c. Do attacks on personnel providing relief supplies constitute a violation of IHL? Are they grave breaches of IHL? Even attacks on armed UN forces providing relief? (GC IV, Arts 3, 4, 23, 27, 59, 142 and 147, P I, Arts 50, 51(2), 69, 70, 81 and 85; P II, Arts 4(2)(a), 13(2) and 18)
2. a. If the UN forces are authorized to use force to establish and maintain a secure environment in Somalia for providing humanitarian aid, does the UN become a party to the conflict and hence internationalize a non-international armed conflict? Or can the UN forces be considered for purposes of the applicability of IHL as armed forces of the troop-contributing States (which are Parties to the Geneva Conventions), and can any hostilities be considered as an armed conflict between those States and the party responsible for the opposing forces? Does Somalia thereby become an occupied territory to which Convention IV applies? Which provisions of Convention IV applicable to occupied territories can appropriately apply to such a UN presence which contradicts its own basic aims?
- b. The Security Council authorizes the UN forces "to use all necessary means" (Resolution 794, para. 10). Are such measures limited by IHL? If so, by the IHL of international or non-international conflicts? Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a party to an international armed conflict in the sense of Art. 2 common to the Conventions? What do you think of the argument that IHL cannot formally apply to these or any other UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality, and their aim is not to make war but to enforce peace?
- c. Can you imagine why the UN and its Member States do not want to recognize the *de jure* applicability of IHL to UN operations or to establish precisely which principles and spirit of IHL they recognize as being applicable to UN operations?
- d. Do attacks on the Pakistani UNOSOM contingent constitute a violation of IHL? Are they grave breaches of IHL? Are the members of that contingent civilians or combatants? Are they "taking no active part in hostilities"? Even if they are creating a secure environment for humanitarian relief to be brought to Somalia?
3. Do the resolutions enforce *jus ad bellum* or *jus in bello*, or both? Is such mixing of the two detrimental to respect for IHL?

Case No. 198, Belgium, Belgian Soldiers in Somalia**A. Korad Kalid v. Paracommando Soldier**

[Source: Available under No. 7 A.R. 1995 at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

THE MILITARY COURT,

**Permanent Dutch-Language Chamber, in Session in Brussels,
has Issued the Judgment Below**

IN THE MATTER OF:

**THE PUBLIC PROSECUTOR'S DEPARTMENT and
104 Korad Kalid Omar, resident in Kismayo, Somalia, [...]**

v.

**105 V[...] J[...] F[...] J[...], [...], 3rd Para Battalion in Tielen,
standing accused that**

As a soldier on active service in Kismayo, Somalia, he did, on August 21, 1993, deliberately wound or strike Ayan Ahmed Farah; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That the accused's conduct should be tested against the rules of engagement which served as a guide for the Belgian troops in Somalia;

That, as a soldier, the accused formed part of a Belgian contingent dispatched to protect a humanitarian operation; that the deployment of military forces presupposes that the humanitarian operation could be threatened by force and that the international community considered that legitimate force could be used to curb or neutralize unlawful force;

That despite the peaceable intentions of the Belgian and other troops, they had to deal both in Somalia and elsewhere with hostile armed elements;

That in those circumstances the Belgian officers were compelled to take security measures in order to perform their mission and ensure their own safety and that of their men;

That the facts took place at check-point Beach, where the base was protected by a wall; that guard posts were set up in front of the wall and that barbed wire fencing was put up in front of those guard posts;

That on the night of August 20 to 21, 1993, the accused was on guard duty between two and three o'clock in Post 3, with orders to prevent anyone from penetrating into the safety area, i.e., through the barbed wire fencing;

That he suddenly spotted a shadow which he identified as a child; that he carried out his instructions; that it was subsequently found that Liebrand, who was manning Post 4 and had a night-glass, reacted in exactly the same manner, i.e., he fired a warning shot followed by a shot aimed at the legs;

That the accused and Liebrand interpreted and carried out the same orders and followed the same rules of engagement, in the same circumstances and in the same way; that it may thus be stated that the reaction and assessment of both soldiers were correct;

That the intruder was indeed a child; that it is nevertheless an unfortunate and regrettable fact that, in certain cultures and certain circumstances, despite the International Convention on the Rights of the Child, children are wrongfully used in war situations or in the use of force;

That the accused's duties at the time of the facts were difficult and dangerous; that he had to take a decision in a fraction of a second; that his safety and that of his unit could depend on his decision; that it would be unfair to judge his conduct during that night from a comfortable situation far in time and space from where it was exercised; that the fact that his colleague Liebrand reacted in the same way must be given more weight than theoretical speculations;

That it must rather be emphasized that, by aiming at the legs, he limited the necessary damage to such an extent that the Court Martial noted with satisfaction that Doctor Pierson was able to conclude that "she got away with a scar on her buttock"; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on August 21, 1993, as a member of UNOSOM, the UN humanitarian operation in Somalia;

Whereas, in the performance of these duties, the accused saw it as his duty at a given moment, as night guard, to fire an aimed rifle shot at the legs of the child, then aged twelve, of the claimant in the civil action; that in so doing he wounded the victim;

2. With regard to the argument of the defence

[...]

Whereas, according to the provisions of Article 70 of the penal code, no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas in Article 417 of the penal code the law as a general rule presumes the momentary need for self-defence when it is a question of preventing, by night, the climbing or breakage of the fences, walls or accesses to an inhabited house or flat or its dependencies;

3. With regard to the requirements for citing a superior's order as grounds for justification

Whereas, in accordance with domestic and international law, it is necessary to check the legitimacy of every order given;

Whereas, in other words, to be able to claim a superior's order as grounds for justification:

- (a) the cited order must be given beforehand, and its implementation must correspond to the purpose of that order,
- (b) the cited order must be issued by a legitimate superior acting within the limits of his authority,
- (c) the order issued must be legitimate, i.e., in conformity with the law and regulations;

Whereas, in connection with this last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate;

Whereas a careful investigation must be made to establish whether the force dictated by the senior officer did not exceed that which was absolutely necessary to bring about the intended action;

Whereas the conduct of which the defendant stands accused will be more closely examined hereafter in the light of the above;

4. With regard to the order given to the accused on August 21, 1993

Whereas, according to the defence, the order given to the accused during his duties as a night guard at the time of the facts was "to defend and prevent anyone from penetrating into" the cantonment of various Belgian military units [...];

5. With regard to the rules of engagement and their legal nature

Whereas this order, cited by the accused in the context of Article 70 of the penal code, must also be viewed in conjunction with the other, more general and earlier permanent instructions given him in the form of the rules of engagement;

Whereas the said rules of engagement are to be understood as meaning the general directives issued by the competent authority in the matter (in this instance, the UN as the international political authority);

Whereas these rules of engagement are intended to give as precise instructions as possible to the armed forces under the direct or indirect command of the

aforementioned competent (political or military) authority on the circumstances in which they may use all forms of force in the performance of their duties in an existing or possibly impending armed conflict;

Whereas these rules of engagement initially took the form of a mandate under international administrative law;

Whereas they have this nature with respect to both the Member States called upon by international bodies to take part in certain operations and the commanders that a Member State makes directly available to the international organization concerned;

Whereas the Member States, on the other hand, also “*translate*” the rules of engagement *in the form of an order*, relating to the use of armed force, for the troops *they deploy*;

Whereas, if this (oral or written) order to Belgian military personnel is to translate into an obligation of obedience and thus be admissible in a prosecution for insubordination under the terms of Articles 28 *et seq.* of the military penal code, it must, on the one hand, be issued by a hierarchical or operational superior of the same nationality, within the meaning of said Article 28 of the military penal code; and whereas it may, on the other hand, be disobeyed if its implementation can clearly involve the commission of a crime or offence (see Article 11, para. 2, subpara. 2, of the *Tuchtwet* (Code of Military Discipline [Law of 14 January 1975, available in French on <http://www.just.fgov.be>]]));

Whereas, in the actual drafting of the rules of engagement, account must be and was taken of the other relevant legal provisions issued, and as a rule only the legislator can repeal or suspend a legal provision;

Whereas, regardless of the form in which they are set out, rules of engagement are not to be regarded as orders similar to legislation;

Whereas the Court can further agree with the theoretical views put forward by the Public Prosecutor’s Department in its submission regarding the rules of engagement; whereas, more specifically, the Public Prosecutor’s Department correctly points out that the actual content of the rules of engagement discussed here is influenced by a number of rather incidental factors, legal standards and factual items, such as:

- the identity of the political authority involved,
- the nature of the ongoing operation,
- international law, including the law of armed conflicts and the relevant treaties,
- the “host nation’s” legislation,
- the domestic legal provisions of the Member States placing their armed forces at the disposal of the international organization concerned,
- and, obviously, not least the existing operational requirements and the national or international aims involved;

Whereas, while all these factors must undoubtedly be and were taken into account in the establishment and definition of rules of engagement by the Member State,

the criminal judge must, in assessing the grounds for justification as specified, for the purposes of the case before him, in Article 70 of the penal code, primarily test the conduct of the accused soldier who implemented the rules of engagement against the order as actually issued by the hierarchical superior from the Member State concerned to the soldier of his own nationality;

Whereas for the accused soldier the rules of engagement thus took the form of an order, both *de jure* and *de facto*;

6. With regard to the rules of engagement as they were to be implemented by the accused on August 21, 1993 [...]

Whereas even though the prosecution file contains no information on the name and rank of the Belgian superior who laid down the rules of engagement as an order and line of conduct for the accused, there is not the slightest doubt that those rules of engagement were issued to the accused by a Belgian superior; [...]

Whereas, in essence, at the time of the facts attention had to be paid first and foremost to the pertinent factors below:

- 1) the accused was given defensive orders;
- 2) in implementing these *defensive* orders, the accused was authorized to use deadly force in response to hostile acts or clear signs of imminent hostilities;
- 3) in the event of an attack or threat by *unarmed* individuals, the accused was entitled to use reasonable minimal force to repel the attack or threat after a verbal warning, a show of strength and the firing of warning shots;
- 4) the accused was entitled to regard *armed* individuals as a threat;
- 5) only minimum force was ever to be used.

7. With regard to the manner in which the accused carried out the orders given to him on August 21, 1993 [...]

Whereas the accused acted with the necessary care and in accordance with the law in the given circumstances;

Whereas, on observing the child creep through the concertina and thus arrive in the immediate vicinity of the bunker, he first gave the necessary verbal warnings in both Somali and English;

Whereas he then fired two warning shots into the ground about 50 cm away from the child, who still showed no reaction;

Whereas he finally decided to fire an aimed shot;

Whereas he fired this aimed shot at non-vital organs, viz. the legs;

Whereas the infiltration detected terminated only with this aimed shot;

Whereas the procedure followed by the accused was the only possible one to fulfil his defensive duty;

Whereas the accused had to regard the threat as real and, in order to ward off this threat, used minimum force after giving the required warnings;

Whereas the accused was physically incapable of catching the intruder (in view of the special position of the bunker, which was accessible only from the rear along an aperture in the cantonment wall);

Whereas it was unrealistic to call upon other reserve facilities, e.g., the picket;

Whereas in view of the possible imminent attack, the reaction had to be prompt and this reaction was also commensurate;

Whereas, all being considered, there was no other action suitable in the circumstances which could be taken to prevent further penetration;

Whereas the orders had been given beforehand, and their implementation corresponded to their intention;

Whereas the order was legitimate and was issued by a legitimate superior acting within his authority;

Whereas the force used was unmistakably proportional to the nature and extent of the threat;

Whereas, furthermore, it may be remarked that another guard acted in almost the same manner as the accused;

Whereas in this connection, and to conclude, it may also be remarked that, contrary to what the defence claims, one must reasonably accept that the victim was hit by a shot from the accused and not by the shot from the aforementioned other guard; whereas here attention must be paid primarily to the short distance from which it was fired; [...]

**ON THESE GROUNDS,
THE COURT,**

[...]

Declares the accused not guilty of the charges brought against him; [...]

B. Osman Somow v. Paracommando Soldier

[Source: Available at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation.]

**PRO JUSTITIA
No. 51 of the Judgment
Nos. 102 and 103 of the session record**

**THE MILITARY COURT,
permanent Dutch-language chamber, in session in Brussels,
has issued the judgment below**

IN THE MATTER OF:

**THE PUBLIC PROSECUTOR'S DEPARTMENT and
102 Osman Somow Mohamed, resident in Jilib-Gombay-Village, Somalia, [...]
v.
103 D[...] A[...] Maria Pierre[...], R/69016, Paracommando Battery
in Braaschaat,
standing accused that**

As a soldier on active service in Kismayo, Somalia, he did, on April 14, 1993, accidentally cause the death of Hassan Osman Soomon through a lack of foresight or care, but without the intention to assault another person; [...]

* * *

Notice of appeal having been given [...] against the judgment after trial handed down by the Court Martial in Brussels, [...]

states that the Court Martial, having considered *inter alia*: [...]

That Belgium, along with many other countries, dispatches soldiers to protect humanitarian operations; that the dispatch of military troops is justifiable only insofar as humanitarian operations are threatened by force and the international community considers that it has the right to neutralize or curb such force by means of another, legitimate, force;

That events over the past few years have shown that such operations are dangerous not only for the populations whom they are intended to help, but also for those who are given the unenviable task of using the force authorized by the international community;

That the first question to be put is whether the use of a weapon which caused the death of Hassan Osman Soomon was justified and whether, in the use of this weapon, an error was made which would not have been committed by a regular, cautious, highly trained soldier; [...]

That the accused was assigned on July 14, 1993, between 7.00 and 9.00 a.m., to an observation post on the Kismayo beach with orders to guard a shooting sector between barbed wire fences on his left and an imaginary line on his right within which were at least two wrecked ships, with the instruction that no-one was to enter that sector and that no-one should have the opportunity to "install" himself in the wrecks;

That the investigation has established that there was a person to the right of the largest ship; that the accused, after issuing all the specified warnings, aimed at the port side of the hull as a warning and in order not to hit the person on the starboard side of the hull, that the bullet (probably, for nothing is certain) ricocheted and struck the victim who was also in the forbidden area;

That it has not been established from the overall investigation that the accused formally exceeded the rules of engagement, and that no fault, or even carelessness, has been proven to the satisfaction of the law; [...]

III. WITH REGARD TO THE CASE ITSELF

1. Introduction

Whereas the facts of the charge lie within the context of the duties which the accused was performing on July 14, 1993 [...] as a member of UNOSOM, the UN humanitarian operation in Somalia; [...]

Whereas, in the performance of these duties, the accused unintentionally killed the victim;

2. With regard to the argument of the defence

Whereas the defence, moving for acquittal, claims that not the slightest fault can be attributed to the accused; [...]

Whereas, according to the provisions of Article 70 of the penal code [available in French on <http://www.just.fgov.be>], no offence has been committed if the act is prescribed by law and ordered by the competent authority;

Whereas Article 260 of the penal code provides grounds for justification in favour of an official who has carried out an unlawful order issued to him by a superior in matters falling under the latter's authority; [...]

Whereas the objective ground for justifying the application of the law and the admissibility of the lawful order issued by the competent authority cannot justify any subjective lack of precaution;

Whereas a defendant who has carried out a lawful order in an imprudent manner may not invoke the provisions of Article 70; whereas this also applies to persons belonging to the forces of law and order;

Whereas a person belonging to such forces who incorrectly carries out an order from his superior may not invoke Article 260 of the penal code either; [...]

3. With regard to the order given to the accused on July 14, 1993

Whereas the accused, in his statement drawn up on the date of the facts, claims that his instructions were to drive out any person found in a certain area of the beach at KISMAYO, SOMALIA, using all possible means of intimidation;

Whereas this statement is not contradicted by any other information in the file;

Whereas, *in fine* of the undated report [...], deputy prosecutor FRANSKIN emphasizes the military importance of the order, to wit that the shipwreck lying in the forbidden area could be used by a sniper;

Whereas the order, as described above, to be obeyed by the accused must be viewed also in conjunction with the other, more general instructions issued to him, whether in the form of regulations or in the form of rules of engagement and codes of conduct;

Whereas if a judgment is to be based on the compulsory nature of rules of engagement, it is not enough purely and simply to assume beforehand the binding character of those rules; whereas their precise legal nature must first be determined; whereas, for the accused, the rules of engagement in question also took the form of an order, both *de jure* and *de facto*;

Whereas, in connection with the said rules of engagement, account must indeed be taken of the instructions as actually given to the accused;

Whereas, according to the Public Prosecutor's Department, the rules of engagement [...], were applicable to Operation UNOSOM II starting from May 4, 1993;

Whereas the defence does not dispute this fact;

Whereas, therefore, the order given to the accused at the time of the facts allowed him to make considered use of the weapon as the very last means of subduing an unarmed person who constituted a threat to the discharge of his mission in the controlled area; whereas, in firing any shot, he had to take considerable care to avoid any collateral harm;

Whereas even the law of armed conflicts contains obligations regarding the precautions to be taken in order to spare the population during attacks (Article 57 of Protocol I of May 8, [sic] 1977 additional to the Geneva Conventions of August 12, 1949);

4. With regard to the manner in which the accused carried out the orders given to him on July 14, 1993

Whereas the Court, after examining the documents on file and the case presented in court, reaches the conclusion that the accused correctly carried out the order given to him in that, in the given circumstances, he behaved with the care required of a regular, cautious, highly trained soldier and in accordance with the law;

Whereas the Public Prosecutor's Department rightfully does not dispute "that the accused was authorized in the given circumstances to fire a warning shot";

Whereas the “force” inherent in the firing of that warning shot was proportional to the extent of the established threat, and it can be recalled that it was never the accused’s intention to harm anyone’s bodily integrity;

Whereas it must be remembered that that warning shot was necessary to intimidate a person, never identified, who was entering the forbidden area and also that that person was, from the accused’s position, to the right of the wreck;

Whereas the Public Prosecutor’s Department and the claimant in the civil action blame the accused for having selected the curved steel bow of the wreck as his aiming point and not, for example, the flat surface of its pilothouse;

Whereas it may also be concluded from the account of the facts that:

- the accused did indeed choose the port side of the curved steel bow of the wreck as his aiming point;
- the victim was fatally wounded as a result of the ricochet of the warning shot fired by the accused, and that it must be noted that the victim entered the area monitored by the accused from behind the wreck;
- before that time the accused had not noticed the victim’s presence at all and that, moreover, in view of his position, he had not been able to notice it before, especially as he was observing the state of the area through his binoculars;

Whereas the legal question to be answered is also whether the accused failed to exercise foresight and care when firing his warning shot;

Whereas this question must be answered in the negative since, in view of the curvature of the steel bow of the wreck, the bullet could only have ricocheted towards the area which no-one was allowed to enter;

Whereas it may be assumed that the accused selected this aiming point precisely in order that the person with regard to whom he was required to take intimidation measures should not be injured or killed by a ricocheting bullet;

Whereas it is very clear from the report of the investigation conducted by deputy prosecutor FRANSKIN on the spot that the victim was fatally wounded at only some five metres from the port side of the wreck;

Whereas this relatively short distance supports the accused’s claim that he had never seen the victim and could not therefore take account of his presence;

Whereas the accident may be ascribed solely to a set of unfortunate circumstances which could not be foreseen by the accused; [...]

**ON THESE GROUNDS,
THE COURT,**

[...]

Declares the accused not guilty of the charges brought against him, taking into account the change in the date of the facts and the identity of the victim; [...]

DISCUSSION

1. a. Does the applicability of IHL depend on whether the accused, as part of a Belgian contingent of UNOSOM, are considered to be under Belgian authority? Or that of the UN?
- b. Does IHL apply in these circumstances to these UN forces? What do you think of the argument that IHL cannot formally apply to UN operations, because they are not armed conflicts between equal partners but law enforcement actions by the international community authorized by the Security Council representing international legality, and their aim is not to make war but to enforce peace?
- c. Can the accused be considered for purposes of the applicability of IHL as members of the armed forces of Belgium (which is party to the Geneva Conventions), and can any hostilities they engage in be considered an armed conflict between Belgium and Somalia?
2. a. Assuming that IHL applies to the accused, although they are on a UN mission, does IHL apply to the situation in Somalia? Is there an armed conflict? Is it an international or non-international armed conflict? Could the IHL of international armed conflicts apply even if there were no hostilities between UN forces and regular Somali armed forces? If only events like those described in either of the cases occurred, could the situation be qualified as an armed conflict? (GC IV, Art. 2)
- b. If the IHL of international armed conflict applied, were the acts of either of the accused to be judged under the law governing the conduct of hostilities? (P I, Art. 51(2)) Or under the provisions on the treatment of protected civilians? (GC IV, Arts 27 and 32) Were those provisions violated?
- c. Did the acts of the accused violate IHL independently of whether the Belgian operations in Somalia were subject to the laws of international or of non-international armed conflicts? (GC I-IV, Art. 3)
- d. If IHL does not apply, is the accused's shooting of the child, in Case A., prohibited by international law? If IHL applies, does it provide special protection for children? Are the rules on this special protection relevant in this case? (GC IV, Art. 50; P I, Art. 77; P II, Art. 4(3))
3. a. If IHL applies, were the shootings in these cases governed by IHL, by international human rights law, or by both? Which of the two branches of law contains sufficiently detailed rules to enable the accused's behaviour to be prosecuted?
- b. Does international human rights law apply during an armed conflict? Even to hostile acts committed by combatants? If these acts don't necessarily violate the right to life?
- c. Did the accused's acts conform to Art. 57 of Protocol I? Particularly in Case B., did the Court correctly conclude that the accused exercised the appropriate level of foresight and care? Assuming that the IHL of international armed conflicts is applicable, is Art. 57 at all applicable to such uses of force as those of the accused?
- d. Were the accused's acts in conformity with UN standards for law enforcement officials, e.g., the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990? [Principle 9 reads: Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.]

Are those principles applicable to the accused's acts even in an international armed conflict? Did the threats in either case constitute a situation as described in Principle 9 warranting such action

by the accused? Is factor 3) mentioned in Case A., section III. 6., consistent with Principle 9 of the *Basic Principles*? Were the orders given to the accused in Case B. consistent with Principle 9?

4. a. When may a superior order provide a defence against charges of a violation of IHL? When does a superior order prevent punishment for such a violation? When does it reduce punishment for such a violation? (ICC Statute, Art. 33) [See **Case No. 23**, The International Criminal Court]
- b. In the first case, could the accused, as a mere rank-and-file soldier, know if the order received was legal?
- c. Are Arts 70 and 260 of the Belgian Criminal Code compatible with IHL as regards an order to commit a war crime?

Case No. 199, Canada, R. v. Brocklebank

[**N.B.:** Clayton Matchee, the Canadian soldier suspected of being the leader of the military group which beat to death a Somali adolescent, Shidane Arone, in 1993, appeared in court for the first time on 23 July 2002 (Source: *Le Devoir*, Montréal, 24 July 2002)]

[**Source:** Canada, Court Martial Appeal Reports, Volume 5 Part 3, 1995-1997; footnotes partially reproduced. Paragraph numbers have been added to facilitate discussion.]

HER MAJESTY THE QUEEN**Appellant,****v.****D.J. Brocklebank****(Private, Canadian Forces), Respondent****INDEXED AS: R.v. BROCKLEBANK****File No.: CMAC 383****Heard: Toronto, Ontario, 29 January, 1996****Judgment: Ottawa, Ontario, 2 April, 1996****Present: Strayer C.J., Décary and Weiler JJ.A.**

[Décary J.A:]

[...]

THE FACTS

[...]

[5.] I would add the following to the description of facts set out by my colleague:

- Prior to the departure of the Canadian contingent to Somalia, the Canadian Forces did not instruct the soldiers as to their role and duties as participants in a peacekeeping mission. Nor is there evidence that during their general training soldiers were ever instructed with respect to peacekeeping missions as opposed to war operations.
- On March 16, 1993, Private Brocklebank, [...] who was coming down with dysentery, went to bed early, without knowing that he was to be assigned later on in the evening. From the time he went to bed until he was awakened by Master Corporal Matchee ("Matchee") at approximately 2300 hours, he did not get up, did not leave his tent and did not have any knowledge of the fact that there had been an arrest and that both Matchee and Private Brown ("Brown") had been torturing the prisoner.
- At approximately 2045 hours on the night of March 16, 1993, Sergeant Hillier's patrol captured a Somali youth, Sidane Arone ("Arone"). Flexicuffs were placed on the prisoner's wrists, a baton was placed under his arms at the back, and he was walked through the camp in this way by Captain Sox

("Sox") and by Brown. On the way to the bunker, they stopped briefly at the Command Post so that Sox could tell Major Seward ("Seward") that they had captured someone.

- Brown testified that he had been ordered by Sox to go to the front gate and to get whoever was on gate guard duty, which happened to be Matchee. According to Brown, once Matchee had come to the bunker, Sox had told Matchee, "You are in charge of the prisoner". Sox was the only witness who testified that it was standard operating procedure for the person who was the gate guard to pull back, stay at the bunker location and assume responsibility for the prisoner. Brown, Corporal Glass, Sergeant Hooyer and Sergeant Hillier all testified to the fact that no such standard operating procedure existed.
- Once they reached the bunker, the prisoner was secured by Matchee and by Brown. Sox gave instructions to Matchee that flexicuffs were to be put on the ankles of the prisoner to secure him.
- At approximately 2100 or 2130 hours, Matchee ordered Brown to go and get Matchee's flashlight. When Brown returned with the flashlight, Sox, Warrant Officer Murphy, Seward and other persons were squatted down looking into the bunker. Brown then left the bunker area and some time later, Matchee came to Brown's tent and told Brown that he was going to interrogate or hassle the prisoner. Matchee also told Brown about some kind of an abuse order from Captain Sox, and that Captain Sox wanted the prisoner beaten.
- Brown was scheduled for gate guard duty at 2200 hours, although he first learned that he was going to be on duty that night sometime after 1930 hours. At approximately 2200 hours, Brown was on his way to his sentry post at the gate when Matchee ordered him over to the bunker. At that time, according to Brown, Matchee was in charge of the prisoner while Brown was on guard duty. [Footnote 3: Private Brown was eventually charged and convicted with one count of torture. He was not charged with negligent performance of a military duty.] Brown de-kitted, went into the bunker and began beating the prisoner with Matchee.
- Prior to the arrival of the respondent at the bunker at approximately 2308 hours, Matchee had been beating the prisoner and was showing the prisoner to various people, none of whom had done anything to try to stop Matchee.
- Brown testified that a flashlight was required to see anything in the bunker.
- According to the respondent, when Matchee woke him at approximately 2300 hours, the respondent had no idea why he was being woken. He understood that he was ordered to be on duty at the front gate.
- After leaving his tent at approximately 2307 hours, the respondent was heading to the front gate when Matchee called him to come over to the bunker. The respondent testified that he believed that this was an order

and he walked toward the bunker. As he got close to the bunker, Matchee pointed a flashlight at a Somalian in the bunker and said, "Look what we got here". The respondent testified that he had no idea who the prisoner was, nor did he have any idea as to why the person was in the state in which he saw him.

- After Matchee turned off the flashlight, he asked the respondent for his pistol. The respondent asked what Matchee wanted it for and Matchee's response was something to the effect of, "Give me the f'n pistol, just give me your pistol Brocklebank". Brown testified that the respondent still seemed puzzled and told Matchee, "But it's loaded" and Matchee said, "Just give me your pistol Brock, that's an order". The respondent followed the order and gave Matchee his pistol, although he had no awareness at that point what Matchee's intended use of the pistol was. It was not until Matchee told Brown, "I'd like to take a picture of me", that the respondent understood why Matchee wanted the pistol. Matchee then held the pistol to the prisoner's head and told Brown to take pictures of him, which Brown did. After this, Matchee returned the pistol to Brocklebank.
- Brown left the bunker after the picture taking. Brown testified that in the entire time that he was in the area of the bunker, he never saw the respondent de-kit, never saw him enter the bunker and never saw him touch the prisoner. Further, Brown was clear that at no time did he ever see the respondent abuse the prisoner or encourage Matchee in what he was doing. There were no photographs of the respondent with the prisoner.
- The respondent testified that after Brown had left, he remained outside the pit while Matchee was down in the pit with the prisoner. The respondent asked Matchee if anyone else "had seen this" and Matchee told him that Warrant Officer Murphy had kicked or hit the prisoner and that Captain Sox had instructed Matchee to "give him a good beating, just don't kill him".
- The respondent testified that he remained outside at the entrance of the bunker, watching the gate from the bunker. He never went down into the pit while Matchee was present. Even though he knew the beating was going on, he assumed it was as a result of an order given to Matchee and he sat there, in shock, not realizing the severity of the beating.
- The respondent testified that at no point had he been ordered to guard the prisoner and that he believed that the prisoner was in the custody of Matchee.

[6.] I shall now move on to the three grounds of appeal. [...]

THE FIRST GROUND OF APPEAL: THE CHARGE OF TORTURE

[7.] I agree with my colleague that the first ground of appeal should be dismissed.

[8.] The accused was charged under section 269.1 of the Criminal Code of Canada ("*the Criminal Code*") and under section 72 of the National Defence Act ("*the Act*"), of the offence of aiding and abetting in the commission of torture. The relevant *Criminal Code* provision reads as follows:

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. [...]

72. (1) Every person is a party to and guilty of an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it;
- (c) abets any person in committing it; or
- (d) counsels or procures any person to commit it.

[9.] In order to be found guilty of the offence of aiding and abetting in the commission of torture, the panel [the members of the court of first instance] had to be convinced beyond reasonable doubt that Brocklebank a) did or omitted to do something; b) for the purpose of aiding Matchee in the commission of the offence of torture.

[10.] Assuming for the sake of discussion that the accused did or omitted to do something, there was, in my view, not even an iota of evidence that could establish that the respondent had formed the intention required to commit the offence he was charged with. [...]

THE THIRD GROUND OF APPEAL: THE DEFENCE OF OBEDIENCE TO SUPERIOR MILITARY ORDERS

[11.] The defence of obedience to superior military orders was put to the panel by the Judge Advocate in his charge on the offence of torture. Even defence counsel agrees that the defence he was raising was not that of obedience to superior military orders; what he wanted to do, as my colleague puts it, was to raise the defence of honest belief as negating the mens rea of the offence of torture. [...]

[...]

THE SECOND GROUND OF APPEAL: NEGLIGENT PERFORMANCE OF A MILITARY DUTY

[12.] The prosecution alleges that the Judge Advocate made two fatal errors in his instructions to the panel on the charge of negligent performance of a military duty.

a) *The standard of care* [...]

[18.] In summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable

person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. [...] Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer. [...]

b) *A de facto duty of care*

[24.] Second, the prosecution alleges that the Judge Advocate failed to instruct the panel that the respondent had a *de facto* duty of care as a Canadian Forces soldier to protect civilians with whom he came in contact from foreseeable danger, whether or not he was aware of the duty. Conversely, defence counsel claims that the Judge Advocate erred in instructing the panel that on the charge of negligent performance of a military duty imposed upon the respondent, the panel could consider the “non-statutory duty of care to observe the provisions of chapter 5 of the Unit Guide to the Geneva Conventions with respect to civilians with whom the Canadian Forces come into contact”. [...]

[25.] The Judge Advocate was of the view that section 5 of chapter 5 of the Unit Guide to the Geneva Conventions issued by the Chief of Defence Staff (I shall return to the Unit Guide in more details further in these reasons) imposes on a member of the Canadian Forces, at all times including in peacetime, a duty to safeguard civilians in Canadian Forces custody whether or not these civilians are in that member’s custody. The Judge Advocate further instructed that the mere knowledge or notice of the relevant provision in the Unit Guide is sufficient to activate the duty and render culpable under section 124 of the Act an omission to safeguard a civilian prisoner. While it is not questioned that the Geneva Conventions for the Protection of War Victims assert the right of civilians to be protected from acts of violence where possible I cannot so quickly subscribe to the Judge Advocate’s view that as a matter of military law, the Unit Guide and the Geneva Conventions apply to peacekeeping missions and if they do, that they create a “military duty” in the sense of section 124 of the *National Defence Act*. I will elaborate my reasoning with an outline of the nature and purpose of the charge of negligently performing a military duty, to be followed with an examination of the nature and effect of the Unit Guide and the Geneva Conventions.

i) The charge of negligent performance of a military duty

aa) The context [...]

[35.] The offence of negligently performing a military duty, [...] concerns the discharge of any military duty. The charge relates explicitly to the manner of discharging a military duty imposed upon a member of the Canadian Forces. [...] The

impugned act or omission of the accused must constitute a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. [...]

bb) "A military duty" [...]

[48.] The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff. Although this casts a fairly wide net, I believe that it is nonetheless necessary to ground the offence in a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the performance of military duty *per se*, which upon a plain interpretation of section 124, it was clearly not Parliament's intention to sanction by that section.

ii) Military duty to safeguard prisoners; the Unit Guide and the Geneva Conventions

aa) Where prisoner in custody of the accused

[49.] It is a principle of law, recognized by counsel for both parties, that a person who has physical custody of, and authority over a prisoner is under a duty to safeguard that prisoner. That duty exists and is enforceable independently of the Unit Guide and of the Geneva Conventions.

[50.] Counsel for the prosecution relies on a stream of English and Canadian jurisprudence for what he refers to as a common law duty of care. While I agree that the principle exists, I would hesitate to apply *mutatis mutandis* to the military milieu a jurisprudence developed in a non-military context. Although all military duties are subsumed into the broader category of legal duties, general private law duties such as a tort law duty of care owed by prison guards to prisoners are not, in my opinion, contemplated by the term "military duty". As I earlier stated, it is clear that Parliament did not intend to codify a civil law duty of care in the Code of Service Discipline. [...]

[52.] [...] The Judge Advocate correctly instructed the panel that before they could find Private Brocklebank guilty of the charge, they had to establish beyond a reasonable doubt that the prisoner was in his custody, or that he had custodial responsibilities in respect of the prisoner sufficient to invoke the military duty to safeguard the prisoner.

bb) Where prisoner in custody of the Canadian Forces but not in custody of the accused

[53.] The appellant contends, in what appears to have been an afterthought, that even if the prisoner was in the direct custody of the accused, the latter was nonetheless bound by a *de facto* duty to come to the assistance of an aggrieved prisoner in Canadian Forces custody with whom he came in contact. The Judge Advocate agreed with the prosecution. [...]

[56.] [...] Defence counsel having mentioned:

... I believe it is a matter agreed as between us, that there is no suggestion that the Geneva Convention applies to the situation that is before you, but it is admitted that insofar as a guard guarding a prisoner in the army has a responsibility at common law, as we understand the ordinary common law. The responsibility of a guard to the prisoner is so akin to what the Geneva Convention sets out that I have no objection to you having it, but that it will not be an issue as to whether or not, in fact, the rules of the Geneva Convention apply specifically to what occurred in the Somalian operation. [...]

[58.] A military duty, as I earlier found, can arise from statute, regulation, or specific instruction, such as an order from a superior officer or an imperative from the Chief of Defence Staff. Counsel for both prosecution and the defence concede that there is no statutory or regulatory duty extant which imposes an obligation on members of the Canadian Forces to take positive steps to safeguard prisoners who are not in their direct custody. The appellant, however, relies on Canadian Forces Publication (CFP) 318(4), Unit Guide to the Geneva Conventions, issued by the Chief of Defence Staff on June 15, 1973, as the basis of a general military duty of all service members to protect civilian prisoners not in their custody.

[59.] The aims of the manual, as appears from its introduction, is “to acquaint all ranks with the principles of the Geneva Conventions for the Protection of War Victims signed on August 12, 1949” and to comply with the provision contained in each of the four Conventions “requiring participating nations to distribute the text of the Convention as widely as possible and, in particular, to include a study of these texts in programmes of military instruction”. The manual “is a guide only”. Paragraph 5 of chapter 1 states that the provisions of the Conventions apply “to all nations who have accepted the conventions in declared war and in any other armed conflict which may arise” and paragraph 7 states that “(i)t therefore follows that members of the Canadian Forces should observe all the provisions of the Conventions when engaged in any conflict”.

[60.] Chapter 5 of the manual is entitled “Treatment of Civilians” and it deals specifically with Convention IV of the Geneva Conventions, i.e. the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, known as the Civilian Convention. It is noted in the first paragraph that “[t]he Civilian Convention is designed to give protection to categories of civilians particularly exposed to mistreatment in time of war” and that “[i]ts provisions are [...] restricted to the *inhabitants of occupied territory*” [my emphasis]. Paragraph 2 specifies that “the provisions outlined in this chapter should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact”. Paragraph 5 provides as follows:

5. Civilians are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They must be humanely treated at all times

and protected against all acts of violence possible and, where appropriate, against insults and public curiosity. [Footnote 31: Whether a civilian, once he becomes a prisoner, remains a civilian for the purposes of the Civilian Convention, is a question which I need not answer in view of the conclusion I have reached as to the applicability and meaning of the Convention. I shall assume, for the sake of discussion, that the civilian convention treats civilians on a same footing whether or not they are prisoners.]

- [61.] I do not believe that the relevant provisions of the Unit Guide constitute specific instructions or imperatives giving rise to an ascertainable military duty. The provisions are, by the very words of the manual, “a guide only”.
- [62.] Even if they were to be considered a specific instruction, they would not apply to the case at bar for the simple reason that the Civilian Convention itself, which the Unit Guide purports to explain, does not apply. The mission of the Canadian Forces in Somalia was a peacekeeping mission. There is no evidence that there was a declared war or an armed conflict in Somalia, let alone that Canadian Forces were engaged in any conflict [footnote 32: The 1949 Geneva Conventions have been approved by the Canadian Parliament in the *Geneva Conventions Act* (R.S.C. 1985, c. G-3, as amended). Protocols I and II to these Conventions, which were adopted in Geneva in 1977, were approved by the Canadian Parliament on June 12, 1990 (38-39 Eliz. II, c. 14) in an amendment to the *Geneva Conventions Act*. Section 9 of *Geneva Conventions Act* provides that “[a] certificate issued by or under the authority of the Secretary of State for External Affairs stating that at a certain time a state of war or of international or non-international armed conflict existed between the States therein or in any State named therein is admissible in evidence in any proceedings for an offence referred to in this Act.” No such certificate having been filed in this case, this court is simply not at liberty to assume the existence of a state of war or of an armed conflict in Somalia. Without such evidence, the Convention cannot be said to be applicable and it follows that the Unit Guide to that convention cannot apply either.]. There is no evidence that the prisoner was “exposed to mistreatment in time of war” or that the prisoner was an “inhabitant of occupied territory”. That the Civilian Convention does not by its very terms apply to peacekeeping missions is confirmed by the wording of the Additional Protocols adopted in Geneva in 1977. In the *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, it is observed that the Civilian Convention “only protects civilians against arbitrary enemy action, and not – except in the specific case of the wounded, hospitals and medical personnel and material – against the effects of hostilities” and that “although humanitarian law had been developed and adapted to the needs of the time in 1949, the Geneva Conventions did not cover all aspects of human suffering in armed conflict”. (General Introduction at xxix). The 1977 Protocol I, which relates to the Protection of Victims of International Armed Conflicts and whose article 51 was meant to enlarge the concept of “protection of the civilian population” as found in the Civilian Convention, only affords civilians “general protection against dangers of military operations” means “all the movements and activities carried out by armed forces related to hostilities”. The 1977 Protocol II, which relates to the Protection of Victims of Non-International Armed Conflicts, contains a similar provision (article 13).
- [63.] Since the Civilian Convention cannot be related to peacekeeping missions such as the one in which the Canadian Forces were involved in Somalia. I fail to see

how it could be said that the Unit Guide whose aim is to explain that Convention applies to such missions. I find, furthermore, that there was no evidence before the Judge Advocate that would allow the Court to assume that the peacekeeping mission could be equated to an armed conflict within the purview of the Civilian Convention or the Unit Guide. [...]

- [64.] Even if I were to hold that the Unit Guide is a source of specific instructions whose application should be extended to peacekeeping missions, the provision of the Unit Guide that declares that civilians “must be humanely treated at all times and protected against all acts of violence where possible and, where appropriate, against insults and public curiosity” would not, in my view, establish a *de facto* military duty as asserted by the prosecution.
- [65.] I see no basis in law for the inference that the Geneva Conventions or the relevant provisions of the Unit Guide impose on service members the obligations [...], to take positive steps to prevent or arrest the mistreatment or abuse of prisoners in Canadian Forces custody by other members of the Forces, particularly other members of superior rank. I do not wish to comment on the duty that a superior officer might have in similar circumstances, but assert that a military duty in the sense of section 124 of the *National Defence Act*, to protect civilian prisoners not under one’s custody cannot be inferred from the broad wording of the relevant sections of the Unit Guide or of the Civilian Convention. I agree [...] that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner, consistent with Canada’s international obligations, the rule of law and simple humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international Conventions and more specifically, the Unit Guide, I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.
- [66.] Through the *Geneva Conventions Act* Parliament has honoured its international obligations and codified as offences under Canadian law the “grave breaches” listed in the 1949 Geneva Conventions, including torture and inhumane treatment. [...] It is not insignificant that neither the 1965 statute nor the 1990 amendment impose a specific duty on armed forces personnel to protect prisoners in their custody. [...]

CONCLUSION [...]

- [70.] In closing, I would remark that although I am not prepared to extract from the relevant provisions of the Unit Guide a culpable military duty to safeguard prisoners where no custodial relationship exists between the accused and the prisoner, I would add that it remains open to the Chief of Defence Staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the Chief of Defence Staff to specify that these standards apply equally in time of war as in time of peace,

to impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge and to ensure that Canadian Forces members receive proper instructions not only during their general training but also prior to their departure on specific missions. Given Canada's traditional and ongoing role as a peacekeeping nation, and the possibility, of if not likelihood of similar circumstances arising in the future, this might prove a useful undertaking. [...]

STRAYER C.J.: I agree [...]

WEILER J.A. (dissenting): [...]

[83.] Torture is an offence of specific intent. The Crown must therefore prove that Brocklebank failed to act in order to assist Matchee in torturing Arone. Both the Crown and the defence agreed that if Brocklebank was guarding Arone then at common law he has a duty to protect him. If, however, Brocklebank was not guarding Arone, the Crown proceeded on the basis that Brocklebank could be guilty as a party under section 21 of the *Criminal Code* because he ought to have known that he had a duty to protect civilians, and his failure to do so aided and abetted the torture of Arone. The defence admitted that prisoners and civilians in Canadian Forces custody must be protected against all acts of violence as a matter of General Service Knowledge ("GSK"). As part of their battle training, soldiers were instructed on the provisions of the Geneva Convention for the treatment of prisoners of war as well as civilians. In materials provided to them (specifically those in Exhibit "J"), it was clear that the Geneva Convention specifically prohibits the torture or abuse of civilians. It was clear in these materials that the Geneva Convention "should be regarded as the minimum standard of treatment of any civilians with whom our armed forces come in contact with." The defence did not admit that the accused had specific knowledge of this duty. The position of the Crown is that evidence of Brocklebank's specific knowledge of the GSK was immaterial and the Judge Advocate erred in his summation in not clearly saying so.

[84.] Given the particular approach of the Crown, this ground of appeal must fail. In relation to the charge of torture, Brocklebank's specific knowledge of the GSK was relevant to his purpose in handing over his revolver to Matchee and to his intention in continuing to be present at the bunker. Clearly, if Brocklebank was under a duty to protect Arone and did not do so for the purpose of aiding Matchee to torture Arone, he could be found guilty as a party. At the opposite end of the spectrum, it is trite to say that had Brocklebank been unarmed, his mere presence while Arone was being tortured would not amount to aiding and abetting if Brocklebank had no duty towards Arone. These two extremes, which were put by the Judge Advocate, ignore a third position. Brocklebank was armed. If the purpose of his presence was to ensure against Arone's escape, particularly when he was left alone with Arone while Matchee went for a cigarette, then there was evidence upon which he could have been found guilty as a party. [...]

- [89.] [...] The Judge Advocate instructed the panel that before they could find that Brocklebank was guilty of a breach of a statutory duty of care under section 124 of the *National Defence Act*, they must find beyond a reasonable doubt that Brocklebank had actual knowledge of a duty under section 124 and actual knowledge of the provisions relating to the Geneva Convention. This was an error inasmuch as section 150 of the Act states:

The fact that a person is ignorant of the provisions of this Act or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person.

- [90.] This provision imposes liability on an objective standard. [...] Earlier in his ruling rejecting a motion by the defence that the prosecution had failed to make out a *prima facie* case, the Judge Advocate expressed the view that members of the Canadian Forces are under a duty to observe the provisions of chapter 5 of the Unit Guide to the Geneva Convention with respect to civilians with whom the Canadian Forces come into contact and that, specifically, the duty includes the protecting of civilians from all acts of violence where possible. In considering whether Brocklebank ought to have known that soldiers on a peacekeeping mission have a duty of care towards civilians, the panel should have been instructed that it was not necessary to prove that Brocklebank had actual knowledge of the duty in section 124 [...]. Evidence that Brocklebank was given notification of a duty to protect civilians, through lectures given to Brocklebank's platoon, was presented at trial. The average soldier would have been aware of this duty. In my opinion, a peacekeeping mission is a military operation carried out by armed forces with the aim of preventing hostilities and therefore within the Geneva Convention as enlarged by the 1977 Protocols. [...]

THE THIRD GROUND OF APPEAL

- [96.] At trial, Brocklebank testified that he questioned Matchee about his torture of Arone and that Matchee responded that Sox told him to "[g]ive him a good beating, just don't kill him." In cross-examination, Brocklebank testified that he did not do anything about the beating because he thought it had been ordered. The appellant submits that the Judge Advocate erred in law when he directed the members of the panel in respect of the applicability of the defence of superior orders. Even if Brocklebank lacked the courage to point his pistol at Matchee and stop him, he could have sought help. He did not do so.
- [97.] In *R. v. Finta*, [...] the Supreme Court recognized that the defence of obedience to superior orders was available to members of the military. The defence is not available where the orders in question were manifestly unlawful unless the circumstances of the offence were such that the accused had no moral choice as to whether to follow the orders. The respondent concedes that Brocklebank had a moral choice but submits that the orders in question were not manifestly unlawful. To be manifestly unlawful the orders must offend the conscience of

every right-thinking person. Because [of] Brocklebank's lower rank, the defence contends that he was not in a position to assess the lawfulness of the order.

- [98.] If Brocklebank had been ordered to assist in abusing Arone, it would, in my opinion, have been a manifestly unlawful order. As a result, there was no evidentiary foundation for the defence of obedience to superior orders [...].
- [99.] The defence raised does not appear at heart to be a defence based on Brocklebank's obedience to an order given by a superior: the only orders which Brocklebank received from Matchee were to go to the pit and to give him his gun. Rather, the defence is one of non-interference based on a belief that an order has been given to a superior officer. The defence raised here is that Brocklebank honestly believed that Matchee was entitled to beat Arone because Matchee told him that Sox had said it was O.K. so long as he did not kill him. In essence, the appellant raises the defence of honest belief as negating the mens rea of the offence. [...]

DISCUSSION

1. a. (*Paras 62, 63, 89 and 90*) Does the Court recognize that international humanitarian law (IHL) is applicable to acts committed against Arone? Does Judge Décary develop his reasoning as he says he will in para. 25? What is the opinion of Judge Weiler? What is your opinion? Was there an armed conflict in Somalia? Were there military operations there? Was there an armed conflict in which Canadian forces were involved? Was Canada a party to the armed conflict? If there was no armed conflict, is that sufficient to conclude that GC IV did not apply? (GC IV, Art. 2)
- b. (*Para. 62, note 32*) Could the Court have decided that there was an armed conflict in Somalia in the absence of a certificate from the Secretary of State for External Affairs confirming it?
2. Which rules of IHL did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27, 31, 32)
3. Was Brocklebank a hierarchical superior of those who tortured and killed Arone?
4. a. (*Paras 5 and 49*) Was Arone a prisoner of Canada? Was Canada responsible for Arone's treatment, or were the persons detaining Arone entirely responsible for it? (GC IV, Art. 29)
- b. Is Canada responsible for the behaviour of Seward, Sox, Brown, Matchee and Brocklebank? Even if they acted in violation of Canadian regulations? Even if they had acted contrary to their orders? (P I, Art. 91) Was Canada's responsibility limited to ensuring that its agents did not mistreat Arone, or was it also required to ensure that third parties did not mistreat Arone? (GC IV, Art. 27)
- c. (*Paras 5 and 49-52*) Among those implicated (Seward, Sox, Brown, Matchee and Brocklebank), who detained or kept watch over Arone? Did those who detained or kept watch over Arone only have a duty not to mistreat him, or did they also have a duty to protect him? (GC IV, Art. 27)
- d. (*Paras 24, 25, 53-67*) Was Arone in the custody of Brocklebank? In the Court's opinion? In the opinion of Judge Weiler? If this had not been the case, could Brocklebank have been punished if he had mistreated Arone? If he did not have Arone in his custody, did Brocklebank, as an agent of Canada, have to uphold Canada's obligation to protect prisoners in Canada's power? Is there, in addition, a general obligation for every soldier to protect all civilians, even those not detained? Only if they are in the power of the party to which the soldier belongs? (GC IV, Art. 27) Is a failure to meet this obligation a grave breach? (GC IV, Art. 147; P I, Art. 86(1))

- e. (*Paras 48-61, 64, 89 and 90*) Did Brocklebank have “the task” of upholding Art. 27 of GC IV? Under international law? Under Canadian law? Was this task sufficiently precise and verifiable to render its non-performance punishable? Is knowledge of the rule a prerequisite for any punishment in the event of a violation?
 - f. (*Para. 60*) Does Art. 27 of GC IV apply only to the inhabitants of occupied territories? Is a civilian held prisoner still a protected civilian? What is the difference between the text of Art. 27 and that of Chapter 5, para. 5, of the manual quoted in para. 60?
 - g. (*Paras 5 and 97-99*) Could Brocklebank refuse when his superior, Matchee, ordered him to give him his pistol? Did he have an obligation to refuse? In the opinion of Judge Weiler? If Matchee had killed Arone with Brocklebank’s pistol, would Brocklebank have been an accomplice to the murder? Could what Matchee did with Brocklebank’s pistol be termed torture? Was Brocklebank an accomplice to torture?
 - h. (*Paras 11 and 99*) If Brocklebank believed that Captain Sox had ordered the ill-treatment inflicted on Arone, could the order justify a failure to fulfil his obligation to protect Arone? (ICC Statute, Art. 33 [See **Case No. 23**, The International Criminal Court] and paras 98-99 of the dissenting opinion of Judge Weiler.)
 - i. What should Brocklebank have done when he saw Arone?
 - j. (*Paras 64-65*) Would Brocklebank have been convicted if the Court had recognized the applicability of the Geneva Conventions?
5. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or the separate breach of negligently performing their duty as commanders?
6. What are the objective factors that might have led these individuals to commit the offences?

Case No. 200, Canada, R. v. Boland

[Source: Court Martial Appeal Court of Canada, CMAC-374, Ottawa, Ontario, May 16, 1995; footnotes omitted.]

**Court Martial Appeal Court of Canada
Ottawa, Ontario, Tuesday, May 16, 1995**

between:

**HER MAJESTY THE QUEEN, Appellant
and**

**V89 944 991
SERGEANT BOLAND, MARK ADAM, Respondent**

JUDGMENT

STRAYER C.J. [...]

FACTS

[...] The respondent Sergeant Boland was in command of one of the sections of 4 Platoon. Matchee and Brown were members of that section. 4 Platoon was commanded by Captain Sox. It was part of 2 Commando company commanded by Major Seward. [...]

Matchee was charged but was later found unfit to stand trial. Brown was convicted of manslaughter and torture. He was sentenced to five years imprisonment and both the conviction and sentence have been confirmed by this Court.

Boland was charged with two offences. The first charge was for the torture of Arone, an offence prohibited by section 269.1 of the *Criminal Code* as incorporated by section 130 of the *National Defence Act* as an offence under the latter Act. The second charge was that of negligently performing a military duty. Boland pleaded guilty to the charge of torture. The charge of torture was not proceeded with. [...]

The statement of circumstances, with Boland's differing evidence noted, was as follows. During the morning of March 16th Sergeant Boland, who was in poor health, had been told at a meeting of the "O" group, involving section heads and their platoon commander, that certain steps were to be taken concerning the threat of Somali infiltrators coming into the compound. Section commanders were told that the company commander had said: "abuse them if you have to, just make the capture". Boland decided not to pass this on to his men. His section had responsibility for guard duty that evening, including the guarding of any prisoners that might be apprehended. Such prisoners were to be put in an unoccupied machine gun bunker near the compound gate. After Arone was apprehended outside the Canadian compound by a patrol headed by Captain Sox, he was delivered to Boland's section. At that time Matchee was on duty and Private Brown was present when the prisoner

was put in the bunker. At this point the prisoner was bound by his ankles and his wrists and had a baton stuck through his elbows behind his back. Boland arrived shortly before 2100 hours to relieve Matchee. Boland ordered Arone's ankles released and arranged for looser wrist binding. According to the statement of circumstances, while Boland was there "another soldier" secured the riot baton by putting a sash cord over one end of it, putting the cord over a roof beam, and tying it to the other end of the baton. (Boland states that Arone was sitting on the ground with his hands bound and the baton behind his elbows although the precise time of this state of affairs was not clear). While Boland was present Matchee retied Arone's ankles. He removed the "skirt" (some kind of light garment worn by Somalian males) from Arone and tied it around Arone's head. He then proceeded to pour water on Arone's head. Boland told Matchee to stop doing that or he would suffocate Arone. (Boland's version suggests that Matchee may have been trying to give Arone a drink by pouring water on his cheek. Boland also suggested that the blindfolding was proper as a security measure, although it was not explained why a prisoner would be led through Canadian lines without being blindfolded and then blindfolded after having seen the interior of the bunker). Matchee remained for some time during Boland's guard duty lasting from 2100 to 2200 hours. Matchee then left and later returned with Brown who arrived at about 2155 to relieve Boland. In Boland's presence Brown punched Arone in the jaw. (Boland in his account only referred to Brown saying something to Arone). As Boland went off duty at 2200 hours he said to Brown and Matchee: "I don't care what you do, just don't kill the guy." (According to Boland, he said "don't kill him", and this was said "in a facetious sort of way, sarcastic".)

Matchee stayed on with Brown for a time after 2200 hours during which time both are said to have hit and kicked Arone. Matchee left and went to the tent of Corporal McKay where he drank beer. Boland arrived at the same tent and had a beer with Matchee and McKay. Matchee said that Brown had been hitting Arone and that he, Matchee, intended to burn the soles of Arone's feet with a cigarette. Boland is reported to have said "Don't do that, it would leave too many marks. Use a phone book on him." (Boland confirmed this discussion took place, but said he did not believe Matchee and thought he was just trying to get a reaction. He said his own reply was sarcastic and the discussion of the phone book was "flip, banter", there being no phone books available.) In the same conversation Boland told Matchee of the instructions from senior officers that it was all right to abuse prisoners, on which Matchee commented "Oh, yeah!" Again, in parting, Boland said to Matchee "I don't care what you do, just don't kill him". (Boland admitted saying this but explained it thus: "I was sick and tired of the conversation and I just brushed him off with that"). At this point it should have been obvious that Matchee planned to go back to the bunker. Boland himself went to bed without returning to the bunker. Matchee did return to the bunker about 2245 and proceeded, with the acquiescence or assistance of Brown, to beat Arone to death.

Some other evidence introduced on behalf of Boland by examination or cross-examination indicated that in these circumstances a section commander was entitled to go to bed and that any problems experienced by a troop on duty was to be reported to the duty officer who in this case was Sergeant Gresty. Boland testified that he believed Brown to be a "weak" soldier from whom he would not have expected

aggressive treatment of a prisoner. He also claimed that he was not aware of the aggressive tendencies of Matchee who had just been assigned to his section. There was however other evidence that Boland “knew what he [Matchee] was like” and that “Matchee’s reputation was quite well known within 4 Platoon [...]”. This reputation was that “he could be quite a bully”.

Boland did, during his evidence in chief, confirm that he had acted negligently. [...]

The Crown, as indicated above, more generally contends that the sentence of ninety days imposed by the General Court Martial was quite inadequate and it should have been at least eighteen months imprisonment. [...]

ANALYSIS

[...]

Adequacy of the Sentence

[...] Apart from the inadequate instructions given by the Judge Advocate, I do not believe it is possible to say that this panel of officers could reasonably have fixed the sentence at only ninety days, whatever view they took of the evidence properly before them. As a minimum it must be recognized that the respondent never disputed the particulars of his offence, namely that he failed to ensure, as it was his duty to do, that Arone was safeguarded. In his own examination in chief he confirmed on several occasions that he had been negligent. The sad but unalterable fact is that that negligence led to the death of a prisoner. Even taking the view of the evidence most favourable to the respondent, the panel was bound to conclude that Boland had strong reason to be concerned about the conduct of Matchee and Brown in respect of a helpless prisoner. Even if the panel believed he did not see Brown strike the prisoner on the first occasion and even if it concluded that Boland disbelieved Matchee’s statement that Brown had struck the prisoner after he, Boland, had left, Boland had admitted that he considered Brown to be a “weak” soldier who could surely not be counted on to resist the initiatives of Matchee. He admitted having seen Matchee do life-threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard Matchee speak of intending to burn the prisoner with cigarettes. He thus had good grounds of apprehension as to Matchee’s conduct. There was also evidence from even some defence witnesses that Matchee’s reputation was well known. Yet, it was clear that Boland had said at least once and probably twice in the presence of Matchee: “I don’t care what you do, just don’t kill the guy”. He gave no proper order to Matchee as to safeguarding the prisoner and left him unsupervised. Nor was it in dispute that it was Boland’s responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. Boland failed in that duty, with grave consequences.

I see nothing in the instructions of the Judge Advocate, nor in the sentence, to indicate the General Court Martial had a proper regard to the fundamental public policy which underlies the duty of a senior non-commissioned officer to safeguard the person or life of a civilian who is a prisoner of Canadian Forces, particularly from apprehended brutality or torture at the hands of our own troops. That is this case. There were here

no mitigating circumstances such as the presence of an armed or dangerous prisoner, or even one who was physically uncontrollable. These events did not happen in the heat of battle. There was nothing to suggest that this prisoner had caused any harm to any Canadian or to any Canadian military property: indeed he was captured, not in the Canadian compound, but in an abandoned adjacent compound. No one can dispute the difficult and sometimes hazardous circumstances under which Canadian forces were operating in Somalia in general, nor the physical problems which Boland himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others.

It is only fair to note the good, and in some respects remarkably good, record of the respondent both prior to going to Somalia and in Somalia itself. He carried out some exercises involving great courage and initiative. Reports indicate that since his conviction and sentencing he has shown a positive attitude and received good performance evaluations. (Although automatically demoted, upon sentence of incarceration, to the rank of private, he has since earned a promotion to corporal). He has also suffered a major financial loss due to his demotion. Regrettably, none of this can adequately offset, for sentencing purposes, his very serious failure to ensure the safety of a prisoner.

The argument has also been made that more senior officers were even more responsible for this deplorable situation and that Boland should not bear the burden. Reference is made to the order or message said to have been passed on from the company commander that it was all right to abuse prisoners. In the case of Boland this argument as to the greater responsibility of superiors cuts two ways. Private Brown, one of the lowest ranking persons involved, has been convicted of manslaughter and torture and sentenced to five years. Boland, his immediate commanding officer who admitted to negligence in not preventing Brown's criminal actions, was sentenced to ninety days. There appears to be a disparity between these sentences. To the extent that justification is sought in the superior "order" to abuse prisoners, Boland to his credit recognized this to be an improper order and at one point at least decided not to pass it on. Therefore he can hardly invoke it as a defence. With respect to the responsibility of Boland's superiors, and the charges, verdicts, and sentences concerning various commissioned officers, at least some of these remain under appeal and will have to be dealt with on their own terms at the appropriate time.

It has also been argued since that since Boland has already served his sentence the court should not return him to prison. This is certainly a matter for serious consideration but it can not be elevated into a rule of law, particularly where the initial sentence was for only ninety days. To accept that in such circumstances such a person could not be returned to prison after an appeal would mean that Crown appeals against such sentences would normally be pointless, the processes of appeal necessarily consuming more time than the sentence itself. This circumstance is not of itself a sufficient reason for refusing to increase the sentence. At the same time it is obvious that Crown appeals from such short sentences should be expedited far more than has this one, and this Court stands ready to assist if so requested.

I agree with the Crown's submission that the offence itself could readily warrant a sentence of eighteen months. I believe however that, having regard to all the circumstances, including the respondent's good record both before and after this event and the fact that returning him to prison will cause greater hardship than if he had served the whole of his sentence at one time, a sentence of one year incarceration should be imposed.

DISPOSITION

The Crown's application for leave to appeal the sentence will be granted, the appeal will be allowed, and the sentence of imprisonment will be increased to one year.

DISCUSSION

1. Which rules of international humanitarian law (IHL) did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27, 31, 32)
2. Was Boland a hierarchical superior of those who tortured and killed Arone?
3.
 - a. Did Boland know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? Did he take all feasible measures in his power to prevent the breach? (P I, Art. 86(2))
 - b. Did Boland have only command responsibility for the crime or was he also a co-perpetrator, accomplice or instigator?
 - c. How do you explain, taking into account the circumstances described in the Boland decision, that the authorities dropped the charge of torture, even though the Court considered in the case against Seward that Boland "had ample means of knowing that Arone was in immediate danger at the hands of his men and he had the opportunity to intervene but did not" [See **Case No. 201**, Canada, R. v. Seward]?
 - d. Did the Court apply the correct test under IHL for assessing the knowledge and intent of Boland? Does IHL lay down such tests? Does it leave States entirely free in this regard?
 - e. Is torture a grave breach of IHL? (GC I-IV, Arts 50/51/130/147 respectively) Did Canada violate IHL by not prosecuting Boland for torture? (GC I-IV, Arts 49/50/129/146 respectively)
4. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or may be punished for the separate breach of negligently performing their duty as commanders?
5. Does Boland's sentence seem appropriate to you? What factors need to be taken into consideration?
6. What are the objective factors that might have led these individuals to commit the crimes?

Case No. 201, Canada, R. v. Seward

[Source: Court Martial Appeal Court of Canada, CMAC-376; footnotes omitted.]

Court Martial Appeal Court of Canada [...]

between:

HER MAJESTY THE QUEEN, Appellant

and

MAJOR A.G. SEWARD, Respondent

REASONS FOR JUDGMENT

CHIEF JUSTICE STRAYER

FACTS

The respondent was the Officer Commanding the 2 Commando unit of the Canadian Airborne Regiment when it was deployed to Somalia in December 1992 as part of a peace-keeping or peace-making assignment. It was generally responsible for maintaining security in the town of Belet Huen and a surrounding area of about 100 square kilometres, its camp being outside the town.

There had been some problems of Somalians infiltrating the Canadian camp. When captured they were normally detained until there was a patrol going into the town which would take them and turn them over to the local police.

On the morning of March 16, 1993 the respondent Major Seward conducted an Orders Group in which he gave orders and “taskings” to his platoon commanders. This included Captain Sox as commander of 4 platoon which was responsible for providing front gate security and the capture of infiltrators in the area. Captain Sox testified that he was told by Major Seward on this occasion that with respect to the capture of infiltrators “I was tasked with to capture and abuse the prisoners”. Captain Reinelt, the respondent’s second-in-command, who was also present, said that Major Seward said ‘you could abuse them.’” Captain Sox was surprised at this directive and asked for clarification. He testified that the clarification he received was as follows:

I was told simply that it meant to rough up and there was something to the effect of “teach them a lesson”.

According to the respondent what he said initially, after instructing Captain Sox to patrol for infiltrators, was:

I don’t care if you abuse them but I want those infiltrators captured.

He further testified that upon Captain Sox requesting clarification as to whether he wanted infiltrators to be abused, his reply was:

No. Abuse them if you have to. I do not want weapons used. I do not want gun fire [...].

Captain Reinelt testified that while he thought the word “abuse” was a “poor choice of words” he understood Major Seward’s intention to be that

[w]hatever force was necessary in the apprehension of the prisoner could be used in terms of capturing.

When one of his section commanders, Sergeant Hillier, asked him what “abuse” meant Sox said that he told Hillier “that it was explained to me as again to rough up”.

Seward admitted in testimony at his trial that nothing during his “training as an infantry officer or [in] Canadian doctrine [...] would permit the use of the word ‘abuse’ during the giving of orders.”

Captain Sox later held his own orders group with the section commanders and Warrant Officer of his platoon, including Sergeant Boland who was in charge of section 3. He testified that in passing on information from the orders group held by Major Seward, he told his group that

We were to send out standing patrols and that we had been tasked to capture and abuse prisoners.

According to Sergeant Boland, commander of section 3 which had been assigned responsibility for gate security from 1800 to 2400 that night, Captain Sox had passed on the information that “the prisoners were to be abused”. After the meeting of this “O” group he discussed this instruction with Sergeant Lloyd, another section commander, and they both said they were not going to pass on that information to their respective sections. However later that evening, after a young Somalian named Shidane Abukar Arone had been captured and was being held by Boland’s section, Boland said to Master Corporal Matchee, a member of his section that Captain Sox had given orders that the prisoners were to be abused.

According to Boland, Matchee’s response to this was to say “Oh yeah!”.

Unfortunately Matchee returned to the bunker where Arone was being held and he and Private Brown proceeded to beat Arone to death. According to Brown, at one point he urged Matchee to stop the beating. Matchee refused, “[b]ecause Captain Sox wants him beaten for when we take him to the police station tomorrow”.

The respondent Major Seward was charged on two counts: that he had unlawfully caused bodily harm to Arone contrary to section 130 of the *National Defence Act* and section 269 of the *Criminal Code* of Canada; and that he had negligently performed a military duty imposed on him contrary to section 124 of the *National Defence Act*. The particulars of this negligence were stated to be that he

by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

He entered pleas of not guilty to both charges. The General Court Martial found him not guilty on the first charge but guilty on the second charge and in respect to the latter he was sentenced to a severe reprimand.

The Crown initially filed a notice of appeal against the acquittal on the first count and with respect to the sentence on the second count. The respondent cross-appealed against the conviction on the second count. However when the appeal came on for hearing the only issue argued by either party was that of the fitness of the sentence on the second count. Although in its factum the Crown had proposed that this sentence should be increased from severe reprimand to that of dismissal from Her Majesty's service, during argument Crown counsel asked that the sentence be increased to dismissal with disgrace, the maximum sentence provided for an offence under section 124. [...]

ANALYSIS [...]

Disposition of application for leave and of sentence appeal

The Court is of the view that the appeal raises substantial issues and therefore leave to appeal sentence must be granted. [...]

In interpreting the panel's findings of fact from the record in a manner most favourable to the respondent, it is legitimate to note some of the instructions given by the Judge Advocate to the panel on the requirements of a finding of guilt on count 2. For example he stated to the panel:

If you have a reasonable doubt that the conduct of or words used by Major Seward, in the context of all the circumstances of this case, did amount to an instruction to his subordinates to abuse prisoners then you must give him the benefit of that doubt and the prosecution will not have proven this essential ingredient of the offence charged.

The panel nevertheless convicted on count 2. To instruct the panel on the concept of "negligence" in section 124 on which the second count was based, the Judge Advocate stated:

To go further into the factors which constitute negligence I tell you that as a matter of law the alleged negligence must go beyond mere error in judgement. Mere error in judgement does not constitute negligence. The alleged negligence must be either accompanied by a lack of zeal in the performance of the military duty imposed or it must amount to a measure of indifference or a want of care by Major Seward in the matter at hand or to an intentional failure on his part to take appropriate precautionary measures.

The panel obviously found there to be such negligence. [...]

In short the panel must be taken to have concluded that the respondent did issue an "abuse" order and that his doing so was no mere error in judgment. He himself confirmed

that he was taking a “calculated risk” in doing so and that nothing in his training or in Canadian doctrine would permit the use of that word during the giving of orders.

A major issue in this appeal has been the extent, if any, to which the panel of the General Court Martial or this Court on appeal should take into account, with respect to sentence, the disastrous events which followed the giving of this order. It is said on behalf of the respondent that since he was acquitted on count 1 (the charge of causing bodily harm to Shidane Abukar Arone) the death of Arone through abuse at the hands of the respondent’s subordinates could not be a circumstance to be taken into account with respect to sentence. While the panel was excluded, the prosecutor argued forcefully that it should be instructed, in the matter of sentence, that the consequences which followed upon the giving of the respondent’s order were relevant, particularly because they reflected a breakdown in discipline to which the order must be taken to have contributed. Part of that breakdown in discipline involved the beating to death of Arone. The Judge Advocate did not accept this position and in fact instructed the panel as follows:

[...] Mr. President and Members of the Court, I instruct you as a matter of law that because of your finding of not guilty on the first charge that you are not to consider as an aggravating factor when deciding punishment the bodily harm or death suffered by Mr Arone and the prosecutor’s comments in respect thereof.

The only reference the Judge Advocate made to the prosecutor’s position was the lengthy enumeration of some eighteen factors the panel should consider in sentencing, including “consequences of his negligence”. This was neither explained nor elaborated upon.

In my view this was a serious defect in the instruction by the Judge Advocate to the panel. In this respect he did not, I believe, have adequate regard to the stated particulars of the offence upon which the respondent had just been convicted: namely, that he had negligently performed a military duty in that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.

This count addressed a failure in command. The evidence when interpreted reasonably and in a way most favourable to the respondent amply demonstrates that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent’s subordinates. This not only contributed to the death, of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately finding themselves facing serious charges. Some have gone to prison as a result. These matters all properly related to the charge, as particularized, that the respondent “failed to properly exercise command over his subordinates”. This was never specifically and seriously addressed by the Judge Advocate in his instructions on sentence. I am of the view that given the obvious findings of fact which the panel did make, and taking the most benign view of the evidence, it is impossible to think that a properly instructed panel would have accorded the derisory sentence of a severe reprimand.

The Judge Advocate failed to give any direction to the panel with respect to another relevant matter, namely the sentences of other service personnel already convicted in respect of the same chain of events. He did, at the request of the prosecutor, place before the panel the fact that Private Elvin Kyle Brown and former Sergeant Boland had been convicted of what he described as “breaches of discipline” for which Brown was sentenced to five years imprisonment and Corporal Boland was sentenced to ninety days detention. [...] The Judge Advocate gave no hint as to what use the panel might make of this information. In fact the circumstances of conviction and sentence of former Sergeant Boland were highly relevant. Both he and Seward were convicted under section 124 of negligent performance of a military duty. Like the respondent, Boland was not directly involved in the infliction of injury on Arone. Like the respondent, Boland was guilty of a failure to exercise properly his command, but neither was convicted of being a party to the actual torture and death of Arone. In the case of the respondent, by his acquittal on count 1 he must be taken to have been found neither to have intended nor to have been capable or reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner. In one important aspect of course the respondent’s position was less reprehensible than Boland’s: Boland was found by this Court to have had ample means of knowing that Arone was in immediate danger at the hands of his men and he had the opportunity to intervene but did not. Indeed some of his comments to Matchee and Brown directly condoned extreme abuse short of killing Arone.

Boland’s sentence was therefore an important point of comparison which should have been explained to the panel, unless one is to believe that there can be no comparison between the sentences of officers and of non-commissioned officers. Boland’s sentence being relevant to the fixing of a sentence for the respondent, it is also important to note that, since the respondent’s trial and sentencing, Boland’s sentence was increased from three months detention to one year imprisonment. If Boland’s sentence is to influence that of the respondent’s, it should now be seen as indicating an increase in the sentence of the latter.

I have concluded that the sentence of a severe reprimand should be set aside because it is not a fit sentence. It is clearly unreasonable and clearly inadequate on the facts which the General Court Martial must be taken to have found, on facts which were amply proven but not referred to in the faulty instruction by the Judge Advocate, and on the criteria which were or should have been put before the panel by the Judge Advocate. To reiterate, the panel found him guilty of negligently performing a military duty as particularized in count 2 namely:

“[i]n that he [...] by issuing an instruction to his subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so.” [...]

In a passage frequently quoted by military lawyers, Lamer C.J.C in *R v. G  n  reux* said:

“to maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of

military discipline must be dealt with speedily and, *frequently punished more severely than would be the case if a civilian engaged in such conduct*". (emphasis added.)

I think it is fair to assume that in any well-run civilian organisation an order given by a mid-level executive, leading to such disastrous consequences for his subordinates and the organisation, would rate more than a negative comment in his personnel file, the equivalent of a "severe reprimand".

The Crown asked at trial for a sentence including dismissal with disgrace and a "short period of imprisonment commensurate with the gravity of his offence". While its factum filed in this Court proposed an increase of sentence from severe reprimand to that of dismissal from Her Majesty's service, at the hearing of the appeal Crown counsel said that the sentence should instead be increased further to dismissal with disgrace, which is the maximum sentence provided under section 124. As noted earlier we ensured that counsel had a further opportunity, in response to our questions, to react to the possibility of the maximum sentence being imposed or some lesser sentence which would still represent an increase.

After considering all the submissions, I have concluded that an appropriate sentence would be a short term of imprisonment which I would fix at three months together with dismissal from Her Majesty's Service. This is not the maximum sentence, as called for by the Crown, of dismissal with disgrace, nor is it the maximum term of imprisonment possible for this offence which could be any term for less than two years. I believe this falls within the acceptable range of sentences, having particular regard to the sentence imposed on Boland by this Court of one year imprisonment. Certainly a severe reprimand as imposed by the General Court Martial does not fall within such a range when one considers the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of Arone, unlike Boland's proximity and means of knowledge of what was likely to occur, Seward was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put on him a higher standard of care, a standard which he did not meet.

While I recognize from the evidence before the Court Martial that 2 Commando was working under great difficulties, those difficulties did not include active warfare. Nothing suggests that the infiltrator problem represented any serious threat to the lives or security of Major Seward's unit. What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada. [...]

I believe that the sentence of three months imprisonment with dismissal would be a fit sentence. [...]

Signed by B.L.Strayer C.J.

DISCUSSION

1. Which rules of IHL did Canada violate with respect to the treatment of Arone? (GC IV, Arts 27, 31, 32)
2. Was Seward a hierarchical superior of those who tortured and killed Arone?
3.
 - a. Did Seward know or have information which should have enabled him to conclude that his subordinates were going to commit a breach of IHL? In the Court's opinion? In your opinion? How can Seward be considered "neither to have intended nor to have been capable of reasonably foreseeing that any of his subordinates would mistreat unto death any Somalian prisoner" if he told them to "abuse them"? Did the Court apply the correct test under IHL for assessing the knowledge and intent of Seward? (P I, Arts 86(2) and 87(3))
 - b. Did Seward take all feasible measures in his power to prevent the breach?
 - c. Did Seward have only command responsibility for the breach or was he also a co-perpetrator, accomplice or instigator? Did he not actually order his subordinates to commit the breach?
 - d. How do you explain, taking into account the circumstances described in the three cases [*See Case No. 199*, Canada, R. v. Brocklebank and *Case No. 200*, Canada, R. v. Boland], that Seward was found not guilty of the charge that "he had unlawfully caused bodily harm to Arone"? Did Canada violate IHL by acquitting him? Can a State violate its international obligations through an acquittal delivered by an independent and impartial court? Is it not sufficient to prosecute in order to uphold international law? (GC I-IV, Arts 49/50/129/146 respectively)
4. Did Canada sufficiently uphold its obligation to prosecute grave breaches by bringing the direct perpetrators to trial for the breach of IHL and the superiors for negligently performing their military duty? To comply with IHL, should the superiors also have been convicted as co-perpetrators or instigators of torture? Does IHL merely require that grave breaches are punished, but leave it to national law to decide whether superiors committed the same breach as their subordinates or may be simply punished for the separate breach of negligently performing their duty as commanders?
5. Does Seward's sentence seem appropriate to you? What factors need to be taken into consideration?
6. What are the objective factors that might have led these individuals to commit the crimes?

**Case No. 202, Geneva Call, Puntland State of Somalia
Adhering to a Total Ban on Anti-Personnel Mines**

[N.B.: Geneva Call is a neutral and impartial humanitarian organization dedicated to engaging armed non-State actors (NSAs) towards compliance with the norms of international humanitarian law (IHL) and human rights law (IHRL). To this end, Geneva Call engages NSAs into, *inter alia*, respecting the anti-personnel mine ban and cooperating with humanitarian organizations working to reduce the effects of those mines. Geneva Call thus developed the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*. This innovative mechanism allows NSAs, which are not eligible to enter into the Ottawa Convention, to undertake to observe its norms. The Government of the Republic and Canton of Geneva is the custodian of the Deeds.

To date, 41 NSAs in Burundi, India, Iran, Iraq, Myanmar/Burma, the Philippines, Somalia, Sudan, Turkey, and Western Sahara have signed the *Deed of Commitment* banning anti-personnel mines.]

[See also **Document No. 17**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction]

A. Deed of Commitment

[Source: Geneva Call, “Deed of Commitment under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action,” Puntland State of Somalia, available at www.genevacall.org]

**DEED OF COMMITMENT UNDER GENEVA CALL FOR ADHERENCE TO A TOTAL BAN
ON ANTI-PERSONNEL MINES AND FOR COOPERATION IN MINE ACTION**

I, Abdullahi Yusuf, President of Puntland State of Somalia,

Recognising the global scourge of anti-personnel mines which indiscriminately and inhumanely kill and maim combatants and civilians, mostly innocent and defenceless people, especially women and children, even after the armed conflict is over;

Realising that the limited military utility of anti-personnel mines is far outweighed by their appalling humanitarian, socio-economic and environmental consequences, including on post-conflict reconciliation and reconstruction;

Rejecting the notion that revolutionary ends or just causes justify inhumane means and methods of warfare of a nature to cause unnecessary suffering;

Accepting that international humanitarian law and human rights apply to and oblige all parties to armed conflicts;

Reaffirming our determination to protect the civilian population from the effects or dangers of military actions, and to respect their rights to life, to human dignity, and to development;

Resolved to play our role not only as actors in armed conflicts but also as participants in the practice and development of legal and normative standards for such conflicts, starting with a contribution to the overall humanitarian effort to solve the global landmine problem for the sake of its victims;

Acknowledging the norm of a total ban on anti-personnel mines established by the 1997 Ottawa Treaty, which is an important step toward the total eradication of landmines;

NOW, THEREFORE, hereby solemnly commit myself and my government to the following terms:

1. TO ADHERE to a total ban on anti-personnel mines. By anti-personnel mines, we refer to those devices which effectively explode by the presence, proximity or contact of a person, including other victim-activated explosive devices and anti-vehicle mines with the same effect whether with or without anti-handling devices. By total ban, we refer to a complete prohibition on all use, development, production, acquisition, stockpiling, retention, and transfer of such mines, under any circumstances. This includes an undertaking on the destruction of all such mines.
2. TO COOPERATE IN AND UNDERTAKE stockpile destruction, mine clearance, victim assistance, mine awareness, and various other forms of mine action, especially where these programs are being implemented by independent international and national organisations.
3. TO ALLOW AND COOPERATE in the monitoring and verification of our commitment to a total ban on anti-personnel mines by Geneva Call and other independent international and national organisations associated for this purpose with Geneva Call. Such monitoring and verification include visits and inspections in all areas where anti-personnel mines may be present, and the provision of the necessary information and reports, as may be required for such purposes in the spirit of transparency and accountability.
4. TO ISSUE the necessary orders and directives to our commanders and fighters for the implementation and enforcement of our commitment under the foregoing paragraphs, including measures for information dissemination and training, as well as disciplinary sanctions in case of non-compliance.
5. TOTREAT this commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms, particularly of international humanitarian law and human rights, and to contribute to their respect in field practice as well as to the further development of humanitarian norms for armed conflicts.
6. This Deed of Commitment shall not affect our legal status, pursuant to the relevant clause in common article 3 of the Geneva Conventions of August 12, 1949.
7. We understand that Geneva Call may publicize our compliance or non-compliance with this Deed of Commitment.
8. We see the desirability of attracting the adherence of other armed groups to this Deed of Commitment and will do our part to promote it.
9. This Deed of Commitment complements or supercedes, as the case may be, any existing unilateral declaration of ours on anti-personnel mines.
10. This Deed of Commitment shall take effect immediately upon its signing and receipt by the Government of the Republic and Canton of Geneva which receives it as the custodian of such deeds and similar unilateral declarations.

Done this 11th day of November 2002, at Eldoret, Kenya

ABDULLAHI YUSUF, PRESIDENT OF PUNTLAND

For GENEVA CALL

ELISABETH REUSSE-DECREY

President

LARE OKUNGU

Regional Director for Africa

For THE GOVERNMENT OF THE REPUBLIC AND CANTON OF GENEVA

Robert HENSLER

B. State of implementation in 2008

[Source: Geneva Call, "Somalia: Puntland authorities destroy anti-personnel mines," Press Release, 24 July 2008, www.genevacall.org]

Somalia: Puntland authorities destroy anti-personnel mines

Geneva/Garowe, 24 July 2008

On 24 July 2008, the Puntland Mine Action Centre (PMAC), with technical support from Mines Advisory Group (MAG), destroyed 48 stockpiled antipersonnel (AP) mines near Garowe, in accordance with the Geneva Call *Deed of Commitment* [...].

Asked about the event, Mr. Yassin Ali Abdulle, Vice-Minister of Interior and Security, stressed that "Puntland is determined to destroy its AP mine stockpile in compliance with the *Deed of Commitment* and will continue to facilitate mine action to the best of its ability. We are grateful for the support provided to date in the form of landmine impact surveys and, more recently, explosive ordnance disposal (EOD). But we also hope that today's successful operation will help mobilize resources to begin clearing areas contaminated by mines and unexploded ordnance (UXO) in order to prevent future accidents and release contaminated land for the communities to use." According to local authorities, AP mines and other dangerous explosive items claim civilian casualties every year. [...]

The 48 PMP-71 mines destroyed in Garowe were first disclosed to Geneva Call during a field mission in November 2004. The volatile security situation in Somalia and difficulties in securing donor interest delayed their destruction. PMAC and MAG are in the process of training EOD teams and completing an inventory of mines and other explosive ordnances in Puntland's military camps requiring urgent and safe disposal. Items scheduled for future destruction, security conditions permitting, include the BM-21 rockets and anti-vehicle mines observed by Geneva Call in a military compound in Galkayo in July 2007. [...]

C. State of implementation in 2009

[Source: Geneva Call, "Somalia: Puntland authorities and stakeholders review progress in the implementation of Geneva Call's Deed of Commitment banning anti-personnel mines", Press Release, 22 June 2009, available at www.genevacall.org]

Somalia: Puntland authorities and stakeholders review progress in the implementation of Geneva Call's Deed of Commitment banning anti-personnel mines

22 June 2009 - Geneva

With the financial support of Medico International, Geneva Call and the Puntland Mine Action Centre (PMAC) convened on 9 June in Garowe, the administrative capital of Puntland, a workshop on the implementation of the Geneva Call's "Deed of Commitment [...]".

The workshop aimed at reviewing progress made since the signing of the *Deed of Commitment* in 2002 by the Puntland authorities and at identifying the next steps towards a mine-free Puntland. [...]

Puntland's signing of the *Deed of Commitment* has translated into significant progress in mine action. In 2003, the PMAC was established with UNDP support and subsequently implemented landmine impact surveys covering all areas of Puntland. In 2007, Handicap International launched a mine risk education project and a year later another NGO, the Mines Advisory Group (MAG), began explosive ordnance disposal work. Geneva Call facilitated the deployment of MAG in Puntland. Moreover, in compliance with the *Deed of Commitment*, the Puntland authorities have destroyed 126 stockpiled AP mines to date. However, despite this progress, further efforts are needed, particularly in mine clearance and victim assistance.

At the opening of the workshop, the newly elected President, M. Abdirahman Mohamed Mohamud (Farole), reiterated that "Puntland is committed to continue to comply with the *Deed of Commitment*" and called for support to "assist the victims by providing artificial limbs, vocational training, funding for small businesses to kick start." Elisabeth Decrey Warner, President of Geneva Call, also stressed the importance of additional external support. "Landmines and explosive remnants of war (ERW) continue to kill and maim in Puntland. Survivors do not receive enough support and mine/ERW contamination has still a serious economical impact in many districts, preventing roads or pastoral land to be used by the local communities", she said. "Additional mine action programmes are required and we hope this workshop will attract the attention of the international community on the remaining needs. Experience shows that when support is forthcoming, there can be swift progress."

DISCUSSION

1. If the Puntland State of Somalia (Puntland) was engaged in an armed conflict when it signed the Deed of Commitment in 2002, was it then bound by IHL?
2.
 - a. Assuming that IHL applied to Puntland, had the latter an obligation not to use anti-personnel mines? Before signing the agreement, was Puntland bound by such a prohibition? Would it have been bound by the prohibition if Somalia had been party to the Ottawa Convention?
 - b. Could Puntland have become bound by the Ottawa Convention? As an auto-proclaimed autonomous region of Somalia? (CIHL, Rules 11, 12 and 14) [See also **Document No. 17**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Art. 9]
 - c. Is Puntland bound by the Deed of Commitment? Did the signature of the Deed of Commitment create an international obligation for Puntland? Towards whom?
 - d. Did the Deed of Commitment have any implication for Somalia? Is Somalia, based upon the Deed, bound by the prohibition of the use of anti-personnel mines? Would the Deed of Commitment govern the conduct of hostilities between Puntland and Somalia, even if Somalia is not party to the Ottawa treaty? Does it create a unilateral obligation for Puntland towards Somalia?
3. Does the Deed of Commitment constitute an agreement between Puntland and Geneva Call? Does it constitute an agreement between Puntland and the Canton of Geneva? If so, would such agreements be governed by international law?
4. What does Art. 5 mean? Does it create an obligation for Puntland to respect other rules of IHL and human rights law? Could and will Geneva Call monitor the compliance with such an undertaking?
5.
 - a. Does the Deed of Commitment provide for any enforcement mechanism? How may respect for the terms of the Deed of Commitment be monitored? Does Geneva Call bear any responsibility for supervising its implementation?
 - b. Does the Deed of Commitment provide for any reporting mechanisms? For any sanction mechanisms? What may be done if the terms of the Deed of Commitment are violated? Does Geneva Call bear any responsibility for sanctioning violations?
6.
 - a. Did the Deed of Commitment constitute a recognition of Puntland? As a party to a conflict? As an autonomous region in Somalia? At least by Geneva Call? Did it affect the legal status of the group? Does the fact that the Canton of Geneva has signed the Deed of Commitment amount to recognition of the group by Switzerland?
 - b. Did the Deed of Commitment legitimize Puntland's cause? Did it legitimize the means and methods used by the group?
 - c. In conducting hostilities after the signing of the Deed, could Puntland have used any other weapons not prohibited by the Deed of Commitment? Does the Deed of Commitment encourage the use of violent means not prohibited by the text?
7. Would it be possible to have similar Deeds of Commitment for other issues? Such as the ban on the use of child soldiers? Of torture? Of indiscriminate attacks? In terms of legal obligations, what are the differences for an armed group between using anti-personnel mines and using child soldiers, torture or indiscriminate attacks? What would be the implications for an armed group signing or refusing to sign a Deed of Commitment prohibiting the use of child soldiers, torture or indiscriminate attacks, in terms of criminal responsibility? Would it be possible for Geneva Call to monitor respect for Deeds of Commitment prohibiting such practices?

8. What are the advantages and disadvantages of such a Deed of Commitment? Compared with a provision in an IHL treaty prohibiting an armed group to use anti-personnel mines? With a special agreement between Somalia and Puntland prohibiting the use of landmines? With the obligation of States Parties under Art. 9 of the Ottawa Convention to prevent, suppress and repress the use of anti-personnel mines by persons or on territories under their jurisdiction or control? [*See also Document No. 17*, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction]

Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia

[Case Study prepared by Marco Sassòli, first presented by the authors in August 1998 at Harvard University.]

[N.B.: The purpose of this Case Study is not to discuss the history of the conflicts or the facts but only the applicable International Humanitarian Law, its relevance for the humanitarian problems arising in recent armed conflicts, and the dilemmas faced by humanitarian actors. If any facts are insinuated by the following questions, this is only done for training purposes. In addition, this Case Study is entirely based upon public documents and statements made by the ICRC and other institutions to the general public.]



The map has no political connotations.

1. In the late eighties tension rises in the Socialist Federal Republic of Yugoslavia:

- Economic crisis of the Yugoslav system of self-governing economy and economic tension between the richer northern and the poorer southern Republics.
- Bloody riots in Kosovo (1981, 1989, 1990) by the large Albanian majority living in the historical heartland of Serbia. Kosovo was an autonomous province within Serbia, but also a member of the Federal Republic of Yugoslavia. It held a population of 1,585,000 inhabitants in 1981 – date of the last census – 77% ethnic Albanians and 13% ethnic Serbs. The 1974 constitution gave Kosovo considerable autonomy. During the 80s, the Serb minority suffered discrimination in the hands of the provincial authorities controlled by Albanians, who demanded more power and the status of a Republic for Kosovo. In 1989, constitutional reforms withdrawing jurisdiction from the government of Kosovo over certain issues were adopted, despite strong opposition from the Kosovo Albanian population which organized protests and strikes in response. In 1990, the Serbian parliament suspended the Kosovo Assembly when the latter adopted a resolution declaring Kosovo to be independent from Serbia.
- The publication of a Serbian nationalist Memorandum by the Serbian Academy of Sciences and the rise to power of the Serbian nationalist politician Slobodan Milosevic in Serbia (1986).
- The disbanding of the communist one-party system with the formation of opposition parties in the Republics of Slovenia and Croatia (1988) and multiparty elections in all six Republics bringing nationalist parties to power.

In 1991, the fragmentation increases to such a degree that the Republics of Slovenia and Croatia want to secede; the central Yugoslav institutions are increasingly blocked by a stalemate between the “Serb block” and those Republics wanting to secede.

- a. As tensions continue to rise, but before conflict breaks out openly, what can humanitarian organizations do to lower tensions, to prevent the outbreak of an armed conflict, or to prevent violations of international humanitarian law in the event that a conflict breaks out?
- b. For an organization like the ICRC that wants to make sure it will be able to fulfill its mandate and be accepted by all sides in the event that conflict breaks out, what are the limits to such preventive action?
- c. How are the Croatian and Yugoslav authorities likely to react to proposals:
 - to start a general information campaign on Human Rights?
 - to train the Yugoslav Peoples Army, the Croatian forces, and local Serbian forces in Croatia in international humanitarian law?
 - to visit Kosovo Albanians detained by the authorities of Serbia?
 - to visit Croats detained by the Yugoslav central authorities or local Serbian forces as well as Serbs detained by the Croatian authorities in order to monitor their treatment?

- d. According to IHL, once the resolution declaring Kosovo's independence was adopted, has Kosovo become a territory occupied either by the Socialist Federal Republic of Yugoslavia or by Serbia? (HR, Art. 42; GC IV, Art. 2(2); P I, Art. 1(4))
2. On June 26, 1991, Croatia declares its independence. In Croatia, the Serbian minority living in Eastern Slavonia, Western Slavonia, and the Krajinas does not agree with a secession of Croatia and is ready to oppose it violently. The Yugoslav People's Army tries to hinder Slovenia and Croatia from seceding and to maintain itself at least in parts of Croatia controlled by the Serb minority; first trying to intercede between Croatian and local Serbian forces and later more and more openly supporting local Serbian forces. As a result, the Yugoslav People's Army obtained or maintained in fierce fighting control over one third of the territory of Croatia, while in other parts of Croatia its troops had to retreat into their barracks where they were besieged.
 - a. Was the conflict in Croatia in fall 1991 of an international or a non-international character? (GC I-IV, Arts 2 and 3)
 - b. What role do the constitution of the former Yugoslavia (arguably implying a right for republics to secede), the declaration of independence of Croatia of 26 June 1991, and the recognition of Croatia by third States (30 on 17.01.1992) have in answering question a.? Is the ICRC competent to answer this question? Should the UN Security Council answer this question?
 - c. What dilemmas does the answering to this question create for any humanitarian organization? Does it create different dilemmas for a Human Rights organization?
 - d. Would you answer this question if you were the ICRC? How could the ICRC otherwise ascertain the application of the rules of the Geneva Conventions and Additional Protocols?
 - e. Were Croatian soldiers captured in December 1991 by the Yugoslav People's Army prisoners of war? If captured by Croatian forces, were members of local Serbian militias in Eastern Slavonia fighting with the Yugoslav People's Army prisoners of war? (GC III, Arts 2 and 4)
 - f. Was the part of the Croatian territory controlled by the Yugoslav People's Army an occupied territory under Convention IV?
3. In fall 1991, the Yugoslav People's Army and local Serbian militias besieged and constantly bombarded the town of Vukovar in the easternmost part of Croatia.
 - a. As a result, the Croatian soldiers defending Vukovar ran short of ammunition and together with the local Croatian and Serbian civilian population, ran short of food and medical supplies. For which of those goods did the Yugoslav People's Army have an obligation to allow passage, and to what conditions could it subject such a free passage? (GC IV, Art. 23; P I, Art. 70, CIHL Rule 55)
 - b. Would you, as a humanitarian organization, take the initiative of suggesting the evacuation towards the west of local Croatian civilians? Which criteria should those civilians fulfill to be evacuated? What reactions to such a proposal can be expected from the Croats and from the Yugoslav authorities? Do they have an obligation to allow such an evacuation? Under what conditions? What reaction can be expected from local and international public opinion?
 - c. The hospital of Vukovar is no longer able to cope with the number of wounded soldiers and civilians. The Croatian and Yugoslav authorities are ready to allow the evacuation of the wounded as part of an agreement under which Croatia simultaneously allows Yugoslav soldiers confined in their barracks

in Croatian towns since the beginning of the conflict to leave for Yugoslav-controlled territory. As a humanitarian organization, would you suggest such an agreement? Would you let it be negotiated under your auspices? Would you organize the evacuation of the wounded? Would you supervise the simultaneous withdrawal of Yugoslav soldiers from their barracks? Under what conditions? What legal, political, and humanitarian considerations have to be taken into account?

4. The ICRC, facing difficulties to qualify the conflict and the resulting inability to invoke the protective rules of IHL in its operations, and trying to establish a humanitarian dialogue with the parties far from the cease-fire and political negotiations, invites plenipotentiaries of the belligerent sides to Geneva in order to agree on rules to be respected in the armed conflict as close as possible to those IHL provides for in international armed conflicts and to discuss any other humanitarian problems.
 - a. What are the difficulties for the Croatian and the Yugoslav authorities in accepting such an invitation? How can the ICRC overcome them? What difficulties can be expected during the negotiations?
 - b. Which rules of the law of international armed conflict can be expected to meet particular resistance by each side? Would you suggest Art. 3(3) common to the Geneva Conventions as a legal basis for the agreement to be negotiated? Doesn't an agreement that falls short of the entire law of international armed conflict violate 6/6/6/7 respectively of the four Conventions?
 - c. What are the advantages and disadvantages of the "Memorandum of Understanding" finally concluded on 27 November 1991? For the war victims in the former Yugoslavia? For the ICRC? For IHL in the long run?

[See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A.]]
5. After the fall of Vukovar, the front-line approaches Ossijek. Again, the wounded flow towards the local hospital, which is not spared by indiscriminate bombardments by the Yugoslav People's Army and local Serbian militias. The Yugoslav authorities claim that the Croatian army systematically places artillery positions around the hospital to either shield them from Yugoslav attacks or to mobilize international public opinion when the hospital is hit during Yugoslav attacks against those positions.
 - a. What is your legal evaluation of the bombardments and of the alleged Croatian behaviour? May the alleged Croatian behaviour justify the Yugoslav attacks? (GC I, Art. 21; GC IV, Arts 18 and 19; P I, Arts 12 and 13, CIHL Rules 28 and 30)
 - b. What can a humanitarian organization suggest in such a situation? Should it assess the facts and find out whether the hospital is actually targeted and whether the Croats actually use it to shield artillery positions? What are the chances that a humanitarian organization comes to definite findings? Should it make them public? Should it suggest the creation of a hospital zone under Art. 14 or of a neutralized zone under Art. 15 of Convention IV? What are the arguments in favour of each solution? What are the advantages and disadvantages to establishing any such zone: for the war victims? For a humanitarian organization? For the belligerents? What difficulties can be expected in negotiating such an agreement? How would you prepare for those negotiations?

6. On January 4, 1992, the 15th cease-fire agreement between Croatia and the Yugoslav People's Army entered into force and was long-lasting. On February 21, the UN Security Council established through Resolution 743 (1992) the United Nations Protection Forces (UNPROFOR), deployed, in particular, in the Serb-held territories in Croatia, with the mandate of ensuring that the "UN Protected Areas" (UNPAs) are demilitarized through the withdrawal or disbandment of all armed forces and that all persons residing in these areas are protected from fear of armed attack. In reality, UNPROFOR could only partly fulfill this mandate as local Serbian forces remained in control of the areas.
 - a. When UNPROFOR deployed in spring 1992 in the Serb-held territories of Croatia, did it have to respect the rules of Convention IV on occupied territories?
 - b. Could UNPAs be considered Croatian territories occupied by Yugoslavia through local Serbian forces?
7. At the end of 1991 and the beginning of 1992, mutual accusations of war crimes between Croatia and Yugoslavia increased sharply in international media, international fora, the regular sessions of the parties' plenipotentiary representatives under ICRC auspices (in which the atmosphere deteriorates due to such accusations), and in letters from both sides addressed to the ICRC. Croatia refers in particular to the evacuation (under the eyes of an ICRC delegate) and assassination of hundreds of patients of the Vukovar hospital by the Yugoslav People's Army.
 - a. What follow-up would you give to such accusations if you were the ICRC? What humanitarian arguments are in favour or against a follow-up? Would you accept requests by one side to enquire into such allegations? At least if the request comes from the side against which the allegation is made? If both sides request the ICRC to enquire?
 - b. What would you do with the letters of mutual accusation addressed to the ICRC?
 - c. Chairing the meetings of the parties' plenipotentiary representatives, how would you deal with the mutual accusations? Would you allow a discussion? Would you suggest the establishment of a commission of enquiry?
 - d. Would you suggest the parties to submit their allegations to the International Humanitarian Fact-Finding Commission provided for by Art. 90 of Protocol I?
 - e. If you had to draft a proposal for the creation of an *ad hoc* fact-finding commission along the lines of Art. 90 of Protocol I, on which issues could you expect the greatest resistance and by which side?
 - f. If a fact-finding commission is established, should the ICRC delegate who witnessed the "evacuation" of the patients of Vukovar hospital testify? Under what circumstances? Should this delegate testify today before the International Criminal Tribunal for the Former Yugoslavia? What arguments could the ICRC use not to let him testify?

[See **Case No. 214**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel]
8. In spring 1992, when the prisoners of the conflict in Croatia had to be repatriated, Belgrade refused the repatriation of many of them claiming:
 - that they were under judicial proceedings for desertion and high treason (as members of the Yugoslav People's Army having "fought for the enemy");

- that they had committed war crimes.

Zagreb refused repatriation for similar arguments.

- a. What do you think of these arguments from a legal point of view? (GC III, Arts 85, 119(5), and 129)
 - b. If you were the ICRC, how would you have dealt with this deadlock? What does “repatriation” mean for a Serbian member of the Serbian minority in Croatia, who lived before the conflict in Zagreb, was drafted into the Yugoslav People’s Army, and was captured by Croatian forces?
9. Bosnia-Herzegovina is ethnically divided between a relative majority of Bosnian Muslims (considered as a nationality called “Muslims” in the former Yugoslavia), Serbs, and Croats. In April 1992, it declared its independence following a referendum, boycotted by Serbs, in which Muslims and Croats voted in favour of independence. An armed conflict broke out between (Muslim and Croatian) forces loyal to the government, supported on the one hand, by Croatia, and on the other hand by Bosnian Serb forces opposing the independence of Bosnia-Herzegovina, supported by the Yugoslav People’s Army, particularly by its units made up of Bosnian Serbs.
- a. How would you qualify the conflict in Bosnia-Herzegovina: Is it an international or a non-international armed conflict? (GC I-IV, Arts 2 and 3; Agreement No. 1 of May 22 1992 (hereinafter Agreement No. 1) [See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] Arts 1 and 2) Does the involvement of Belgrade (and Zagreb) change your qualification? Whose involvement could change the qualification?
[See **Case No. 211**, ICTY, The Prosecutor v. Tadic]
 - b. Would you qualify the conflict if you were a humanitarian organization? If you had to negotiate an *ad hoc* agreement between the parties on the applicable international humanitarian law, would you base it on Art. 3(3) common to the Geneva Conventions?
 - c. Under Convention IV, who is a protected civilian in Bosnia-Herzegovina? (GC IV, Art. 4) Under Agreement No. 1? (Agreement No. 1, Art. 2(3)) Is the forced displacement of Bosnian Muslims from Serb-held Banja Luka to government-held Tuzla unlawful (GC IV, Arts 35 and 49(1), P II, Art. 17; Agreement No. 1, Art. 2(3)) Is the forced recruitment of Muslims by the Bosnian Serbs unlawful? Is the forced recruitment of Bosnian Serbs by the Sarajevo government unlawful? (GC IV, Arts 51 and 147) When is it lawful for the Sarajevo government to compel Serb inhabitants of Sarajevo to dig trenches on the front-line? (GC IV, Arts 40 and 51)
10. Beginning in late April 1992 and continuing throughout the whole conflict, the belligerent parties of the three ethnic groups in Bosnia-Herzegovina, particularly at the beginning the Bosnian Serb authorities, undertook a campaign of “ethnic cleansing” against civilians of other ethnic groups living in the regions they controlled. Sometimes villages inhabited by other ethnic groups were indiscriminately bombed to force civilians to flee; often men were rounded up and arrested as “terrorists” and potential combatants, while women were sometimes raped and often sent, together with children and elderly persons, either in organized transports or on their own to areas controlled by “their own” ethnic group. Property belonging to these people was being systematically burned or razed to the ground, thus shattering all hope of return for the ousted families. In other cases, members of another ethnic group simply lost their jobs and were

harassed with non-violent means by the local authorities and their neighbours until they saw no more future in their home region and fled. It was not always clear whether those acts of “ethnic cleansing” were planned by the authorities or were spontaneous acts of the local population in a generalized atmosphere of inter-ethnic hatred. In later phases of the conflict, additional waves of ethnic cleansing broke out in reaction to such practices, and the main actors were those forced to flee their homes in territory controlled by other ethnic groups and who sought refuge in territory controlled by their ethnic group.

- a. Are all the above-mentioned practices prohibited under IHL? Under IHL of international armed conflict as well as under IHL of non-international armed conflict? (GC III, Arts 3 and 4; GC IV, Arts 3, 27, 32, 33, 35-43, 49, 52 and 53; P I, Arts 48, 51, 52 and 75; P II, Arts 4 and 17 Arts 23, 25; HR, Art. 28; CIHL Rules 49-51, 93)
 - b. What can humanitarian organizations do against such practices? May they organize appropriate transportation and negotiate passage through the front lines for civilians wishing to leave under the pressure of such practices? Don't they contribute thus to ethnic cleansing? May they do it at least when the concerned civilians fear for their lives?
11. In May 1992, the ICRC's head of delegation in Sarajevo was killed during a deliberate attack on the Red Cross convoy in which he was traveling in Sarajevo. Since it was no longer able to provide sufficient protection and assistance for the victims and failed to obtain security guarantees from the parties, the ICRC withdrew from Bosnia-Herzegovina.
- a. May the ICRC withdraw from a country affected by an armed conflict? (GC III, Arts 9 and 126; GC IV, Arts 10 and 143)
 - b. May a humanitarian organization withdraw from a conflict area because one of its staff is killed? At least if no sufficient security guarantees are offered for the future? Even if the party to the conflict responsible for the attack is unknown? Could this withdrawal be considered as a collective punishment? Could it be said that the organization thus takes the victims as hostages against their authorities? Couldn't an organization help at least some victims even without security guarantees? Does that mean that the life of an expatriate aid worker is worth more than that of a local victim?
 - c. May a humanitarian organization leave a conflict area because IHL is too blatantly violated?
 - d. May a humanitarian organization withdraw from a conflict area because it cannot sufficiently fulfill its mandate of protecting and assisting victims? If it is denied access to some victims? If it can no longer assist the local population because its relief convoys are not allowed free passage by the other side? If its confidential or public approaches have no impact on the behaviour of the parties? If its visits to prisons do not lead to any improvement of unacceptable conditions of detention of prisoners? What if the organization could nevertheless help some victims? Could this withdrawal be considered as a collective punishment? Could it be said that the organization thus takes the victims as hostages against their authorities? May a neutral and impartial humanitarian organization continue to act in a conflict if only one side allows it access to victims (“belonging” to the other side), while the other side denies access?
12. When the ICRC returned to Bosnia-Herzegovina in the summer of 1992 it was finally allowed to visit, in particular in the “Manjaca Camp”, large numbers of the (surviving) men rounded up by Bosnian Serb forces during ethnic cleansing

operations in Eastern and Central Bosnia. Its delegates found appalling conditions of detention, seriously undernourished prisoners who could not expect to survive the Bosnian winter, and collected highly disturbing allegations of summary executions. It tried to draw the attention of the international community and public opinion on those facts, but succeeded only when TV Crews were allowed by the Bosnian Serbs to film detainees in Manjaca.

Through considerable relief efforts and frequent visits, the ICRC managed to improve conditions of detention, but it came to the conclusion that only the release of all prisoners before the Bosnian winter could solve the humanitarian problem. Relief efforts in favor of the inmates were hampered by violent demonstrations of the local Serbian population in villages around Manjaca camp who were suffering from the consequences of international sanctions against Serbs and did not want to allow free passage to the relief convoys. On September 15, 1992, 68 injured and sick detainees were evacuated to London to receive medical attention. Thanks to the pressure of international public opinion and by constant negotiations with the parties, the ICRC got them to conclude, on October 1, an agreement under which more than 1,300 detainees were to be released before mid-November (925 by Bosnian Serbs, 357 by Bosnian Croats, and 26 by Bosnian government forces). Under the agreement, the detainees to be released could choose during individual interviews without witnesses with ICRC delegates, whether they wanted to be released on the spot, to be transferred to regions controlled by their ethnic group, or to be transferred to a refugee camp in Croatia in view of (temporary) resettlement abroad. Affected by what they had undergone and in view of the generalized atmosphere of ethnic cleansing, practically all inmates from Manjaca chose to leave the country.

- a. Why did the Bosnian Serb authorities give TV cameras access to Manjaca? Didn't the world media, by airing the images from Manjaca, increase the fear among ethnic minority groups and thus contribute to "ethnic cleansing"?
- b. Should a humanitarian organization provide food and shelter to detainees? Under IHL, isn't that the responsibility of the detaining authorities? Should a humanitarian organization ask detaining authorities to release prisoners if they do not treat them humanely?
- c. May a humanitarian organization distribute relief aid to the local population of villages surrounding Manjaca so that they let the relief convoys go to Manjaca? Is it an application of the Red Cross principles of neutrality and impartiality or is it a case of pure operational opportunism? Doesn't a humanitarian organization thus give in to blackmail? How would you judge the situation if the Bosnian Serbs were asking for fuel for heating (which could however also be used for tanks) – as they later successfully asked UNPROFOR?
- d. Was the detention of men between 16 and 60 years old, militarily trained as territorial defence in the former Yugoslavia and ready to join Bosnian government forces, necessarily unlawful? (GC III, Arts 4 and 21; GC IV, Arts 4, 42 and 78) Could the ICRC ask for their release? Doesn't the ICRC visit detainees only out of concern for their humane treatment, without interfering into the reasons for their detention or asking for their release? Don't massive requests for releases accredit in the minds of the parties the (wrong) idea that if they give the ICRC access to prisoners they have to release or exchange them, thus increasing the tendency to hide prisoners from the ICRC?
- e. Didn't the releases of the Bosnian Muslim detainees, most of whom understandably chose to be transferred abroad, contribute to "ethnic cleansing"? Should the inmates remain detained, for their

- protection, until they can safely return home? Does the party controlling the territory where the released prisoners are transferred to have an obligation not to enroll them (again) into military service against the party that released them? (GC III, Art. 117)
- f. How would you have reacted to the parties' claims (*prima facie* not totally unreasonable) during negotiations on the releases that many of the persons detained had committed war crimes?
13. During the whole conflict, Sarajevo was (practically) surrounded by Bosnian Serb forces, but defended by Bosnian government troops. It was constantly bombed by Bosnian Serb artillery. The survival of the inhabitants of Sarajevo or, more precisely, their ability not to surrender to the Bosnian Serbs, was made possible mainly by relief flights of UNPROFOR (offering its logistics to and acting for the UNHCR), which were often interrupted following attacks by Bosnian Serb or unknown forces, or due to lack of security guarantees.
- a. Was it lawful to bomb Sarajevo? (P I, Arts 48 and 51; Agreement No.1, Art. 2(5)) Does your appreciation under IHL of those bombings change after Sarajevo had been declared a "safe area" by the UN Security Council (as described *infra*, point 14.)?
- [See also **Case No. 218**, ICTY, The Prosecutor v. Galic]
- b. Is the stopping by Bosnian Serbs of relief convoys to Sarajevo unlawful? (GC IV, Arts 23 and 59; P I, Art. 70; Agreement No. 1, Art. 2(6)). Do neighbouring Croatia and the UN Security Council (in case of an embargo) have similar obligations towards the Bosnian Serbs? To what conditions may the Bosnian Serb authorities subordinate the passage of relief convoys?
- to the checking of the convoy?
 - to the distribution of relief to civilians only?
 - to the distribution of relief to both Serbs and Bosnian Muslims?
 - to the distribution of relief under outside supervision?
 - to the simultaneous agreement by Bosnian government forces to allow passage of relief convoys to Serb controlled areas?
 - to the release of prisoners by the Bosnian government?
 - to the respect of cease-fire agreements by the Bosnian Muslims?
- c. What are the advantages and disadvantages of bringing relief by airlift to Sarajevo? What may the advantages and risks be for the UNHCR given that the airlift is under the full operational responsibility of UNPROFOR?
- d. What could be the legitimate and illegitimate interests of the Bosnian Serbs to hinder relief supplies to Sarajevo?
- e. Could the Bosnian government have reasons to hinder relief supplies to Sarajevo?
14. As the ICRC was confronted with continuing practices of "ethnic cleansing" by all parties (the Bosnian Muslim population being, however, the main victims), that threatened the lives of ethnic minority populations and made large groups of population flee when front lines changed, and as no third country seemed ready to offer even temporary asylum to one hundred thousand Bosnian refugees, the ICRC suggested, in the fall of 1992, the establishment of protected zones to shelter endangered civilians. The concept and location of the zones should be based on

an agreement of the parties, but UNPROFOR should provide internal and external security for such zones.

In 1993, the UN Security Council established through Resolutions 819 and 824 (1993) safe areas in and around the towns of Sarajevo, Tuzla, Zepa, Gorazde, Bihac, and Srebrenica, controlled by the Bosnian government, asking for the immediate cessation of hostile acts against those areas and the withdrawal of Bosnian Serb units from their surroundings.

[See Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993]

This had to be monitored by UN Military observers. The parties were asked to fully cooperate with UNPROFOR, but UNPROFOR was not given a clear mandate to defend those areas and the Resolutions only invoked Chapter VII of the UN Charter (permitting the use of force) as far as the security and freedom of movement of UNPROFOR was concerned. Security Council Resolution 836 (1993) went further authorizing UNPROFOR *“acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties [...]”* The Security Council did not ask for a demilitarization of those areas but decided in Resolution 836 (1993) *“to extend [...] the mandate of UNPROFOR in order to enable it [...] to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina [...]”*

- a. What humanitarian problems led the ICRC to suggest the establishment of protected zones and the UN Security Council to establish safe areas? How does IHL normally deal with such problems?
- b. What are the particular reasons and dangers in establishing any kind of safety zones in a situation of “ethnic cleansing” like the one in Bosnia-Herzegovina?
- c. Does the ICRC suggest establishing one of the protected zones provided by IHL? Does IHL provide for an international monitoring of such a zone? Is international protection of such a zone provided by IHL? Is it compatible with IHL? Why does the ICRC suggest international military protection? Should the Security Council give UNPROFOR the mandate to defend those areas? (GC I-IV, Art. 3; GC IV, Arts 14 and 15; P I, Arts 59 and 60)
- d. Should the ICRC suggest the demilitarization of the protected zones (from Bosnian government forces)? Is this condition implied in the spirit of IHL on protected zones? Would such a condition have been realistic? Would the creation of a zone without such demilitarization have been realistic? May Bosnian government forces stay in the safe areas established by the Security Council? Under IHL and the UN resolutions, may they launch attacks from the safe areas against Bosnian Serb forces?
- e. Were the zones open to occupation by the adverse party? Under IHL, is such a requirement inherent to protected zones? Would such a requirement have been realistic?
- f. Does the ICRC proposal come under *jus ad bellum* or under *jus in bello*? Does it respect the Red Cross principles of neutrality and impartiality? Doesn't it suggest the use of force against one side of the conflict? What is the legal basis of the ICRC proposal?
- g. On what essential points do the safe areas established by the Security Council differ from the protected zones suggested by the ICRC?
- h. Do the safe areas established by the Security Council come under *jus ad bellum* or under *jus in bello*? Is it appropriate to charge peacekeeping forces with the mandate they got under the Resolutions?

- i. Which elements of the “safe areas” established by Resolutions 819 and 824 recall or implement *jus in bello*? *Jus ad bellum*?
15. In the beginning of 1992, the Co-presidents of the International Conference on the Former Yugoslavia, C. Vance and Lord Owen, presented a peace plan for Bosnia-Herzegovina (the Vance-Owen Plan), which included the division of Bosnia into 10 nationally defined cantons. Bosnian Croats were delighted by the plan which increased their territory, while Bosnian Serbs rejected it coldly. The Bosnian (Muslim) president was undecided. The Bosnian Croats tried to implement it forcefully in central Bosnia. They demanded that the Bosnian government forces withdraw within the borders of their assigned cantons and that the joint command of the forces of Croat Defence Council (HVO) and the BH Army be established. If not, HVO threatened to implement the Vance-Owen Plan itself. After the deadline expired, on April 16, 1993, HVO forces carried out a coordinated attack on a dozen villages in the Lasva Valley (belonging to the Croatian canton of the Vance-Owen Plan). Troops from Croatia were present on HVO-controlled territory but did not fight in the Lasva Valley. Croatia financed, organized, supplied, and equipped HVO.
 - a. Was there an international armed conflict between Bosnia-Herzegovina and Croatia? If so, did IHL of international armed conflicts also apply to the fighting in the Lasva Valley between HVO and Bosnian government forces? Were the parts of the Lasva Valley, falling under HVO control during the fighting, occupied territories under IHL? Were its Bosnian Muslim inhabitants protected persons? Were the Bosnian Croats living in parts of the Lasva Valley which remained under government control protected persons too? (GC IV, Arts 2 and 4)
 - b. Was Agreement No.1 applicable to the fighting in the Lasva Valley?
[See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]]
 16. In the Bihac area, in the Western-most part of Bosnia-Herzegovina, inhabited almost exclusively by Bosnian Muslims, Mr. Fikret Abdic, a Muslim businessman and politician, and his followers (mainly the employees of his “Agrokommerc” industry near Velika Kladusa) were not ready to follow the politics of the Bosnian government; they claimed autonomy and aligned themselves with the Bosnian Serbs and the neighbouring Croatian Serbs. An armed conflict between Bosnian government forces in the Bihac enclave surrounded by Bosnian and Croatian Serb forces and by those of Mr. Abdic followed. In 1995, the two-and-a-half-year siege of the Bihac enclave was ended by an offensive of Croatian forces against the Croatian Serb forces. When Bosnian government forces subsequently took Velika Kladusa, the followers of Mr. Abdic fled into neighbouring Croatia where they were halted in Kupljensko by the Croatian authorities.
 - a. Under IHL, how do you qualify this conflict? What instruments of IHL apply (taking into account that Bosnia-Herzegovina is a party to all instruments of IHL)? (GC I-IV, Art. 3; P II, Art. 1)
 - b. Was Agreement No. 1 applicable to that conflict?

- c. Could the Bosnian authorities punish followers of Mr. Abdic for the mere fact that they took part in the rebellion, even if they respected IHL?
- d. Had the Croatian authorities an obligation to let followers of Mr. Abdic into Croatia?
- e. Could the Croatian authorities forcibly drive those persons back from Kupljensko to Bosnia-Herzegovina?
- f. Could the Croatian authorities deny the entering of relief into Kupljensko camp in order to drive its inhabitants back to Bosnia-Herzegovina?

17. Following widely publicized and credible reports by the media, by different human rights organizations, and by representatives of the international community about widespread atrocities committed as part of practices of “ethnic cleansing”, including rapes allegedly committed in particular by Bosnian Serb forces on a systematic basis and as a policy, the international public opinion and the international community insisted on the punishment of those responsible for such serious violations of IHL and of human rights. Particularly outraged about rapes, a specific instrument against such practices was desired and it was said that contemporary IHL does not sufficiently prohibit rape. First, the UN Security Council established in Resolution 780 (1992) a Commission of Experts enquiring into alleged violations which later published a very extensive report, but on May 25, 1993, it went further establishing by Resolution 827 (1993), acting under Chapter VII of the UN Charter, an “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” (ICTY) in The Hague. The ICTY is competent to prosecute grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. It has concurrent jurisdiction with national courts, but primacy over them when it so decides. All States have to cooperate with the ICTY.

[See **Case No. 210**, UN, Statute of the ICTY and **Case No. 217**, ICTY, *The Prosecutor v. Kunarac, Kovac and Vukovic*]

- a. Why did the media, the public opinion, and the Security Council react so strongly against violations of IHL in the former Yugoslavia? Was it because they were more serious than those committed in Cambodia, Afghanistan, Zaire, Liberia, or Chechnya? Because they were more wide-spread and systematic? Because the media widely covered them? Because they were seen as having been mainly committed by the party seen as the aggressor? Because the international community was not ready to stop the war? Because it happened in Europe?
- b. Is rape prohibited by IHL of international armed conflicts? By IHL of non-international armed conflicts? Is it a grave breach of IHL? Is it a war crime? Even in non-international armed conflicts? Are there any grave breaches of IHL in non-international armed conflicts? If the law of international armed conflicts is applicable, is the rape of a Bosnian Muslim woman by a Bosnian Serb soldier in Bosnia-Herzegovina a grave breach? Is the rape of a Bosnian Serb woman by a Bosnian government soldier a grave breach? (GC IV, Art. 147; P I, Art. 85(5); Agreement No.1, Art. 5)
- c. Who has the obligation to prosecute persons having committed grave breaches in Bosnia-Herzegovina? (GC IV, Art. 146; Agreement No.1, Art. 5) Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Are the prosecution of war criminals before an international tribunal and its concurrent jurisdiction compatible with the obligation of States under IHL to search for and prosecute war criminals? (GC I-IV, Arts 49/50/129/146 respectively)
- d. Will the ICTY have to qualify the conflict in fulfilling its mandate?

- e. Were the different armed conflicts in the former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in the former Yugoslavia? Does that (the final result) actually matter? Doesn't the prosecution of (former) leaders make peace and reconciliation more difficult? Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?
 - f. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Is the creation of a tribunal competent to try acts committed before it was established itself violating the prohibition (in IHL and Human Rights Law) of retroactive criminal legislation? How, apart from a resolution of the Security Council, could the ICTY have been established? What are the advantages and disadvantages of other methods?
 - g. Is the establishment of an International Tribunal only for the former Yugoslavia a credible measure to increase respect for IHL? At least if the Security Council is willing to establish additional tribunals in similar future cases? Is it reasonable to expect the Security Council to establish similar tribunals in all similar cases? Can one imagine a tribunal not competent to decide when it is competent?
 - h. Under IHL and the Statute of the tribunal, does the ICTY relieve States from their obligation to search for and prosecute war criminals?
 - i. Is the Statute of the ICTY penal legislation or does it simply provide rules of competence of the ICTY? Even when it applies to non-international armed conflicts?
 - j. Can you imagine why the Statute does not refer to grave breaches of Protocol I? Is there any possible justification for this omission, taking into account that the former Yugoslavia and all its successor States are Parties to Protocol I and that the parties to the conflicts have undertaken to respect large parts of it regardless of the qualification of the conflict? How could the ICTY nevertheless try grave breaches of Protocol I?
[See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts]
 - k. Has the ICRC a right to visit an accused detained by the ICTY? Must it be notified of sentences as a *de facto* substitute of the Protecting Power? (GC I and II, Art. 10(3); GC III, Arts 10(3), 107 and 126, GC IV, Arts 11(3), 30, 74 and 143; P I, Art. 5(4)). If you were the ICRC, would you try to visit war criminals?
 - l. Do those detained under the authority of the ICTY (pending trial or having been sentenced) lose IHL status as protected civilians or prisoners of war if they had such status before being arrested in the former Yugoslavia? Is it lawful to deport a civilian arrested in the former Yugoslavia to the Hague to stand trial? (GC III, Art. 85; GC IV, Arts 49 and 76(1); P I, Art. 44(2))
 - m. Does it weaken the credibility of IHL if the ICTY cannot gain custody over the major violators of IHL in the former Yugoslavia? Do indictments by the ICTY have an impact if arrest warrants are not enforced by States?
18. During the whole conflict in Bosnia-Herzegovina, soldiers who fell into the power of adverse parties and civilian men of fighting age were rounded up in waves of "ethnic cleansing" or to increase the number of persons to be exchanged. Those persons were generally held together; the ICRC often had access to them and was able to register them. From the beginning of the conflict, the parties had been quick to establish "exchange commissions" which drew up lists – or used those provided

by the ICRC – of all prisoners available in order to barter with the opposing forces; in many cases civilians were arrested solely for exchange purposes, sometimes for releasing them to impress international celebrities planning a visit in the region and asking for a gesture. Prisoners were sometimes traded even for fuel or alcohol. Partly because of the length of the conflict and the intermingling of civilians and combatants among the prisoners, humanitarian organizations were often present during those negotiations, facilitating the conclusion of “deals”, and trying to ensure a minimum of humane treatment during such exchanges. The ICRC was also ready to be present at exchanges if certain conditions for the detainees were respected and if the institution was allowed to interview detainees in private to ensure that their choice of destination was respected by the parties.

- a. Which of the mentioned categories of prisoners may be detained under IHL? When must they be released? Is it acceptable under IHL to exchange prisoners who have to be released? To exchange prisoners who do not have to be released? (GC III, Art. 118; GC IV, Arts 37, 41-43, 76, 78 and 132; P I, Art. 85(4)(b))
 - b. From a humanitarian and moral point of view, what are the advantages and disadvantages of prisoner exchanges? If two parties exchange all (known) prisoners (of a certain category)? If they exchange one prisoner for another? How can the risk that persons are rounded up just in view of an exchange be avoided? Do hidden or unregistered prisoners have a greater or a smaller “value” on the “exchange market”?
 - c. Should humanitarian organizations be present during exchange negotiations? During the actual exchanges? What are the advantages and disadvantages of their presence? What minimum conditions should be fulfilled before a humanitarian organization or representatives of the international community accept to organize, supervise, or monitor exchanges?
 - d. What are the reasons for the ICRC to register the prisoners it visits? Should lists drawn up after such registration be transmitted to the detaining authorities? To the adverse side? Even if it is in view of exchange negotiations? Is that provided for in IHL? Are there exceptions? Do such lists reduce the risk that persons are rounded up just in view of exchanges? Does a transmission to the adverse party not incite the detaining party to hide prisoners it does not want to exchange from the ICRC? (GC III, Arts 122 and 123; GC IV, Arts 137 and 140)
19. In the spring of 1995, Sarajevo was again entirely cut off from vital supplies and came under heavy fire from Bosnian Serbs violating once more an agreement upon a heavy weapons exclusion zone established by the UN Security Council in February 1994. This time, however, after a UN ultimatum went unacknowledged, NATO reacted with air strikes against Bosnian Serb ammunition stocks in the Pale area. Bosnian Serb forces responded by arresting some 350 UN military observers and UNPROFOR personnel stationed on territory they controlled. Some of those persons were held on or near possible military objectives. ICRC delegates gained access to only some of them and to Bosnian Serb soldiers captured by UNPROFOR when they tried to attack one of UNPROFOR’s outposts. The UN personnel were finally released after long negotiations.

After another shelling of the Sarajevo marketplace, a joint British/French rapid reaction force was deployed on Mount Igman to enforce access for relief convoys to Sarajevo, and NATO launched air strikes against Bosnian Serb communication

posts, arms storehouses, weapons factories, and strategic bridges. A water reservoir was also struck, and a pregnant woman was wounded by glass splinters from a hospital window that blew up under the shock created by one of the aforementioned bombings. Two French NATO pilots who had to abandon their military aircraft by parachute after it had been shot down by Bosnian Serb forces were captured by Bosnian Serb forces.

- a. Is IHL applicable to NATO air strikes? Even though they only enforce UN Security Council resolutions and act in defence of the inhabitants of Sarajevo? Is IHL of international armed conflicts applicable or is it IHL of non-international armed conflicts? (GC I-IV, Art. 2 and preamble para. 5; P I, Art. 1) Did all the mentioned NATO air strikes comply with IHL? Even when a water reservoir was damaged and a pregnant mother hurt? (P I, Arts 51, 56 and 57, CIHL Rules 15 and 22) Are hospitals and pregnant mothers not specially protected by IHL? (GC I, Arts 16 and 18, CIHL Rules 28, 30, 134)
- b. Is the UN a party to the Conventions and Protocols? Can the UN conceivably be a Party to an international armed conflict in the sense of Art. 2 common to the Conventions? For the purposes of the applicability of IHL, can the UN forces be considered as armed forces of the contributing States (which are Parties to the Conventions), and can any hostile acts be considered an armed conflict between those States and the party responsible for the opposing forces?
- c. Are members of UNPROFOR detained by Bosnian Serb forces prisoners of war or hostages? (GC III, Art. 4; GC IV, Arts 4 and 34) May they be detained? May they be held in a facility considered as a military objective? (GC III, Art. 22; GC IV, Art. 28, CIHL Rule 121) Has the ICRC a right to visit them? Even if they are not prisoners of war? If they are hostages? If IHL is not applicable? If IHL of non-international armed conflicts is applicable? Must they be released? When? Why would the UN object to their personnel being qualified as prisoners of war?
- d. Are Bosnian Serb soldiers captured by UNPROFOR prisoners of war? Even if UNPROFOR captured them in an act of self-defence?
- e. Did the shooting down of the French NATO aircraft violate IHL? May the Bosnian Serb soldiers who shot them down be punished for that attack?
- f. Are the French pilots detained by Bosnian Serb forces prisoners of war, “UN experts on mission” (protected by the relevant multilateral convention), or hostages? (GC III, Art. 4; GC IV, Arts 4 and 34; CIHL Rule 96) Is France engaged in an international armed conflict against Bosnian Serbs?
- g. May the French pilots be detained? Has the ICRC a right to visit them? Must they be released? When? Why would France object to their qualification as prisoners of war? If you were the French pilots, would you prefer to be treated as a prisoner of war under Geneva Convention III or to be protected under the UN Convention on the Safety of UN and Associated Personnel which makes it a crime to attack UN personnel and establishes a duty not to detain them? What are the advantages and disadvantages of both options regarding treatment, repatriation, and the chances that your status is accepted and respected by the enemy?

[See **Case No. 22**, Convention on the Safety of UN Personnel]

20. Since 1992, Srebrenica and its surroundings, with nearly 40,000 inhabitants and displaced persons, were an enclave held by Bosnian government forces, surrounded and regularly attacked by (but sometimes also attacking) Bosnian Serb forces. In 1993, Srebrenica was declared a “safe area” by the UN Security Council, but it was not demilitarized, continued to be submitted to indiscriminate attacks and insufficient relief was brought in. The only expatriate presence was

some 300, mainly Dutch, UNPROFOR peace-keepers. International humanitarian organizations failed to establish a permanent expatriate presence, or abandoned it because they lacked opportunities to develop serious assistance or protection activities. In summer 1995, peace negotiations showed a tendency to divide Bosnia-Herzegovina into a Serb entity in the North and the East and a Croat-Muslim entity in the West and the Centre. Srebrenica is located in the East.

In July 1995, military pressure on Srebrenica increased into a full-fledged offensive with tanks and indiscriminate artillery bombardment. Despite requests by Bosnian government forces (also taking the form of threats, hostage-taking, and attacks against peace-keepers), the Dutch UNPROFOR battalion refused to respond to the Bosnian Serb offensive against Srebrenica. Only on July 11, when Srebrenica had practically already fallen, US military airplanes destroyed one Bosnian Serb tank outside Srebrenica.

12,000-15,000 men fled Srebrenica, many of them with their weapons, through the woods towards Bosnian government controlled territory. At least 5000 of those men never arrived to that territory, but were killed during Bosnian Serb attacks on the column, which also occurred after men surrendered. Some of them even committed suicide in despair.

On July 12, Srebrenica fell. Nearly 26,000 men, women, and children tried to take refuge at the UNPROFOR base of Potocari. There, however, Bosnian Serb forces rounded up women and children and sent them by bus toward the front-line, which they often had to cross on foot while exhausted and amid fighting. More than 3000 boys and men of military age were separated from the women and children and arrested, before the eyes of Dutch UNPROFOR soldiers, by the Bosnian Serb forces allegedly to check whether they had committed war crimes. Only a few men who were wounded and later visited by the ICRC and those who managed to escape were ever seen again, and reported that all others had been summarily executed.

The ICRC, which had not been allowed by Bosnian Serb forces to be present during the events, concentrated on the reception of the displaced on Bosnian government-controlled territory and registered all names of missing men given by their families. The ICRC assumed that at least more than 3000 men arrested at Potocari had to be in Bosnian Serb detention and undertook all possible bilateral steps with the Bosnian Serb authorities to gain access to those prisoners, to monitor their conditions of detention, to register them, and to inform their worried families. However the Bosnian Serb authorities gave evasive answers and used delaying tactics, as all parties had often done during the conflict. Towards the end of July, when the ICRC was finally given access to Bosnian Serb prisons, it found only very few detainees from Srebrenica. The ICRC, however, did not yet abandon the hope that the others were secretly detained and continued to press Bosnian Serb authorities for access. Only when the ICRC was able to see all prisoners in Bosnia-Herzegovina, after the signing of the Dayton Peace Agreement (*See infra*, point 21.), did it come to the conclusion that the overwhelming majority of the (as of July 1997) more than 7000 missing people from Srebrenica had been killed, mainly after arrest or capture.

- a. Should humanitarian organizations have maintained an expatriate presence in Srebrenica, even when the activities they were able to develop did not justify such a presence? At least for reasons of “passive protection” of the population and to show them that they were not forgotten? Does such “passive protection” work?
 - b. How could the UN Security Council have avoided the deaths of 7000 inhabitants of Srebrenica? By not declaring Srebrenica a safe area? By demilitarizing it? By changing the mandate of UNPROFOR? By drastically increasing the number of UNPROFOR personnel to be stationed in Srebrenica? Could it have avoided the massacre without avoiding the fall of Srebrenica? How should it have reacted to the fall in order to avoid the massacre?
 - c. Has IHL failed in Srebrenica? How could one have made sure that it worked? Does the case of Srebrenica show the limits of IHL? Does it show that, in certain cases where *jus in bello* is not respected, only *jus ad bellum* contains a solution?
 - d. How should the Dutch peace-keepers have reacted to the separation of men from women and children and to the arrest of the former? Was that a violation of IHL?
 - e. How could humanitarian organizations and human rights organizations have reacted to the news about the fall of Srebrenica in order to avoid the massacre? Particularly if their analysis of the situation led them to the conclusion that the Bosnian Serb forces would slaughter any Bosnian Muslim men they arrest?
 - f. Was the reaction of the ICRC to the events of Srebrenica wrong? What could it have done if it had correctly analysed the situation and arrived at the conclusion that the Bosnian Serb forces slaughtered any Bosnian Muslim men they arrested? Should the ICRC at least have abandoned its line when the first allegations of massacres by survivors were collected? Would that have helped any victims of the conflict?
21. Following the NATO airstrikes and successful military offensives of Croatian and Bosnian government forces in the Croatian Krajinas and Western and Central Bosnia, the international community, led by the US, persuaded the parties to conclude a cease-fire on October 5, 1995, and after considerable pressure and exhausting negotiations with the Presidents of Bosnia-Herzegovina, Croatia, and Serbia (the latter two also representing the Bosnian Croats and Serbs) the Dayton Peace Agreement was reached in Dayton, Ohio, on November 21 and signed in Paris, on December 14. Military aspects of the agreement had to be implemented by IFOR, a NATO-led international implementation force, with powers and manpower much greater than UNPROFOR and a mandate clearly permitting it to use force in implementing the Agreements.

One of the crucial humanitarian points on the agenda of those having to implement the peace agreement was the release of all detainees. Annex 1A of the Dayton Agreement on the Military Aspects of the Peace Settlement contains Article IX on “Prisoner Exchanges”, which obliges the parties to release and transfer by January 19, 1996 all prisoners in conformity with IHL. They are bound to implement a plan to be developed for this purpose by the ICRC and fully cooperate with the latter. They must provide a comprehensive list of all prisoners they hold and give full and unimpeded access not only to all places where prisoners are kept but also to all prisoners by private interview at least 48 hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination

of the onward destination of each prisoner. Notwithstanding those obligations, “each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.”

Despite this commitment of the parties, the process lasted well beyond the agreed time frame and was made all the more arduous by the parties’ reluctance to abandon their practice of exchanging detainees and the continuation of negotiations at the local level. The Bosnian government, in addition, objected to a global release on the grounds that no light had yet been shed on the fate of thousands of people who had disappeared after the fall of Srebrenica. Throughout the process, ICRC delegates visited and registered new detainees held by all the parties, building up a comprehensive view of the detention situation in Bosnia-Herzegovina, establishing lists of their own and carrying out private interviews. In January, some 900 prisoners about which the parties had notified the ICRC were released by the stated deadline. However, the ICRC had thereafter to initiate a phase of intensive diplomatic pressure in order to obtain the release of the remainder, informing the political and military representatives of the international community, including IFOR, NATO, and the US of the failure of the parties to fulfil their obligations. Detainees still behind bars were declared by the detaining parties to be held on suspicion of war crimes, although in most of the cases the ICRC was not aware of any proceedings against them either at the national level or through the ICTY. A breakthrough was finally achieved at the Moscow ministerial meeting of March 23, 1996, at which the ICRC President and the High Representative (of the international community, a post created by the Dayton Peace Agreement to oversee civilian aspects of its implementation), placed the issue of release of detainees clearly on the table. The international community was not ready to pledge money for the reconstruction of Bosnia and Herzegovina before this important aspect of the Dayton peace agreement was implemented. The results were almost immediate. On April 5, the parties finally agreed that the remaining detainees against whom there were no substantiated allegations of war crimes would be released within a day, while accusations of war crimes were checked by ICTY. This was implemented.

[See **Case No. 206**, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities]

- a. Taking into account its title reading “prisoner exchanges”, does Art. IX of Annex 1-A provide for a unilateral obligation to release prisoners? Is the obligation unilateral under IHL or may it be subject to reciprocity? May the Dayton Agreement differ from IHL, subjecting the obligation to reciprocity? (GC III, Arts 6 and 118; GC IV, Arts 7 and 133; CIHL Rule 128; Agreement No.1, Art. 2(3)(2))
- b. Does Art. IX go beyond the obligations provided for by IHL? (GC III, Arts 118, 122, 123 and 126; GC IV, Arts 133, 134, 137, 138, 140 and 143; CIHL Rule 128)
- c. Is Art. IX compatible with the obligations provided for by IHL in the case of grave breaches? Must a Party release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest,

- detention, surrender, or access, at the end of the “period of consultations” under Art. IX(1)? Under IHL? May a Party release such a person under IHL? Was the further agreement of the Parties, concluded in Rome, under which no person may be retained or arrested under war crimes charges, except with the permission of ICTY, compatible with IHL? Can you imagine why the US urged the Parties to conclude such an agreement? (GC III, Arts 118, 119(5) and 129-131; GC IV, Arts 133 and 146-148; CIHL Rules 128 and 158)
- d. Why did the ICRC refuse to link the release of prisoners with the problem of missing persons? Is not a missing person for whom a testimony of arrest by the enemy exists or whom the ICRC once visited, a prisoner to be released under IHL?
 - e. What are the risks for a humanitarian organization like the ICRC when the massive international political, economic, and even military pressure are the only reasons why it managed to carry out a humanitarian operation like the release of all prisoners (which is part of the implementation of IHL)? In particular, if that pressure is mainly directed at one side? Is that compatible with the Red Cross principles of neutrality and impartiality? Could the ICRC have avoided constantly informing the international community about the (extent of) non-compliance of each party with its obligations? Could the ICRC have pursued its traditional bilateral and confidential approach with each party separately?
22. When the conflict in Bosnia-Herzegovina ended, families continued to report nearly 20,000 missing persons [among them, as of July 1997, 16,152 Bosnian Muslims (including more than 7000 from Srebrenica), 2331 Bosnian Serbs, and 621 Bosnian Croats]. Article V in Annex 7 of the Dayton Peace Agreement stipulates that: “The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for.” Art. IX(2) of its above-mentioned Annex 1-A furthermore obliged the Parties to give each other’s grave registration personnel, “within a mutually agreed period of time”, access to individual and mass graves “for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners.”

On this basis, the ICRC proposed that the former belligerents set up a Working Group on the Process for Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia-Herzegovina – a convoluted title reflecting the nature of the political negotiations that led to the establishment of this body. While the Parties endorsed the proposal itself, they engaged in endless quibbling over the wording of the Rules of Procedure and of the Terms of Reference drafted by the ICRC. Nevertheless, the Working Group, which is chaired by the ICRC, has met ten times in 1996 in the presence of representatives of other international institutions involved, Croatia, and the Federal Republic of Yugoslavia. Most of the tracing requests registered by the families have been submitted, during sessions of the Working Group, to the Party responsible (16,000 to the Bosnian Serbs, 1700 to the Bosnian Muslims, and 1200 to the Bosnian Croats). The Working Group has adopted a rule whereby the information contained in the tracing requests, as well as the replies that the Parties are called on to provide, are not only exchanged bilaterally between the families and the Parties concerned through the intermediary of the

ICRC, but are also communicated to all the members of the Working Group, that is, to all the former belligerents and to the High Representative. Since 1996, the ICRC has submitted to the concerned Parties close to 20 000 names of missing persons, requesting them to provide the information necessary to clarify their fate, in conformity with their obligations under the Dayton Agreement. (See <http://www.icrc.org/eng>)

- a. Which elements of the ICRC action to trace missing persons in Bosnia-Herzegovina go beyond IHL? Under IHL, does a party to an international armed conflict have, at the end of the conflict, an obligation:
 - to search for persons reported missing by the adverse party?
 - to provide all information it has on the fate of such persons?
 - to identify mortal remains of persons it must presume to have belonged to the adverse party?
 - to provide the cause of death of a person whose mortal remains it has identified?
 - to inform unilaterally about the results of such identification?
 - to return identified mortal remains to the party to which the persons belonged?
 - to properly bury identified and non-identified mortal remains?
 - to provide families of the adverse side access to graves of their relatives?

(GC I, Arts 15-17; GC III, Arts 120, 122 and 123; GC IV, Arts 26 and 136-140; P I, Arts 32-34; CIHL, Rule 114-116)
 - b. Why does the ICRC only submit cases of missing persons registered by their families? Does IHL support that decision? Does IHL also give a party the right to submit tracing requests? Has the ICRC an obligation to accept such requests? (GC I, Art. 16; GC III, Arts 122(3), (4) and (6) and 123; GC IV, Arts 137 and 140; P I, Art. 32; CIHL Rule 116)
 - c. What are the reasons, advantages, and risks regarding the solution to communicate all tracing requests and replies to all members of the ICRC chaired Working Group? Does that prevent politicization?
 - d. Does Art. IX(2) go beyond the obligations provided for by IHL? Does this provision provide for a unilateral obligation on each side to give the other side's grave registration personnel access? May a party use evidence for war crimes obtained by its grave registration personnel acting under Art. IX(2) in war crimes trials? (P I, Art. 34; CIHL Rules 114-116)
23. During the conflicts in Croatia and Bosnia-Herzegovina, the ethnic Albanian Kosovans spoke out in favour of independence for Kosovo and set up parallel health and educational facilities in the province. Their resistance was essentially non-violent. The Yugoslav authorities kept military control over the whole Kosovo. Repression mainly consisted of short-term detention, administrative and police harassment. The Kosovo Liberation Army (UCK) was formed in the mid-1990s; it urged armed resistance against the Serbs. In 1996, it started to carry out armed attacks against the Serbian police forces in Kosovo, which struck back at UCK militants with violence.
- a. Can this situation be qualified as an armed conflict? If so, is it a non- international or an international armed conflict? Can the UCK be considered a national liberation movement? (GC I-IV, Arts 2 and 3; P I, Art. 1(4); P II, Art. 1)

- b. Can the UCK armed attacks against the Serbian police forces and the police attacks against UCK members be considered as attacks against civilians? (P I, Arts 43, 50 and 51(3); CHIL Rules 1-6)
24. The conflict escalated in February 1998. The UCK wrested temporary control over parts of Kosovo. Serb forces and ethnic Albanian independence fighters clashed chiefly in the Drenica region, where the Serbian police forces and the Yugoslav army bombed several villages, expelling the inhabitants from areas in which the UCK was operating. Nearly 2,000 people died and almost 300,000 fled as a result. In March 1998, the Security Council reacted by adopting resolution 1160 (1998) condemning the excessive use of force by the Serbian police forces against civilians and establishing an arms embargo. On 23 September, it adopted resolution 1199 (1998), in which it demanded a cease-fire in Kosovo, the withdrawal of Serbian forces and the opening of direct negotiations. The resolution referred to the conflict as a threat to peace and security in the region.
- a. Can this situation be qualified as an armed conflict? If so, is it a non-international or an international armed conflict? Can the UCK now be considered a national liberation movement? Did the Security Council resolutions influence your answer? (GC I-IV, Arts 2 and 3; P I, Preamble para. 5 and Art. 1(4); P II, Art. 1)
- b. Could civilians be expelled on the grounds that UCK fighters had to be isolated? If the deportation was intended to shield them from the fighting? Is deportation a war crime? (GC IV, Arts 49 and 147; P II, Art. 17; ICC Statute, Art. 8(2)(a)(vii) and (2)(e)(viii)) [See **Case No. 23**, The International Criminal Court, [Part A.]]
25. The period between April and August 1998 saw no let-up in the fighting between Yugoslav troops and ethnic Albanian independence fighters on the territory of Kosovo. On 15 May 1998, Yugoslav President Milosevic and Kosovo Albanian leader Ibrahim Rugova met under the auspices of American mediator Richard Holbrooke. Under the threat of NATO bombardments, the mediation resulted in October in President Milosevic's agreement to withdraw Serbian forces, to call a halt to the fighting and to accept the deployment of 2,000 unarmed OSCE monitors in Kosovo. The UCK rejected the agreement. Nevertheless, on 26 October 10,000 Serbian policemen withdrew from Kosovo and NATO suspended its threat to conduct air raids. In December 1998, renewed fighting broke out between the UCK and Serbian forces.
- On what principles of IHL can third States or international organizations propose or demand the deployment of monitors? (GC I-IV, Art. I, Arts 8/8/8/9 and 10/10/10/11 respectively; P I, Art. 89) What was the point in dispatching unarmed monitors to ascertain compliance with IHL? What could the monitors do if the Serbian authorities violated IHL? If UCK did so? What would have been the advantages and disadvantages of deploying armed monitors?
26. On 30 January 1999, NATO announced that it would carry out air strikes against the territory of the Federal Republic of Yugoslavia (FRY) if the latter did not meet the demands of the international community. Negotiations were held between the parties to the conflict from 6 to 23 February in Rambouillet and from 15 to 18

March in Paris. The resulting peace agreement was agreed by the Kosovo Albanian delegation. The Serbian delegation rejected it.

NATO considered that all efforts to reach a negotiated political settlement to the crisis in Kosovo had failed and decided to launch air strikes against the FRY, a step announced by NATO Secretary General on 23 March 1999. On the same day, the Federal Republic of Yugoslavia published a decree stating that the threat of war was imminent; the next day it declared a state of war.

[See **Case No. 226**, Federal Republic of Yugoslavia, NATO Intervention]

- a. Was there an international armed conflict between Yugoslavia and NATO? Between Yugoslavia and each of the NATO member States? Between Yugoslavia and each of the States participating in the air strikes? Was there a declaration of war? Is a declaration of war needed for international humanitarian law to apply?
 - b. Was the law of international armed conflict applicable to NATO forces, even though their objective was to protect Kosovo Albanians from Serbian repression? Would the answer be the same on the hypothesis that the bombings were the only means of protecting the Kosovans from genocide? (GC I-IV, Arts 1 and 2; P I, Preamble para. 5)
 - c. Does the disputed lawfulness of NATO air strikes, without any armed aggression on the part of Yugoslavia, and of Security Council authorization make the applicability of IHL to those attacks open to question? (P I, Preamble para. 5)
27. The air strikes lasted a little less than three months, from 24 March to 8 June 1999. They gave rise to several controversial incidents, some of which are described below.
- A. On 12 April, a train transporting civilian passengers was destroyed as it came out of a tunnel on a bridge near Grdelica; 10 civilians were killed and at least 15 wounded. The United States said that its intention had been to destroy the bridge, which was part of Serbia's communications network, and that the pilot would not have seen the train while aiming at the bridge.
 - B. On 14 April, a convoy of ethnic Kosovo Albanians fleeing to Djakovica was attacked (according to the Yugoslav authorities, between 70 and 75 civilians were killed and more than one hundred wounded). NATO explained that the British pilot, who was flying at high altitude to avoid Yugoslav anti-aircraft guns, thought he was attacking a convoy of armed and security forces that had just destroyed a number of Albanian villages to the ground.
 - C. The Pancevo petrochemical complex was bombed on 15 and 18 April, with no loss of life.
 - D. Electricity-generating and transmitting stations were repeatedly attacked, the aim being, according to some NATO officials, to cut off power to Yugoslavia's military communications system; according to others, it was to stir civilian unrest against President Milosevic by depriving the population of electrical power.
 - E. The bridge over the Danube in Novi Sad (located hundreds of kilometers from Kosovo) was destroyed.

- F. The Chinese embassy in Belgrade was destroyed (3 civilians killed, 15 wounded). The United States explained that this was a mistake caused by their intelligence services failing to accurately situate the Yugoslav government's supply office, which was the intended target of the attack.
- G. On 23 April, just after 2 a.m., NATO deliberately bombed a Radio Television Serbia building in Belgrade; 16 people died and another 16 were seriously wounded. Certain NATO representatives justified the attack on the grounds that the building was also used for military transmissions. Others, including the British Prime Minister, said that Yugoslav media propaganda enabled President Milosevic to stay in power and encouraged the population to take part in the violence against the Kosovans.
- a. Analyze each of the above attacks so as to determine whether the controversy they gave rise to refers to whether they were aimed at a military objective, whether collateral civilian losses were admissible or whether the necessary precautions had been taken in the attack. Where different versions of the facts or different explanations have been given, deal with each separately. (P I, Arts 51, 52(2) and 57; CIHL Rules 14-24)
- b. Can an attack that "mistakenly" (contrary to the attacker's intent) targets or affects civilians violate IHL? Can it constitute a grave breach of IHL? A war crime? (P I, Arts 57 and 85(3); ICC statute, Arts 30 and 32; CIHL Rules 15-24)
- c. Given that there was no international armed conflict between the United States and China, were the Chinese diplomats in Belgrade protected under IHL? Were they protected persons? (GC I-IV, Art. 2; GC IV, Art. 4; P I, Art. 50)
28. Furthermore, throughout the campaign, NATO forces used projectiles containing depleted uranium and fragmentation bombs against military objectives. After the conflict, the remnants of those munitions were deemed to put the civilian population and NATO's international staff and troops deployed in Kosovo in danger.
- Are such munitions prohibited by IHL? Can the use of a means of warfare be prohibited against military objectives or combatants because of its long-term effects on the combatants? On the region's civilian population? On the environment? (P I, Arts 35, 36, 51(4)(a) and (5)(b) and 55; CIHL Rules 44-45, 70)
29. During NATO air strikes, three US soldiers stationed in Macedonia fell into the power of Yugoslavia. It was not known whether they were abducted in Macedonia or had mistakenly crossed into Kosovo. The ICRC was able to visit them only after four weeks of intense representations.
- Are the US soldiers prisoners of war? Do doubts about the circumstances of their arrest in any way affect their status? When should they have been repatriated? If they were abducted in Macedonia, should they have been released before the end of the hostilities? (GC III, Arts 2, 4, 118 and 126(5); CIHL Rule 128)
30. With the launch of air strikes, the forces of the Federal Republic of Yugoslavia and of the Republic of Serbia stepped up their attacks against the Kosovo

Albanians; in the following months they forcibly expelled over 740,000 ethnic Albanian Kosovans, about one third of the total ethnic Albanian population. An undetermined number of ethnic Albanian Kosovans were killed during operations conducted by the Yugoslav and Serbian forces. A smaller number were killed in NATO air strikes.

- a. Was it unlawful for the Yugoslav and Serbian forces to forcibly expel the population of Kosovo? (GC IV, Arts 49 and 147; P II, Art. 17; ICC Statute, Arts 8(2)(a)(vii) and 2(e)(viii))
 - b. If so, was the forced displacement of the population a war crime or a crime against humanity? (ICC Statute, Arts 7(1)(d), (2)(d), 8(2)(a)(vii), (2)(e)(viii))
 - c. Can it be said that acts of genocide were committed against the population of Kosovo? (ICC Statute, Art. 6)
 - d. Can deportation be justified by NATO air strikes and by the fact that UCK was allied with NATO and that the Albanian population of Kosovo wanted to be liberated by NATO? Since the massacres and population displacements intensified when the air strikes started, can NATO be partly held responsible for the plight of the civilian population?
 - e. Does IHL also protect the Kosovans against NATO? (P I, Arts 49(2) and 50)
31. The ICRC withdrew its 19 representatives from Kosovo on 29 March 1999 because of the worsening security situation brought about by the Serb paramilitary forces. It remained active, however, in the neighboring republics, assisting Kosovan refugees. After having negotiated its return to Kosovo with the Serbian authorities and following a survey on security conditions, the ICRC re-opened its office and resumed its humanitarian activities in the province in late May 1999.
- a. Was the ICRC entitled to be present in Kosovo? In Belgrade? (GC I-IV, Art. 3, Arts 9/9/9/10 respectively; GC III, Art. 126(5); GC IV, Art. 143(5))
 - b. Was the ICRC entitled to be in Kosovo by virtue of IHL or by virtue of a bilateral agreement with Yugoslavia? Was Yugoslavia obliged to ensure adequate conditions of security for ICRC delegates? (GC III, Art. 126(5); GC IV, Art. 143(5))
 - c. Was the ICRC mission in Kosovo a failure because it withdrew? Should the ICRC have withdrawn from all of Yugoslavia? In what circumstances does the ICRC withdraw from a country?
 - d. If the ICRC had been able to stay in Kosovo throughout the conflict, what could it have done to help the Albanian population?
32. On 27 May 1999, the Chief Prosecutor of the ICTY, Ms Louise Arbour, issued an indictment against Slobodan Milosevic, charging him with crimes against humanity and violations of the law and customs of war in Kosovo. (See ICTY web site: <http://www.icty.org>)
- a. Why was Slobodan Milosevic not indicted for grave breaches of the Geneva Conventions in Kosovo? (GC IV, Arts 2, 4 and 147)
 - b. Given that Slobodan Milosevic in person did not necessarily commit crimes against humanity and violations of the laws and customs of war, by virtue of what principle was the ICTY Chief Prosecutor able to indict him for those crimes? (ICTY Statute, Art. 7) [See **Case No. 210**, UN, Statute of the ICTY [Part C.]]

- c. As head of State, didn't Slobodan Milosevic benefit from immunity for acts committed while he was in office?
33. On 3 June 1999, the Serbian parliament agreed to an international plan that brought an end to the conflict in Kosovo. The plan provided for the deployment of an international force under United Nations auspices, the withdrawal of Serbian forces from Kosovo and the return of refugees. On 10 June 1999, the Serbian forces that left Kosovo were replaced by an international NATO force of 35,000 men mandated by United Nations Security Council resolution 1244 (1999): KFOR. The Security Council resolution also established the United Nations Interim Administration Mission in Kosovo (UNMIK) to administer the territory on a provisional basis. Kosovo was thus placed under international administration but remained under Yugoslav sovereignty. On 21 June, an agreement to demilitarize the UCK was signed between the prime minister of the "provisional government" and the KFOR Commander. All legislative and executive authority relating to Kosovo, including the administration of justice, was conferred on UNMIK and exercised by the Secretary-General's Special Representative (initially Bernard Kouchner, then Soren Jessen-Petersen, and at present [in 2010] Lamberto Zannier).

The end of the bombings did not spell the end to the climate of political violence in Kosovo. Non-Albanians were the victims of acts of violence referred to by some people as "reverse ethnic cleansing". It was in this context that the bodies of 14 murdered Serbs were discovered in the village of Gracko, on 23 July 1999. Although almost 800,000 ethnic Albanian refugees were able to return to their homes, about 200,000 Serbs and Roma people had to leave.

- a. How would you qualify the situation in Kosovo after the withdrawal of the Serbian forces? (GC I-IV, Arts 2 and 3; P I, Art. 1)
 - b. Did the "reverse ethnic cleansing" violate IHL? (GC IV, Arts 3, 27 and 32; P II, Arts 4(2)(a) and (b) and 17; CIHL Rules 87 and 90)
 - c. Does the fact that the Serbian victims of "reverse ethnic cleansing" previously tolerated much harsher abuse of the Albanian population justify the abuse to which they were subjected? Justify a degree of understanding on the part of KFOR and UNMIK for that subsequent abuse? (GC IV, Arts 3, 27 and 33(3); P II, Art. 4(2)(a) and (b))
 - d. Is Kosovo a territory occupied by KFOR? Even though its deployment was provided for in a Security Council resolution? Even though that deployment was in the interests of the local population? Even though it was agreed to by Yugoslavia? (GC IV, Art. 2; P I, Preamble para. 5)
 - e. What rules of the Fourth Geneva Convention on occupied territories are incompatible with the objectives of the KFOR and UNMIK presence? What rules might UNMIK find useful? If IHL were applicable, would UNMIK be obliged to prevent the attacks against the minorities in Kosovo? In that case, could all legislative and executive authorities relating to Kosovo, including the administration of justice, be conferred on an international civil servant? (HR, Arts 42 and 43; GC IV, Arts 64-66)
34. At the end of 2000, ethnic Albanians in Presevo Valley (southern Serbia) formed the Ushtria Clirimtare e Presheva, Medvegja e Bujanovc (UCPMB), an armed movement that mirrored the UCK. The movement sought to make Presevo Valley,

a 5-kilometer-wide strip of land bordering Kosovo, a part of the province. Although the valley was situated in Serbia, the Yugoslav army had had to withdraw from it under the agreements with KFOR. The population was about 80 per cent Albanian. The UCPMB launched a guerrilla war pitting its forces against those of Serbia.

What is the status of this situation under IHL? What would be its status if the allegations that the UCPMB was equipped and financed by the UCK were true? If the UCK had overall control on the UCPMB? What were KFOR's and UNMIK's obligations towards the UCPMB? (GC I-IV, Arts 1-3; P II, Art. 1)

35. In the Former Yugoslav Republic of Macedonia, the Albanian minority considered that it was not equitably represented on State bodies. There were few Albanian-speakers, for example, in the security forces, even in areas where Albanian-speakers lived in majority. On 16 February 2001, the UCKM (the Macedonian faction of the UCK) started to occupy a few Albanian-speaking villages situated near the borders with Kosovo and Serbia. In March 2001, it started to promote the secession of the north-western part of Macedonia and its Albanian majority. On 14 March 2001, during an Albanian demonstration on the streets of Tetovo, a dozen UCKM members dispersed among the demonstrators shot at the police. The next day, the UCKM shelled the centre of Tetovo, which was controlled by Macedonian forces.
 - a. How would you qualify this situation under IHL? How would it be qualified if the allegations that the UCKM was equipped and financed by the UCK were true? If the UCK had overall control on the UCKM? (GC I-IV, Arts 2 and 3; P II, Art. 1)
 - b. Does IHL prohibit UCKM members from mixing with the demonstrators? From attacking, thus scattered among the demonstrators, the Macedonian police forces? (P I, Arts 37 (1)(c), 44(3) and 51(7); CIHL Rule 65)
36. Civilians suffered during hostilities, in particular in the Tetovo region, where it was extremely difficult to obtain food, medicines and other basic necessities. Hundreds of people were forced by the fighting to flee their homes. Issuing an ultimatum, the Macedonian security forces encouraged the Albanian-speaking civilians to leave the villages controlled by the UCKM so that they could attack the combatants without endangering the civilian population. The UCKM often prevented the civilians from leaving.
 - a. Were the Macedonian authorities obliged to allow supplies into the villages controlled by the UCKM? What prior conditions could they set? Would those conditions have been realistic? (GC IV, Art. 23; P I, Art. 70; P II, Art. 18(2))
 - b. Were the authorities' efforts to make civilians living in the villages controlled by the UCKM flee lawful under IHL? (GC IV, Arts 49 and 147; P II, Art. 17)
 - c. Can the UCKM prevent civilians from leaving the villages it controls? (P I, Arts 51(7) and 58; CIHL Rules 22-24)
37. On 13 August 2001, after seven months of clashes between the UCKM rebels and the security forces, all the parties concerned signed a peace agreement that provided for enhanced rights for the Albanian-speaking minority, the disarmament of the

UCKM and an amnesty for the rebels. On 22 August, the first NATO contingents were deployed in Macedonia as part of Operation “Essential Harvest”, to collect the rebels’ weapons. The first UCKM weapons were collected on 27 August 2001.

[The length of this case study reflects the endless waves of conflict that ravaged the Balkans for many years. The authors are hopeful that future events will not add to it.]

**Case No. 204 Former Yugoslavia, Special Agreements
Between the Parties to the Conflicts**

**A. Yugoslavia/Croatia, Memorandum of Understanding of
November 27, 1991**

[Source: Mercier, M., *Without Punishment, Humanitarian Action in Former Yugoslavia*, Appendix: Document IV, London, East Haven, 1995, pp 195-198]

MEMORANDUM OF UNDERSTANDING

We the undersigned,

H.E. Mr. Radisa Gacic, Federal Secretary for Labour, Health, Veteran Affairs and Social Policy

Lt. General Vladimir Vojvodic, Director General, Medical Service of the Yugoslav People's Army

Mr. Sergej Morsan, Assistant to the Minister of Foreign Affairs, Republic of Croatia

Prim. Dr. I. Prodan, Commander of Medical Headquarters of Ministry of Health, Republic of Croatia

Prof. Dr. Ivica Kostovic, Head of Division for information of Medical Headquarters, Ministry of Health, Republic of Croatia

Dr. N. Mitrovic, Minister of Health, Republic of Serbia

taking into consideration the Hague statement of 5 November 1991 undertaking to respect and ensure respect of international humanitarian law signed by the Presidents of the six Republics; having had discussions in Geneva under the auspices of the International Committee of the Red Cross (ICRC) on 26 and 27 November 1991 and with the participation of:

Mr. Claudio Caratsch, Vice-President of the ICRC

Mr. Jean de Courten, Director of Operations, Member of the Executive Board of the ICRC

Mr. Thierry Germond, Delegate General for Europe (Chairman of the above-mentioned meeting)

Mr. Francis Amar, Deputy Delegate General for Europe

Mr. François Bugnion, Deputy Director of Principles, Law and Relations with Movement

Mr. Thierry Meyrat, Head of Mission, ICRC Belgrade

Mr. Pierre-André Conod, Deputy Head of Mission, ICRC Zagreb

Mr. Jean-François Berger, Taskforce Yugoslavia

Mr. Vincent Lusser, Taskforce Yugoslavia

Mr. Marco Sassòli, Member of the Legal Division

Mrs. Cristina Piazza, Member of the Legal Division

Dr. Rémy Russbach, Head of the Medical Division

Dr. Jean-Claude Mulli, Deputy Head of the Medical Division

Mr. Jean-David Chappuis, Head of the Central Tracing Agency

have agreed to the following:

(1) *Wounded and sick*

All wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention of August 12, 1949

(2) *Wounded, sick and shipwrecked at sea*

All wounded, sick and shipwrecked at sea shall be treated in accordance with the provisions of the Second Geneva Convention of August 12, 1949.

(3) *Captured combatants*

Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention of August 12, 1949.

(4) *Civilians in the power of the adverse party*

- [1] Civilians who are in the power of the adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949 (Articles 79 to 149).
- [2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I.

(5) *Protection of the civilian population against certain consequences of hostilities*

The civilian population is protected by Articles 13 to 26 of the Fourth Geneva Convention of August 12, 1949.

(6) Conduct of hostilities

Hostilities shall be conducted in accordance with Article 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 Weapons Convention.

(7) Establishment of protected zones

The parties agree that for the establishment of protected zones, the annexed standard draft agreement shall be used as a basis for negotiations.

(8) Tracing of missing persons

The parties agree to set up a Joint Commission to trace missing persons; the Joint Commission will be made up of representatives of the parties concerned, all Red Cross organizations concerned and in particular the Yugoslav Red Cross, the Croatian Red Cross and the Serbian Red Cross with ICRC participation.

(9) Assistance to the civilian population

- [1] The parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party's civilian population, it being understood that both parties are entitled to verify that the consignments are not diverted from their destination.
- [2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

(10) Red Cross emblem

- [1] The parties undertake to comply with the rules relating to the use of the Red Cross emblem. In particular, they shall ensure that these rules are observed by all persons under their authority.
- [2] The parties shall repress any misuse of the emblem and any attack on persons or property under its protection.

(11) Forwarding of allegations

- [1] The parties may forward to the ICRC any allegations of violations of international humanitarian law, with sufficient details to enable the party reportedly responsible to open an enquiry.

- [2] The ICRC will not inform the other party of such allegations if they are expressed in abusive terms if they are made public. Each party undertakes, when it is officially informed of such an allegation made or forwarded by the ICRC, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

(12) Request for an enquiry

- [1] Should the ICRC be asked to institute an enquiry, it may use its good offices to set up a commission of enquiry outside the institution and in accordance with its principles.
- [2] The ICRC will take part in the establishment of such a commission only by virtue of a general agreement or an *ad hoc* agreement with all the parties concerned.

(13) Dissemination

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence, and to paramilitary or irregular units not formally under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

(14) General provisions

- [1] The parties will respect the provisions of the Geneva Conventions and will ensure that any paramilitary or irregular units not formally under their command, control or political influence respect the present agreement.
- [2] The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

(15) Next meeting

The next meeting will take place in Geneva on 19-20 December 1991.

[The signatures of the above-mentioned persons follow.]

Geneva, November 27, 1991

B. Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992

[Source: Mercier, M., *Crimes Without Punishment, Humanitarian Action in Former Yugoslavia*, London, East Haven, 1995, pp. 203-207]

AGREEMENT

At the invitation of the International Committee of the Red Cross,

Mr. K. Trnka, Representative of Mr. Alija Izetbegovic
President of the Republic of Bosnia-Herzegovina

Mr. D. Kalinic, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. J. Djogo, Representative of Mr. Radovan Karadzic
President of the Serbian Democratic Party

Mr. A. Kurjak, Representative of Mr. Alija Izetbegovic
President of the Party of Democratic Action

Mr. S. Sito Coric, Representative of Mr. Miljenko Brkic
President of the Croatian Democratic Community

Met in Geneva on the 22 May 1992 to discuss different aspects of the application and of the implementation of international humanitarian law within the context of the conflict in Bosnia-Herzegovina, and to find solutions to the resulting humanitarian problems. Therefore

- conscious of the humanitarian consequences of the hostilities in the region;
- taking into consideration the Hague Statement of November 5, 1991;
- reiterating their commitment to respect and ensure respect for the rules of International Humanitarian Law;

the Parties agree that, without any prejudice to the legal status of the parties to the conflict or to the international law of armed conflict in force, they will apply the following rules:

1. General Principles

The parties commit themselves to respect and to ensure respect for the Article 3 of the four Geneva Conventions of August 12, 1949, which states, in particular:

- 1) Persons taking no active part in the hostilities, including members of armed groups 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 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;
 - b) taking of hostages;
 - c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - d) 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 civilized peoples.
- 2) The wounded and sick shall be collected and cared for.

An impartial body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

2. Special agreement

In accordance with the Article 3 of the four Geneva Conventions of August 12, 1949, the Parties agree to bring into force the following provisions:

2.1. Wounded, sick and shipwrecked

The treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of August 12, 1949, in particular:

- All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
- In all circumstances, they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

2.2. *Protection of hospitals and other medical units*

- [1] Hospitals and other medical units, including medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attacks.
- [2] The protection shall not cease unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities.

2.3. *Civilian population*

- [1] The civilians and the civilian population are protected by Articles 13 to 34 of the Fourth Geneva Convention of August 12, 1949. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. They shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
- [2] All civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I. Civilians who are in the power of an adverse party and who are deprived of their liberty for reasons related to the armed conflict shall benefit from the rules relating to the treatment of internees laid down in the Fourth Geneva Convention of August 12, 1949.
- [3] In the treatment of the civilian population there shall be no adverse distinction founded on race, religion or faith, or any other similar criteria.
- [4] The displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
- [5] The International Committee of the Red Cross (ICRC) shall have free access to civilians in all places, particularly in places of internment or detention, in order to fulfil its humanitarian mandate according to the Fourth Geneva Convention of August 12, 1949.

2.4. *Captured combatants*

- [1] Captured combatants shall enjoy the treatment provided for by the Third Geneva Convention.
- [2] The International Committee of the Red Cross (ICRC) shall have free access to all captured combatants in order to fulfil its humanitarian mandate according to the Third Geneva Convention of 12 August 1949.

2.5. Conduct of hostilities

Hostilities shall be conducted in the respect of the laws of armed conflict, particularly in accordance with Articles 35 to 42 and Articles 48 to 58 of Additional Protocol I, and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices annexed to the 1980 Weapons Convention. In order to promote the protection of the civilian population, combatants are obliged to distinguish themselves from the civilian population.

2.6. Assistance to the civilian population

- [1] The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively to the civilian population.
- [2] They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

3. Red Cross Emblem

The Red Cross emblem shall be respected. The Parties undertake to use the emblem only to identify medical units and personnel and to comply with the other rules of international humanitarian law relating to the use of the Red Cross emblem and shall repress any misuse of the emblem or attacks on persons or property under its protection.

4. Dissemination

The Parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.

5. Implementation

- [1] Each party undertakes to designate liaison officers to the ICRC who will be permanently present in meeting places determined by the ICRC to assist the ICRC in its operations with all the necessary means of communication to enter in contact with all the armed groups they represent. Those liaison officers shall have the capacity to engage those groups and to provide guarantees to the ICRC

on the safety of its operations. Each party will allow the free passage of those liaison officers to the meeting places designated by the ICRC.

- [2] Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

6. General provisions

- [1] The parties undertake to respect and to ensure respect for the present agreement in all circumstances.
- [2] The present agreement will enter in force on May 26, at 24h00 if all parties have transmitted to the ICRC their formal acceptance of the agreement by May 26, 1992 at 18h00.

DISCUSSION

1. Do the two agreements qualify the conflicts? Could the ICRC have suggested the Memorandum of Understanding of November 27, 1991 (MoU) if it had qualified the conflict between Croatia and Yugoslavia as an international one? Could Agreement No. 1 of May 22, 1992 (A1) concern an international armed conflict? (GC I-IV, Arts 2, 3 and 6/6/6/7; P I, Art. 1)
2.
 - a. Why does the ICRC suggest such agreements? Why do the parties conclude such agreements? Who are the parties to the two agreements? Who is bound by the two agreements?
 - b. Is the MoU binding for the Socialist Federative Republic of Yugoslavia and Croatia? Is A1 binding on Bosnia and Herzegovina? Is it acceptable that A1 places “the Republic of Bosnia-Herzegovina” and political parties on an equal footing? (GC I-IV, Art. 3(3))
 - c. What difficulties could the ICRC foresee when it invited the parties to negotiate those agreements? How did it overcome those difficulties?
3. Does Art. 3 of the MoU give captured combatants prisoner-of-war status? May Croatian soldiers who formerly served in the Yugoslav People’s Army and fall into the power of Yugoslavia be sentenced for high treason?
4.
 - a. Do Art. 4(1) of the MoU and Art. 2.3(2) of A1 provide the same protection to civilians deprived of their liberty as the IHL of international armed conflicts, less protection, or better protection? (GC IV, Arts 37, 41, 76, 78 and 79)
 - b. Is a Serb inhabitant of western Slavonia, whose ancestors lived for 400 years in that part of Croatia and who is arrested by the Croatian police, “in the power of the adverse party” in the sense of Art. 4(1) of the MoU? Is a Bosnian Muslim inhabitant of Banja Luka, whose ancestors lived for 400 years in that part of Bosnia and Herzegovina and who is arrested by the Bosnian Serb police, “in the power of the adverse party” in the sense of Art. 2.3(2) of A1? Is a Serb inhabitant of Sarajevo, whose ancestors lived for 400 years in the capital of Bosnia and Herzegovina and who is arrested by the Bosnian police, “in the power of the adverse party” in the sense of Art. 2.3(2) of A1? What are the advantages and disadvantages of thus labelling

persons as “protected persons” according to their ethnic origin? Is there any other way to apply the law of international armed conflict?

5. a. Is there any prohibition of forced displacements in the MoU? In the IHL of international armed conflicts? Where? Why was that provision not included in the MoU? Did the practice of “ethnic cleansing” therefore not violate IHL in the conflict between Croatia and Yugoslavia? (GC IV, Art. 49)
- b. Is there a prohibition of forced displacements in A1? Does its wording come from the law of international or of non-international armed conflicts? (GC IV, Art. 49; P I, Art. 85(4); P II, Art. 17)
6. a. Can you imagine why Art. 6 of the MoU and Art. 2.5 of A1 exclude Arts 43-47 of Protocol I from their reference to the Protocol’s rules on the conduct of hostilities?
- b. Was there any obligation for combatants to distinguish themselves from the civilian population in the conflict between Croatia and Yugoslavia? (HR, Art. 1; GC III, Art. 4(A); P I, Arts 44(3) and 48; P II, Art. 13)
7. Do Art. 9 of the MoU and Art. 2.6 of A1 on humanitarian assistance correspond to the IHL of international armed conflicts, or does it go further? If yes, on which points? (GC IV, Arts 10, 23, 59-61, 108-109, 142; P I, Arts 69, 70, 81)
8. a. Which rules on implementation do the two agreements contain? Which implementation mechanisms provided for in the IHL of international armed conflicts are not mentioned? Can you imagine why the parties did not want to mention those mechanisms?
- b. Are there any provisions on war crimes in the two agreements? Which elements of IHL’s grave breaches regime do the agreements lack? Are those gaps crucial, taking into account that the national legislation of the former Yugoslavia, in which the rules of IHL on grave breaches were incorporated, was taken over by its successor States? By accepting a rule of behaviour of the IHL of international armed conflicts in the agreements, did a party thereto necessarily also undertake to treat a violation of that rule as a grave breach if it is so qualified by IHL? Under those agreements, can the International Criminal Tribunal for the former Yugoslavia prosecute any violation of the IHL of international armed conflicts that is qualified as a grave breach? Only if the rule violated is contained in the agreements? Only if it also violates customary IHL?
- c. What are the differences between the rules on implementation contained in the two agreements? Can you explain them?
- d. Why is the ICRC, in Art. 12 of the MoU, so circumspect about an enquiry into allegations of violations? Aren’t enquiries an important means of implementing IHL? Shouldn’t the ICRC conduct an enquiry itself, due to its knowledge of the field, its expertise in IHL and its well-recognized neutrality and impartiality, at least if both parties agree to it doing so? Can you imagine the reasons for the ICRC’s extreme prudence in this regard?
- e. What is the purpose of a mechanism such as that provided for in Art. 5(1) of A1?
- f. Does the MoU’s Art. 14(1) incorporate all of the Geneva Conventions into the MoU? To which units is Art. 14(1) intended to apply? Does that provision make any sense?
9. a. What are the advantages and disadvantages of such agreements? Can they be interpreted and applied without reference to the whole of IHL?
- b. Was the MoU applicable in the conflict between local Serb inhabitants of parts of Croatia (in particular the Krajinas) and the government of Croatia? Even if Yugoslavia no longer had any control over the activities of those local Serbs?
- c. Was A1 applicable in the armed conflict in the Bihac area between autonomist Bosnian Muslim followers of Mr. Abdic and Bosnian government forces?

**Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas
in 1992-1993****A. ICRC, Position Paper, The Establishment of Protected Zones for
Endangered Civilians in Bosnia and Herzegovina**

[Source: ICRC position paper. Distributed on 30 October 1992 to the governments concerned, the Co-chairmen of the London Conference on the former Yugoslavia and the Office of the UN High Commissioner for Refugees.]

POSITION PAPER**THE ESTABLISHMENT OF PROTECTED ZONES FOR
ENDANGERED CIVILIANS IN BOSNIA-HERZEGOVINA**

The main aspects of the “ethnic cleansing” process in Bosnia-Herzegovina are well known: intimidation, threats, harassment, brutality, expropriation, torture, large-scale hostage taking and internment of civilians, larger-scale deportations, summary executions, etc.

For months the situation has become more and more tragic and desperate for the civilians belonging either to ethnic minorities or to the defeated sides, as in northern Bosnia-Herzegovina or more recently in the central part of the country (Jajce-Travnik-Prozor area), where the situation is deteriorating daily.

Today there are at least 100,000 Muslims living in the north of Bosnia-Herzegovina, who are terrorized and whose only wish is to be transferred to a safe haven. If the international community wants to assist and protect these people, the “safe haven” concept must be transformed into reality.

As no third country seems to be ready, even on a provisional basis, to grant asylum to one hundred thousand Bosnian refugees, an original concept must be devised to create protected zones in Bosnia-Herzegovina which are equal to the particular requirements and the sheer scale of the problem.

In view of the extremely alarming situation currently prevailing in the country, the ICRC recommends the international community to set up protected zones in Bosnia-Herzegovina. As a matter of priority, a protected zone should be set up in northern Bosnia-Herzegovina to shelter the endangered civilians. The creation of other such zones might also have to be considered in central Bosnia-Herzegovina in the near future.

The concept of a safety zone is included in international humanitarian law, which provides for various kinds of zones. However, the present situation calls for the creation of zones adapted to its specific requirements and, in particular, which need an international protection.

It is now up to the international community to diligently study the feasibility of protected zones which, as mentioned, could not in the present situation be left under

the sole responsibility of the parties controlling the territory in which the zones are located. The setting up of protected zones for tens of thousands of civilians is far beyond the capacity of the ICRC alone.

Conditions to be met

- The protected zone(s) must meet appropriate hygiene standards.
- The protected zone(s) must be in an area where the necessary protection may be assumed.
- The international responsibility for such zone(s) must be clearly established.
- The parties concerned must give their agreement to the concept and to the location of the protected zone(s).
- Duly mandated international troops, such as UNPROFOR, must assure the internal and the external security of this zone(s), as well as for part of the logistics.
- International organizations must help with the entire installation of the zone(s) – housing, shelter, heating, sanitation – and with the logistics. In addition, the organizations involved must take responsibility for the food deliveries, the cooking and the medical services.

The ICRC is willing and ready to offer its services to help with the establishment and running of such zones.

In accordance with its mandate, the ICRC will in particular be in charge of tracing activities in the zone(s) and, at least partly, of their relief and medical infrastructures.

Despite the obvious difficulties and the financial, material and logistical burden, not to mention the whole security aspect, that the establishment of such a zone(s) would entail for the international community, the ICRC is of the opinion that there is currently no alternative to this plan. Winter is approaching and it is likely that it will reach Bosnia-Herzegovina before any peace agreement is signed and implemented.

Forced and unprotected massive transfers of the population to central Bosnia-Herzegovina are totally unacceptable and cannot go on. Too many civilians, while forced to cross the frontlines on foot, have already been killed either in the crossfire of combatants, as there is no cease-fire, or deliberately by snipers.

In order to establish protected zones, UNPROFOR should be deployed as soon as possible in Bosnia-Herzegovina. The ICRC furthermore strongly hopes that the United Nations Security Council will soon consider extending the UNPROFOR mandate in Bosnia-Herzegovina, thus enabling its troops to guarantee the security of such zones.

B. Security Council, Resolution 819 (1993)

[Source: UN Doc. S/RES/819 (April 16, 1993)]

The Security Council,

[...] *Reaffirming* the sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina,

Reaffirming its call on the parties and others concerned to observe immediately the cease-fire throughout the Republic of Bosnia and Herzegovina,

Reaffirming its condemnation of all violations of international humanitarian law, including, in particular, the practice of “ethnic cleansing”,

Concerned by the pattern of hostilities by Bosnian Serb paramilitary units against towns and villages in eastern Bosnia [...]

Deeply alarmed at the information provided by the Secretary-General to the Security Council on April 16, 1993 on the rapid deterioration of the situation in Srebrenica and its surrounding areas, as a result of the continued deliberate armed attacks and shelling of the innocent civilian population by Bosnian Serb paramilitary units,

Strongly condemning the deliberate interdiction by Bosnian Serb paramilitary units of humanitarian assistance convoys,

Also strongly condemning the actions taken by Bosnian Serb paramilitary units against UNPROFOR, in particular, their refusal to guarantee the safety and freedom of movement of UNPROFOR personnel,

Aware that a tragic humanitarian emergency has already developed in Srebrenica and its surrounding areas as a direct consequence of the brutal actions of Bosnian Serb paramilitary units, forcing the large-scale displacement of civilians, in particular women, children and the elderly,

Recalling the provisions of resolution 815 (1993) on the mandate of UNPROFOR and in that context acting under Chapter VII of the Charter of the United Nations,

[The only paragraph in resolution 815 (1993) pertinent to our concern reads as follows: “The Security Council [...] determined to ensure the security of UNPROFOR and its freedom of movement for all its missions, and to these ends acting under Chapter VII of the Charter of the United Nations [...]”. Later, Security Council resolution 836 (1993) of June 4, 1993 however authorized UNPROFOR “acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties [...]”.]

1. *Demands* that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act;
2. *Demands also* to that effect the immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica and their immediate withdrawal from the areas surrounding Srebrenica;
3. *Demands* that the Federal Republic of Yugoslavia (Serbia and Montenegro) immediately cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary units in the Republic of Bosnia and Herzegovina;

4. *Requests* the Secretary-General, with a view to monitoring the humanitarian situation in the safe area, to take immediate steps to increase the presence of UNPROFOR in Srebrenica and its surroundings; *demands* that all parties and others concerned cooperate fully and promptly with UNPROFOR towards that end; and requests the Secretary-General to report urgently thereon to the Security Council;
5. *Reaffirms* that any taking or acquisition of territory by threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable;
6. *Condemns* and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of "ethnic cleansing";
7. *Reaffirms its condemnation* of all violations of international humanitarian law, in particular the practice of "ethnic cleansing" and *reaffirms* that those who commit or order the commission of such acts shall be held individually responsible in respect of such acts;
8. *Demands* the unimpeded delivery of humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina, in particular to the civilian population of Srebrenica and its surrounding areas and *recalls* that such impediments to the delivery of humanitarian assistance constitute a serious violation of international humanitarian law;
9. *Urges* the Secretary-General and the United Nations High Commissioner for Refugees to use all the resources at their disposal within the scope of the relevant resolutions of the Council to reinforce the existing humanitarian operations in the Republic of Bosnia and Herzegovina in particular Srebrenica and its surroundings;
10. *Further demands* that all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel as well as members of humanitarian organizations;
11. *Further requests* the Secretary-General, in consultation with UNHCR and UNPROFOR, to arrange for the safe transfer of the wounded and ill civilians from Srebrenica and its surrounding areas and to urgently report thereon to the Council;
12. *Decides* to send, as soon as possible, a mission of members of the Security Council to the Republic of Bosnia and Herzegovina to ascertain the situation and report thereon to the Security Council; [...]

C. Security Council Resolution 824 (1993)

[Source: UN Doc.S/RES/824 (May 6, 1993)]

The Security Council,

[...]

Having considered the report of the Mission of the Security Council to the Republic of Bosnia and Herzegovina (S/25700) authorized by resolution 819 (1993), and in particular, its recommendations that the concept of safe areas be extended to other towns in need of safety,

Reaffirming again its condemnation of all violations of international humanitarian law, in particular, ethnic cleansing and all practices conducive thereto, as well as the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities, [...]

Taking also into consideration the formal request submitted by the Republic of Bosnia and Herzegovina (S/25718),

Deeply concerned at the continuing armed hostilities by Bosnian Serb paramilitary units against several towns in the Republic of Bosnia and Herzegovina and *determined* to ensure peace and stability throughout the country, most immediately in the towns of Sarajevo, Tuzla, Zepa, Gorazde, Bihac, as well as Srebrenica,

Convinced that the threatened towns and their surroundings should be treated as safe areas, free from armed attacks and from any other hostile acts which endanger the well-being and the safety of their inhabitants,

Aware in this context of the unique character of the city of Sarajevo, as a multicultural, multi-ethnic and pluri-religious centre which exemplifies the viability of coexistence and interrelations between all the communities of the Republic of Bosnia and Herzegovina, and of the need to preserve it and avoid its further destruction, [...]

Convinced that treating the towns referred to above as safe areas will contribute to the early implementation of the peace plan, [...]

Recalling the provisions of resolutions 815 (1993) on the mandate of UNPROFOR and in that context acting under Chapter VII of the Charter, [...]

3. *Declares* that the capital city of the Republic of Bosnia and Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Gorazde, Bihac, as well as Srebrenica, and their surroundings should be treated as safe areas by all the parties concerned and should be free from armed attacks and from any other hostile act;
4. *Further declares* that in these safe areas the following should be observed:
 - (a) The immediate cessation of armed attacks or any hostile act against these safe areas, and the withdrawal of all Bosnian Serb military or paramilitary units from these towns to a distance wherefrom they cease to constitute a menace to

their security and that of their inhabitants to be monitored by United Nations military observers [Later Security Council Resolution 836, para. 5 is even more explicit: “5. *Decides to extend (...) the mandate of UNPROFOR in order to enable it (...) to promote the withdrawal of military or paramilitary units other than those of the Government of the Republic of Bosnia and Herzegovina...*”];

- (b) Full respect by all parties of the rights of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe-areas in the Republic of Bosnia and Herzegovina and full respect for the safety of the personnel engaged in these operations;
- 5. *Demands* to that end that all parties and others concerned cooperate fully with UNPROFOR and take any necessary measures to respect these safe areas;
- 6. *Requests* the Secretary-General to take appropriate measures with a view to monitoring the humanitarian situation in the safe areas and to that end, authorizes the strengthening of UNPROFOR by an additional 50 United Nations military observers [...];
- 7. *Declares* its readiness, in the event of the failure by any party to comply with the present resolution, to consider immediately the adoption of any additional measures necessary with a view to its full implementation, including to ensure respect for the safety of the United Nations personnel; [...]

DISCUSSION

*Please assume for the discussion of questions 1 to 5 that the IHL of international armed conflicts is applicable, at least thanks to the agreement between the parties of May 23, 1992 [See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]]*

1.
 - a. Which humanitarian problems prompted the ICRC to suggest the establishment of protected zones and the UN Security Council to establish safe areas? How does IHL normally deal with those problems?
 - b. What are the special reasons and the particular dangers of establishing any kind of safety zones in a situation of “ethnic cleansing” such as that in Bosnia and Herzegovina?
2.
 - a. Does the ICRC suggest the establishment of one of the types of protected zones foreseen by IHL? Does IHL provide for international supervision of such a zone? Does IHL provide for international protection of such a zone? Is such protection compatible with IHL? Why does the ICRC suggest international military protection? (GC I, Art. 23; GC IV, Arts 14, 15 and Annex I; P I, Arts 59 and 60)
 - b. Does the ICRC suggest that the protected zone be demilitarized (exclusion of Bosnian government forces)? Is this condition implied in the spirit of IHL on protected zones? Would such a condition have been realistic? Would a zone without such demilitarization have been realistic? (GC I, Art. 23; GC IV, Arts 14, 15 and Annex I; P I, Arts 59 and 60)
 - c. Were the zones suggested by the ICRC open to occupation by the adverse party? Is a requirement to that effect inherent in protected zones under IHL? Would such a requirement have been realistic? (GC I, Art. 23; GC IV, Arts 14, 15 and Annex I; P I, Arts 59 and 60)

- d. Does the ICRC proposal come under *jus ad bellum* or *jus in bello*? Does it respect the Red Cross principles of neutrality and impartiality? Doesn't it suggest the use of force against one side in the conflict? What is the legal basis for the ICRC's proposal?
3. On which essential points do the safe areas established by the Security Council differ from the protected zones suggested by the ICRC?
4.
 - a. Does the Security Council establish one of the types of protected zones provided for by IHL? Does IHL provide for international protection of such a zone? Is such international protection compatible with IHL? (GC I, Art. 23; GC IV, Arts 14, 15 and Annex I; P I, Arts 59 and 60) What is the mandate of UNPROFOR in the safe areas? Does the Security Council give UNPROFOR the mandate to defend the safe areas? Are 50 additional military observers sufficient to monitor the situation in the safe areas? To protect the safe areas? To defend the safe areas?
 - b. Are the zones established by the Security Council to be demilitarized? May Bosnian government forces stay in the safe areas? May they, under the resolutions and IHL, launch attacks from the safe areas against Bosnian Serb forces? (GC I, Art. 23; GC IV, Arts 14, 15 and Annex I; P I, Arts 59 and 60)
 - c. Are the safe areas established by the Security Council open to occupation by the Bosnian Serb forces?
 - d. Do the safe areas established by the Security Council come under *jus ad bellum* or *jus in bello*? Is it appropriate for peacekeeping forces to be given the mandate assigned to them under the resolutions?
 - e. What impression do the Security Council resolutions give to the Bosnian Muslim inhabitants of the safe areas? To the government of Bosnia and Herzegovina? Are those impressions justified?
5. Which elements of Resolutions 819 and 824 recall or implement *jus in bello*? Which do so for *jus ad bellum*? How do you qualify in particular operative para. 5 of Resolution 819?
6. Please answer the following questions by applying alternatively the law of international and the law of non-international armed conflicts.
 - a. Do deliberate acts by the Bosnian Serbs to force the evacuation of the civilian population from (Bosnian government-controlled) Srebrenica constitute a violation of IHL? (GC IV, Art. 49; P II, Art. 17)
 - b. Is the impeding of humanitarian assistance to the civilian population of Srebrenica a violation of IHL? Under IHL, are UNPROFOR and the international humanitarian agencies entitled to have free access to all safe areas? (GC IV, Arts 23, 30 and 59; P I, Arts 70 and 81; P II, Art. 18.)
 - c. Do the Bosnian Serbs have an obligation under IHL to allow the evacuation of wounded and sick civilians from Srebrenica? (GC IV, Art. 17)

Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities**A. General Framework Agreement for Peace in Bosnia and Herzegovina**

[Source: Reproduced *in extenso* in *ILM*, vol. 35, 1996, p. 75]

Concluded on November 21, 1995 in Dayton (United States) and signed in Paris on December 14, 1995 by the Presidents of the Republic of Bosnia and Herzegovina, the Federal Republic of Yugoslavia and the Republic of Croatia. (This Agreement brought the hostilities on the territory of Bosnia and Herzegovina to an end.)

Annex 1A: Agreement on the Military Aspects of the Peace Settlement**Article IX: Prisoner Exchanges**

1. The Parties shall release and transfer without delay all combatants and civilians held in relation to the conflict (hereinafter “prisoners”), in conformity with international humanitarian law and the provisions of this Article.
 - (a) The Parties shall be bound by and implement such plan for release and transfer of all prisoners as may be developed by the ICRC, after consultation with the Parties.
 - (b) The Parties shall cooperate fully with the ICRC and facilitate its work in implementing and monitoring the plan for release and transfer of prisoners.
 - (c) No later than thirty (30) days after the Transfer of Authority [which had to take place on December 19, 1995], the Parties shall release and transfer all prisoners held by them.
 - (d) In order to expedite this process, no later than twenty-one (21) days after this Annex enters into force, the Parties shall draw up comprehensive lists of prisoners and shall provide such lists to the ICRC, to the other Parties, and to the Joint Military Commission and the High Representative. These lists shall identify prisoners by nationality, name, rank (if any) and any internment or military serial number, to the extent applicable.
 - (e) The Parties shall ensure that the ICRC enjoys full and unimpeded access to all places where prisoners are kept and to all prisoners. The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.

- (f) The Parties shall take no reprisals against any prisoner or his/her family in the event that a prisoner refuses to be transferred.
 - (g) Notwithstanding the above provisions, each Party shall comply with any order or request of the International Tribunal for the Former Yugoslavia for the arrest, detention, surrender of or access to persons who would otherwise be released and transferred under this Article, but who are accused of violations within the jurisdiction of the Tribunal. Each Party must detain persons reasonably suspected of such violations for a period of time sufficient to permit appropriate consultation with Tribunal authorities.
2. In those cases where places of burial, whether individual or mass, are known as a matter of record, and graves are actually found to exist, each Party shall permit graves registration personnel of the other Parties to enter, within a mutually agreed period of time, for the limited purpose of proceeding to such graves, to recover and evacuate the bodies of deceased military and civilian personnel of that side, including deceased prisoners.

B. Tracing Missing Persons in Bosnia and Herzegovina

[Source: Girod C., "Bosnia-Herzegovina: Tracing Missing Persons," in *IRRC*, No. 312, 1996, pp. 387-391]

Every war brings its share of missing persons, whether military or civilian. And every individual reported missing is then sought by a family anxiously awaiting news of their loved one. These families cannot be left in such a state of anguish.

For the truth, however painful it may be, is preferable to the torture of uncertainty and false hope. In Bosnia and Herzegovina civilians were especially affected by a conflict in which belligerents pursued a policy of ethnic cleansing by expelling minority groups from certain regions. Thousands of people who disappeared in combat or were thrown into prison, summarily executed or massacred, are still being sought by their families.

What is a missing person?

International humanitarian law contains several provisions stipulating that families have the right to know what has happened to their missing relatives and that the warring parties must use every means at their disposal to provide those families with information [...]. Taking these two cardinal principles in particular as a basis for action, the International Committee of the Red Cross (ICRC) has set up various mechanisms to assist families suffering the agony of uncertainty, even after the guns have fallen silent.

In any conflict the ICRC starts out by trying to assess the problem of persons reported missing. Families without news of their relatives are asked to fill out tracing requests describing the circumstances in which the individual sought was last seen. Each request is then turned over to the authorities with whom the person in question last had contacts. This working method means that the number of people gone missing does not correspond to the actual number of conflict victims – a gruesome count

which the ICRC does not intend to perform. In Bosnia and Herzegovina, more than 10,000 families have so far submitted tracing requests to the ICRC or to the National Red Cross or Red Crescent Societies in their countries of asylum.

Agreements for Peace in Bosnia and Herzegovina [...]

Prior to the drafting of the General Framework Agreement for Peace in Bosnia and Herzegovina, which the parties negotiated in Dayton, Ohio, in autumn 1995, the United States consulted the main humanitarian organizations. With the ICRC it discussed the release of detainees and the tracing of missing persons. The first of these issues is dealt with in the Annex on Military Aspects of the Peace Settlement, and the second is covered in the Framework Agreement's provisions pertaining to civilians. Thus Article V, Annex 7, of the Agreement stipulates that: "The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for". The terms of this Article take up and confirm the core principles of international humanitarian law.

The Framework Agreement also confers on the ICRC the task of organizing, in consultation with the parties involved, and overseeing the release and transfer of all civilian and military prisoners held in connection with the conflict. The ICRC performed this task in cooperation with the Implementation Force (IFOR) entrusted with carrying out the military provisions of the Framework Agreement.

ICRC action

Despite resistance from the parties, over 1,000 prisoners were returned home. Throughout the operation, which lasted about two months, the ICRC firmly refused to link the release process with the problem of missing persons, just as it had refused to become involved in the reciprocity game the parties used to play during the conflict. The success of the operation was also ensured by the international community, which was convinced that the ICRC was taking the right approach and pressured the parties to cooperate. Since many detainees had been withheld from the ICRC and were therefore being sought by their families, it was important to empty the prisons before addressing the issue of missing persons.

On the basis of the General Framework Agreement for Peace in Bosnia and Herzegovina, the ICRC thus proposed that the former belligerents set up a Working Group on the Process for Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia and Herzegovina – a convoluted title reflecting the nature of the political negotiations that led to the establishment of this body. While the parties endorsed the proposal itself, they engaged in endless quibbling over the wording of the Rules of Procedure and of the Terms of Reference drafted by the ICRC. Nevertheless, the Working Group, which is chaired by the ICRC, has already met three times in the Sarajevo offices of the High Representative for Bosnia and Herzegovina^[2] in the presence of the ambassadors of the Contact Group on Bosnia and Herzegovina^[3], the representative of the presiding member of the European Union^[4] and the representatives of Croatia and

the Federal Republic of Yugoslavia. These meetings were also attended by IFOR and the United Nations Expert on Missing Persons in the Former Yugoslavia^[5].

Despite numerous plenary and bilateral working sessions, it has not been possible to bring the parties to agree on matters of participation and representation (the question under discussion is whether or not the former belligerents are the same as the parties that signed the Framework Agreement) or formally to adopt the Rules of Procedure. However, these Rules have been tacitly agreed on in the plenary meetings, making it possible to begin practical work: more than 10,000 detailed cases of persons reported missing by their families have already been submitted to the parties, which must now provide replies.

In a remarkable departure from the procedure normally followed in such cases, the Working Group has adopted a rule whereby the information contained in the tracing requests, as well as the replies that the parties are called on to provide, are not only exchanged bilaterally between the families and the parties concerned through the intermediary of the ICRC, but are also communicated to all the members of the Working Group, that is, to all the former belligerents, and to the High Representative. Such a policy of openness is meant to prevent further politicization of the issue and the ICRC intends to pursue it, in particular by issuing a gazette that lists the names of all missing persons and by publishing these names on the Internet. This should prompt possible witnesses to approach the ICRC with confidential information concerning the fate of individuals who have gone missing, which the organization could then pass on to the families concerned.

Indeed, after every war families seek news of missing relatives and the settlement of this question is always a highly political issue. One reason is that for a party to provide information is to admit that it knows something, which may give it the feeling that it is owning up to some crime. Another reason is that the anguish of families with missing relatives is such that they generally band together and pressure their authorities to obtain information from the opposite party, which may be tempted to use these families to destabilize the other side.

The issue of exhumations

As the tragic result of more than three years of conflict, Bosnia and Herzegovina is strewn with mass graves in which thousands of civilians were buried like animals. The graves in the region of Srebrenica are a horrifying example. Displaced families in Tuzla interviewed by the ICRC allege that more than 3,000 people were arrested by Bosnian Serb forces immediately after the fall of the enclave in mid-July 1995. Since the authorities in Pale have persistently refused to say what happened to these people, the ICRC has concluded that all of them were killed.

Families now wish to recover the bodies of their missing relatives in the wild hope of being able to identify them. Before this can be done, however, an *ante mortem* database^[6] must be set up so as to have a pool of information with which forensic evidence can later be compared. Between the two operations, the bodies must be exhumed, knowing that most of the mass graves in Bosnia and Herzegovina are

situated on the other side of ethnic boundaries, which prevents families and the relevant authorities from gaining access to them.

Families are also demanding that justice be done. That is the role of the International Criminal Tribunal for the Former Yugoslavia, set up by the United Nations Security Council while the fighting was still raging in Bosnia and Herzegovina. The Tribunal intends to exhume a number of bodies to establish the cause of death and gather evidence and proof of massacres. However, it is not the Tribunal's responsibility to identify the bodies or to arrange for their proper burial.

Between the families' need and right to know what has become of their missing relatives, and that justice must be done, lie thousands of bodies in the mass graves. While it would probably be unrealistic to imagine that all the bodies buried in Bosnia and Herzegovina could ever be exhumed and identified,^[7] the moral issue of their proper burial must still be addressed. Without the cooperation of the former belligerents and of IFOR, however, all discussion remains purely theoretical. Only when people have peace in their hearts and when justice has been done will thoughts of revenge be forgotten and belief in peace and justice be restored in every individual and every community.

Notes: [...]

2. Former Swedish Prime Minister Carl Bildt's appointment to this post was confirmed by the United Nations Security Council shortly before the General Framework Agreement for Peace in Bosnia and Herzegovina was signed in Paris on December 14, 1995. Just as IFOR, which is made up of NATO troops and Russian troops, is entrusted with implementing the military provisions of the Framework Agreement, so it is the task of the High Representative to implement the Agreement's provisions pertaining to civilians.
3. France, Germany, the Russian Federation, the United Kingdom and the United States.
4. Italy at the time of writing.
5. Manfred Nowak, who in 1994 was appointed by the UN Commission on Human Rights as the Expert in charge of the Special Process on Missing Persons in the Territory of the Former Yugoslavia.
6. A database containing all pertinent medical information that can be obtained from families with missing relatives.
7. According to the forensic experts of the American organization, *Physicians for Human Rights*, who exhumed bodies for the International Criminal Tribunal that was set up following the horrific massacres in Rwanda, the success rate for identifying remains exhumed from a grave containing several hundred bodies is no higher than 10 to 20 percent, providing a detailed *ante mortem* database is available.

DISCUSSION

1. a. In view of its title "Prisoner Exchanges", does Art. IX of the Dayton Agreement's Annex 1-A provide for a unilateral obligation to release prisoners? Under IHL, is that obligation unilateral or may it be subject to reciprocity? May the Agreement deviate from IHL by subjecting the obligation to reciprocity? (GC III, Arts 6 and 118; GC IV, Arts 7 and 133) [*See also Case No. 204*, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B., Art. 2.3(2)]]
- b. Which provisions of Art. IX(1) go beyond the obligations laid down by IHL? (GC III, Arts 118, 122, 123 and 126; GC IV, Arts 133, 134, 137, 138, 140 and 143)
- c. Is Art. IX(1)(g) compatible with the obligations laid down by IHL with regard to grave breaches? Must a Party release a prisoner it suspects of a war crime but for whom the ICTY does not request arrest, detention, surrender, or access at the end of the "period of consultations": Under Art. IX(1)? Under IHL? May a Party release such a person under IHL? Was the further agreement

of the Parties, concluded in Rome, under which no person may be retained or arrested on war crimes charges except with the permission of the ICTY, compatible with IHL? Can you imagine why the US pressed the Parties to conclude such an agreement? (GC III, Arts 118, 119(5) and 129-131; GC IV, Arts 133 and 146-148)

- d. Why did the ICRC refuse to link the release of prisoners to the problem of missing persons? Under IHL, is not a missing person for whom a testimony of their arrest by the enemy exists, or who was once visited by the ICRC, a prisoner to be released?
2. Which elements of the ICRC's activities to trace missing persons in Bosnia and Herzegovina go beyond IHL? Under IHL, does a party to an international armed conflict have an obligation, at the end of the conflict:
 - to search for persons reported missing by the adverse party?
 - to provide all information it has on the fate of such persons?
 - to identify mortal remains of persons it must presume to have belonged to the adverse party?
 - to inform of the cause of death of a person whose mortal remains it has identified?
 - to inform unilaterally of the results of such identification?
 - to return identified mortal remains to the party to which the persons belonged?
 - to give proper burial to identified and non-identified mortal remains?
 - to give families belonging to the adverse side access to their relatives' graves?
 (GC I, Arts 15-17; GC III, Arts 120, 122 and 123; GC IV, Arts 26 and 136-140; P I, Arts 32-34)
3. a. Why does the ICRC only submit cases of missing persons that have been submitted to it by their families? Does IHL support that decision? Does IHL also give a party to a conflict the right to submit tracing requests? Has the ICRC an obligation to accept such requests? (P I, Art. 32; GC I, Art. 16; GC III, Arts 122(3), (4), (6) and 123; GC IV, Arts 137 and 140)
- b. What are the reasons for, and the advantages and risks of, the solution whereby all tracing requests and replies are to be communicated to all members of the Working Group chaired by the ICRC? Does that prevent politicization?
4. Does Art. IX(2) go beyond the obligations provided for by IHL? Does this provision place each side under a unilateral obligation to allow the other side's grave registration personnel to have access to graves? May a Party use evidence of war crimes, obtained by its grave registration personnel acting under Art. IX(2), in war crimes trials? (P I, Art. 34)

Case No. 207, Bosnia and Herzegovina, Using Uniforms of Peacekeepers

[Source: Martin, H., *Financial Times*, May 31, 1995]

UN Troops Put on Alert for Serb Infiltrators

Troops on the ground in Sarajevo are on heightened alert because of the threat of Serb infiltration into their camps.

In taking nearly 400 UN hostages, the Serbs have also managed to secure 21 armoured personnel carriers, six light tanks and three armoured cars.

Serbs, dressed in stolen French uniforms and flack jackets, took over a UN-controlled bridge in the heart of Sarajevo on Saturday; now the motto is: trust no one. All UN soldiers are on amber alert, donning flack jackets and helmets and blocking the main gates of their various bases with armoured personnel carriers.

In the leafy grounds of the UN headquarters, the Danish guards were taking extra security measures because of the Serb threat. Lt Tomas Malling, who is in charge of the guards, said: "Of course it's a worry to us and we're checking vehicles very carefully". [...]

At the French main base, a young guard on the gate claims that "everybody is quite relaxed" as he nervously searches your bag and scrutinises your face. One captain said: "We were sent here as peacekeepers. What has been done is scandalous but that doesn't mean we feel angry enough to become aggressive." [...]

Another said the UN should withdraw. "Then we should come back and take the Serbs out, because they are the enemy now." A colleague added: "If we are peacekeepers let's be peacekeepers. But if we are peacemakers, let's turn nasty."

DISCUSSION

1. a. Is IHL applicable to these events? Is the UN a Party to the Conventions and Protocols? Can the UN conceivably be a party to an international armed conflict in the sense of Art. 2 common to the Conventions? Can the UN forces be considered for purposes of the applicability of IHL as armed forces of the troop-contributing States (which are Parties to the Conventions), and can any hostilities be considered an armed conflict between those States and the party responsible for the opposing forces? [See **Case No. 198**, Belgium, Belgian Soldiers in Somalia]
- b. If IHL is applicable to these events, does the law of international or of non-international armed conflict apply?
- c. Would IHL prohibit UN soldiers from disguising themselves in Serb uniforms? At least for the purpose of maintaining peace?
2. a. Under IHL, may a belligerent never wear the uniform of the enemy? (P I, Art. 39) [See also **Case No. 92**, United States Military Court in Germany, Trial of Skorzeny and Others]
- b. Is the wearing of peacekeepers' uniforms by members of Bosnian Serb armed forces prohibited under IHL? Even if peacekeepers are not bound by IHL? Even if there is no armed conflict between the peacekeepers and the Bosnian Serb forces? (P I, Arts 37 and 38)

- c. Did the wearing of French uniforms and flack jackets by the Serbs when taking over a UN-controlled bridge violate IHL? Is it a war crime? (P I, Arts 37, 38(2) and 39)
- d. Are the answers different if UN soldiers are no longer considered by a belligerent party as peacekeepers but as enemies? (P I, Art. 39)

Case No. 208, Germany, Government Reply on Rapes in Bosnia

[Source: German Bundestag, Document 12/4048, 12th legislative period, December 29, 1992; original in German, unofficial translation.]

REPLY by the Federal Government to the written questions submitted by Bundestag members [...] – Document 12/3838 – Systematic rape as a means of Serb warfare, *inter alia* in Bosnia

[The reply was issued on behalf of the Federal Government in a letter signed by Ursula Seiler-Albring, Minister of State at the Federal Ministry of Foreign Affairs, and dated 15 December 1992. The document also sets out – in small type – the text of the questions.]

1. What knowledge does the Federal Government have of the systematic rape of predominantly Muslim girls and women by Serb soldiers and irregulars, principally in Bosnia?

Has the Federal Government made representations to the Serbian government in Belgrade in connection with such rape?

According to the information at the disposal of the Federal Government, based on concurrent first-hand accounts, it must be assumed that mass rape is being committed against predominantly Muslim girls and women. Precise figures relating to the actual extent of this serious violation of fundamental human rights are not available. There are growing indications that this is a case of systematic rape aimed at destroying the identity of another ethnic group. The Federal Government has therefore made vigorous and repeated representations to the "Yugoslav" government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations.

2. In what way does the Federal Government intend to play its part in ensuring the investigation, prosecution and worldwide proscription of such rape?

Rape is already a criminal offence under the international law of war, which also applies to the region of the former Yugoslavia. The Federal Government is currently looking into possible ways in which those fundamental rules for the safeguard of human dignity can be widely implemented.

The Federal Government was the first to take practical measures to assist and counsel the girls and women concerned. The discussions held with the victims during that process are also serving to advance the investigation into the facts of each individual case. In addition, the Federal Government has asked UN Special Rapporteur Mazowiecki to devote particular attention to the issue of rape. Further investigation work is being carried out by self-help groups on the ground.

3. In what way will the Federal Government push for rape to be incorporated as a war crime in the international conventions relating to the protection of the [civilian] population in war zones and civil war zones?

The rape of women and girls is already prohibited in armed conflict and to be deemed a war crime under the existing provisions of international humanitarian law. In that respect reference must be made in particular to the provisions of Article 27, para. 2, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 and of Article 4, para. 2(e), of the Protocol additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts. Should the reports of systematic mass rape of predominantly Muslim women and girls be confirmed, this would, moreover, meet the statutory definition for systematic harm to an ethnical group within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948. [...]

DISCUSSION

1. Is rape by a belligerent and its agents prohibited in international armed conflicts? In non-international armed conflicts? (GC I-IV, Art. 3 and Arts 50/51/130/147 respectively; GC IV, Art. 27(2); P I, Art. 76(1); P II, Art. 4(2)(e); CIHL, Rule 93)
2. Are all deliberately committed violations of IHL war crimes? (GC I-IV, Arts 50/51/130/147 respectively; PI, Art. 85)
3. Is rape by a belligerent and its agents committed in an international or a non-international armed conflict a grave breach of IHL? Is it otherwise a war crime? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85)

Case No. 209, United Kingdom, Misuse of the Emblem

[Source: *Shropshire Star*, February 8, 1996, p.4]

Mercy Trucker Getting Cross ...

Shropshire mercy trucker Mike Taylor has been told he faces legal action unless he removes the British Red Cross emblem from his lorry.

Charity bosses say the Newport aid worker is committing a crime by using the red cross emblem without authorisation.

But Mr Taylor, who delivers food and emergency supplies to the war torn Bosnia, has pledged to keep the symbol on his trucks.

"I'm very annoyed about the whole thing but I refuse to take the emblems off. It's all very petty."

He said the International Red Cross had given him permission to use the symbol. In the past three years he has taken 24 loads over to the former Yugoslavia.

"The symbol is internationally recognised and I use it for protection when I cross the front line," he said.

"The International Red Cross in Geneva let me use the emblem but this problem is with the British branch," he said.

In a letter received by Mr Taylor, the head of international law at the British Red Cross states: "Unless I hear from you by February 13, that you are making arrangements to have the red cross signs removed as a matter of urgency, I shall have no alternative but to take further action."

Mr Taylor added: "I can't believe the Red Cross is making such a fuss about this."

A spokesperson for the British Red Cross, Colin McCallum, said Mr Taylor was breaking UK law.

He added only people working for the Red Cross could use the symbol, otherwise it would be impossible to control who was using it.

DISCUSSION

1. Who may use the red cross emblem? For which purposes? (HR, Art. 23(f); GC I, Arts 38 and 53; GC II, Arts 41-43; P I, Arts 8(I), 18, and Annex I, Arts 4-5; P II, Art. 12)
2. a. For what purpose did the trucker wish to use the emblem? Is the emblem ever to be used for protection in such circumstances? When is it to be used as a protective device? When as an indicative device? Is it true that only people working for the Red Cross can use the emblem? In general? Specifically to transport food aid in conflict areas? (GC I, Art. 44; P I, Art. 18)

- b. Does the trucker's use of the emblem in such a way constitute misuse? If so, is this misuse of the emblem a war crime? Would any misuse of the emblem constitute a war crime? If so, when? (HR, Art. 34; GC I, Art. 53; P I, Arts 37(1)(d), 38 and 85(3)(f))
3.
 - a. Was the trucker here authorized to use the emblem? Even assuming that the ICRC gave him permission? Who authorizes the protective use of the emblem? The International Red Cross and Red Crescent organizations? The National Societies? The States Parties? Who is responsible for punishing misuse and abuse of the emblem? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18)
 - b. Which obligations do States Parties to the Conventions and Additional Protocols have with regard to the emblem? Must each State Party adopt implementing legislation, such as the United Kingdom's Geneva Conventions Act of 1957? Which issues should this legislation cover? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18)
4.
 - a. Is not, as the trucker said, the British Red Cross making a fuss about this? Should the Red Cross still urge that he be punished under the UK's Geneva Conventions Act of 1957, even when his safety depends on using the emblem? After all, isn't his mission for a humanitarian purpose? Is this a sufficient justification?
 - b. In what sense is the British Red Cross concerned about the trucker's use of the emblem? Only because he did not receive prior authorization? Because he is competing with the Red Cross in the "humanitarian business" and using the Red Cross "trademark"? What dangers to the emblem's authority result from such misuse of the emblem? What impact does it have on the emblem's essential neutrality? On its impartiality? Does such misuse undermine the protection it provides?
 - c. May or must a National Red Cross Society seek to combat misuse of the emblem? Because it is a violation of IHL or because the same emblem is also used by the National Society? May or must a National Red Cross Society seek more generally to combat specific violations of IHL? Including seeing to it that violators are brought to justice?

Case No. 210, UN, Statute of the ICTY

A. Security Council Resolution 827 (1993)

[Source: UN Doc. S/RES/827 (May 25, 1993).]

The Security Council,

[...]

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed, [...]

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. *Approves* the report of the Secretary-General;
2. *Decides* hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between

January 1, 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. *Requests* the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;
4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute; [...]
7. *Decides* also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law; [...]

B. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)

[Source: UN Doc. S/25704 (May 3, 1993); footnotes omitted.]

[...]

A. Competence *ratione materiae* (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.
34. In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.
35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention

on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945. [...]

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.
38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.
39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law. [...]

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
42. The Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nuremberg Tribunal also recognized that war crimes defined in article 6(b) of the Nuremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.
43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.
44. These rules of customary law, as interpreted and applied by the Nuremberg Tribunal, provide the basis for the corresponding article of the statute [Article 3] [...]

C. Statute 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, May 25, 1993

[Source: Originally published as Annex to the *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808* (1993), (S/25704), approved by the Security Council by Resolution 827 (1993), May 25, 1993.]

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

[...]

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as “the International Tribunal”) shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

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, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4
Genocide

- 1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
- 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) imposing measures intended to prevent births within the group;
 - (e) forcibly transferring children of the group to another group.
- 3. The following acts shall be punishable:
 - (a) genocide;
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide;
 - (e) complicity in genocide.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
Individual criminal responsibility

1. 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.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10
Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
 - (a) the act for which he or she was tried was characterized as an ordinary crime; or
 - (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11
Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

- (a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- (b) the Prosecutor; and

(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.
6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13

Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 *bis*
Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - (a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as “The International Tribunal for Rwanda”) in accordance with article 12 *bis* of the Statute of that Tribunal;
 - (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
 - (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter*
Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - (a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
 - (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
 - (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
 - (e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.
2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*
Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
 - (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;

- (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
 - (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal.
 - (d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
- (a) be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - (b) have power:
 - (i) to adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) to review an indictment pursuant to article 19 of the Statute;
 - (iii) to consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute;
3. Notwithstanding, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:
- (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - (b) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - (c) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.
4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

Article 14

Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in

accordance with Article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers.

4. Two of the judges elected or appointed in accordance with article 12 of the Statute of the International Tribunal for Rwanda shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.
5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19
Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
- (g) not to be compelled to testify against himself or to confess guilt.

Article 22**Protection of victims and witnesses**

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23**Judgement**

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24**Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25**Appellate proceedings**

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) an error on a question of law invalidating the decision; or
 - (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26
Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27
Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29
Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

Article 30

The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31

Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33

Working languages

The working languages of the International Tribunal shall be English and French.

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

D. Security Council Resolution 1534 (2004)

[Source: Resolution 1534 (2004) Adopted by the Security Council at its 4935th meeting, on 26 March 2004; available on <http://www.un.org>]

The Security Council,

[...]

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY's completion strategy and its resolution 1503 (2003) of 28 August 2003,

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

4. *Calls on* the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
5. *Calls on* each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); [...]
9. *Recalls* that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular;
10. *Welcomes* in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region; [...]

DISCUSSION

1. a. Were the various armed conflicts in the former Yugoslavia, even those of a purely internal character, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL an appropriate measure to stop

- that threat? Can we today say whether it contributed to the restoration of peace in the former Yugoslavia? Does that (the end result) actually matter? Doesn't the prosecution of (former) leaders make peace and reconciliation more difficult?
- b. Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?
2. a. May the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a "court established by law"? Does the creation of a tribunal competent to try acts committed before it was established itself violate the prohibition (in IHL and international human rights law) of retroactive penal legislation?
 - b. How else than by a resolution of the Security Council could the ICTY have been established? What are the advantages and disadvantages of those other methods?
3. a. Does IHL provide for the possibility of prosecuting war criminals before an international tribunal? Is the prosecution of war criminals before an international tribunal and its concurrent jurisdiction as described in Art. 9 of the Statute compatible with the obligation of States under IHL to search for and prosecute war criminals? (GC I-IV, Arts 49/50/129/146 respectively)
 - b. Under IHL and the Statute, does the ICTY relieve States of their obligation to search for and prosecute war criminals?
4. a. Are Arts 2-5 and 7 penal legislation or simply rules determining the ICTY's competence?
 - b. Is Art. 3 retroactive penal legislation, at least when applied to non-international armed conflicts?
5. Is the UN Secretary-General right in stating that the principle of *nullum crimen sine lege* requires that the ICTY apply rules of IHL which are beyond any doubt part of customary law? (*Doc B., para. 34*) Would an application of rules (such as those of Protocol I) accepted by all parties to a conflict violate that principle? From the point of view of the principle *nullum crimen sine lege*, is a prosecution for a violation of a rule of customary law more or less problematic than a prosecution for a violation of clearly applicable treaty law? Do you see a divergence here between civil law and common law traditions? Would an application of treaty law make the transfer of accused persons from third States not party to the respective treaty impossible?
6. a. Does Art. 2 cover all grave breaches of the Conventions? (GC I-IV, Arts 50/51/130/147 respectively)
 - b. Can you imagine why Art. 2 does not refer to grave breaches of Protocol I? Is there any possible justification for this omission, taking into account that the former Yugoslavia and all its successor States are parties to Protocol I and that the parties to the conflicts have undertaken to respect large parts of it, regardless of the qualification of the conflict? [See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts, and **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part A., para. 143]] How could the ICTY nevertheless try grave breaches of Protocol I?
7. a. Which elements in Art. 3 go beyond the grave breaches mentioned in Protocol I? Are any grave breaches of Protocol I not covered by Art. 3? (P I, Arts 11(4) and 85)
 - b. Is an attack on an undefended building a grave breach of contemporary IHL? Is it always prohibited by IHL? Even if the building is uninhabited? Can an undefended building become a military objective? How would you formulate Art. 3(c) under contemporary IHL? (HR, Art. 25; GC IV, Arts 53 and 147; P I, Arts 52, 59 and 85(3)(d))

- c. Is plunder of private property a grave breach of IHL? How would you formulate Art. 3(e) under contemporary IHL? (GC IV, Arts 33 and 147)
- 8. a. Can Art. 7(1) be inferred from the pertinent provisions of the Conventions and Protocol I? Does it correspond to a rule of customary IHL? Could it conceivably be a rule newly introduced by the ICTY Statute? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 85(1) and 86(2))
b. Do you see any substantive difference between Art. 7(3) of the Statute and Art. 86(2) of Protocol I?
- 9. Is Article 10 compatible with IHL?
- 10. a. Which rights granted to the accused under Art. 21 go beyond those granted by IHL to suspected war criminals? Which guarantees of IHL go further? (GC I-IV, Arts 49/50/129/146 respectively; GC III, Arts 105-107; P I, Art. 75)
b. Has the ICRC a right to visit an accused? Must it be notified of sentences as a *de facto* substitute for the Protecting Power? (GC I and II, Arts 10(3); GC III, Arts 10(3), 107 and 126; GC IV, Arts 11(3), 30, 74 and 143; P I, Art. 5(4))
- 11. Do persons held under the authority of the ICTY (pending trial or after being sentenced) lose their status under IHL as protected civilians or prisoners of war if they had such status before being arrested in the former Yugoslavia? Are any of the Statute's provisions incompatible with such status and the treatment prescribed by IHL for holders of it? Is it lawful to deport a civilian arrested in the former Yugoslavia to The Hague to stand trial? (GC III, Art. 85; GC IV, Art. 49; P I, Art. 44(2))

Case No. 211, ICTY, The Prosecutor v. Tadić**A. ICTY, The Prosecutor v. Tadić, Appeals Chamber, Jurisdiction**

[Source: ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995; available on <http://www.un.org>, footnotes omitted]

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

**DECISION ON THE DEFENCE MOTION FOR
INTERLOCUTORY APPEAL ON JURISDICTION**

I. INTRODUCTION**A. The Judgement Under Appeal**

1. The Appeals Chamber [...] is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.
2. Before the Trial Chamber, Appellant had launched a three-pronged attack:
 - a. illegal foundation of the International Tribunal;
 - b. wrongful primacy of the International Tribunal over national courts;
 - c. lack of jurisdiction *ratione materiae*.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

"THE TRIAL CHAMBER [...] HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." [...].

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL [...]**A. Meaning Of Jurisdiction [...]**

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized

structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). [...]

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal [...]

1. Does The International Tribunal Have Jurisdiction? [...]

15. To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council "intended" to entrust it with, is to envisage the International Tribunal exclusively as a "subsidiary organ" of the Security Council (see United Nations Charter, Arts. 7(2) & 29), a "creation" totally fashioned to the smallest detail by its "creator" and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of "subsidiary organ": a tribunal. [...]
22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council. [...]

C. The Issue Of Constitutionality [...]

27. The Trial Chamber summarized the claims of the Appellant as follows:

"It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an *ad hoc* criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent

in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of *ad hoc* tribunals to try particular types of offences [...]” [...]

1. **The Power Of The Security Council To Invoke Chapter VII**

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” [...]

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law). [...]

30. [...] [A]n armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words “breach of the peace”. [...]

But even if it were considered merely as an “internal armed conflict”, it would still constitute a “threat to the peace” according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a “threat to the peace” and dealt

with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the “subsequent practice” of the membership of the United Nations at large, that the “threat to the peace” of Article 39 may include, as one of its species, internal armed conflicts. [...]

3. *The Establishment Of The International Tribunal As A Measure Under Chapter VII [...]*

c) *Was The Establishment Of The International Tribunal An Appropriate Measure?*

39. [...] Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends [...]. [...]

4. *Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be “Established By Law”?*

41. [...] The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. [...]

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, [...] and in Article 8(1) of the American Convention on Human Rights, [...].

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. [...]

This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be “established by law.”

43. [...] The case law applying the words “established by law” in the European Convention on Human Rights [...] bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on

the discretion of the executive; rather they should be regulated by law emanating from Parliament. [...]

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (see United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects. [...]

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter. [...]
45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. [...] This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. [...] [A]t the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law [...]. The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness. [...]
46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost *verbatim* in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. [...]
48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS [...]

B. Sovereignty Of States [...]

58. [...] It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity. [...]

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as “ordinary crimes” or proceedings being “designed to shield the accused”, or cases not being diligently prosecuted [See Case No. 210, UN, Statute of the ICTY [Part C., Art. 10(2)]]. [...]

IV. LACK OF SUBJECT-MATTER JURISDICTION [...]

A. Preliminary Issue: The Existence Of An Armed Conflict [...]

67. International humanitarian law governs the conduct of both internal and international armed conflicts. [...]. The definition of “armed conflict” varies depending on whether the hostilities are international or internal but, contrary to Appellant’s contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. [...]
68. Although the Geneva Conventions are silent as to the geographical scope of international “armed conflicts,” the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

“[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.” [...]

Article 3(b) of Protocol I [...] contains similar language. [...] In addition to these textual references, the very nature of the Conventions – particularly Conventions III and IV – dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. [...] Article 2, paragraph 1, [protocol II] provides:

“[t]his Protocol shall be applied [...] to all persons *affected* by an armed conflict as defined in Article 1.”[...]

The same provision specifies in paragraph 2 that:

“[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.”[...]

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language “for reasons related to such conflict”, suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find 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. 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.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought

military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts.[...] Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed [...] 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. There is no doubt that the allegations at issue here bear the required relationship. [...]

B. Does The Statute Refer Only To International Armed Conflicts?

1. *Literal Interpretation Of The Statute*

71. [...] Article 2 refers to “grave breaches” of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. [...] In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

2. *Teleological Interpretation Of The Statute*

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army (“JNA”) in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia),

they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). [...]

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding of November 27, 1991.) [See Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A]] Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives [...] committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter Agreement No. 1).) [See Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B]] Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. [...] If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse

an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal. [...]

74. [...] The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.
75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

"clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised."

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. [...] As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the [Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute.").

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that

the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as “grave breaches”, because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as “protected persons” under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as “grave breaches”, because such civilians would be “protected persons” under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.
78. [...] As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly punishable only under Articles 2 and 3 of the Statute. [...]

3. *Logical And Systematic Interpretation Of The Statute*

(a) *Article 2*

79. Article 2 of the Statute of the International Tribunal provides:

[...] By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to “grave breaches” of

the Conventions. Each of the four Geneva Conventions of 1949 contains a “grave breaches” provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (See, e.g., *Amicus Curiae* Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadić*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, U.S. *Amicus Curiae* Brief), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. [...]

80. [...] The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute “grave breaches”; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of all Contracting States to search for and try or extradite persons allegedly responsible for “grave breaches.” The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system.
81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of “grave breaches.” [...] [T]he reference to the Geneva Conventions contained in [the] Statute of the Tribunal, [...] to the notion of “protected persons or property” must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions. [...]

83. [...] [T]he Chamber notes with satisfaction the statement in the *Amicus Curiae* brief submitted by the Government of the United States, where it is contended that:

“the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character.” (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the “grave breaches” system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual [...], the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina [...] [and] a recent judgement by a Danish court [...] on the basis of the “grave breaches” provisions of the Geneva Conventions, [...] without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict [...].

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts. [...]

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

[See **Case No. 210**, UN, Statute of the ICTY]

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal’s interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; [...]. Appellant’s argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all “violations of the laws or customs of war”; and (ii) the

enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). [...] considered *qua* customary law [...]. [T]he Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" [...]. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities. [...] Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. [...]

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law (on this point *see below*, para. 143). [...]
91. [...]. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. [...]
92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely “grave breaches” of the Geneva Conventions or violations of the “Hague law.” Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.
93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the *Nicaragua* case, [See Case No. 153, ICJ, *Nicaragua v. United States*] Article 1 of the four Geneva Conventions, whereby the contracting parties “undertake to respect and ensure respect” for the Conventions “in all circumstances”, has become a “general principle [...] of humanitarian law to which the Conventions merely give specific expression.” (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter *Nicaragua* Case). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

“In situations of **serious violations** of the Conventions or of this Protocol, the High Contracting Parties **undertake to act, jointly or individually, in co-operation with the United Nations** and in conformity with the United Nations Charter.” (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all “serious violations” of international humanitarian law.

(ii) *The Conditions That Must Be Fulfilled For A Violation Of International Humanitarian Law To Be Subject To Article 3*

94. The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

- (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 (*see below*, para. 143);
- (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. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the “serious violation” has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

*(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts**a. General*

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.
97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent [...]. Secondly, internal armed conflicts have become more and more cruel and protracted [...]. Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof [...]. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach [...]. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

98. The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (*Nicaragua* Case, at para. 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and, as we shall show below (para. 117), to the core of Additional Protocol II of 1977.
99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. [...] Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

"The rules of international law as to what constitutes a military objective are undefined [...]. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature."

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

"I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed."

101. Such views were reaffirmed in a number of contemporaneous resolutions by the Assembly of the League of Nations, and in the declarations and agreements of the warring parties. For example, on 30 September 1938, the Assembly of the League of Nations unanimously adopted a resolution concerning both the Spanish conflict and the Chinese-Japanese war. After stating that "on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations" and that "this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under recognised principles of international law", the Assembly expressed the hope that an agreement could be adopted on the matter and went on to state that it

"[r]ecognize[d] the following principles as a necessary basis for any subsequent regulations:

- (1) The intentional bombing of civilian populations is illegal;
 - (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
 - (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence."
102. Subsequent State practice indicates that the Spanish Civil War was not exceptional in bringing about the extension of some general principles of the laws of warfare to internal armed conflict. While the rules that evolved as a result of the Spanish

Civil War were intended to protect civilians finding themselves in the theatre of hostilities, rules designed to protect those who do not (or no longer) take part in hostilities emerged after World War II. [...]

In an important subsequent development, States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949. The International Court of Justice has confirmed that these rules reflect "elementary considerations of humanity" applicable under customary international law to any armed conflict, whether it is of an internal or international character. (*Nicaragua Case*, at para. 218). Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.
104. [...] In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law. [...]
108. In addition to the behaviour of belligerent States, Governments and insurgents, other factors have been instrumental in bringing about the formation of the customary rules at issue. The Appeals Chamber will mention in particular the action of the ICRC, two resolutions adopted by the United Nations General Assembly, some declarations made by member States of the European Community (now European Union), as well as Additional Protocol II of 1977 and some military manuals.
109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows

that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict.

The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

"the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law". This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law."

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." [...] The resolution stated the following:

"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [...the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.
 2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.
 3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.
 4. Civilian populations as such should not be the object of military operations.
 5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.
 6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.
 7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.
 8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The *Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations*, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application."
112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.
113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies

and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter.”

114. A similar, albeit more general, appeal was made by the Security Council [...].

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, “the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population” [...] and resolution 814. As for Georgia, see Resolution 993 [...].

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. [...]

116. It must be stressed that, in the statements and resolutions referred to above, the European Union and the United Nations Security Council did not mention common Article 3 of the Geneva Conventions, but adverted to “international humanitarian law”, thus clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope.

117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles.

This proposition is confirmed by the views expressed by a number of States. [...] [F]or example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). [...] [T]he Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war [...]. Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions “developed and supplemented” common Article 3, “which in turn constitute[d] the minimum protection due to every human being at any time and place” [...]. Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

“[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process”.

118. That at present there exist general principles governing the conduct of hostilities (the so-called “Hague Law”) applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." [...]

119. [...] We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare. As the Appeals Chamber has pointed out above (*see* para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." [...].

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

"The Twelve are greatly concerned at reports of the alleged use of chemical weapons against the Kurds [by the Iraqi authorities]. They confirm their previous positions, condemning any use of these weapons. They call for respect of international humanitarian law, including the Geneva Protocol of 1925, and Resolutions 612 and 620 of the United Nations Security Council [concerning the use of chemical weapons in the Iraq-Iran war]." [...]

121. A firm position to the same effect was taken by the British [...] [and] [...] German authorities. [...].
122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements."

On 13 September 1988, Secretary of State George Schultz, [...] strongly condemned as “completely unacceptable” the use of chemical weapons by Iraq. [...]

123. It is interesting to note that, reportedly, the Iraqi Government “flatly denied the poison gas charges.” Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. [...] It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States’ assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons [...].
124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals – a matter on which this Chamber obviously cannot and does not express any opinion – there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts. [...]
126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts. [...]

(iv) *Individual Criminal Responsibility In Internal Armed Conflict*

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts [...]. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg [...] considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals [...]. Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” [...]

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. [...]
130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. [...]
131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany, which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3 [...]. Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence". The relevant provisions of the manual of the United States [...] may also lend themselves to the interpretation that "war crimes" [...] include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 [...].
132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1990, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. Article 142 (on war crimes against the civilian population) and Article 143 (on war crimes against the wounded and the sick) expressly apply "at the time of war, armed conflict or occupation"; this would seem to imply that they also apply to internal armed conflicts. [...] Without any ambiguity, a Belgian law enacted on 16 June 1993 for the implementation of the 1949 Geneva Conventions and the two Additional Protocols provides that Belgian courts have jurisdiction to adjudicate breaches of Additional Protocol II to the Geneva Conventions relating to victims of non-international armed conflicts. Article 1 of this law provides that a series of "grave breaches" (infractions graves) of the four Geneva Conventions and the two Additional Protocols, listed in the same Article 1, "constitute international law crimes" [...]. [See Case No. 68, Belgium, Law on Universal Jurisdiction]
133. Of great relevance to the formation of *opinio juris* to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them.

134. All of these factors confirm 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.
135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the *Criminal Code* of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.
136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that: [See *Case No. 204*, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] [...].

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that :

“All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released.”

This provision, [...] implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict. [...]

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

143. Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by

the conflicting parties. [...] It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. [...]

B. ICTY, *The Prosecutor v. Tadić*, Trial Chamber, Merits

[Source: ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1, Trial Chamber II, Judgement, 7 May 1997; available on <http://www.un.org>, footnotes omitted]

[...]

I. INTRODUCTION [...]

C. The Indictment [...]

45. Paragraph 6 relates to the beating of numerous prisoners and an incident of sexual mutilation at the Omarska camp [...]. A number of prisoners were severely beaten, [...] [one of them] was sexually mutilated. It is charged that all but [...] 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 Sevik 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 [...].
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 [...] and others so severely that only [...] survived. [...]

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. [...]
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. [...] was called out and beaten and kicked until he was unconscious. [...]
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 [...] from the column and to have shot and killed them. [...]
51. The final paragraph of the Indictment, paragraph 12, relates to an incident in the villages of Jaskici 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 [...] were killed in front of their homes; [...] were beaten and then taken away. The Prosecution alleges that the accused was one of those responsible for these killings and beatings. [...]

III. FACTUAL FINDINGS [...]

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 [...] the father of [...] 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. [...]
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. [...]
470. [...] 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 Cela, 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. [...]

V. EVIDENTIARY MATTERS [...]

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".
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. [...]

G. Testimony of Dragan Opacic

553. During the course of this trial the truthfulness of the testimony of one witness, Dragan Opacic, 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. [...]
554. Two points should be made in regard to this submission. First, the provenance of Dragan Opacic 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. [...]

VI. APPLICABLE LAW

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

1. Existence of an Armed Conflict [...]

(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 humanitarian law. [...]
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 Karadzic. The Bosnian Serb forces occupied and operated from a determinate, if not definite, territory, comprising a significant part of Bosnia and 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. [...]
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 (later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other. [...]

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

573. [...] [F]or an offence to be a violation of international humanitarian law, [...] 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. 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 of Sivci and Jaskici. 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 opština 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 opština 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. [...]

B. Article 2 of the Statute [...]

2. Status of the Victims as “Protected Persons” [...]

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

580. Most of the victims of the accused’s acts within the opstina 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 Jaskici. 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 effective control over an area. 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.

In the case of *opstina* Prijedor, only parts of the opstina, 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 *opstina* 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 *opstina* Prijedor were not controlled by the VRS until 27 May 1992, there was not an effective occupation of the remainder of *opstina* 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.

581. In any event, for those persons in *opstina* 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 effective control [of] 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.

582. On 15 May 1992 the Security Council, in resolution 752 of 1992, 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 *opstina* 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. It is thus for the Trial Chamber to characterize the exact nature of the armed conflict, of which the events in *opstina* Prijedor formed a part, when applying international humanitarian law to those events. [...]

(c) *Were the victims in the hands of a party to the conflict of which they were not nationals?*

[N.B.: The Appeals Chamber reversed this part of the Judgement [See Part C. of this Case, paras 68-171].]

[...]

C. Article 3 of the Statute

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: [...]

(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. ...; [...]*

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". 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. [...]

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 [...] are committed against persons taking no active part in hostilities. [...]

615. [...] 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 *opstina* 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. [...]

VII. LEGAL FINDINGS [...]

723. According to [common article 3 to the Geneva Conventions] 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. [...]
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”.
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 [...]. 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. [...]

C. ICTY, *The Prosecutor v. Tadić*, Appeals Chamber, Merits

[Source: ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999; available on <http://www.un.org>, footnotes omitted]

22. The Prosecution raises the following grounds of appeal against the Judgement:

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").

Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskici, as alleged in Counts 29, 30 and 31 of the Indictment. [...]

IV. THE FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT IT HAD NOT BEEN PROVED THAT THE VICTIMS WERE "PROTECTED PERSONS" UNDER ARTICLE 2 OF THE STATUTE (ON GRAVE BREACHES)

A. Submissions of the Parties

1. The Prosecution Case

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant's acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention. [...]

B. Discussion

1. The Requirements for the Applicability of Article 2 of the Statute

80. Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

- (i) The nature of the conflict. [...] [T]he international nature of the conflict is a prerequisite for the applicability of Article 2.
 - (ii) The status of the victim. Grave breaches must be perpetrated against persons or property defined as “protected” by any of the four Geneva Conventions of 1949. To establish whether a person is “protected”, reference must clearly be made to the relevant provisions of those Conventions.
81. In the instant case it therefore falls to the Appeals Chamber to establish first of all (i) on what legal conditions armed forces fighting in a *prima facie* internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the factual conditions which are required by law were satisfied. [...]

2. The Nature of the Conflict [...]

87. In the instant case, there is sufficient evidence to justify the Trial Chamber’s finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de jure* or *de facto* organs of a foreign Power, namely the FRY.

3. The Legal Criteria for Establishing When, in an Armed Conflict Which is *Prima Facie* Internal, Armed Forces May Be Regarded as Acting On Behalf of a Foreign Power, Thereby Rendering the Conflict International [...]

(b) *The Notion of Control: The Need for International Humanitarian Law to Be Supplemented by General International Rules Concerning the Criteria for Considering Individuals to be Acting as De facto State Organs*

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials. Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.

(c) *The Notion of Control Set Out By the International Court of Justice in Nicaragua*

99. In dealing with the question of the legal conditions required for individuals to be considered as acting on behalf of a State, i.e., as *de facto* State officials, a high degree of control has been authoritatively suggested by the International Court of Justice in *Nicaragua*.

100. [...] The Court went so far as to state that in order to establish that the United States was responsible for “acts contrary to human rights and humanitarian law” allegedly perpetrated by the Nicaraguan *contras*, it was necessary to prove that the United States had specifically “directed or enforced” the perpetration of those acts. [...]

(i) *Two Preliminary Issues*

102. Before examining whether the *Nicaragua* test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility. [...] The Appeals Chamber, with respect, does not share this view.

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State. Logically these conditions must be the same both in the case: (i) where the court’s task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the “grave breaches” regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international. [...]

114. On close scrutiny, and although the distinctions made by the [International] Court [of Justice] might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as *de facto* State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the *contras* were concerned: in their case no specific

instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated.

(ii) *The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive*

115. [...] The Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive. There are two grounds supporting this conclusion.

a. *The Nicaragua Test Would Not Seem to Be Consonant With the Logic of the Law of State Responsibility [...]*

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission [...]. Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. [...] The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.
118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State [...]. In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a *de facto* State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. [...]
119. To these situations another one may be added, which arises when a State entrusts a private individual [...] with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State [...]. In this case, [...] it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.
120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war

or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. [...] [A] State is internationally accountable for *ultra vires* acts or transactions of its organs. [...] The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. [...]
122. The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State. [...]
123. [...] [I]nternational law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The Nicaragua Test is at Variance With Judicial and State Practice

124. There is a second ground – of a similarly general nature as the one just expounded – on which the *Nicaragua* test as such may be held to be unpersuasive. This ground is determinative of the issue. The “effective control” test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised. In short, as shall be seen, this practice has upheld the *Nicaragua* test with regard to individuals or unorganised groups of individuals acting on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.

125. In cases dealing with members of military or paramilitary groups, courts have clearly departed from the notion of “effective control” set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). [...]
130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States. Nicaragua also supports this proposition, since the United States, although it aided the *contras* financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other assistance to the *contras*, the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as “its obligation [...] not to use force against another State.” This was clearly a case of responsibility for the acts of its own organs).
131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.
132. It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission. [...]
137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly

endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in *Nicaragua*, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.
139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.
140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.
141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State. [...]
144. Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs. In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.
145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these

armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY [...]

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the decision of the Trial Chamber [...] that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two “factors” emphasised in the Judgement need to be recalled: first, “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” and second, with respect to the VRS, “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)”. According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces. The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.
151. What emerges from the facts which are [...] uncontested by the Trial Chamber (concerning the command and control structure that persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:
 - (i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.
 - (ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also

that the FRY/VJ directed and supervised the activities and operations of the VRS. As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

- (iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter “active elements” of the FRY’s armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina. Much *de facto* continuity, in terms of the ongoing hostilities, was therefore observable and there seems to have been little factual basis for the Trial Chamber’s finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.
- (iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.

The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY’s own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992.

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade. It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade. In spite of this, [...] the Trial Chamber [...] concluded that “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).”
153. The Appeals Chamber holds that to have required proof of specific orders circumventing or overriding superior orders not only applies the wrong test but

is also questionable in this context. A distinguishing feature of the VJ and the VRS was that they possessed shared military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have ever been necessary as these forces were of the same mind; a point that appears to have been virtually conceded by the Trial Chamber.

154. Furthermore, the Trial Chamber, noting that the pay of all [...] officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well “be equated with control”. The Trial Chamber nevertheless dismissed such continuity [...] as being “as much matters of convenience as military necessity” and noted that such evidence “establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.” In the Appeals Chamber’s view, however, [...] it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution. In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.
155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the Republika Srpska by the Government of the FRY to have been “crucial” to the pursuit of their activities and that “those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations.” [...]
156. As the Appeals Chamber has already pointed out, [...] it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial [...] had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. [...]
157. An *ex post facto* confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres. [...] Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated

a dialogue with all political and military forces wielding actual power on the ground (whether *de facto* or *de jure*) [...]. The fact that from 4 August 1994 the FRY appeared to cut off its support to the Republika Srpska because the leadership of the former had misgivings about the authorities in the latter is not insignificant. Indeed, this “delinking” served to emphasise the high degree of overall control exercised over the Republika Srpska by the FRY, for, soon after this cessation of support from the FRY, the Republika Srpska realised that it had little choice but to succumb to the authority of the FRY. [...]

160. All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.
161. This would therefore constitute yet another (albeit indirect) indication of the subordinate role played vis-à-vis the FRY by the Republika Srpska and its officials in the aforementioned period, including 1992.
162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.

5. The Status of the Victims

163. Having established that in the circumstances of the case the first of the two requirements set out in Article 2 of the Statute for the grave breaches provisions to be applicable, namely, that the armed conflict be international, was fulfilled, the Appeals Chamber now turns to the second requirement, that is, whether the victims of the alleged offences were “protected persons”.

(a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines “protected persons” – hence possible victims of grave breaches – as those “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In

addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

165. Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality. In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as “protected persons” unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not “protected persons” as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of “protected persons”.
166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

(b) Factual Findings

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were “protected persons” as they found themselves in the hands of armed forces of a State of which they were not nationals.
168. It might be argued that before 6 October 1992, when a “Citizenship Act” was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming that this proposition

is correct, the position would not alter from a legal point of view. As the Appeals Chamber has stated above, Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.

C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.
171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32. [...]

[N.B.: By the trial judgement of 7 May 1997 and the appellate decision of 15 July 1999, as well as the sentencing decisions of 14 July 1997 and 11 November 1999, and finally by the decision on appeal against sentence of 26 January 2000, Dusko Tadic was convicted of 20 of the crimes with which he was charged, including crimes against humanity, violations of the laws and customs of war and grave breaches of the 1949 Geneva Conventions. He was sentenced to 20 years' imprisonment. Tadic was released on 18 July 2008 to Serbia, whose nationality he obtained in 2006, after having served two thirds of his sentence, in Germany.]

D. ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgement

[Source: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina ["the Applicant"] v. Serbia and Montenegro ["the Respondent"]*), Judgement of 26 February 2007, available on: www.icj-cij.org, footnotes omitted]

(3) The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs

[...]

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the "Scorpions", the "Red Berets", the "Tigers" and

the “White Eagles” must be deemed, notwithstanding their apparent status, to have been “*de facto* organs” of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons – or groups of persons – who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* [...] [See Case No. 153, ICJ, *Nicaragua v. United States*]. In paragraph 109 of that Judgment the Court stated that it had to

“determine ... 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” [...].

Then, examining the facts in the light of the information in its possession, the Court observed that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf” [...], and went on to conclude that “the evidence available to the Court ... is insufficient to demonstrate [the *contras*] complete dependence on United States aid”, so that the Court was “unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States” [...].

392. The passages quoted show that, according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.
393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as “complete dependence”.

It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years [...], and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" [...], did this signify a total dependence of the Republika Srpska upon the Respondent.
395. [...] The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

(4) The question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control

396. [...], [T]he Court must now determine whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.
397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all

their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs – this question having already been answered in the negative. What must be determined is whether FRY organs – incontestably having that status under the FRY's internal law – originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows [See **Case No. 53**, International Law Commission, Articles on State Responsibility]:

"Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* [...]. In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" [See **Case No. 153**, ICJ, *Nicaragua v. United States* [Para. 115]] [...]; this led to the following significant conclusion:

"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." [...]

400. The test thus formulated differs in two respects from the test – described above – to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

[...]

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case [...] [See Part C. of this case]. In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case [...]. In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict

is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.
406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons – neither State organs nor to be equated with such organs – only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.
407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility. [...]

E. ICTY, *The Prosecutor v. Ramush Haradinaj et al.*

[Source: *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj* (Haradinaj et al.), Trial Chamber Judgement, 3 April 2008, Case No. IT-04-84-T, available on www.icty.org, footnotes omitted]

3. General elements for Article 3 of the Statute

3.1 Law on general elements

32. The Indictment charges the Accused with 19 counts of violations of the laws or customs of war under Article 3 of the Statute, of which 18 are pursuant to Common Article 3 to the four Geneva Conventions of 1949 ("Common Article 3"). Article 3 of the Statute states: "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war". The jurisdictional requirements and general elements are analysed below.
33. Article 3 of the Statute is a "residual clause" which gives the Tribunal jurisdiction over any serious violation of international humanitarian law not covered by Articles 2, 4, or 5 of the Statute. To fall within this residual jurisdiction, the offence charged must meet four conditions: (i) it must violate a rule of international humanitarian law; (ii) the rule must bind the parties at the time of the alleged offence; (iii) the rule must protect important values and its violation must have grave consequences for the victim; and (iv) such a violation must entail the individual criminal responsibility of the perpetrator.
34. It is well established in the jurisprudence of this Tribunal that violations of Common Article 3 fall within the ambit of Article 3 of the Statute. In the present case, the charges of murder, cruel treatment, and torture as violations of the laws or customs of war are based on Common Article 3(1)(a). The charges of outrages upon personal dignity are based on Common Article 3(1)(c). All of these charges clearly meet the four jurisdictional requirements set out above. The rules contained in Common Article 3 are part of customary international law applicable in non-international armed conflict. The crimes prohibited by Common Article 3 undoubtedly breach rules protecting important values and involve grave consequences for the victims. They also entail individual criminal responsibility. The Chamber therefore has jurisdiction over such violations.

[...]

36. Once jurisdiction is established, there are three general conditions that must be met for the applicability of Article 3 of the Statute: first, there must be an armed conflict; second, there must be a nexus between the alleged offence and the armed conflict; and third, for charges based on Common Article 3, the victim must not take active part in the hostilities at the time of the alleged offence.
37. *Armed Conflict.* The test for determining the existence of an armed conflict was set out by the Appeals Chamber in the *Tadić* Jurisdiction Decision:

[A]n 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. 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. [para. 70 of *Tadić*, Jurisdiction]

38. This test serves to distinguish non-international armed conflict from banditry, riots, isolated acts of terrorism, or similar situations. The Trial Chamber must determine whether (i) the armed violence is protracted and (ii) the parties to the conflict are organized. The Trial Chamber will proceed to examine how these criteria have been interpreted in previous cases of the Tribunal.

[...]

49. The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.
50. The Trial Chamber now turns to examine how the criterion of the organization of the parties has been interpreted in practice.

[...]

60. These cases highlight the principle that an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.

[...]

3.2 Findings on the existence of an armed conflict

3.2.1 Organization of the KLA

[...]

89. The above evidence shows that in addition to many hundreds if not thousands of full-fledged KLA soldiers in early 1998, the months of March and April saw a surge in the number of KLA volunteers. This contributed to the development of a mainly spontaneous and rudimentary military organization at the village level. The evidence shows, in April, the initial phases of a centralized command structure above the various village commands, in particular through the efforts of Ramush Haradinaj, who was consolidating *de facto* authority. By this time, the KLA also controlled, by the presence of checkpoints and armed soldiers, a considerable amount of territory in the Dukagjin area. It had established logistics that provided access to considerable numbers of weapons, although they may not have been sufficient to arm all the new recruits. Furthermore, the evidence establishes that KLA soldiers received at least rudimentary military training and used guerrilla tactics. Finally, the KLA issued communiqués in its name. On the basis of this evidence, and in light of the Trial Chamber's finding in section 3.2.2, below, the Trial Chamber is satisfied that by 22 April 1998 the KLA qualified as an "organized armed group" under the *Tadić* test.

3.2.2 Intensity

[...]

96. By at least late April, Serbian forces shelled the Dukagjin area. Shemsedin Cekaj testified that from no later than 21 April 1998 until the end of May 1998 he was able to hear from his home in Peć/Pejë, and from Rznić/Irznik where he sometimes travelled, the almost daily shelling of several villages towards the south. Rustem Tetaj testified that Glođane/Gllogjan was shelled consistently between April and September 1998. Cufë Krasniqi testified that from April 1998 to late August 1998, the villages of the Dukagjin area were shelled by Serbian artillery, which led people to leave their villages in May 1998. Witness 28 testified that by 22 April 1998, she had heard from Albanian refugees of extensive shelling by the Serbian police in Dečani/Deçan municipality. ECMM reported that Serbian forces fired on villages in Dečani/Deçan municipality on 23 April 1998.
97. The evidence shows that civilians were disappearing in, or escaping from, combat zones in Dečani/Deçan municipality by late April. [...] In addition, Zvonko Marković testified that Albanians were passing through Ljumbarda/Lumbardh while shooting, which led all Serbs in about six Serbian households in the village to flee to Dečani/Deçan around that time. Cufë Krasniqi confirmed that Serbian families left Dečani/Deçan municipality in April and May 1998.
98. The Trial Chamber received reliable contemporaneous evidence indicating that clashes between the KLA and Serbian forces resumed on 22 April 1998. In

the morning of 22 April 1998, 20-30 persons attacked the 52nd Military Police Battalion from a hill named “Suka e Vogelj”, to which Serbian forces responded with a double-barrelled anti-aircraft gun and a 155 millimetre Howitzer. In the early afternoon, there was another attack on the 52nd Military Police Battalion from Suka e Vogelj. Also on the same day, there was an exchange of fire between troops of the 53rd border battalion and persons at a barricade in Babaloć/Baballoq, Dečani/Deçan municipality. Colonel Delić ordered the deployment of standby forces in response to KLA activities. John Crosland noted that on 23 April 1998, the situation in Dečani/Deçan and Đakovica/Gjakovë remained extremely tense following substantial shooting in the area on the day before as a result of which many civilians, both Serbs and Kosovar Albanians, left the most affected areas. According to him, the clashes, which had commenced in the Drenica/Drenicë area, had now moved to the Dečani/Deçan area. On that day, Crosland was in the Dečani/Deçan area where he observed an “unprecedented” presence of VJ men and material, including heavy guns dug in at strategic positions near the FRY/Albania border, convoys with lorries full of soldiers, and Gazelle helicopters and an Orao (“Eagle”) jet bomber in the air. He also reported that the Serbian refugee centre near Babaloć/Baballoq was defended by up to 100 MUP men, and that life in bigger towns like Peć/Pejë and Đakovica/Gjakovë proceeded normally. On the same day, VJ from the Košare/Koshare border post clashed with the KLA at the FRY/Albania border, killing 16 of them. During the night, the 52nd Military Police Battalion came under prolonged fire from automatic rifles and mortars. In the morning of 24 April 1998, unidentified persons attacked a police checkpoint in Turicevac/Turiceve, Srbica/Skenderaj municipality, killing one policeman and seriously wounding another. Around noon, a police station in Klinčina/Kliqinë, Peć/Pejë municipality was attacked. In the evening of 25 April 1998, the KLA launched an infantry attack on the 52nd Military Police Battalion at the Lake Radonjić/Radoniq dam. On 27 April 1998, there were three separate clashes between the KLA and the VJ at the FRY/Albania border. The next day, Crosland observed movements of increased numbers of VJ men and material, including artillery, which he for the first time saw engaged in joint operations with the MUP. He assessed that the number of police and VJ in Kosovo/Kosova was higher than at any stage so far in the crisis, having been reinforced from outside the province.

99. The attacks on the Ahmeti, Jashari, and Haradinaj compounds between late February and late March 1998 marked a significant escalation in the conflict between the KLA and the Serbian forces. However, they were isolated events followed by periods of relative calm. The conflict intensified on 22 April 1998. Considering in particular the frequent shelling in Dečani/Deçan municipality, the flight of civilians from the countryside, the daily clashes between the KLA and the Serbian forces, and the unprecedented scale of deployment of VJ forces on the ground and their participation in combat, the Trial Chamber finds, on the basis of the evidence before it, that the conflict came to meet the intensity requirement of the *Tadić* test on 22 April 1998.

3.2.3 Conclusion

100. Considering the evidence and the Trial Chamber's findings on both prongs of the *Tadić* test, the Trial Chamber is convinced that an armed conflict existed in Kosovo/Kosova from and including 22 April 1998 onwards. The Trial Chamber received a voluminous amount of evidence relevant to armed conflict from May through September 1998. The KLA further developed its organization throughout the indictment period. Combat operations continued and reached high levels of intensity during major offensives of Serbian forces into the Dukagjin area in late May, early-to-mid-August, and early September 1998. However, since according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period.

DISCUSSION

A. Establishment of the ICTY

1. (*Jurisdiction, paras 11-12*) Is it inherent in the nature of a tribunal that it has incidental jurisdiction to examine whether it was lawfully established? Must an accused, who invokes before a criminal tribunal his or her human right to be tried by a court "established by law", at least have the right that the court examines whether its own establishment was lawful?
2. (*Jurisdiction, paras 30-39*)
 - a. Were the various armed conflicts in the former Yugoslavia a threat to international peace (justifying measures under Chapter VII of the UN Charter [available on <http://www.un.org>])? Does an affirmative answer depend on the qualification of the conflicts as international armed conflicts? Can a non-international armed conflict be a threat to international peace? Is the establishment of the ICTY a suitable measure to re-establish international peace? Do violations of IHL as such threaten international peace?
 - b. Is it possible to say that the ICTY has contributed to re-establishing peace in the former Yugoslavia? In diminishing the number of war crimes committed? Is this final result essential to judge the legality of the ICTY's establishment in regard to the UN Charter? Does not the prosecution of the leaders render them less likely to compromise during peace negotiations?
3. (*Jurisdiction, paras 41-48*) When is an international tribunal established by law? Does the Security Council have the ability to legislate, or is its role restricted to the application of norms? Is there a strict differentiation between the creation of rules and their application in international law? Can a tribunal established by an institution that cannot create rules be "established by law"?

B. Qualification of the conflict and applicable law

4. (*Jurisdiction, paras 67-70*) What are the geographical and temporal scopes of application of IHL? Do IHL rules apply to the whole territory of the State confronted with an international conflict? Non-international? Does the IHL of international armed conflicts apply “until the general conclusion of peace” (*para. 70*)? (GC III, Art. 5; GC IV, Art. 6; P I, Art. 3(b)) Does the law of non-international armed conflicts apply “until a peaceful settlement is achieved” (*para. 70*)? (P II, Art. 2(2))
5. (*Haradinaj, paras 37-100*) When does a non-international armed conflict begin? Which conditions must be fulfilled for a situation to be qualified as a non-international armed conflict? What difficulties could arise from a qualification of the conflict based on its duration rather than on its intensity? Is it necessary for a rebel group to control the territory in order for common Art. 3 to apply? In order to determine whether the group is sufficiently organized? In order to determine whether the group is a party to the conflict? Once the requisite level of intensity has been reached, does IHL apply until a peaceful settlement is achieved? Even if the level of intensity and the rebel group’s degree of organization go down below that threshold? (P II, Art. 2(2))
6.
 - a. (*Jurisdiction, paras 72 and 73*) Which armed conflicts in the former Yugoslavia can be qualified as international? As non-international? Did the participation of the Yugoslav Peoples’ Army internationalize the conflict in Croatia? From which point on? Since Croatia’s declaration of independence? Its recognition by other States? Its admission to the UN? Did the Yugoslav army become an occupying force in the regions of Croatia where it remained? (GC I-IV, Art. 2) What could have internationalized the conflict in Bosnia-Herzegovina? Before 19 May 1992? After that date?
 - b. (*Trial Chamber, Merits, para. 569; Appeals Chamber, Merits, para. 87*) Why was the conflict in Bosnia-Herzegovina international “from the beginning of 1992 until 19 May 1992”? Was that the case even before its declaration of independence of April 1992? Did the Yugoslav Peoples’ Army become an occupying power the day of the declaration of independence?
 - c. (*Jurisdiction, paras 76 and 136; Trial Chamber, Merits, paras 564-569; Appeals Chamber, Merits, paras 87-162*) Why was the conflict in Bosnia-Herzegovina international after 19 May 1992?

C. Qualification of the persons – Protected Persons

7. (*Jurisdiction, para. 76; Appeals Chamber, Merits, paras 163-169*) Is the *reductio ad absurdum* of the ICTY in para. 76 of the Decision on Jurisdiction convincing? If the conflict in Bosnia-Herzegovina is international because the Bosnian Serbs are Yugoslav agents, is the murder of a Muslim by a Serb a grave breach and the murder of a Serb by a Muslim not? In the light of the law of international armed conflicts is this an absurd conclusion? How does the Appeals Chamber avoid this result in its decision on the Merits? (GC IV, Arts 4 and 147)
8. (*Jurisdiction, para. 76; Appeals Chamber, Merits, paras 163-169*)
 - a. According to GC IV, Art. 4, who is a “protected person”? According to the Appeals Chamber? Did it change its opinion between its decision on jurisdiction and its ruling on the merits?
 - b. Does the protection of refugees and neutral nationals depend on their nationality or their actual need for protection? (GC IV, Arts 4(2), 44 and 70(2)) If the protection of refugees and neutral nationals depends on their actual need for protection, can we conclude that IHL gives the status of “protected person” to all those who have an actual need for protection? To protect, does IHL always look to “the substance of relations, not to their legal characterization as such”? (*Appeals Chamber, Merits, para. 168*)

- c. Does the allegiance criterion, taken as a factor defining the status of protected person, apply only in the former Yugoslavia? Only to inter-ethnic conflicts? To all international conflicts? Even to non-international conflicts?
- d. For the fighting factions and the humanitarian actors who have to apply IHL, is it easier and more practical to apply the criterion of allegiance or that of nationality? If you were a civilian detainee, would you claim non-allegiance to your captor in order to gain treatment as a protected person?
- e. Does a government that forcibly enrolls a person who has broken his allegiance – or assigns him to military duties – commit a grave breach in doing so? (GC III, Arts 50 and 130; GC IV, Arts 40, 51 and 147)
- f. Does the Appeals Chamber mention precedents from practice in favour of its interpretation? Is it obliged to do so? In an international armed conflict, do States give their own citizens extended legal protection as soon as their allegiance shifts to the enemy?
- g. Does the fact that the Appeals Chamber applies its new interpretation of Art. 4 of GC IV to Tadić's past actions violate the principle *nullum crimen sine lege*? Is it necessary to qualify Tadić's victims as "protected persons" in order to punish his acts? As grave breaches of the Geneva Conventions? As violations of the laws and customs of war?

D. Violations of IHL – Grave breaches

- 9. (*Jurisdiction, paras 79-84*)
 - a. Why is it important to know if an act can be qualified as a "grave breach"? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1))
 - b. Are there grave breaches of IHL in non-international conflicts? According to the Appeals Chamber? According to the United States? Does the opinion of the US apply to conflicts outside the former Yugoslavia? What are the practical consequences for the US of its interpretation as to its obligations regarding certain conflicts, e.g. those in Central America? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1))
 - c. In non-international armed conflicts, are civilians not "protected persons"? Is an atrocity committed against a civilian in a non-international conflict not committed against a "protected person", and therefore not a "grave breach"? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85)
 - d. In international armed conflicts, are all murders of civilians grave breaches? Must civilians as such be "protected"? Who is a "protected civilian"? Which civilians are not "protected civilians"? (GC IV, Arts 4 and 147)
- 10. (*Appeals Chamber, Merits, paras 68-171*) Which conditions are necessary for Tadić's acts to be qualified as "grave breaches" under Art. 2 of the ICTY Statute? Identify the differences of opinion on the law and the facts between the Appeals Chamber and the Trial Chamber. Is it necessary to qualify the conflict as international in order to punish Tadić's acts?

E. Interpretation of Article 3 of the ICTY Statute – "Laws and customs of war"

- 11. (*Jurisdiction, paras 86-136*)
 - a. When does a violation of IHL come under Art. 3 of the ICTY Statute? Is a serious violation of customary IHL sufficient for this? Of the IHL of non-international armed conflicts? Of the customary IHL of non-international armed conflicts?

- b. Considering the interpretation the Court has given to Art. 3 of the ICTY Statute, why does the decision contain such a detailed analysis of the customary IHL of non-international armed conflicts (*Jurisdiction, paras 96-136*)? Is this analysis necessary to establish the jurisdiction of the ICTY to judge Tadić for the rape, torture and murder of prisoners? Could the ICTY not simply have applied Art. 3 common to the Geneva Conventions and Protocol II? Why are Protocols I and II not mentioned in the ICTY Statute? Was the fear of breaching the principle of *nullum crimen sine lege* (*Jurisdiction, para. 143*) justified in the light of the fact that the former Yugoslavia and its successor States were party to Protocols I and II?
- c. (*Jurisdiction, paras 99 and 109*) What are the specific difficulties of ascertaining customary rules of IHL? How can the ICRC contribute to the development of the customary rules? Can its practice contribute to the formation of the material element of custom? *Opinio juris*? Both? Neither?
- d. Did the Court decide which rules of IHL customarily apply to non-international armed conflicts? Which of these customary laws set out individual penal responsibility for those who violate them? May we deduce from para. 89 of the Decision on Jurisdiction that serious violations of the Hague Regulations on international armed conflicts fall under Art. 3 of the ICTY Statute, even if they were committed during a non-international armed conflict?
- e. (*Jurisdiction, para. 97*) Does the distinction between international and non-international armed conflicts lose significance “as far as human beings are concerned”? Are there IHL rules protecting interests other than those of “human beings”? Is it logically or morally conceivable for States to claim that they are allowed to use, in non-international conflicts, weapons that are banned in international ones (*Jurisdiction, paras 119-126*)? In other areas of IHL, such as the protection and status of persons, is a distinction logically or even morally conceivable?
- f. Do paragraphs 128-136 of the Decision on Jurisdiction simply mean that the acts of Tadić fall under the competence of the ICTY, or do they also mean that third States have the obligation or the right to prosecute such acts committed during non-international armed conflicts elsewhere in the world? How would you formulate the rule established by the ICTY? Does it correspond to State practice? In 1992? In 1995? In 2010?
- g. (*Jurisdiction, paras 89, 94 and 143*) Must a rule from the Geneva Conventions be customary for the ICTY to be able to judge if Tadić violated it?
- h. (*Jurisdiction, para. 135*) If we consider, contrary to the ICTY, that State practice in pursuing violations of the IHL of non-international conflicts does not permit a claim of a customary rule entailing individual penal responsibility, is Tadić necessarily a victim of a violation of the *nullum crimen sine lege* principle?

F. Article 3 common to the Geneva Conventions

12. (*Trial Chamber, Merits, paras 562-568*) What differentiates non-international armed conflict from banditry or terrorism? Is there a minimum level beneath which Art. 3 common to the Conventions does not apply?
13. (*Trial Chamber, Merits, paras 573-575*) During a non-international armed conflict in a given State, do all murders of civilians in that State constitute a violation of common Art. 3? Must there be a link between the conflict and the murder? Must there be a link between the offender and a party to the conflict?
14. (*Trial Chamber, Merits, para. 615*) Which persons does common Art. 3 protect? Is this the same category of people as “protected persons” under the IHL of international armed conflict?

G. State responsibility – effective control v. overall control

15. (*Appeals Chamber, Merits, paras 99-145; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 402-405*) Does the Appeals Chamber believe that it must answer the same question as the ICJ in *Nicaragua v. United States*? Does it give the same ruling? Is it admissible for the ICTY to deliberately not follow the case-law of the ICJ even though, according to Art. 92 of the UN Charter, the latter is the principal judicial organ of the United Nations? In the *Bosnia and Herzegovina v. Serbia and Montenegro* case, does the ICJ believe that it must answer the same question as the ICTY in *Tadić*? Does it give the same ruling? In your opinion, is it possible that the criteria for attributing an act to a third State and for the qualification of a conflict as international are different? What difficulties does different case-law produce? Did the decision of the ICJ in the *Bosnia and Herzegovina v. Serbia and Montenegro* modify the standard set by the ICTY?
16. a. (*Appeals Chamber, Merits, paras 117-123*) Is a State responsible for the acts committed by its agents in violation of their instructions? When does an individual become a *de facto* State agent? Is a State responsible for the acts committed by its *de facto* agents in violation of their instructions? In the case of individuals? If they are organized groups? Why is there stricter responsibility for organized groups than for individuals?
- b. (*Appeals Chamber, Merits, para. 131*) What are the conditions for a third State to become responsible for acts committed by armed groups it supports?
- c. (*ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 390-397*) Does the ICJ give the same answers as the ICTY to questions 16 a. and b.? If not, what are its answers? According to the ICJ, may the acts of a group over which a third State exercises effective control be attributed to that third State?
- d. If all the acts of the VRS can be attributed to the Federal Republic of Yugoslavia (FRY), do the members of those forces automatically become FRY combatants? (P I, Art. 43) If they are captured by the Bosnian armed forces, do they become prisoners of war? (GC III, Art. 4) At the end of the conflict must they be repatriated to the FRY? (GC III, Art. 118) Are Serb civilians also agents of the FRY?
17. (*Appeals Chamber, Merits, paras 150-162*) Which facts led the Appeals Chamber to conclude that the FRY had overall control over the VRS? Are they all convincing? Is the fact that the FRY signed the Dayton Agreement on behalf of the Bosnian Serbs an indication? Could the FRY have helped the VRS after Bosnia-Herzegovina's independence in the same way as the United States did for the *contras* in Nicaragua? How could it have done so without becoming responsible for all acts of the VRS? According to the case-law of the Appeals Chamber, would the United States have been responsible for all the acts of the *contras*?

H. Miscellaneous

18. (*Trial Chamber, Merits, paras 540-553*) What are the specific difficulties of assessing the credibility of witnesses in an inter-ethnic conflict? Of establishing the responsibility of the opposing parties? Of establishing the individual responsibility of someone from a different ethnic group than the witness?
19. (*Trial Chamber, Merits, paras 239-241*) When a prisoner was held in a camp where many others were killed, where he was mistreated and separated from his comrades, and has never been seen again even by his family, can one assume that he is dead? In order to issue a death certificate to his family? To convict those who took part in his detention and mistreatment?

20. What are the four most important statements in the present case for IHL? What do they mean for IHL? For the victims of war? What are the advantages and risks of these statements for the victims of future conflicts?

Case No. 212, ICTY, The Prosecutor v. Martić**A. Rule 61 Decision**

[Source: 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-95-11-I, March 8, 1996; footnotes omitted]

THE PROSECUTOR**v.****MILAN MARTIC****DECISION**

[...]

I. INTRODUCTION

[...]

3. [...] [P]roceedings under Rule 61 of the Rules ensure that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and may proceed nevertheless. To this end, if the Trial Chamber is satisfied that the charges are reasonable, after it has again confirmed the indictment, it shall issue an international warrant of arrest against the accused. Furthermore, should the Trial Chamber be satisfied that failure to execute the warrants of arrest is due in whole or in part to the refusal of a State to cooperate, the President of the Tribunal shall notify the Security Council. The review of the indictment by a panel of Judges sitting in a public hearing reinforces the confirmation decision and, when they are summoned to appear, provides the victims with the opportunity to have their voices heard and to become a part of history.

II. REVIEW OF THE INDICTMENT CHARGES**A CHARGES**

4. Milan Martić is accused of having knowingly and wilfully ordered the shelling of Zagreb with Orkan rockets on May 2 and 3, 1995 (counts I and III). The attacks allegedly killed and wounded civilians in the city. Milan Martić is also accused of being responsible of the shelling because of his position of authority and his alleged failure to prevent the attack or to punish the perpetrators (counts II and IV). During the hearing, the Prosecutor stated that he was presenting the latter two counts in the alternative. [...]

B. COMPETENCE OF THE TRIBUNAL UNDER ARTICLE 3 OF THE STATUTE

5. [...] In its Decision of October 2, 1995 in the *Tadic* case (IT-94-I-AR72, hereinafter “Decision of the Appeals Chamber”) [See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A.]], the Appeals Chamber stipulated that Article 3 [See Case No. 210, UN, Statute of the ICTY] refers to a broad category of offences, namely, all “violations of the laws or customs of war” and that the enumeration of some of these violations provided in Article 3 are merely illustrative and not exhaustive. Since the violation identified by the Prosecutor is not fully covered by paragraphs (a) to (e) of Article 3, the Trial Chamber must verify that it constitutes a violation of the laws or customs of war referred to in the Article. Since the Appeals Chamber set a certain number of conditions for establishing the jurisdiction of the Tribunal pursuant to Article 3, the Trial Chamber must therefore be satisfied that these conditions appear to have been fulfilled at this stage.

1. Identification of Rules of International Humanitarian Law

[...]

8. *Violations of the rules of conventional law* fall within the purview of Article 3 of the Statute qua treaty law. The Appeals Chamber has specified that this Article must be interpreted to include violations of Additional Protocols I and II. All the States which were part of the former Yugoslavia and parties to the present conflict at the time the alleged offences were committed were bound by Additional Protocols I and II, applicable to international and non-international armed conflicts respectively. Under the terms of these additional Protocols, attacks against civilians are prohibited. Articles 85(3)(a) of Additional Protocol I provides that making the civilian population or individual civilians the object of attack constitutes a grave breach, when committed wilfully in violation of the relevant provisions of the Protocol, and causing death or serious injury to body or health. Grave breaches of Additional Protocol I constitute war crimes and are subject to prosecution under Article 3 of the Statute. Furthermore, violations of Article 51(2), stating that “the civilian population as such, as well as individual civilians, shall not be the object of attack” and prohibiting “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population”, fall within the competence of the Tribunal under Article 3. Similarly, violations of paragraph 6 of that same Article, which expressly prohibits “attacks against the civilian population or civilians by way of reprisals”, come within the province of the Tribunal as defined in Article 3 of the Statute. Last, in respect of Additional Protocol II, Article 13(2) provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack”. Paragraph 1 of that same article stipulates that this rule must be observed “in all circumstances” so that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Violations of the Additional Protocol II constitute violations of the laws or customs of war and, as such, come under Article 3 of the Statute.

9. The unqualified character of the conventional rules prohibiting attacks against civilians is also underpinned by Article 60(5) of the 1969 Vienna Convention on the Law of Treaties. This provision excludes the application of the principle of reciprocity in conventional matters, in cases of material breaches of provisions of a treaty “relating to the protection of the human person contained in treaties of humanitarian character”.
10. *As regards customary law* the rule that the civilian population as such, as well as individual civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts.
11. There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterisation as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare. As the Appeals Chamber affirmed, the general principle that the right of the parties to the conflict to choose methods or means of warfare is not unlimited and the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of this corpus of customary law (paragraph 127, Decision of the Appeals Chamber).
12. The applicability of these rules to all armed conflicts has been corroborated by General Assembly resolutions 2444 (XXIII) and 2675 (XXV), both adopted unanimously, in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, both mentioned above, prohibit attacks against the civilian population as such, as well as individual civilians. Both provisions explicitly state that this rules shall be observed in all circumstances. The Appeals Chamber reaffirmed that both articles constitute customary international law.
13. Furthermore, the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare also derive from the “Martens clause”. This clause has been incorporated into basic humanitarian instruments and states that “in cases not covered by (the relevant instruments), civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity, and from the dictates of public conscience”. Moreover, these norms also emanate from the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.
14. It is sufficient to recall at this point that the elementary considerations of humanity are reflected in Article 3 Common to the Geneva Conventions. This provision embodies those rules of customary international law which should be observed “as a minimum” by all parties” at any time and in any place

whatsoever” irrespective of the characterisation of the conflict. The prohibition to attack civilians must be derived from Common Article 3 which provides that “persons taking no active part in the hostilities ... shall, in all circumstances, be treated humanely” and which prohibits, in paragraph 1(a), “violence to life and person, in particular, murder of all kinds, mutilation ...”. Attacks against the civilian population as such or individual civilians would necessarily lead to an infringement of the mandatory minimum norms applicable to all armed conflicts. Article 4 of Protocol II, further developing and elaborating Common Article 3, reiterates these fundamental guarantees.

15. Might there be circumstances which would exclude unlawfulness, in whole or in part? More specifically, does the fact that the attack was carried out as a reprisal reverse the illegality of the attack? The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered wrongful. The International Court of Justice considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law (*Case concerning Military and Paramilitary Activities in and against Nicaragua*, *Nicaragua v. United States of America*, merits, I.C.J. Reports 1986, paragraph 220). [See Case No. 153, ICJ, *Nicaragua v. United States*]
16. The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675, underscoring the need for measures to ensure the better protection of human rights in armed conflicts of all types, posits that “civilian populations, or individual members thereof, should not be the object of reprisals”. Furthermore, Article 51(6) of Protocol I, mentioned above, states an unqualified prohibition because “in all circumstances, attacks against the civilian population or civilians by way of reprisals are prohibited”. Although Protocol II does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so “at any time and in any place whatsoever”. The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of “collective punishments” in paragraph 2(b) of Article 4 of Protocol II.
17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when

confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.

18. Last, even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law. There exists no formal provision forbidding the use of cluster bombs in armed conflicts. Article 35(2) of Additional Protocol I prohibits the employment of “weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury”. In addition, paragraph 4(b) of Article 51 of that same Protocol states that indiscriminate attacks are prohibited. These include attacks “which employ a method or means of combat which cannot be directed at a specific military objective”. Last, under the terms of paragraph 5(b) of that same article, attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated.

[...]

B. Trial Chamber Judgement

[Source: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Case No. IT-95-11-T, 12 June 2007; footnotes omitted]

IN TRIAL CHAMBER I

PROSECUTOR

v.

MILAN MARTIĆ

Judgement

[...]

II. APPLICABLE LAW

A. General requirements of Article 3 of the Statute

1. *Generally*

39. Milan Martić is charged with the following crimes as violations of the laws and customs of war punishable under Article 3 of the Statute: murder, torture and cruel treatment, based on Article 3 common to the four Geneva Conventions of 12 August 1949 (“Common Article 3”), and attacks on civilians based on Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II.
[...]
40. [...] The application of Article 3 of the Statute requires a determination that a state of armed conflict existed at the time the crime was committed and that

the alleged crime was “closely related” to the armed conflict. Furthermore, four conditions, known as the *Tadić* conditions, must be fulfilled for a crime to fall within the jurisdiction of the Tribunal.

2. *Existence of an armed conflict and the nexus requirement*

41. An armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State.” Until a general conclusion of peace or a peaceful settlement is reached, 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”.
42. Common Article 3 requires the warring parties to abide by certain fundamental humanitarian standards by ensuring “the application of the rules of humanity which are recognized as essential by civilized nations” and as such the provisions of Common Article 3 have general applicability. When an accused is charged with violation of Article 3 of the Statute, it is immaterial whether the armed conflict was international or non-international in nature.

[...]

E. *Attacks on civilians*

66. Milan Martić is charged with attacks on civilians, a violation of the laws or customs of war pursuant to Article 3 of the Statute (Count 19).
67. The crime of attacks on civilians is based upon Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which provide, in their relevant parts, that “[t]he civilian population as such, as well as individual civilians, shall not be made the object of attack.”
68. Article 49 of Additional Protocol I defines the term “attack” as “acts of violence against the adversary, whether in offence or in defence”. In relation to attacks on civilians, the Appeals Chamber in *Blaškić* held that there is an absolute prohibition in customary international law against the targeting of civilians. In *Kordić and Čerkez*, the Appeals Chamber held that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity”. According to Article 52(2) of Additional Protocol I only military objectives may be lawfully attacked, that is “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.
69. The prohibition against targeting the civilian population does not exclude the possibility of legitimate civilian casualties incidental to an attack aimed at military targets. However, such casualties must not be disproportionate to

the concrete and direct military advantage anticipated before the attack. In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.

70. It is an element of the crime that the attacks resulted in death or serious bodily injury within the civilian population at the time of such attacks.
71. The Trial Chamber recalls that the Appeals Chamber has considered that "Article 50 of Additional Protocol I contains a definition of civilians and civilian populations", which may largely be viewed as reflecting customary law.

[...]

III. FACTUAL FINDINGS

[...]

G. Attacks on Zagreb on 2 and 3 May 1995

1. "Operation Flash"

302. In the early morning hours of 1 May 1995, armed forces of Croatia launched a military offensive known as Operation Flash. The Trial Chamber has been provided conflicting evidence as to the purpose of this operation. There is evidence that the purpose was to take control over Western Slavonia (Sector West). There is evidence that the operation was Croatia's response to Milan Martić's decision to close the Zagreb-Belgrade motorway. There is also evidence that Croatia planned its attack long before the closure. Two Croatian guard brigades, one regular HV brigade, and special police forces were involved in the operation. Negotiations to find a peaceful settlement took place during the operation, and agreements were reached on 3 May 1995. Operation Flash ended around 4 May 1995 with the RSK losing control over Western Slavonia. A large part of the Serb population fled the area of Western Slavonia.

2. Shelling of Zagreb

(a) 1 May 1995 – Preparation for attack

303. On 1 May 1995, a meeting was held between, *inter alia*, Milan Martić, the Chief of the SVK Main Staff General Milan Čeleketić, the Prime Minister and ministers of the RSK government. The meeting concerned the proposal of the Supreme Defence Council to deal with the situation which had arisen in Western Slavonia resulting from Operation Flash during the morning that day. The evidence shows that both peaceful solutions, involving negotiations and a surrender of parts of Western Slavonia, and non-peaceful solutions were discussed and that Milan Martić, Milan Čeleketić and the most senior officers of the SVK Main Staff were in

favour of the latter. At 1300 hours on 1 May 1995, Milan Čeleketić, in the presence of *inter alia* Milan Martić, ordered artillery fire on Sisak, south-east of Zagreb. The evidence shows that the reason for the attack was “to retaliate against the HV who had carried out an aggression on the Western Slavonia.” Artillery fire was opened at 1700 on 1 May 1995.

304. On 1 May 1995, Milan Čeleketić ordered the M-87 Orkan unit of the SVK to “be alert and ready for engagement on [his] order” and directed them to march from the Knin area to take up positions in Vojnić, 50 kilometres south of Zagreb, by 1400 hours that day.

(b) 2 May 1995

305. In the mid-morning on 2 May 1995, without warning, Orkan rockets hit Zagreb. Rockets struck the centre of the city, [...] as well as [...] a school building [...] and the airport [...].
306. Five persons were killed during these rocket attacks. The body of Damir Dračić was found lying on the sidewalk at Vlaška Street. Ana Mutevelić was killed when a tram was hit at the intersection of Draškovićeve and Vlaška Streets. The body of Stjepan Krhen was found in the courtyard of No. 41 Vlaška Street. Ivanka Kovač died at the trauma clinic in Draškovićeve Street from the injuries she sustained some 700 metres from the hospital. Ivan Brodar was injured on Draškovićeve Street and died as a result of his injuries on 3 May 1995.
307. [...] There is evidence that in total 160 people were injured during the attack on 2 May 1995.

[...]

(c) 3 May 1995

309. At midday on 3 May 1995, Zagreb was again shelled by Orkan rockets [...].
- [...]
313. The Trial Chamber finds that Luka Skračić and Ivan Markulin were killed and that 54 people were injured as a result of the shelling on 3 May 1995.

[...]

IV. RESPONSIBILITY OF MILAN MARTIĆ

[...]

B. Findings on the individual criminal responsibility of Milan Martić

[...]

4. Findings on Counts 1 and 15 to 19

[...]

(b) Military targets in Zagreb and the nature of the M/87 Orkan

461. The Defence argues that there were military targets in Zagreb at the time of the attacks on 2 and 3 May 1995, including the Ministry of Interior, Ministry of Defence, Zagreb/Plešo airport which had a military purpose, and the Presidential Palace. The Trial Chamber notes the report of 2 May 1995 from the SVK Main Staff to the VJ General Staff, which provides that the following targets in Zagreb were fired at by Orkan rockets on that day: the Ministry of Defence, the Presidential Palace and Zagreb/Plešo airport. The Trial Chamber notes that of these targets, the only one that was hit was Zagreb/Plešo airport, where one bomblet landed in a parking lot. [...] However, as will be shown below, the presence or otherwise of military targets in Zagreb is irrelevant in light of the nature of the M-87 Orkan.
462. The M-87 Orkan is a non-guided projectile, the primary military use of which is to target soldiers and armoured vehicles. Each rocket may contain either a cluster warhead with 288 so-called bomblets or 24 anti-tank shells. The evidence shows that rockets with cluster warheads containing bomblets were launched in the attacks on Zagreb on 2 and 3 May 1995. Each bomblet contains 420 pellets of 3mm in diameter. The bomblets are ejected from the rocket at a height of 800-1,000m above the targeted area and explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometres. The dispersion error of the rocket at 800-1,000m in the air increases with the firing range. Fired from the maximum range, this error is about 1,000m in any direction. The area of dispersion of the bomblets on the ground is about two hectares. Each pellet has a lethal range of ten metres.
463. The evidence shows that the M-87 Orkan was fired on 2 and 3 May 1995 from the Vojnić area, near Slavsko Polje, between 47 and 51 kilometres from Zagreb. However, the Trial Chamber notes in this respect that the weapon was fired from the extreme of its range. Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. The Trial Chamber therefore concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties. By 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved. Furthermore, before the decision was made to once again use this weapon on Zagreb on 3 May 1995, the full impact of using such an indiscriminate weapon was known beyond doubt as a result of the extensive media coverage on 2 May 1995 of the effects of the attack on Zagreb.

(c) Defence argument on reprisals

464. The Defence submits that the shelling of Zagreb may be considered lawful reprisal, carried out with the aim of putting an end to violations of international humanitarian law committed by “the Croatian military and police forces”. In

particular, the Defence submits that the shelling of Zagreb was a reaction to Operation Flash, which was in breach of the cease fire agreement, and “conducted without any respect to the norms of international humanitarian law”.

465. In the law of armed conflict, belligerent reprisals are acts resorted to by one belligerent which would otherwise be unlawful, but which are rendered lawful by the fact that they are taken in response to a violation of that law committed by the other belligerent. Reprisals are therefore drastic and exceptional measures employed by one belligerent for the sole purpose of seeking compliance with the law of armed conflict by the opposite party. It follows that reprisals, in order to be considered lawful, are subject to strict conditions. These conditions are well-established in customary law and are set forth below.
466. Reprisals may be used only as a last resort and only when all other means have proven to be ineffective. This limitation entails that reprisals may be exercised only after a prior and formal warning has been given, which has failed to put an end to the violations committed by the adversary. In addition, reprisals may only be taken after a decision to this effect has been made at the highest political or military level.
467. A further requirement is that the measures taken must be proportionate to the initial violation of the law of armed conflict of the opposite party. According to this condition, the reprisals must cease as soon as they have achieved their purpose of putting an end to the breach which provoked them. Finally, acts of reprisal must respect the “laws of humanity and dictates of public conscience”. The Trial Chamber interprets this condition to mean that reprisals must be exercised, to the extent possible, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians.
468. The Trial Chamber finds that the evidence presented to the Trial Chamber regarding the shelling of Zagreb fails to show that the conditions for lawful reprisals have been met. First, even if the Trial Chamber was to assume that the Croatian forces had engaged in serious violations of international humanitarian law during Operation Flash, the evidence shows that the shelling was not carried out as a last resort, after having exhausted all other means. Indeed, the Trial Chamber has been provided with evidence that peace negotiations were ongoing during Operation Flash, until 3 May 1995. Furthermore, no formal warning was given prior to the shelling that acts of reprisals would be carried out in reaction to the alleged violations conducted during Operation Flash. The Trial Chamber cannot therefore find that the shelling of Zagreb constituted a lawful reprisal and does not consider it necessary to analyse the issue of reprisal any further. [...]

(e) Counts 15 and 16 – Murder

470. The Trial Chamber finds that the deaths of Ana Mutevelić, Damir Dračić, Stjepan Krhen, Ivanka Kovač, Ivan Brodar, Luka Skračić and Ivan Markulin were caused as a result of the rocket attacks on Zagreb, which were ordered by Milan Martić.

Having regard in particular to the Trial Chamber's findings concerning the nature of the M-87 Orkan and that Milan Martić, who ordered the use of the M-87 Orkan, was aware that death was a probable consequence of this attack, the Trial Chamber finds that the mental element of the crime of murder is established. The Trial Chamber recalls that Ivan Markulin was a member of the Croatian MUP and that he was in the process of deactivating a bomb at the time of his death and was not taking an active part in the hostilities. The Trial Chamber therefore finds that Milan Martić bears individual criminal responsibility under Article 7(1) of the Statute for Counts 15 and 16 for the murder of Ana Mutevelić, Damir Dračić, Stjepan Krhen, Ivanka Kovač, Ivan Brodar, and Luka Skračić. The Trial Chamber further finds that Milan Martić bears individual criminal responsibility under Article 7(1) of the Statute for Count 16 for the murder of Ivan Markulin.

(f) Counts 17 and 18 – Inhumane acts under Article 5(i) and cruel treatment under Article 3

471. The Trial Chamber finds that the evidence from persons injured during the shelling of Zagreb is representative of the injuries and suffering caused to the 214 persons who were injured on 2 and 3 May 1995. The Trial Chamber therefore concludes that the shelling caused serious mental and/or physical suffering to those injured. The Trial Chamber considers that Milan Martić knew that the shelling was likely to cause such suffering, and thus intentionally committed acts which amount to cruel treatment under Article 3 and inhumane acts under Article 5 against these persons. The Trial Chamber recalls that of the persons injured, 7 were not civilians. The Trial Chamber therefore finds Milan Martić incurs individual criminal responsibility under Article 7(1) of the Statute for Count 17, other inhumane acts under Article 5(i), and for Count 18 for cruel treatment under Article 3 in relation to 207 victims and for Count 18, cruel treatment under Article 3, in relation to the other 7 victims.

(g) Count 19 – Attacks on civilians under Article 3

472. In examining the responsibility of Milan Martić for the crime of attacks on civilians under Article 3, the Trial Chamber recalls that a direct attack on civilians may be inferred from the indiscriminate character of the weapon used. The Trial Chamber has previously found that the M-87 Orkan was incapable of hitting specific targets. The Trial Chamber has also found that these attacks resulted in death and serious injury to the civilian population. Having regard in particular to the nature of the M-87 Orkan and the finding that Milan Martić knew of the effects of this weapon, the Trial Chamber finds that Milan Martić wilfully made the civilian population of Zagreb the object of this attack. Milan Martić therefore incurs individual criminal responsibility under Article 7(1) of the Statute for Count 19, attacks on civilians under Article 3.

[...]

C. Appeals Chamber Judgement

[Source: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Case No. IT-95-11-A, 8 October 2008; footnotes omitted]

IN THE APPEALS CHAMBER

PROSECUTOR

v.

MILAN MARTIC

Judgement

[N.B.: The Appeals Chamber rejected all grounds of appeal against the parts of the Trial Chamber Judgement reproduced above]

[...]

(a) *The M-87 Orkan rocket as an indiscriminate weapon incapable of hitting specific targets*

[...]

248. At the outset, the Appeals Chamber rejects Martić's arguments in relation to the Luna rocket system. Whether the RSK had another artillery system at its disposal is irrelevant as regards the inquiry into whether the Trial Chamber erred when it considered the M-87 Orkan to be an indiscriminate weapon. The weapon used in the shelling of Zagreb was the M-87 Orkan. Martić has not challenged this finding by the Trial Chamber.

[...]

(d) *The justification of the shelling of Zagreb as a reprisal or as a means of survival*

[...]

268. As for Martić's alternative argument that the shelling of Zagreb was a lawful military action conducted in self-defence, the Appeals Chamber recalls that "whether an attack was ordered as pre-emptive, defensive or offensive is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out was criminal or not." The Appeals Chamber has previously rejected Martić's challenges to the Trial Chamber's findings that the M-87 Orkan was an indiscriminate weapon, that the shelling of Zagreb constituted a widespread attack against the civilian population, that Martić made the civilian population the object of attack, and that he ordered the shelling of Zagreb. As Martić has failed to show any error in the Trial Chamber's conclusion that he deliberately targeted the civilian population of Zagreb, his argument that the shelling of Zagreb was conducted in self-defence must fail. The Appeals Chamber

takes note of Martić arguments in his concluding statement at the appeal hearing that “the Serbs were not aggressors but rather defended themselves in a situation when the United Nations made no attempt to protect them [...]”. However, in particular in light of the fact that the prohibition against attacking civilians is absolute, the Appeals Chamber fails to see how this claim could justify Martić’s actions in relation to the shelling of Zagreb.

[...]

(e) Precautions pursuant to Article 58 Additional Protocol I

270. The Trial Chamber did not address the question of whether or not Croatia had obligations to take precautions against the effects of attacks according to Article 58 of Additional Protocol I. Martić’s argues that the Trial Chamber was required to find a violation of Article 58 of Additional Protocol I by Croatia because “if preventive measures were taken, there would have been no civilian casualties.” The Appeals Chamber squarely rejects this argument. It is one of the pillars of international humanitarian law that its provisions have to be applied in all circumstances. One side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all of its obligations. Consequently, Martić’s argument as to alleged violations of Article 58 of Additional Protocol I by Croatia are irrelevant when assessing his individual criminal responsibility for violating international humanitarian law, in this case the prohibition to make the civilian population the object of attack. [...]

DISCUSSION

1. What is the purpose and what are the advantages and disadvantages of the Rule 61 Procedure? Compared with an *in absentia* trial? With a simple indictment by the Prosecutor?
2. (*Rule 61 Decision, paras 8, 11-14*) Was the armed conflict between the Republic of Croatia and the self-proclaimed Republic of Serbian Krajina an international armed conflict or a non-international armed conflict? Under which conditions could it be qualified as international? Does the ICTY qualify the conflict?
3.
 - a. (*Rule 61 Decision, para. 8*) Does every attack wilfully killing and wounding civilians violate Protocols I and II? If not, in which cases are the Protocols violated? Are the conditions different under Protocol I and Protocol II? Does every attack directed at civilians violate Protocols I and II? (P I, Art. 51; P II, Art. 13)
 - b. Can the prohibition on wilfully killing or wounding civilians already be deduced from the Martens clause? What are the advantages and disadvantages of basing such a prohibition on the Martens clause?
 - c. Are indiscriminate attacks prohibited by Protocol I? By Protocol II? By customary IHL applicable to non-international armed conflicts? Is there a difference between attacks directed against civilians and indiscriminate attacks? Under Protocol I? According to the ICTY? (P I, Art. 51; CIHL, Rules 11 and 12)

- d. Are M-87 Orkan weapons inherently indiscriminate weapons? Were they indiscriminate in this case? Why? Because they contained cluster warheads? Because the rocket itself could not be aimed accurately enough at a military objective? (P I, Art. 51(4); CIHL Rule 12)
 - e. Which specific prohibition of Protocol I was violated by the M-87 Orkan rocket? Is this prohibition also applicable in non-international armed conflicts? Why? (P I, Art. 51(4)(b); CIHL Rule 12)
 - f. Is common Article 3 applicable to the conduct of hostilities? Under common Article 3, is every deliberate killing of a civilian by a rocket attack murder and does every wounding of a civilian constitute cruel treatment? Even when the attack is directed at a military objective?
4. Does the availability of an alternative weapon ever matter when deciding whether an attack is indiscriminate? Whether a weapon is indiscriminate? Whether it cannot be directed at a specific military objective? When deciding whether all feasible precautionary measures were taken? (P I, Arts 51 and 57)
5.
 - a. Is every attack affecting the civilian population prohibited by Protocol I also unlawful if committed as a proportionate reprisal aimed at stopping similar unlawful attacks by the enemy? Under Protocol I? Under customary IHL? According to the Rule 61 decision? According to the Trial Chamber Judgement? (P I, Art. 51(6); CIHL, Rule 145)
 - b. Does Protocol II prohibit reprisals consisting of proportionate violations of Protocol II aimed at stopping similar violations by the adverse party? Is the very concept of reprisals legally conceivable in non-international armed conflicts? (P II, Art. 13) Does customary IHL prohibit reprisals in non-international armed conflicts? (CIHL, Rule 148)
 - c. Does Article 60(5) of the Vienna Convention on the Law of Treaties imply that any reprisals consisting of violations of IHL treaties are unlawful? Is there a difference between reprisals and the ending or suspension of the operation of a treaty because of a substantial breach?
 - d. According to the Trial Chamber Judgement, what are the conditions for a lawful reprisal?
 - e. (*Trial Chamber Judgement, para. 467*) What does the condition that acts of reprisal must respect the “laws of humanity and dictates of public conscience” mean? Does not every reprisal, by definition, violate an IHL prohibition? Does the said condition mean that reprisals may never be directed against the civilian population? That a reprisal may never consist of an indiscriminate attack? When is it impossible to carry out a reprisal in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition on the targeting of civilians?
 - f. Does the condition that reprisals may only be used as a last resort mean that they may never be used during peace negotiations? Never during negotiations to end violations of IHL?
 - g. May a violation of IHL ever be justified by an extreme situation of self-defence, where the very survival of a State is at stake? According to the ICTY Appeals Chamber? According to the ICJ? [See **Case No. 62**, ICJ, Nuclear Weapons Advisory Opinion [Para. 105 E]]
 6. Is the protection of the civilian population a responsibility shared both by the attacker and by the defender? Have they an equal responsibility in this regard? Does the defender’s failure to take passive precautions absolve the attacker from responsibility for an indiscriminate attack? In the case under discussion here? In any situation? Does the defender’s failure to respect the prohibition on the use of human shields absolve the attacker from responsibility for an indiscriminate attack? (P I, Arts 51(7) and 58)

Case No. 213, ICTY, The Prosecutor v. Rajić**A. Rule 61 Decision**

[Source: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, The Prosecutor v. Ivica Rajić, Case No. IT-95-12-R61, September 13, 1996; available at www.icty.org]

PROSECUTOR**v.****IVICA RAJIĆ (a/k/a VIKTOR ANDRIĆ)****REVIEW OF THE INDICTMENT PURSUANT TO RULE 61
OF THE RULES OF PROCEDURE AND EVIDENCE**

[...]

A. The Charges

1. Ivica Rajić is accused of ordering the October 23, 1993 attack against the village of Stupni Do, which was located in the Republic of Bosnia-Herzegovina. The attack was allegedly carried out by the Croatian Defence Council (“HVO”), which are identified as the armed forces of the self-proclaimed Croatian Community of Herceg-Bosna (“HB”), acting under Ivica Rajić’s control. Ivica Rajić is charged under six counts: Count I – a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute of the International Tribunal (“Statute”); Count II – a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count III – violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. [...]

B. Preliminary Matters

2. [...] Rule 61 proceedings [...] give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting such indictment. Rule 61 proceedings therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it shall issue an international arrest warrant. The issuance of such a warrant, with which all States that are Members of the United Nations are obliged to comply, enables the arrest of the accused if he crosses international borders. After a Rule 61 proceeding the President of the International Tribunal may notify the Security Council of the failure of a State to

cooperate with the International Tribunal. The Prosecutor has submitted material in which it is asserted that failure to effect personal service of the indictment on Ivica Rajić is due in whole or in part to the failure of the Republic of Croatia and the Croatian Community of Herzeg-Bosna to cooperate with the International Tribunal.

3. A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. [...]

C. Subject-Matter Jurisdiction

[...]

1. Article 2 of the Statute – Grave Breaches

[...]

8. Because the crimes alleged by the Prosecutor were directed against civilian persons and property, the Geneva Convention relevant to this case is [...] Geneva Convention IV [...]. Based on the provisions of this Convention, the Trial Chamber first considers whether the Prosecutor has shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict and then addresses the issue of whether the attack involved persons and/or property protected under Geneva Convention IV.

a. International Armed Conflict

9. The evidence submitted by the Prosecutor indicates that the attack on the village of Stupni Do was part of the clashes occurring in central and southern Bosnia between the HVO [...] on the one hand, and the forces of the Bosnian Government on the other. [...]
11. [...] The conflict between the HVO and Bosnian Government forces [...] should be treated as internal unless the direct involvement of a State is proven. Thus, the issue of whether the alleged attack on the civilian population of Stupni Do was part of an international armed conflict turns on the existence and extent of outside involvement in the clashes between the Bosnian Government forces and the HVO in central and southern Bosnia.

[...]

i. Direct Military Intervention by Croatia

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian

Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5000 to 7000 members of the Croatian Army [HV], as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia. [...]

17. [...] Documents suggest that HV soldiers serving in the HVO were not volunteers, but rather were mobilized by Croatia and were serving in their capacity as HV soldiers with a special status within the HVO.
18. The above conclusion is supported by witness statements reported sightings of entire brigades of Croatian Army troops in Bosnia. [...] It is unlikely that units of this size would of their own accord volunteer for service in a foreign country. Moreover, witnesses testified to seeing military equipment such as tanks, helicopters and artillery bearing Croatian Army insignia in central and southern Bosnia. [...] It does not seem probable that such equipment could have been transported to Bosnia by volunteers without the cooperation of the Croatian Government. [...]
21. [...] There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.

ii. Croatia's Control of the Bosnian Croats

22. The Chamber's finding regarding the nature of the conflict stated above is all that is necessary to meet the international armed conflict requirement of Geneva Convention IV. Nonetheless, for purposes of the Prosecutor's arguments regarding persons protected under Geneva Convention IV, which are discussed below, the Chamber believes it appropriate to consider the Prosecutor's additional argument that the conflict between the Bosnian Government and HB may be regarded as international because of the relationship between Croatia and HB. The Prosecutor has asserted that Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia.
23. The Trial Chamber believes that an agency relationship between Croatia and the Bosnian Croats – if proven at trial – would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character.
24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 Draft Articles on State Responsibility. Draft Article 8 provides

in relevant part that the conduct of a person or a group of persons shall “be considered as an act of the State under international law” if “it is established that such person or group of persons was in fact acting on behalf of that State”. 1980 II (Part Two) Y.B. Int’l L. Commission at p. 31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of *Nicaragua*, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was whether the relationship 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.

Nicaragua, 1986 I.C.J. Rep. 109. It found that the United States had financed, organised, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court’s decision in the *Nicaragua* case was a final determination of the United States’ responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States’ operational control over the *contras*, holding that the “general control by the [United States] over a force with a high degree of dependency on [the United States]” was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. 115. In contrast, this Chamber is not called upon to determine Croatia’s liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over [...] acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.
26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats. [...]

29. In addition to the evidence of Croatian domination of the military institutions of the Bosnian Croats described above, the Prosecutor has also provided the Trial Chamber with material that suggests that the Bosnian Croat political institutions were influenced by Croatia. [...]
30. In its 7 April 1992 decision recognising the existence of the Republic of Bosnia and Herzegovina, Croatia explicitly stated that recognition of Bosnia implied that “the Croatian people, as one of the three constituent nations in Bosnia and Herzegovina, shall be guaranteed their sovereign rights “and granted Bosnian Croats the right to Croatian citizenship. [...]
31. [...] Perhaps most tellingly, at the time of the conclusion of the Dayton Peace Agreement, the Foreign Minister of the Republic of Croatia, Mate Granic, wrote to the foreign ministers of several States assuring them that the Republic of Croatia would take all necessary steps “to ensure that personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [*sic*] and comply with the provisions of [certain portions of the Dayton Peace Agreement]”. *Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. GAOR, 50th Sess., U.N. SCOR, 50th Sess., at 126-130, U.N. Doc. A/50/790 & S/1995/999 (30 Nov. 1995) (“Dayton Peace Agreement”).
[....]

b. Protected Persons and Property

33. Having concluded that the attack on Stupni Do was part of an international armed conflict, the Trial Chamber now turns to the second requirement for the application of Article 2 of the International Tribunal’s Statute: whether the alleged crimes were “against persons or property protected under the provisions of the relevant Geneva Convention”. [...]

i. Protected Persons

34. Article 4 of Geneva Convention IV, which addresses the protection of civilian persons in time of war, reads in pertinent part:

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.

Under this definition, Bosnian civilian victims qualify as “protected persons” if they are “in any manner whatsoever ... in the hands of a Party to the conflict... of which they are not nationals”. The Prosecutor asserts that the HVO forces under the command of Ivica Rajić were under the control of Croatia to such an extent that Bosnian persons who were the object of the attack by Ivica Rajić’s forces may be regarded as being in the hands of Croatia.

35. The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.
36. The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words "at a given moment and in any manner whatsoever" were "intended to ensure that all situations and all cases were covered".

[...] *Commentary on Geneva Convention IV* [...] [a]t page 47 [...] notes that the expression "in the hands of" is used in an extremely general sense.

[...] 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.
37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. [...] Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically "in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were – for the purposes of the grave breaches provisions of Geneva Convention IV – protected persons vis à vis the Bosnian Croats because the latter were controlled by Croatia. The Trial Chamber notes this holding is solely for the purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

ii. *Protected Property*

38. Geneva Convention IV also contains several provisions that set out the types of property that are protected under the Convention. The Prosecutor has suggested that Article 53 of the Convention is the appropriate definition in this case. Article 53 provides as follows:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The Prosecutor argues that when Stupni Do was overrun by HVO forces under the command of Ivić Rajić and came under their control, "the property of Stupni Do

became protected property in terms of Article 53... [because] it was [Bosnian] property under the control of HVO forces, who are to be regarded as part of the opposite side, namely Croatia, in an international conflict". [...]

39. Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation ... even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2". [...]
42. The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this holding is for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused. [...]

2. Article 3 – Violations of the Laws or Customs of War

[...]

48. In the *Tadic* case the Appeals Chamber established the principle that civilians are protected during internal armed conflicts. *Tadic Appeal Decision on Jurisdiction* at 119, 127. The specific issue of whether an attack on a civilian population constitutes a violation of the laws or customs of war was addressed by Trial Chamber I of the International Tribunal in the *Martić Rule 61 Decision*. Trial Chamber I held that attacks on civilian populations were prohibited under conventional and customary law in both international and internal armed conflicts. With respect to conventional law, the Chamber relied on the provisions of Additional Protocols I and II. It also found a customary prohibition on such conduct based on the Appeals Chamber Decision, resolutions of the United Nations General Assembly, Article 3 Common to the Geneva Conventions and the provisions of Additional Protocols I and II as reflective of customary law. Trial Chamber I further found that the other conditions identified in the Appeals Chamber Decision for the International Tribunal's jurisdiction under Article 3 had been met, i.e., that the violation was serious because it undermined important values and had serious consequences for the victims and involved the individual criminal responsibility of the perpetrator of the violation. See *Martić Rule 61 Decision*, 8, 10, 19, 20. [See Case No. 212, ICTY, The Prosecutor v. Martić [Part A.]] This Trial Chamber agrees with the analysis conducted by Trial Chamber I in the *Martić Rule 61 Decision* and holds that the

International Tribunal has jurisdiction under Article 3 of its Statute to entertain the charge of attack against a civilian population. [...]

D. Reasonable Grounds

[...]

51. The evidence submitted by the Prosecutor indicates that Stupni Do was a small village approximately four kilometres south-east of Vares in central Bosnia. In contrast to nearby Vares, Stupni Do had a mostly Muslim population of approximately two hundred and fifty people. Witnesses testified that at approximately eight o'clock on the morning of 23 October 1993, HVO soldiers under the command of Ivica Rajić attacked Stupni Do. On hearing the gunfire which signalled the beginning of the attack, villagers took to shelters, cellars, and other hiding places. Approximately forty lightly armed local villagers, constituting the local defence forces, attempted to defend and protect their families and property. The shooting continued for approximately three hours, but because the villagers were the HVO's only opposition, they were soon overrun. The village defenders then withdrew to a main shelter to try to protect and warn the people located there. [...]
52. It appears that HVO soldiers went from house to house, searching for village residents. On finding the villagers, the evidence indicates, the HVO forced them out of the shelters and terrorised them. Witnesses' statements indicate that the HVO forcibly took money and possessions from the villagers and that they stabbed, shot, raped, and threatened to kill the unarmed civilians they encountered. The HVO soldiers apparently had no regard for the defencelessness of the villagers. For example, four women who were hiding in a cellar were shot at from above. Three of the four died. The one that survived reported that she escaped from the house only to be shot at by the HVO as she ran away towards the woods. Witnesses indicated that they saw the bodies of at least sixteen unarmed residents who appeared to have been murdered in this or a similar manner. In addition, HVO soldiers attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire. The civilians eventually managed to escape by breaking the door with an axe. Throughout the attack, HVO soldiers fired exploding phosphorus munitions into the houses, causing them to burst into flames. The HVO soldiers dragged many of the corpses into burning houses. [...]
53. According to the Registrar's Office of the Vares municipality, which was responsible for maintaining Stupni Do's death records, by the time the attack ended, thirty-seven Stupni Do residents were dead. Nearly all of the sixty homes in the village were virtually destroyed. [...]
54. Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the "defence force" was made up almost entirely of village residents who came together to defend themselves. [...]

56. [...] There is no evidence that there was a military installation or any other legitimate target in the village. [...]
59. There is proof Ivica Rajić knew about the attack and actually ordered it. [...] Sergeant Ekenheim stated that Ivica Rajić planned the attack and noted that Ivica Rajić had explicitly stated that he took over Stupni Do "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do so they had to neutralise Stupni Do. It was a Bosnian stronghold filled with soldiers and traitors". [...] At one of several meetings with UNPROFOR representatives, Ivica Rajić informed Sergeant Ekenheim and Colonel Henricsson that he would not hurt the civilians, that the troops in Stupni Do were his, and, because he was in charge, he could guarantee that the civilians would not get hurt. [...]
60. It is also evident that HVO troops in the area recognised Ivica Rajić's authority. For example, on the way to Vares, Sergeant Ekenheim and Colonel Henricsson passed a HVO checkpoint at which HVO soldiers said they could not pass without permission from Ivica Rajić, their commanding officer. [...]
61. Finally, a witness who had been a member of the HVO and the Croatian Armed Forces stated that prior to the attack, most of the local HVO troops were deployed to the front line areas by Ivica Rajić [...] This witness believes that Ivica Rajić was in charge of the troops because Ivica h Rajić had given him a hand-written note authorising him to retain his weapons while going in and out of checkpoints around Stupni Do. When they were meeting for this purpose, Ivica Rajić indicated that he was proud of his men's actions and that the casualties were normal for this type of action. [...] This witness also claims that he saw Ivica Rajić slap an HVO soldier who supposedly released a girl during the Stupni Do attack. [...]

E. Failure to cooperate with the International Tribunal

[...]

66. The Trial Chamber believes that Ivica Rajić has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The prosecutor has produced reliable information indicating that Ivica Rajić resides or has been residing in Split in the Republic of Croatia and that he visits Kiseljak, in the Federation of Bosnia and Herzegovina for short periods. [...] In addition, the Trial Chamber has received a power of attorney, signed by Ivica Rajić while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.
67. The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Rajić on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.
68. The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribunal, following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the

Federation of Bosnia and Herzegovina has undertaken to “cooperate fully with all entities involved in implementation of this peace agreement ... including the International Tribunal for the Former Yugoslavia”. Again, despite the presence of Ivica Rajić on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

69. In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that personnel or organisations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [*sic*] and comply with the provisions of the aforementioned Annexes [i.e. annexes 1-A and 2 of the Dayton Peace Agreement].

Dayton Peace Agreement at 126-30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

70. In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajić may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial Chamber so certifies for the purpose of notifying the Security Council. [...]

III. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, PURSUANT TO RULE 61, UNANIMOUSLY

RULES that it has subject-matter jurisdiction over all counts of the indictment against Ivica Rajić;

FURTHER RULES that it is satisfied that there are reasonable grounds for believing that Ivica Rajić committed the crimes charged in all counts of the indictment against him;

HEREBY CONFIRMS all counts of the indictment;

ISSUES an international arrest warrant for Ivica Rajić; and

ORDERS that the arrest warrant shall be transmitted to all States and to the multinational military Implementation Force (IFOR).

NOTES that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrusts the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61 (E). [...]

B. Sentencing Judgement

[Source: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991, The Prosecutor v. Ivica Rajić, Case No. IT-95-12-S, 8 May 2006; available at www.icty.org. Footnotes omitted.]

IN THE TRIAL CHAMBER I

PROSECUTOR

v.

IVICA RAJIĆ, a.k.a. VIKTOR ANDRIĆ

SENTENCING JUDGEMENT

[...]

B. Plea Agreement

13. Ivica Rajić agreed to plead guilty to the following four counts contained in the Plea Agreement:

Count 1: wilful killing (Article 2(a) of the Statute);

Count 3: inhuman treatment (Article 2(b) of the Statute);

Count 7: appropriation of property (Article 2(d) of the Statute);

Count 9: extensive destruction not justified by military necessity and carried out unlawfully and wantonly (Article 2(d) of the Statute).

[...]

17. Ivica Rajić also accepted that, by entering into the Plea Agreement, he had given up the rights related to the presumption of innocence and to a full trial.
18. In exchange for Ivica Rajić's guilty plea, his complete cooperation with the Prosecution, and the fulfillment of all of his obligations under the Plea Agreement, the Prosecution agreed to recommend to the Trial Chamber the imposition of a "single combined sentence in the range of twelve to fifteen years, with the Accused able to argue for a sentence at the bottom of this range (twelve years) and the Prosecutor able to argue for a sentence at the top of this range (fifteen years)." Both Parties also understood that the Trial Chamber was not bound by any agreement reached between them on the preferred sentence.

[...]

VI. DISPOSITION

184. For the foregoing reasons, having considered the arguments and the evidence presented by the Parties, the **TRIAL CHAMBER**

PURSUANT TO the Statute and the Rules,

SENTENCES Ivica Rajić to 12 (twelve) years of imprisonment;

[...]

DISCUSSION

The questions relate to Part A, Rule 61 Decision.

1. (*Paras 2, 66-70, Disposition*) What are the advantages and inconveniences of the “Article 61 Procedure” compared with an *in absentia* trial or with a simple indictment by the prosecutor? What purpose does the “Article 61 Procedure” fulfil? What are the consequences of the Tribunal’s ruling for Rajić, for Croatia, and for Bosnia and Herzegovina? How could the Tribunal rule against the Federation of Bosnia and Herzegovina (which is one of the two constituent entities of Bosnia and Herzegovina)? Is not Bosnia and Herzegovina now internationally responsible for the Federation of Bosnia and Herzegovina? Could the UN Security Council now impose sanctions against Bosnia and Herzegovina? Against the Federation of Bosnia and Herzegovina? Against the latter’s inhabitants of Croat nationality? Or (under the decision discussed here) also against those of Bosnian Muslim nationality?
2. (*Paras 8, 33 and 34*) Is every wilful killing of a civilian in an armed conflict a grave breach of IHL? At least if it is committed in an international armed conflict? (GC IV, Arts 1, 4 and 147)
3.
 - a. (*Paras 13-31*) Did the Tribunal decide that an armed conflict existed between Bosnia and Herzegovina, and Croatia? How did it establish its existence? Was it sufficient that Croatia financed, organized, supplied and equipped the Croatian Defence Council (HVO)? Did the HVO have to be an organ of the Croat government? Does the Tribunal apply the same criteria as the ICJ applied in the Nicaragua Case? [See **Case No. 153**, ICJ, *Nicaragua v. United States*]
 - b. (*Paras 13-31*) Was the presence of Croatian troops on the territory of Bosnia and Herzegovina sufficient to make it an international armed conflict? Did the Tribunal consider that troops from Croatia were present in Stupni Do? If not, how could it consider that the laws of international armed conflict nevertheless applied? Was it necessary to apply the law of international armed conflict to punish the behaviour of Rajić? (GC IV, Arts 1 and 3; P II, Arts 4 and 13) [See **Case No. 204**, *Former Yugoslavia, Special Agreements Between the Parties to the Conflicts* [Part B.]]
 - c. (*Paras 31 and 69*) Was Croatia’s undertaking “to ensure that” HVO personnel respect the Dayton Peace Agreement sufficient to prove that the HVO was acting on its behalf? (See, by analogy, GC I-IV, Art. 1)
 - d. (*Paras 34-37*) Does the Tribunal not apply the reasoning of the Prosecutor, which was qualified as absurd and fallacious by the Appeals Chamber in paragraph 76 of the *Tadić* case? [See **Case No. 211**, ICTY, *The Prosecutor v. Tadić* [Part A.]] If a “defender” of Stupni Do had tortured a passing Bosnian Croat inhabitant of nearby Vares, would that have been a grave breach of IHL? How could the latter have been qualified as a “protected person” in relation to that “defender”? (GC IV, Arts 4, 27, 31 and 147)
 - e. (*Paras 37 and 42*) Is the question whether, under Art. 2 of the Statute, the Tribunal has subject-matter jurisdiction over acts committed by the HVO distinct from the question of Croatia’s liability for acts of the HVO?
 - f. (*Part B.*) Could Rajić have been sentenced for the same acts if the conflict had been qualified as not of an international character?
4. (*Paras 34-37*) How can someone be in the hands of Croatia who has never been under its jurisdiction (nor under the control of its troops)?
5. (*Paras 39 and 42*) After the HVO attack was Stupni Do a territory occupied by Croatia?

6. (*Para. 48*) Why is an attack on a civilian population in a non-international armed conflict a violation of IHL? (GC I-IV, Art. 3; P II, Art. 13)
7. (*Paras 51-56*) Were there any military objectives in Stupni Do? Were members of the “‘defence force’ [that] was made up almost entirely of village residents who came together to defend themselves” civilians or combatants? Were they military objectives? If they were, did that make their wives or their houses legitimate targets? (P I, Arts 48, 50 and 52)
8. (*Para. 59*) Was the plan of Rajić to “neutralise Stupni Do” “because he thought the Bosnian Army would launch an attack against Vares through Stupni Do” a violation of IHL? Would it have violated IHL if he did not fear an attack against Vares? (P I, Arts 48, 50 and 52)

Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel

[See also **Document No. 28**, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal]

A. ICTY, The Prosecutor v. Simic *et al.*

[**Source:** ICTY, The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric, IT 95-9. PT, in the Trial Chamber, Decision of 27 July 1999; footnotes omitted]

[**N.B.:** This decision was made public by the Tribunal on 1st October 1999.]

IN THE TRIAL CHAMBER
Decision of: 27 July 1999

PROSECUTOR
v.
BLAGOJE SIMIC [and Others]
EX PARTE CONFIDENTIAL

DECISION ON THE PROSECUTION MOTION UNDER RULE 73
FOR A RULING CONCERNING THE TESTIMONY OF A WITNESS [...]

II. SUBMISSIONS**A. The Prosecution [...]**

3. [...] In the Prosecution's view, the issue is whether a third party to the proceedings such as the ICRC is entitled to intervene to prevent a willing witness from testifying. The Prosecution asserts that the issues in contention between the ICRC and the Prosecution are: (1) whether the ICRC has a right to determine unilaterally that ICRC employees or former employees may not give evidence before the International Tribunal despite their willingness to do so, the Prosecution position being that it does not; (2) alternatively, whether it is for the Trial Chamber to determine whether protective measures could adequately protect a relevant confidentiality interest of the ICRC; and (3) if so, then it is for the Trial Chamber to determine whether, in this particular case the circumstances are so extreme that the ICRC has a relevant confidentiality interest which can only be protected by not allowing the witness to be called at all. Again the Prosecution argues that they are not. The Prosecution presents arguments on various issues which it anticipates the ICRC will raise, in particular as to immunity and privilege.
4. With respect to the ICRC's general position, the Prosecution states that it understands the ICRC's concern to be that national authorities might deny ICRC personnel access to places where persons protected by the Geneva Conventions are located if they think that these ICRC personnel might subsequently testify in criminal proceedings about what they have seen and heard in those places.

Although sympathetic to the ICRC concerns, the Prosecution reiterates its view that the ICRC does not enjoy, as a matter of law, any immunity or privilege that would enable it, unilaterally, to prevent any of its former employees from testifying.

5. The Prosecution contends that the Trial Chamber should make a determination on a case by case basis and should decide that a witness be precluded from testifying only in exceptional circumstances. It is the Prosecution's contention that protective measures could afford appropriate protection to the ICRC interests. [...]

B. The ICRC [...]

12. The ICRC relies, *inter alia*, on the following arguments in support of its opposition: the ICRC's international mandate, its operational principles and their application, its status of immunity, the privileged nature of its communications and the impact of such testimony on its operations, and the privilege or confidentiality doctrine in national law.
13. It is the ICRC's general position that the testimony of a former ICRC employee would involve a violation of principles of international humanitarian law concerning the role of the ICRC and its mandate under the Geneva Conventions, the Additional Protocols and the Statute of the ICRC. The ICRC submits that the testimony would jeopardise its ability to discharge its mandate in the future, as concerned parties (national authorities or warring parties) are likely to deny or restrict access to prison and detention facilities if they believe that ICRC officials or employees might subsequently give evidence in relation to persons they met or events they witnessed. [...]
14. The ICRC relies on the mandate entrusted to it under the Geneva Conventions, the Additional Protocols and its Statute, together with its special status and role, to support its arguments. It places particular emphasis on the importance of respecting the principles of, *inter alia*, impartiality and neutrality, as well as the need for confidentiality in the performance of its functions. The ICRC notes that, by adhering to these principles, it has been able to win the trust of warring parties to armed conflicts and bodies engaged in hostilities, in the absence of which it would not be able to perform the tasks assigned to it under international humanitarian law. Further, the ICRC asserts that in carrying out its mandate it undertakes a duty of confidentiality towards the warring parties. An essential feature of that duty is that ICRC officials and employees do not testify about matters which come to their attention in the course of performing their functions. [...]
19. [...] The ICRC contends that the International Tribunal should exclude evidence to be given without the consent of the ICRC unless the Prosecution can demonstrate that there is an overwhelming need to admit such evidence and that this need is strong enough to outweigh the need for confidentiality and the likely adverse effect on the ICRC's ability to function. The ICRC argues that the following conditions must be met in order for the above-mentioned test to be satisfied:
 - (1) the crimes charged must be of the utmost gravity;

- (2) the evidence must be indispensable, in the sense that the case could not be mounted without it; and
- (3) admitting the evidence would not prejudice the work of the ICRC.

In the ICRC's opinion, on the basis of the information currently available, in particular as to the substance of the evidence, these criteria are not met in the present case. [...]

III. DISCUSSION [...]

A. Issues not in dispute between the Prosecution and the ICRC [...]

36. [...] It is the Trial Chamber's view that the ICRC has an interest in this matter sufficient to entitle it to present arguments on the Motion if the Information is based on knowledge gathered by a former employee while carrying out official duties, as ICRC's interests could then be potentially affected. It is acknowledged that a distinction should be drawn between information gathered in an official capacity and information gathered in a private capacity. If the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working. It follows from this that the relevant entity can be considered to have a legal interest in such information and accordingly may raise objections to the disclosure of the Information. By contrast, in cases where information is acquired by an individual in his private capacity, the entity has no legal interest. Further, if the Information had been obtained in the course of carrying out tasks which do not fall within the competence of the ICRC, it follows that the ICRC could not claim an interest in relation to the non-disclosure of the Information. [...]

B. Issues in dispute and relevant issues

38. The issue is not whether the International Tribunal has jurisdiction over the ICRC and, in particular, it is not whether the International Tribunal has the power to compel the ICRC to produce the Information. In the Trial Chamber's view, the issue to be considered is whether the ICRC has a relevant and genuine confidentiality interest such that the testimony of a former employee, who obtained the Information while performing official duties, should not be admitted. [...]
42. [...] It is trite that the International Tribunal is bound by customary international law, not least because under Article 1 of its Statute it applies international humanitarian law, which consists of both customary and conventional rules [...].
44. The Trial Chamber thus finds that the following considerations are relevant to the determination of the issue at hand: [...]

1. Whether under conventional or customary international law there is a recognition that the ICRC has a confidentiality interest such that it is entitled to non-disclosure of the former employee's testimony

(a) The ICRC's mandate under conventional and customary international law [...]

46. It is widely acknowledged that the ICRC, an independent humanitarian organization, enjoys a special status in international law, based on the mandate conferred upon it by the international community. The Trial Chamber notes that the functions and tasks of the ICRC are directly derived from international law, that is, the Geneva Conventions and Additional Protocols. Another task of the ICRC, under its Statute, is to promote the development, implementation, dissemination and application of international humanitarian law. [...]
50. The specific status and role of the ICRC was also recognised by the General Assembly of the United Nations. "Considering the special role carried on accordingly by the ICRC in international humanitarian relations", the General Assembly granted the ICRC the status of observer to the General Assembly. The Trial Chamber notes that this resolution was sponsored by 131 States and adopted unanimously by the General Assembly. When introducing the resolution on behalf of the co-sponsors, the Permanent Representative of Italy to the United Nations referred to the ICRC in the following terms: "The special role conferred upon the ICRC by the international community and the mandate given to it by the Geneva Conventions make of it an institution unique of its kind and exclusively alone in its status." On the same occasion, the United States representative stated that the "unique mandate of the ICRC sets the Committee apart from the other international humanitarian relief organizations or agencies".
51. The widely acknowledged prestige of the ICRC and its "*autorité morale*" are based on the fact that the ICRC has generally consistently adhered to the basic principles on which it operates to carry out its mandate. The fundamental principles on which the ICRC relies in the performance of its mandate are the principles of humanity, impartiality, neutrality, independence, voluntary service, unity, and universality. Of particular relevance to the issue at hand are the principles of neutrality, impartiality and independence.
52. [...] The three principles of impartiality, neutrality and independence have been described as "derivative principles, whose purpose is to assure the Red Cross of the confidence of all parties, which is indispensable to it". They are derivative in the sense that they do not relate to objectives but to means. Neutrality and impartiality are means enabling the ICRC to carry out its functions. According to these principles, the ICRC may not be involved in any controversy between parties to a conflict.
53. The principle of impartiality calls on the ICRC to perform its functions without taking sides. According to the ICRC, impartiality "does in fact correspond to the very ideal of the Red Cross, which bars it from excluding anyone from its humanitarian concern". According to the neutrality principle, the ICRC may not take sides in armed conflicts of any kind and ICRC personnel should abstain from any interference, direct or indirect in war operations. The ICRC submits that, to

comply with this principle, it must avoid behaving in a way that could be perceived by one of the warring parties, past or present, as adopting a position opposed to it. The principle of neutrality also requires that the ICRC not engage in controversies, in particular of a political, racial or religious nature. Neutrality means that the ICRC treats all on the basis of equality, and as to governments or warring parties, does not judge their policies and legitimacy. The principle of independence calls on the ICRC to conduct its activities freely, and solely on the basis of decisions made by its own organs and according to its own procedures. Accordingly, it cannot depend on any national authority. This guarantees its neutrality. [...]

55. The submissions of both the Prosecution and the ICRC also address the issue of confidentiality. The principle of confidentiality, on which the ICRC relies, refers to its practice not to disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions. The ICRC argues that this principle is a key element on which it needs to rely in order to be able to carry out its mandate. It has been described as a “working tool” or, more generally, as a practice. Confidentiality is directly derived from the principles of neutrality and impartiality. The Trial Chamber notes that it is always referred to in relation to its humanitarian activities. Further, all staff employed by the ICRC undertake to respect the principle of confidentiality. A pledge of discretion is incorporated in every employment contract. [...]
59. A consequence of the fundamental principles of neutrality and impartiality, and of the working principle of confidentiality, is the ICRC’s policy not to permit its staff to testify before courts and, in particular, not to testify against an accused. The ICRC is of the view that any testimony by one of its employees, past or present, concerning information acquired while performing ICRC functions cannot be disclosed without the ICRC’s prior approval.
60. The Trial Chamber accepts the ICRC’s submission that it has had a consistent practice as to the non-testimony of its delegates and employees before courts since the Second World War. [...] Headquarters agreements also contain a provision to this effect. [...]
63. The Prosecution submits that the ICRC has not been consistent in its practice because it has issued public statements in relation to violations of international humanitarian law in specific conflicts. The ICRC rebuts the Prosecution submission, arguing that it only releases public statements when certain conditions are met and, in any case, only when it is convinced that its ability to carry out its mandate would not be prejudiced. The ICRC also submits that its public statements are very general and never mention individuals. The Trial Chamber does not find convincing the argument of the Prosecution that the release of public statements by the ICRC constitutes a departure from its confidentiality policy. On the contrary, it is convinced that the ICRC’s practice not to make public statements about specific acts committed in violation of humanitarian law and attributed to specific persons reflects its fundamental commitment to the principle of neutrality. [...]

(b) The impact of disclosure on the ICRC's ability to carry out its mandate

65. As noted before, in order to carry out its mandate, the ICRC needs to have access to camps, prisons and places of detention, and in order to perform these functions it must have a relationship of trust and confidence with governments or the warring parties. [...] These activities within the protective powers system depend on invitation or acceptance by the detaining power. These authorisations in turn are based on a relationship of trust and confidence established by the ICRC with governments and warring parties. The ICRC also needs to gain the confidence of prisoners visited. [...] The ICRC also submits that admission of the Information would have a prejudicial effect on the safety of its delegates and staff in the field as well as the safety of the victims. [...]

(c) Findings [...]

73. The analysis in the previous section has clearly indicated that the right to non-disclosure of information relating to the ICRC's activities in the possession of its employees in judicial proceedings is necessary for the effective discharge by the ICRC of its mandate. The Trial Chamber therefore finds that the parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and the Protocols. In that regard, the parties must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.
74. The ratification of the Geneva Conventions by 188 States can be considered as reflecting the *opinio juris* of these State Parties, which, in addition to the general practice of States in relation to the ICRC as described above, leads the Trial Chamber to conclude that the ICRC has a right under customary international law to non-disclosure of the Information. [...]

2. Whether the ICRC's confidentiality interest should be balanced against the interests of justice

76. It follows from the Trial Chamber's finding that the ICRC has, under international law, a confidentiality interest and a claim to non-disclosure of the Information, that no question of the balancing of interests arises. The Trial Chamber is bound by this rule of customary international law which, in its content, does not admit of, or call for, any balancing of interest. The rule, properly understood, is, in its content, unambiguous and unequivocal, and does not call for any qualifications. Its effect is quite simple: as a matter of law it serves to bar the Trial Chamber from admitting the Information. [...]

3. Whether protective measures could adequately meet the ICRC's confidentiality interest

80. The Trial Chamber's finding that there is a rule of customary international law barring it from admitting the Information necessarily means that the question of the adoption of protective measures does not arise. [...]

IV. DISPOSITION

For the foregoing reasons

Pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DECIDES that the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given.

A Separate Opinion of Judge David Hunt is appended to this Decision. [...]

**EX PARTE AND CONFIDENTIAL
SEPARATE OPINION OF JUDGE DAVID
HUNT ON PROSECUTOR'S MOTION
FOR A RULING
CONCERNING THE TESTIMONY OF A WITNESS [...]**

IV. THE INTERESTS INVOLVED [...]

15. I accept that this obligation of confidentiality that the ICRC has to the warring parties – an obligation which has permitted it to carry out that mandate [...].
17. However, the interest of the ICRC in protecting itself against the disclosure that such information had been revealed in evidence is not the only public interest which exists in this matter. There is also a powerful public interest that all relevant evidence must be available to the courts who are to try persons charged with serious violations of international humanitarian law, so that a just result might be obtained in such trials in accordance with law. [...]

V. IS THE ICRC'S PROTECTION AGAINST DISCLOSURE ABSOLUTE?

19. [...] The joint decision of Judge Robinson and Judge Bennouna (to which I shall refer as the "joint decision") has, however, accepted that the ICRC is afforded an absolute protection against the disclosure of such evidence by customary international law. [...]
22. It has not been suggested by the ICRC that the absolute nature of its protection against disclosure has been *expressly* accepted as having become part of customary international law. At most, it is said only that it has been *tacitly*

recognised. But has it? Has the acceptance by the States to which the ICRC refers been that its protection should be treated as absolute by everyone, including the international criminal courts, or merely that the States themselves will support the absolute nature of the ICRC's protection so far as they are able to give effect to it – for example, by entering into agreements to provide an immunity in their own national courts? It is only if the former is the case that there would be a customary international law which binds this Tribunal.

23. [...] The joint decision has referred to Headquarters Agreements between the States and the ICRC to the effect that its employees enjoy immunity from giving evidence in national courts. Whilst such clauses may constitute *opinio juris* and State practice for the purposes of finding a customary rule that the ICRC's protection before national courts is an absolute one, I am not persuaded that such a rule includes *international* criminal courts whose task it is to try serious violations of international humanitarian law, including grave breaches of those same Geneva Conventions. [...] To my mind, it is an enormous step to assume that the States had contemplated at the time of the Geneva Conventions the existence of a similar immunity in international criminal courts (created for the first time almost a half of a century later), or that they have contemplated the existence of such an immunity since in such courts. For these reasons, I am not persuaded that the answer is supplied by customary international law. [...]
28. I have considered the submissions of the ICRC with care, and (I confess) with sympathy, but I am not presently persuaded by its arguments, or by the joint decision, that its protection against disclosure is the absolute one which it asserts. Two situations will suffice to demonstrate why, in my view, it may well be necessary in the rare case that the courts (or at least the international criminal courts) should have the final say.
29. The first situation is where the evidence of an official or employee of the ICRC is vital to establish the innocence of the accused person. Is the accused to be found guilty and sentenced to a substantial term of imprisonment in order to ensure the ICRC's protection against the risk of disclosure? [...]
31. The second situation where, in my view, it may be necessary that the courts should have the final say is where the evidence of an official or employee of the ICRC is vital to establish the guilt of the particular accused in a trial of transcendental importance. The policy of the ICRC would inevitably exclude its consent to such evidence being given.
32. I do not suggest that the international criminal courts would *necessarily* permit the evidence of an ICRC official or employee to be given in either of those two situations. The peculiar circumstances of individual cases are so various that no such forecast could properly be made. Nor would I restrict the situations in which a balancing exercise should be carried out by the courts to those two which I have mentioned. It is impossible to foresee every situation which may arise. That is why guidelines such as those that have been laid down by the ICRC are an inadequate substitute for the balancing exercise which would be carried out by such a court. In every case, the court would weigh the competing interests – the importance

of the evidence in the particular trial and the risk that the fact that the evidence has been given by an official or employee of the ICRC would be disclosed – to determine on which side the balance lies. But I emphasise that it would necessarily be rare that the evidence would be of such importance as to outweigh the ICRC's protection against disclosure. [...]

VI. THE BALANCING EXERCISE [...]

41. In my opinion, the balance in this case lies clearly in favour of the ICRC. I would therefore not permit the evidence to be given whether or not the ICRC's protection against disclosure is absolute.

VII. DISPOSITION

42. The joint decision gives a ruling that "the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given". I am assured that such a ruling is intended to be limited to the evidence which the prosecution seeks to call from this particular witness – a limitation which is confirmed elsewhere in the joint decision – and that it is not intended to reflect the reasoning of the joint decision itself, that no evidence could ever be given by former officials of the ICRC where the facts came to their knowledge by virtue of their employment.
43. Upon that basis, I agree with that ruling.

B. ICC, Rules of Procedure and Evidence, Rule 73

[Source: ICC-ASP/1/3 (Part II-A), adopted on 09/09/2002; available on <http://www.icc-cpi.int>]

Rule 73

Privileged communications and information [...]

4. The Court shall regard as privileged, and consequently not subject to disclosure, including by way of testimony of any present or past official or employee of the International Committee of the Red Cross (ICRC), any information, documents or other evidence which it came into the possession of in the course, or as a consequence, of the performance by ICRC of its functions under the Statutes of the International Red Cross and Red Crescent Movement, unless:
 - (a) After consultations undertaken pursuant to sub-rule 6, ICRC does not object in writing to such disclosure, or otherwise has waived this privilege; or
 - (b) Such information, documents or other evidence is contained in public statements and documents of ICRC.
5. Nothing in sub-rule 4 shall affect the admissibility of the same evidence obtained from a source other than ICRC and its officials or employees when such evidence

has also been acquired by this source independently of ICRC and its officials or employees.

6. If the Court determines that ICRC information, documents or other evidence are of great importance for a particular case, consultations shall be held between the Court and ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the circumstances of the case, the relevance of the evidence sought, whether the evidence could be obtained from a source other than ICRC, the interests of justice and of victims, and the performance of the Court's and ICRC's functions.

DISCUSSION

1.
 - a. Why are confidentiality and the refusal to testify so important in the eyes of the ICRC? Is it not generally more effective to condemn publicly all violations of IHL committed in an armed conflict? Other organizations use the method of condemnation: what are the differences between the ICRC and those organizations? In terms of mandate, legal status, effectiveness? Can it be said that they compete with each other, or are their roles complementary?
 - b. Is confidentiality a principle like neutrality, impartiality or independence? Does it necessarily follow from those principles? Would an organization necessarily violate its neutrality or impartiality by allowing its staff to testify before international criminal tribunals?
2.
 - a. What value does the case-law of international criminal tribunals have in international law? What is a customary rule of international law? On what grounds does the Chamber conclude that the ICRC's right to non-disclosure is based on customary law? Does the fact that immunity was granted in headquarters agreements help to make this immunity a customary rule? How can the ICRC contribute towards the formation of customary rules? With respect to IHL? With respect to its immunity? Can its practice constitute the objective element of the custom? The *opinio juris*? Or can the ICRC's practice only contribute towards the emergence of these elements in States?
 - b. Does the ICTY Trial Chamber infer the ICRC's absolute immunity from the customary law resulting from real practice and the *opinio juris* of States? Or from an interpretation of treaty-based rules? Does it find that the immunity results from practice, or that it is implicit in the mandate given by the States to the ICRC?
3. Don't the interests of justice take precedence over this principle of non-disclosure? Although it did not happen in this case, how would it be if the testimony of an ICRC delegate enabled judges to amend or reverse their decision? What would the direct or indirect consequences be, for the ICRC's field operations and its access to war victims, of an ICRC delegate's testimony involving the disclosure of confidential information?
4. Does the fact that the ICC's Rules of Procedure and Evidence incorporate this privilege granted to the ICRC confirm its customary nature?
5. Compare the immunity granted to the ICRC as set out by the ICTY and by the ICC's Rules of Procedure and Evidence. Do the exceptions provided for in Rule 73 of the latter contradict the theory of absolute immunity put forward by the ICTY?

Case No. 215, ICTY, The Prosecutor v. Kupreskic et al.

[Source: ICTY, The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, IT 95-16, Trial Chamber, Judgement, 14 January 2000; available on <http://www.un.org/icty>; footnotes omitted.]

IN THE TRIAL CHAMBER [...]
Judgement of: 14 January 2000

PROSECUTOR
v.
Zoran KUPRESKIC,
Mirjan KUPRESKIC,
Vlatko KUPRESKIC,
Drago JOSIPOVIC,
Dragan PAPIC,
Vladimir SANTIC, also known as “VLADO”

JUDGEMENT [...]

II. THE CHARGES AGAINST THE ACCUSED

31. The Prosecutor alleged the following facts and charged the following counts:
32. The accused helped prepare the April 1993 attack on the Ahmici-Santici civilians [...].
33. Under COUNT 1 all six accused are charged with a CRIME AGAINST HUMANITY, [...] on the grounds that from October 1992 until April 1993 they persecuted the Bosnian Muslim inhabitants of Ahmici-Santici and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove all Bosnian Muslims from the village and surrounding areas. As part of this persecution, the accused participated in or aided and abetted the deliberate and systematic killing of Bosnian Muslim civilians, the comprehensive destruction of their homes and property, and their organised detention and expulsion from Ahmici-Santici and its environs.
34. Under COUNTS 2-9 the accused Mirjan and Zoran Kupreskic are charged with murder as a CRIME AGAINST HUMANITY, [...] and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, [...] (murder) [...]. When the attack on Ahmici-Santici commenced in the early morning of 16 April 1993, Witness KL was living with his son, Naser, Naser's wife, Zehrudina, and their two children, Elvis (aged 4) and Sejad (aged 3 months). Armed with an automatic weapon, Zoran and Mirjan Kupreskic entered Witness KL's house. Zoran Kupreskic shot and killed Naser. He then shot and wounded Zehrudina. Mirjan Kupreskic poured flammable liquid onto the furniture to set the house on fire. The accused then shot the two children, Elvis and Sejad. When Witness KL fled the burning house, Zehrudina,

who was wounded, was still alive, but ultimately perished in the fire. Naser, Zehrudina, Elvis and Sejad all died and Witness KL received burns to his head, face and hands.

35. Under COUNTS 10 and 11 Zoran and Mirjan Kupreskic are charged with a CRIME AGAINST HUMANITY, [...] (inhumane acts) [...] and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, [...] (cruel treatment) [...], on the grounds of killing Witness KL's family before his eyes and causing him severe burns by burning down his home while he was still in it.
36. Under COUNTS 12-15 the accused Vlatko Kupreskic is charged with murder and inhumane and cruel treatment as CRIMES AGAINST HUMANITY, [...], as well as VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, [...] Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of the accused in Ahmici [...] HVO [Croat Defence Council] soldiers shot at Bosnian Muslim civilians from the accused's house throughout the attack. Members of the Pezer family, who were Bosnian Muslims, decided to escape through the forest. As they ran by the accused's house toward the forest, the accused and other HVO soldiers in front of his house, aiding and abetting each other, shot at the group, wounding Dzenana Pezer, [...] and another woman. Dzenana Pezer fell to the ground and Fata Pezer returned to assist her daughter. The accused and the HVO soldiers shot Fata Pezer and killed her.
37. Under COUNTS 16-19, Drago Josipovic and Vladimir Santic are charged with CRIMES AGAINST HUMANITY, [...] (murder) and [...] (inhumane acts) [...] as well as with VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, [...] (murder and cruel treatment). On 16 April 1993, numerous HVO soldiers, including the accused, attacked the home of Musafer and Suhreta Pucul, while the family, which included two young daughters, was sleeping. During the attack, the accused and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Pucul whilst holding members of his family nearby. As part of the attack, the HVO soldiers, including the accused, vandalised the home and then burned it to the ground. [...]

V. THE APPLICABLE LAW [...]

A. Preliminary Issues

1. General

510. Two particular arguments which have either been put forward by the Defence in their submissions or which are implicit in the testimony of witnesses called by the Defence need to be rebutted in the strongest possible terms.
511. The first is the suggestion that the attacks committed against the Muslim population of the Lasva Valley were somehow justifiable because, in the Defence's allegation, similar attacks were allegedly being perpetrated by the Muslims against the Croat population. The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations

found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants. [...]

2. The *Tu Quoque* Principle is Fallacious and Inapplicable: The Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law [...]

517. [T]he *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that “The High Contracting Parties undertake to respect ... the present Convention *in all circumstances*” (emphasis added). Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that “No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article (i.e. grave breaches)”. Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity. [...]
519. As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.
520. Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character. One illustration of the consequences which follow from this classification is that if the norms in question are contained in treaties, contrary to the general rule set out in Article 60 of the Vienna Convention on the Law of Treaties [See Quotation, *supra*, Chapter 13, IX. 2. c) dd) but no reciprocity], a material breach of that

treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle *inadimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties.

3. The Prohibition of Attacks on Civilian Populations [...]

525. More specifically, recourse might be had to the celebrated Martens Clause which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 84]] True, this Clause may not be taken to mean that the “principles of humanity” and the “dictates of public conscience” have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 [of Protocol I] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.
526. As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.
527. As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those

States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

528. [...] It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers. [...]
530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts. [...]
531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion. With regard to the formation of a customary rule, two points must be made to demonstrate that *opinio juris* or *opinio necessitatis* can be said to exist.
532. First, even before the adoption of the First Additional Protocol of 1977, a number of States had declared or laid down in their military manuals that reprisals in modern warfare are only allowed to the extent that they consist of the use, against enemy armed forces, of otherwise prohibited weapons – thus *a contrario* admitting that reprisals against civilians are not allowed. [...] The fact remains, however, that elements of a widespread *opinio necessitatis* are discernible in

international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that “civilian populations, or individual members thereof, should not be the object of reprisals”. A further confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilians must always be prohibited. It is also notable that this view was substantially upheld by the ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva Conventions on the Iran-Iraq war [See Case No. 170, ICRC, Iran/Iraq Memoranda] and by Trial Chamber I of the ICTY in *Martić*. [See Case No. 212, ICTY, *The Prosecutor v. Martić*]

533. Secondly, the States that have participated in the numerous international or internal armed conflicts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran-Iraq war of 1980-1988 as well as – but only *in abstracto* and hypothetically – by a few States, such as France in 1974 and the United Kingdom in 1998. The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.
534. The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on sub-paragraph d of Article 14 (now Article 50) of the Draft Articles on State Responsibility [See Case No. 53, International Law Commission, Articles on State Responsibility], which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the Commission noted that Article 3 common to the four 1949 Geneva Conventions “prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment” It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law. Secondly, as the International Court of Justice rightly held in *Nicaragua* [See Case No. 153, ICJ, *Nicaragua v. United States* [Para. 219]], it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts. Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.
535. It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which

entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) elementary considerations of humanity' (as mentioned above).

536. Finally, it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949. Hence, whether or not the armed conflict of which the attack on Ahmici formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

4. The Importance the International Tribunal can Attach to Case Law in its Findings of Law

537. This issue, albeit of general relevance and of a methodological nature, acquires special significance in the present judgement, as it is largely based on international and national judicial decisions. The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case-law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence. What judicial value should be assigned to this corpus?
538. The value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper. The Trial Chamber shall therefore first of all consider, if only briefly, this matter – a matter that so far the Tribunal has not had the opportunity to delve into.

539. Indisputably, the ICTY is an international court, (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal, as well as the status, privileges and immunities it enjoys under Article 30 of the Statute, and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative corpus to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible lacunae in the Statute or in customary international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world. [...]
540. Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a “subsidiary means for the determination of rules of law” (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). Hence, generally speaking, and subject to the binding force of decisions of the Tribunal’s Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio juris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.

541. As noted above, judicial decisions may prove to be of invaluable importance for the determination of existing law. Here again attention should however be drawn to the need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10 [...]. In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Conventions or the 1977 Protocols or similar international treaties. [...]

C. Persecution as a Crime Against Humanity

567. Persecution under Article 5(h) has never been comprehensively defined in international treaties. Furthermore, neither national nor international case-law provides an authoritative single definition of what constitutes 'persecution'. Accordingly, considerable emphasis will be given in this judgement to elucidating this important category of offences.
568. It is clear that persecution may take diverse forms, and does not necessarily require a physical element. Additionally, under customary international law (from which Article 5 of the Statute derogates), in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel. An explicit finding to this effect was made by the French courts in the *Barbie* and *Touvier* cases. Under Article 5 of the Statute, a key constituent of persecution appears to be the carrying out of any prohibited conduct, directed against a civilian population, and motivated by a discriminatory animus (political, racial or religious grounds). Beyond these brief observations, however, much uncertainty exists [...].
570. Turning to the text of Article 5, the general elements of crimes against humanity, such as the requirements of a widespread or systematic nature of the attack directed against a civilian population, are applicable to Article 5(h) [...]. The text of Article 5, however, provides no further definition of persecution or how it relates to the other sub-headings of Article 5, except to state that persecution must be on political, racial, or religious grounds. From the text of Article 5 as interpreted by the Appeals Chamber in *Tadic*, it is clear that this discriminatory purpose applies to persecution alone. [See Case No. 211, ICTY, The Prosecutor v. Tadic [Part C, paras 282-304]]
571. With regard to a logical construction of Article 5, it could be assumed that the crime of persecution covers acts other than those listed in the other subheadings: each subheading appears to cover a separate crime. However, on closer examination, it appears that some of the crimes listed do by necessity overlap: for example, extermination necessarily involves murder, torture may involve rape, and enslavement may include imprisonment. Hence, the wording

of Article 5, logically interpreted, does not rule out a construction of persecution so as to include crimes covered under the other subheadings. However, Article 5 does not provide any guidance on this point. [...]

572. From the submissions of the parties, it appears that there is agreement between the parties that (a) persecution consists of the occurrence of a persecutory act or omission, and (b) a discriminatory basis is required for that act or omission on one of the listed grounds. Two questions remain in dispute: (a) must the crime of persecution be linked to another crime in the Statute, or can it stand alone? (b) what is the *actus reus* of persecution and how can it be defined? Each of these issues will be addressed in turn.

1. The Alleged Need for a Link Between Persecution and Other International Crimes

573. The Defence alleges that the *Tadic* definition of persecution contravenes a long-standing requirement that persecution be “in execution of or in connection with any crime within the jurisdiction of the Tribunal”. This wording is found in the Charter of the International Military Tribunal (IMT) which defines crimes against humanity as follows:

“[...] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal*, whether or not in violation of the domestic law of the country where perpetrated (emphasis added).”

574. [...] Although Control Council Law No. 10 eliminated this requirement, the ICC Statute upholds it in Article 7(1)(h) [See Case No. 23, The International Criminal Court [Part A]]. The Defence therefore asserts that there is a consensus that persecution is a “relatively narrow concept”, and argues that “persecution should thus be construed as including only acts enumerated elsewhere in the Statute, or, at most, those connected with a crime specifically within the jurisdiction of the ICTY”. [...]
575. It is evident that the phrase “in execution of or in connection with any crime within the jurisdiction of the Tribunal” contained in Article 6(c) refers not just to persecution but to the entire category of crimes against humanity. It should be noted that when this category of crimes was first laid down in Article 6(c), all crimes against humanity were subject to the jurisdictional requirement of a link to an *armed conflict*. Thus crimes against humanity could only be punished if committed in execution of or in connection with a war crime or a crime against the peace. Crimes against humanity constituted a new category of crimes and the framers of Article 6(c) limited its application to cases where there already existed jurisdiction under more “well-established” crimes such as war crimes.
576. Moreover, in its application of Article 6(c), the IMT exercised jurisdiction over individual defendants who had allegedly committed only crimes against

humanity, even when there was only a *tenuous* link to war crimes or crimes against the peace. [...]

577. What is most important, and indeed dispositive of the matter, is that an examination of customary international law indicates that as customary rules on crimes against humanity gradually crystallised after 1945, the link between crimes against humanity and war crimes disappeared. This is evidenced by; (a) the relevant provision of Control Council Law No. 10, which omitted this qualification; (b) national legislation (such as the Canadian and the French laws); (c) case-law; (d) such international treaties as the Convention on Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and the Convention on Apartheid of 1973 [available on <http://www.ohchr.org>]; and (e) the prior jurisprudence of the International Tribunal. This evolution thus evidences the gradual abandonment of the *nexus* between crimes against humanity and war crimes.
578. The Defence relies on Article 7(1)(h) and 2(g) of the ICC Statute to argue that persecution must be charged in connection with another crime under that Statute. Article 7(1)(h) states: [See Case No. 23, The International Criminal Court [Part A.]]
579. Article 7(2)(g) provides: [*ibid.*]
580. Article 7(2) thus provides a broad definition of persecution and, at the same time, restricts it to acts perpetrated “in connection” with any of the acts enumerated in the same provision as constituting crimes against humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression. To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking in the light of the fact that the ICC Statute reflects customary international law in abolishing the *nexus* between crimes against humanity and armed conflict. Furthermore this restriction might easily be circumvented by charging persecution in connection with “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” under Article 7(1)(k). In short, the Trial Chamber finds that although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law. In addition, it draws attention to an important provision of the ICC Statute dealing with this matter. The application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, is restricted by Article 10 of the same Statute which provides that “Nothing in the Statute shall be interpreted as *limiting or prejudicing* in any way *existing or developing* rules of international law for purposes other than this Statute” (emphasis added). This provision clearly conveys the idea that the framers of the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide.

581. Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. It notes that in any case no such requirement is imposed on it by the Statute of the International Tribunal.

2. The Actus Reus of Persecution

(a) Arguments of the Parties

582. The Prosecution argues that “persecutory act” should be defined broadly and that it should include both acts not covered by the Statute and acts enumerated elsewhere in the Statute, particularly other subheadings of Article 5, when they are committed with discriminatory intent. According to the Prosecution:

(a) [T]he crime of persecution has prominence [under customary international law], providing a basis for additional criminal liability in relation to all inhumane acts. [Were it not the case that crimes against humanity could comprise other crimes enumerated in the Statute], this would allow an accused to escape additional culpability for persecution merely by showing that the relevant act falls under another provision of the Statute or elsewhere in the indictment. Persecution is one of the most serious crimes against humanity and an interpretation of the Statute which does not recognise it as such is not tenable.

583. The Prosecution submits that persecution also includes acts not covered elsewhere in the Statute. Thus the persecution charge in the Indictment pertains to “an ethnic cleansing campaign” composed of the killing of Muslim civilians, destruction of their homes and property, and their organised detention and expulsion from Ahmici-Santici and its environs.

584. According to the Defence a broad interpretation of persecution would be a violation of the principle of legality (*nullum crimen sine lege*). Persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution. The Defence submits that on a statutory construction of Article 5, murder is not included in persecution.

585. The Defence does not agree with the conclusion of the Trial Chamber in *Tadic* that persecutory acts could include, “*inter alia*, those of a physical, economic, or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”. The Defence submits that persecution should not include acts which are legal under national laws, nor should it include acts not mentioned in the Statute “which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken”. Such a definition, in the submission of the Defence, would be too broad and strains the principle of legality. They contend that the *Tadic* definition, which basically follows that of the International Law Commission (ILC) Draft Code, should be rejected in favour of the definition found in the ICC Statute, which “embodies the existing consensus within the international community”, and which has taken a much narrower approach to the definition of persecutory acts in its Article 7(2)(g).

(b) Discussion

586. The Trial Chamber will now discuss previous instances in which a definition of persecution has been suggested: firstly, in the *corpus* of refugee law and secondly, in the deliberations of the International Law Commission. The purpose of this discussion is to determine whether the definition propounded there may be held to reflect customary international law.
587. It has been argued that further elaboration of what is meant by the notion of persecution is provided by international refugee law. In its comments on the Draft Code presented in 1991, the government of the Netherlands stated: "It would be desirable to interpret the term 'persecution' in the same way as the term embodied in the Convention on refugees is interpreted". The concept of persecution is central to the determination of who may claim refugee status under the Convention Relating to the Status of Refugees of 1951, as supplemented by the 1967 Protocol.
588. However, the *corpus* of refugee law does not, as such, offer a definition of persecution. Nor does human rights law provide such a definition. The European Commission and the Court have on several occasions held that exposing a person to a risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights. However, their decisions give no further guidance as to the definition of persecution. In an attempt to define who may be eligible for refugee status, some national courts have delivered decisions on what acts may constitute persecution. [...]
589. The Trial Chamber finds, however, that these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.
590. Little guidance in the interpretation of "persecution" is provided by the ILC Draft Code of Crimes Against the Peace and Security of Mankind. The International Law Commission, which originally based its definition of crimes against humanity on the Nuremberg Charter, has included persecution since its earliest draft. The ILC proposed a definition of persecution in its commentary on the Draft Code dated 1996 which stated as follows:

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 recognised in the Charter of the United Nations (Articles 1 and 55) and the ICCPR (Art. 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide.

591. As neither refugee law nor the ILC draft is dispositive of the issue, in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible lacunae must be filled by having recourse to that body of law.
592. In its discussion, the Trial Chamber will focus upon two distinct issues: (a) can the acts covered by the other subheadings of Article 5 fall within the notion of persecution? and (b) can persecution cover acts not envisaged in one of the other subheadings of Article 5?

(c) *Can the Acts Covered by the Other Subheadings of Article 5 Fall Within the Notion of Persecution?*

593. As noted above, the Prosecution argues that whereas the meaning of “persecutory act” should be given a broad definition, including a wide variety of acts not enumerated in the Statute, it should also include those enumerated in the Statute and particularly other subheadings of Article 5 when they are committed with discriminatory intent. By contrast, the Defence argues that it would be a violation of the principle of legality (*nullum crimen sine lege*) for this Tribunal to apply Article 5(h) to any conduct of the accused. On this view, persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution.
594. With regard to the question of whether persecution can include acts laid out in the other subheadings of Article 5, and particularly the crimes of murder and deportation, the Trial Chamber notes that there are numerous examples of convictions for the crime of persecution arising from the Second World War. The IMT in its findings on persecution included several of the crimes that now would fall under other subheadings of Article 5. These acts included mass murder of the Jews by the *Einsatzgruppen* and the SD, and the extermination, beatings, torture and killings which were widespread in the concentration camps. Similarly, the

judgements delivered pursuant to Control Council Law No. 10 included crimes such as murder, extermination, enslavement, deportation, imprisonment and torture in their findings on the persecution of Jews and other groups during the Nazi era. Thus the Military Tribunals sitting at Nuremberg found that persecution could include those crimes that now would be covered by the other subheadings of Article 5 of the Statute.

595. The International Military Tribunal in its Judgement referred to persecution, stating 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". The IMT commenced with a description of the early policy of the Nazi government towards the Jewish people: discriminatory laws were passed which limited offices and professions permitted to Jews; restrictions were placed on their family life and rights of citizenship; Jews were completely excluded from German life; pogroms were organized which included the burning and demolishing of synagogues; Jewish businesses were looted; prominent Jewish businessmen were arrested; a collective fine of 1 billion marks was imposed on Jews; Jewish assets were seized; the movement of Jews was restricted; ghettos were created; and Jews were compelled to wear a yellow star. According to the IMT, "these atrocities were all part and parcel of the policy inaugurated in 1941 [...] But the methods employed never conformed to a single pattern".
596. At Nuremberg, organisations as well as individual defendants were convicted of persecution for acts such as deportation, slave labour, and extermination of the Jewish people pursuant to the "Final Solution". Moreover, several individual defendants were convicted of persecution in the form of discriminatory economic acts. [...]
597. It is clear from its description of persecution that the IMT accorded this crime a position of great prominence and understood it to include a wide spectrum of acts perpetrated against the Jewish people, ranging from discriminatory acts targeting their general political, social and economic rights, to attacks on their person. [...]
600. It is clear that the courts understood persecution to include severe attacks on the person such as murder, extermination and torture; acts which potentially constitute crimes against humanity under the other subheadings of Article 5. This conclusion is supported by the findings of national courts in cases arising out of the Second World War. [...]
604. [...] On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.
605. The Trial Chamber finds that the case-law referred to above reflects, and is indicative of, the notion of persecution as laid down in customary international criminal law. The Trial Chamber therefore concludes that acts enumerated in other sub-clauses of Article 5 can thus constitute persecution. Persecution has been used to describe some of the most serious crimes perpetrated during Nazi

rule. A narrow interpretation of persecution, excluding other sub-headings of Article 5, is therefore not an accurate reflection of the notion of persecution which has emerged from customary international law.

606. It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a lacuna would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group". An example of such a crime against humanity would be the so-called "ethnic cleansing", a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.
607. Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds. The Trial Chamber therefore accepts the submission of the Prosecution that "[p]ersecution, which can be used to charge the conduct of ethnic cleansing on discriminatory grounds is a serious crime in and of itself and describes conduct worthy of censure above and apart from non-discriminatory killings envisioned by Article 5".

(d) Can Persecution Cover Acts not Envisaged in One of the Other Subheadings of Article 5?

608. The Prosecution argues that persecution can also involve acts other than those listed under Article 5. It is their submission that the meaning of "persecutory act" should be given a broad definition and includes a wide variety of acts not enumerated elsewhere in the Statute. By contrast, the Defence submits that the two basic elements of persecution are (a) the occurrence of a persecutory act or omission, and (b) a discriminatory basis for that act or omission on one of the listed grounds. As mentioned above, the Defence argues that persecution should be narrowly construed.
609. The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.
610. The Judgement of the IMT included in the notion of persecution a variety of acts which, at present, may not fall under the Statute of the International Tribunal, such as the passing of discriminatory laws, the exclusion of members of an

ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the requirement that they mark themselves out by wearing a yellow star. [...]

611. It is also clear that other courts have used the term persecution to describe acts other than those enumerated in Article 5. [...]
614. The Trial Chamber is thus bolstered in its conclusion that persecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute. Similarly, whether or not such acts are legal under national laws is irrelevant. It is well-known that the Nazis passed many discriminatory laws through the available constitutional and legislative channels which were subsequently enforced by their judiciary. This does not detract from the fact that these laws were contrary to international legal standards. The Trial Chamber therefore rejects the Defence submission that persecution should not include acts which are legal under national laws.
615. In short, the Trial Chamber is able to conclude the following on the *actus reus* of persecution from the case-law above:
- (a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.
 - (b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.
 - (c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. The scope of these acts will be defined more precisely by the Trial Chamber below.
 - (d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice [...].
 - (e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.

3. The Definition of Persecution

616. In the Judgement of *Prosecutor v. Tadic*, Trial Chamber II held that persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights. [...]
617. As mentioned above, this is a broad definition which could include acts prohibited under other subheadings of Article 5, acts prohibited under other Articles of the Statute, and acts not covered by the Statute. The same approach has been taken in Article 7(2)(g) of the ICC Statute, which states that "[p]ersecution means the intentional and severe deprivation of *fundamental rights* contrary to international law by reason of the identity of the group or collectivity" (emphasis added).
618. However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be *clearly defined limits* on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.
619. Accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. [...]
620. It ought to be emphasised, however, that if the analysis based on this criterion relates only to the *level of seriousness* of the act, it does not provide guidance on *what types of acts* can constitute persecution. The *ejusdem generis* criterion can be used as a supplementary tool, to establish whether certain acts which generally speaking fall under the proscriptions of Article 5(h), reach the level of gravity required by this provision. The only conclusion to be drawn from its application is that only *gross or blatant denials* of fundamental human rights can constitute crimes against humanity.
621. The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts", holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law [available on <http://www.ohchr.org>]. Drawing upon the various provisions of these texts it proves possible *to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity*. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution *as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5*.

622. In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed “inhumane”. This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.
623. The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of “other inhumane acts” also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.
624. In its earlier conclusions the Trial Chamber noted that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution. [...]
627. In sum, a charge of persecution must contain the following elements:
- (a) those elements required for all crimes against humanity under the Statute;
 - (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5;
 - (c) discriminatory grounds.

4. The Application of the Definition set out above to the Instant Case

628. The Trial Chamber will now examine the specific allegations in this case, which are the “deliberate and systematic killing of Bosnian Muslim civilians”, the “organised detention and expulsion of the Bosnian Muslims from Ahmici-Santici and its environs”, and the “comprehensive destruction of Bosnian homes and property”. Can these acts constitute persecution? [See Case No. 216, ICTY, The Prosecutor v. Blaskic]
629. In light of the conclusions above, the Trial Chamber finds that the “deliberate and systematic killing of Bosnian Muslim civilians” as well as their “organised

detention and expulsion from Ahmici” can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.

630. The Trial Chamber next turns its attention to the alleged comprehensive destruction of Bosnian Muslim homes and property. The question here is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution. [...]
631. The Trial Chamber finds that attacks on property can constitute persecution. [...] Such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.

5. The *Mens Rea* of Persecution

632. The Trial Chamber will now discuss the *mens rea* requirement of persecution as reflected in international case-law.
633. Both parties agree that the mental element of persecution consists of *discriminatory intent on the grounds provided in the Statute*. Nevertheless, the Trial Chamber will elaborate further on the discriminatory intent required.
634. When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society. The deprivation of these rights can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself. [...]
636. As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that,

from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide. [...]

VIII. DISPOSITION

A. Sentences

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber finds, and imposes sentence, as follows.

1. Dragan Papic

With respect to the accused, Dragan Papic:

Count 1: NOT GUILTY of a Crime against Humanity (persecution). [...]

5. Drago Josipovic

With respect to the accused, Drago Josipovic:

Count 1: GUILTY of a Crime against Humanity (persecution). [...]

Count 16 [and 18]: GUILTY. [...]

6. Vladimir Santic

With respect to the accused, Vladimir Santic:

Count 1: GUILTY of a Crime against Humanity (persecution). [...]

Count 16 [and 18]: GUILTY. [...]

[N.B.: On appeal, 23 October 2001, the convictions of Zoran, Mirjan and Vlatko Kupreskic for crimes against humanity (persecution) were reversed on the grounds that the indictment was impermissibly vague and the identification evidence was weak. They were released. The convictions of Drago Josipovic and Vladimir Santic on counts 1, 16 and 18 were upheld; moreover, since cumulative charging and conviction is now accepted, they were convicted on counts 17 and 19. However, their overall sentences were reduced to 12 and 18 years imprisonment (respectively). Judgement available on <http://www.un.org/icty>)

DISCUSSION

[See **Case No. 23**, The International Criminal Court [Part A.] and **Case No. 210**, UN, Statute of the ICTY]

I. The *tu quoque* principle

(*Paras 517-520*)

1. a. What does the *tu quoque* argument consist of? How does it compare with the argument of reciprocity in the application of treaties? Why does the defence of *tu quoque* seem inadmissible in international humanitarian law (IHL)?
- b. According to the international law of treaties and the related Vienna Convention, can't a State suspend the execution of its treaty-based duties towards another State that has violated some of its undertakings? According to this same convention, do IHL treaties benefit from a special rule? Why? In what way are they different, so that the *tu quoque* defence seems inadmissible in IHL? (See **Quotation** *supra* Chapter 13, IX. 2. c) dd) but no reciprocity)
- c. Is the rejection of the defence of *tu quoque* related to the fact that the principle of reciprocity is not applicable to IHL? In ratifying an IHL treaty, towards whom did the States Parties contract an obligation?
2. Explain the notions of "norms of *jus cogens*" and of "obligations *erga omnes*". What is the link between these two notions? Are these notions recognized by the whole international community? Is IHL part of *jus cogens*? Only in part? What is the position of your State in regard to *jus cogens* and IHL's relationship to it?

II. The prohibition of attacks on civilian populations

(*Paras 525-536*)

3. (*Paras 525-527*)
 - a. What is the significance of the Martens Clause? For the interpretation of IHL?
 - b. Can a cumulation of attacks, directed against military objectives, each causing non-excessive civilian losses, be banned because of the cumulation of civilian losses? Because these seem excessive when compared with the cumulated military advantages? Because of the Martens Clause? (P I, Arts 51(5)(b) and 57(2)(a)(iii))
4. a. Is the ban on reprisals linked in one way or another to the fact that the principle of reciprocity is not applicable to IHL? Does Art. 60(5) of the Vienna Convention on the Law of Treaties mean that all reprisals that are violations of IHL treaties are illegal? (See **Quotation** *supra*, Chapter 13, IX. 2. c) dd) but no reciprocity)

Is there a difference between reprisals and the termination or suspension of a treaty obligation because of a material breach of the treaty?

 - b. Is the ban on reprisals an element of customary IHL? What is State practice in this matter? Does the fact that some States have recourse to reprisals mean that the ban cannot be customary?
 - c. (*Para. 527*) Is *opinio juris* more important in the field of IHL than practice? Why? Because of the Martens Clause? Do the precedents enumerated in para. 532 show a uniform *opinio juris*? Does the fact that some States have mentioned in *abstracto* their right to take reprisals (*para. 533*) show their practice? Their *opinio juris*? Both? Or neither? Can the ban still be customary?

- d. Are all forms of reprisals banned? Which ones do the Geneva Conventions ban? Protocol I? Customary international law? According to the ICTY? Is any attack affecting civilians that is banned by Protocol I also illegal if committed as a proportionate reprisal with the intent of putting an end to similar unlawful acts committed by the enemy? According to Protocol I? According to customary international law? (GC I, Art. 46; GC II, Art. 47; GC III, Art. 13; GC IV, Art. 33; P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4))
- e. Does the customary ban on reprisals affirmed by the ICTY bind States such as the United Kingdom, which made reservations to Articles 51 and 55 of Protocol I? [See **Case No. 74**, United Kingdom and Australia, Applicability of Protocol I]
- f. (Para. 534) Are reprisals that are not forbidden by IHL but which consist of the non-execution of obligations in regard to IHL (for example the use of certain weapons against combatants), banned by Art. 50(1)(d) of the Articles on State Responsibility? [See **Case No. 53**, International Law Commission, Articles on State Responsibility]
- g. Are reprisals sanctions for violations of international law? Can they be replaced by criminal prosecutions? What are the advantages and inconveniences of such a replacement? What is necessary for it to work?
- h. Are reprisals only banned in the case of international armed conflicts? Also in the case of non-international armed conflicts? According to the IHL of non-international armed conflict, does this also constitute a customary ban? Does Protocol II ban reprisals that would constitute proportionate violations of Protocol II and have the aim of ending similar violations committed by the enemy? Is the concept of reprisals conceivable in the context of non-international armed conflicts? (P II, Art. 13)
- i. (Para. 535) For reprisals to remain admissible under IHL, what limits must be respected?
- j. Does the ICTY's reasoning in paras 525-536 reveal a certain theory about the sources of international law? In adopting a voluntarist theory (according to which international law is based on the will of States), could the ICTY have reasoned in the same way? Would it have come to the same conclusion?

III. The importance of case-law

(Paras 537-541)

5. What are the sources of international law? Of IHL? Is "precedent" a source of IHL? A secondary source? Are international rulings in any way binding on judges? Only judges from the same tribunal? Must national case-law be taken into account by international courts? At least the case-law of the accused's country of origin? (Statute of the International Court of Justice, Art. 38 [available on <http://www.icj-cij.org>]; Statute of the International Criminal Court, Art. 21 [See **Case No. 23**, The International Criminal Court [Part A.]])

IV. Persecution

(Paras 567-636)

6. a. Can the Chamber develop a definition of persecution based on the Statute of the International Criminal Court (ICC) and then use this definition to pronounce its judgement? Would this not be an unlawful application of a rule that came into force after the events and after the creation of the ICTY?

- b. Does the Statute of the ICC only codify customary IHL? Or does Art. 7 represent a step backwards in regard to persecution, compared with the Statute of the ICTY and its case-law?
 - c. Should the Chamber apply the criteria of the definition of persecution contained in the Statute of the ICC as *lex posterior* and therefore establish a “correlation” between persecution and another act that is a crime against humanity or “all other crimes” that come under its jurisdiction? Why did the Chamber choose not to establish this correlation?
7. Do you agree with the reasoning of the Chamber in para. 623? Is it compatible with the principle of *nullum crimen sine lege*? Is it not the role of criminal law and at least that of case-law to define exactly what is forbidden?
8. Do you agree with the Chamber when it refuses to take the concept of persecution in refugee and human rights law into account in establishing the criminal responsibility of a person accused of crimes against humanity? Why? Isn't it the same persecution?
9. a. How would you explain the difference between persecution as a crime against humanity and genocide? What are the differences between genocide, “ethnic cleansing” and persecution? Does not the fact that the persecution must be perpetrated with discriminatory intent (*mens rea*) render the distinction between it and genocide difficult? What is the element in the definition of genocide that makes it possible to differentiate it from a crime of persecution? What is the difference between the *mens rea* of genocide, that of persecution and that of other crimes against humanity?
- b. In its search for a definition of persecution, why does the Chamber refer to the “Final Solution” perpetrated by the Nazi regime against the Jews as a crime against humanity since it was genocide? Can one crime be defined as both persecution (crime against humanity) and genocide? Under what conditions? Since the extermination of Jews by the Nazi regime was genocide, is it still possible to qualify certain acts committed within the scope of the genocide as war crimes or crimes against humanity? On the other hand, must each act contributing to the genocide be perceived as genocide? Did the notion of “genocide” exist during the Second World War? Was this notion created because the concept of “crime against humanity” was not strong enough to describe the extreme degree of the atrocity of genocide?

Case No. 216, ICTY, The Prosecutor v. Blaskic

A. Trial Chamber

[Source: ICTY, The Prosecutor v. Tihomir Blaskic, IT-95-14, Trial Chamber, Decision of 3 March 2000; available on <http://www.un.org/icty>; footnotes partially reproduced.]

**IN THE TRIAL CHAMBER
[...] Decision of: 3 March 2000**

**THE PROSECUTOR
v.
TIHOMIR BLASKIC**

JUDGEMENT [...]

Abbreviations:

**ABiH
Muslim Army of Bosnia-Herzegovina**

**BH
Republic of Bosnia-Herzegovina [...]**

**ECMM
European Commission Monitoring Mission**

**UNPROFOR
United Nations Protection Force [...]**

**HVO
Croatian Defence Council [...]**

**CBOZ
Central Bosnia Operative Zone [...]**

II. APPLICABLE LAW [...]

A. The requirement that there be an armed conflict [...]

2. Role [...]

b) A condition for jurisdiction under Article 5 of the Statute

66. An armed conflict is not a condition for a crime against humanity but is for its punishment by the Tribunal. Based on an analysis of the international instruments in force the Appeals Chamber affirmed the autonomy of that charge in relation to

the conflict since it considered that the condition of belligerence had “no logical or legal basis” and ran contrary to customary international law.

67. Neither Articles 3 or 7 of the Statutes of the ICTR and the International Criminal Court nor *a fortiori* the case law of the Tribunal for Rwanda require the existence of an armed conflict as an element of the definition of a crime against humanity. In his Report to the Security Council on the adoption of the Statute of the future Court, the Secretary-General also explicitly refused to make this condition an ingredient of the crime:

[C]rimes 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.

68. Nonetheless, the Appeals Chamber stated that whether internal or international, the existence of an armed conflict was a condition which gave the Tribunal jurisdiction over the offence. In its analysis of Article 5 of the Statute in the *Tadic* Appeal Decision, the Appeals Chamber concluded that:

[...] Article 5 may be invoked as *a basis of jurisdiction* over crimes committed in either internal or international armed conflicts

This position was reasserted in the *Tadic* Appeal Judgement:

[T]he Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not “a substantive element of the *mens rea* of crimes against humanity” (i.e. not a legal ingredient of the subjective element of the crime).

3. Nexus between the crimes imputed to the accused and the armed conflict

69. In addition to the existence of an armed conflict, it is imperative to find an evident *nexus* between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, 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.

70. The foregoing observations demonstrate that a given municipality need not be prey to armed confrontation for the standards of international humanitarian law to apply there. It is also appropriate to note, as did the *Tadic* and *Celebici* Judgements, that a crime need not:

be part of a policy or 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 the war or in the actual interest of a party to the conflict.

71. With particular regard to Article 5 of the Statute, the terms of that Article, the *Tadic* Appeal Judgement, the Decision of the Trial Chamber hearing the *Tadic* case and the statements of the representatives of the United States, France, Great Britain and the Russian Federation to the United Nations Security Council all point out that crimes against humanity must be perpetrated during an armed conflict.

Thus, provided that the perpetrator's act fits into the geographical and temporal context of the conflict, he need not have the intent to participate actively in the armed conflict.

72. In addition, the Defence does not challenge that crimes were committed during the armed conflict in question but rather that the conflict was international and that the crimes are ascribable to the accused. [...]

B. Article 2 of the Statute: Grave breaches of the Geneva Conventions

[...]

b) Protected persons and property [...]

i) The "nationality" of the victims [...]

127. [...] In an inter-ethnic armed conflict, a person's ethnic background may be regarded as a decisive factor in determining to which nation he owes his allegiance and may thus serve to establish the status of the victims as protected persons. The Trial Chamber considers that this is so in this instance.
128. [...] The disintegration of Yugoslavia occurred along "ethnic" lines. Ethnicity became more important than nationality in determining loyalties or commitments. [...]

ii) Co-belligerent States

134. The Prosecution considered that the Bosnian Muslim civilians were persons protected within the meaning of the Fourth Geneva Convention because Croatia and BH were not co-belligerent States and did not have normal diplomatic relations when the grave breaches were committed.
135. The Defence contended that even if the conflict had been international, the Bosnian Muslim victims of acts imputed to the HVO still would not have had the status of "protected" persons since Croatia and Bosnia-Herzegovina were co-belligerent States united against the aggression of the Bosnian Serbs. It draws its argument from Article 4(2) of the Fourth Geneva Convention, which provides *inter alia* that:
- nationals of a co-belligerent State shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.
136. The Defence argument may be tested from three perspectives: co-belligerence, normal diplomatic relations and the reasoning underlying Article 4 of the Fourth Geneva Convention.

a. Co-belligerence

137. Firstly, the reasoning of the Defence may be upheld only if Croatia and Bosnia-Herzegovina were co-belligerent States or allies within the meaning of Article 4. [...]

138. Granted, Croatia and Bosnia-Herzegovina did enter into agreements over the course of the conflict. One of these, dated 14 April 1992, stipulated that the diplomatic and consular missions of Croatia and Bosnia-Herzegovina abroad would be responsible for defending the interests of the nationals of the other State when there was only a mission of one of the two party-States in the territory of a given country. On 21 July 1992, an agreement on friendship and co-operation was signed and on 25 July the two States entered into an agreement establishing diplomatic relations.
139. However, the true situation was very different from that which these agreements might suggest. Bosnia-Herzegovina perceived Croatia as a co-belligerent to the extent that they were fighting alongside each other against the Serbs. Nonetheless, it is evident that Bosnia did not see Croatia as a co-belligerent insofar as Croatia was lending assistance to the HVO in its fight against the ABiH over the period at issue. [...]
142. In any case, it seems obvious if only from the number of casualties they inflicted on each other that the ABiH and the HVO did not act towards each other within the CBOZ in the manner that co-belligerent States should.
143. In summary, the Trial Chamber deems it established that, in the conflict in central Bosnia, Croatia and Bosnia-Herzegovina were not co-belligerent States within the meaning of the Fourth Geneva Convention.

b. Reasoning of Article 4 of the Fourth Geneva Convention

144. The Trial Chamber adjudges a final observation appropriate. The Commentary of the Fourth Geneva Convention reaffirms that the nationals of co-belligerent States are not regarded as protected persons so long as the State of which they are nationals has normal diplomatic representation in the other co-belligerent State. The reasoning which underlies this exception is revealing: "It is assumed in this provision that the nationals of co-belligerent States, that is to say, of allies, do not need protection under the Convention". [footnote 291: Commentary [published by the ICRC, available on <http://www.icrc.org/ihl>], p.49]
145. In those cases where this reasoning does not apply, one might reflect on whether the exception must nevertheless be strictly heeded. In this respect, it may be useful to refer to the analysis of the status of "protected person" which appears in the *Tadic* Appeal Judgement. The Appeals Chamber noted that in the instances contemplated by Article 4(2) of the Convention:
those nationals are not "protected persons" as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of "protected persons".
[footnote 292: [...] [See **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part C., para. 165]]]

Consequently, in those situations where civilians do not enjoy the normal diplomatic protection of their State, they should be accorded the status of protected person.

146. The legal approach taken in the *Tadic* Appeal Judgement to the matter of nationality hinges more on actual relations than formal ties. If one bears in mind the purpose and goal of the Convention, the Bosnian Muslims must be regarded as protected persons within the meaning of Article 4 of the Convention since, in practice, they did not enjoy any diplomatic protection. [...]

c) The elements of the grave breaches

151. Once it has been established that Article 2 of the Statute is applicable in general, it becomes necessary to prove the ingredients of the various crimes alleged. The indictment contains six counts of grave breaches of the Geneva Conventions which refer to five sub-headings of Article 2 of the Statute.
152. The Defence claimed that it is not sufficient to prove that an offence was the result of reckless acts. However, according to the Trial Chamber, the *mens rea* constituting all the violations of Article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence. The elements of the offences are set out below.

i) Article 2(a) – wilful killing (count 5)

153. The Trial Chamber hearing the *Celebici* case defined the offence of wilful killing in its Judgement. For the material element of the offence, it must be proved that the death of the victim was the result of the actions of the accused as a commander. The intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.

ii) Article 2(b) – inhuman treatment (counts 15 and 19)

154. Article 27 of the Fourth Geneva Convention states that protected persons “shall at all times be humanely treated”. The *Celebici* Judgement analysed in great detail the offence of “inhuman treatment” [footnote 300: *Celebici* Judgement, [available on <http://www.un.org/icty/judgements.htm>], paras 512 to 544]. The Trial Chamber hearing the case summarised its conclusions in the following manner:

inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity [...]. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed “grave breaches” in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment. [footnote 301: *Celebici* Judgement, para. 543]

155. The Trial Chamber further concluded that the category “inhuman treatment” included not only acts such as torture and intentionally causing great suffering or inflicting serious injury to body, mind or health but also extended to other

acts contravening the fundamental principle of humane treatment, in particular those which constitute an attack on human dignity. In the final analysis, deciding whether an act constitutes inhuman treatment is a question of fact to be ruled on with all the circumstances of the case in mind. [footnote 302: *Celebici* Judgement, para. 544]

iii) *Article 2(c) – wilfully causing great suffering or serious injury to body or health (count 8)*

156. This offence is an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health. This category of offences includes those acts which do not fulfil the conditions set for the characterisation of torture, even though acts of torture may also fit the definition given. [footnote 303: *Celebici* Judgement, para. 511] An analysis of the expression “wilfully causing great suffering or serious injury to body or health” indicates that it is a single offence whose elements are set out as alternative options. [footnote 304: *Celebici* Judgement, para. 506]

iv) *Article 2(d) – extensive destruction of property (count 11)*

157. An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of “extensive” is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count. [footnote 305: [ICRC] Commentary, p. 601]

v) *Article 2(h) – taking civilians as hostages (count 17)*

158. Within the meaning of Article 2 of the Statute, civilian hostages are persons unlawfully deprived of their freedom, often arbitrarily and sometimes under threat of death. [footnote 306: Commentary, pp. 600-601] However, as asserted by the Defence, detention may be lawful in some circumstances, *inter alia* to protect civilians or when security reasons so impel. The Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage. The elements of the offence are similar to those of Article 3(b) of the Geneva Conventions covered under Article 3 of the Statute. [...]

C. Article 3 of the Statute – Violations of the Laws or Customs of War [...]

b) The elements of the offences

179. [...] The indictment alleges nine offences under Article 3 in ten counts. The Prosecutor maintained that the *mens rea* which characterises all the violations of Article 3 of the Statute, as well as the violations of Article 2, is the intentionality of the acts or omissions, a concept containing both guilty intent and recklessness likeable to serious criminal negligence. The elements of the offences which must be proved are set forth below.

i) *Unlawful attack against civilians (count 3); attack upon civilian property (count 4)*

180. As proposed by the Prosecution, the Trial Chamber deems that the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity. Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces. Civilian property covers any property that could not be legitimately considered a military objective. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.

ii) *Murder (count 6)*

181. The content of the offence of murder under Article 3 is the same as for wilful killing under Article 2.

iii) *Violence to life and person (count 9)*

182. This offence appears in Article 3(1)(a) common to the Geneva Conventions. It is a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing), Article 2(b) (inhuman treatment) and Article 2(c) (causing serious injury to body) of the Statute. The Defence contended that the specific intent to commit violence to life and person must be demonstrated. The Trial Chamber considers that the *mens rea* is characterised once it has been established that the accused intended to commit violence to the life or person of the victims deliberately or through recklessness.

iv) *Devastation of property (count 12)*

183. Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.

v) *Plunder of public or private property (count 13)*

184. The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the “organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory”. Plunder “should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as ‘pillage’”. [footnote 343: *Celebici* Judgement,

vi) *Destruction or wilful damage to institutions dedicated to religion or education (count 14)*

185. The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.

vii) *Cruel treatment (count 16 and 20)*

186. The Defence asserted *inter alia* that using human shields and trench digging constituted cruel treatment only if the victims were foreigners in enemy territory, inhabitants of an occupied territory or detainees. The Trial Chamber is of the view that treatment may be cruel whatever the status of the person concerned. The Trial Chamber entirely concurs with the *Celebici* Trial Chamber which arrived at the conclusion that cruel treatment constitutes an intentional act or omission "which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of Common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Convention". [footnote 345: *Celebici* Judgement, para. 552]

viii) *Taking of hostages (count 18)*

187. The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the Statute. The commentary defines hostages as follows:

hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces.

[footnote 346: [ICRC] Commentary, p. 229]

Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term "hostage" must be understood in the broadest sense. [footnote 347: Commentary, p. 230] The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking. In this respect, the Trial Chamber will examine the evidence as to whether the victims were detained or otherwise deprived of their freedom by the Croatian forces (HVO or others). [...]

III. FACTS AND DISCUSSION [...]

B. The municipality of Vitez

1. Ahmici, Santici, Pirici, Nadioci

384. The villages of Ahmici, Santici, Pirici, Nadioci, situated about 4 to 5 kilometres from the town of Vitez, belong to the municipality of Vitez. According to the last official census taken in 1991, the municipality had 27 859 inhabitants, made up of 45.5% Croats, 5.4% Serbs, 41.3% Muslims and 2.8% other nationalities. These villages are about 1000 meters away from each other and their total population was about 2 000 inhabitants. Santici, the biggest of the villages, had a population of about 1 000 inhabitants, the majority of whom were Croats, whereas Pirici, the smallest of the villages, was a mere hamlet with a mixed population. Nadioci was also a village with a substantial majority of Croats. Ahmici had about 500 inhabitants, of whom about 90% were Muslims, which meant 200 Muslim houses and fifteen or so Croat ones.
385. On Friday 16 April 1993 at 05:30 hours, Croatian forces simultaneously attacked Vitez, Stari Vitez, Ahmici, Nadioci, Santici, Pirici, Novaci, Putis and Donja Veceriska. General Blaskic spoke of 20 to 22 sites of simultaneous combat all along the road linking Travnik, Vitez and Busovaca. The Trial Chamber found that this was a planned attack against the Muslim civilian population.

a) A planned attack with substantial assets

i) An organised attack

386. Several factors proved, beyond a doubt, that the 16 April attack was planned and organised.
387. The Trial Chamber notes, first of all, that the attack was preceded by several political declarations announcing that a conflict between Croatian forces and Muslim forces was imminent. [...]
388. The declarations were made together with orders issued by the political authorities to the Croatian population in Herceg-Bosna. In particular, on 14 April, Anto Valenta ordered the Croatian officials in the of municipalities in central Bosnia to impose a curfew from 21:00 hours to 06:00 hours and to close the schools until 19 April.
389. The evidence showed moreover that the Croatian inhabitants of those villages were warned of the attack and that some of them were involved in preparing it. Several witnesses, who lived in Ahmici at the material time, testified that Croatian women and children had been evacuated on the eve of the fighting. The witness Fatima Ahmic furthermore stated that a Croatian neighbour had informed her that the Croatian men were holding regular meetings and preparing to “cleanse Muslim people from Ahmici”. Witness S testified that the same thing happened in Nadioci: several Croatian families were said to have left the village several

days before the attack and a Croatian neighbour is alleged to have advised the witness to hide. [...]

390. The method of attack also displayed a high level of preparation. Colonel Stewart stated that he had received many reports indicating an increased presence of HVO troops shortly before the events. The witness Sefik Pezer also said that on the evening of 15 April he had noticed unusual HVO troop movements. On the morning of 16 April, the main roads were blocked by HVO troops. According to several international observers, the attack occurred from three sides and was designed to force the fleeing population towards the south where elite marksmen, with particularly sophisticated weapons, shot those escaping. Other troops, organised in small groups of about five to ten soldiers, went from house to house setting fire and killing. It would seem that a hundred or so soldiers took part in the operation. [...] The attack was carried out in a *[sic]* morning.
391. All the international observers, military experts for the most part, who went to the site after the attack had occurred, stated without hesitation that such an operation could only be planned at a high level of the military hierarchy.
392. The accused himself also consistently expressed that view. Both in the statements he made shortly after the attack in April 1993 and before the Trial Chamber, General Blaskic expressed his conviction that this was "an organised, systematic and planned crime".
393. Like Trial Chamber II in the *Kupreskic* case, the Trial Chamber therefore finds, and this finding is not open to challenge and was indeed unchallenged, that the attack carried out on Ahmici, Nadioci, Santici and Pirici was planned at a high level of the military hierarchy. [...]

b) *An attack against the Muslim civilian population*

i) The absence of military objectives

402. The Defence put forward different arguments in order to explain the fighting. First of all, it pointed to the strategic nature of the road linking Busovaca and Travnik. That road was controlled by the HVO at the material time, but the HVO intelligence services are said to have noted a movement of Muslim troops on 15 April from Travnik towards Ahmici and the neighbouring villages, which led them to believe that the Muslims were seeking to regain control of the road. That submission could not however be deemed to have been sufficient justification for the attack on the villages which with the exception of Antici, were not directly on the main road. [...]
406. The Defence also explained that "authorised CBOZ military activity at times included a legitimate military tactic known as fighting in built-up areas (FIBUA)" defined by the witness Thomas as "clearing of a built-up area on a house-by-house area", usually with automatic weapons and grenades. The Defence recognised that such a tactic often results in many victims, the number of which may even exceed that of the hostile soldiers. The Defence submitted however

that those civilian victims should be considered “collateral casualties” and that such an attack could be legal in certain circumstances. That is an incorrect interpretation of Witness Baggesen’s statements to the Trial Chamber. He said that on the contrary there could be no justification for the death of so many civilians. Furthermore, General Blaskic himself acknowledged in his oral evidence that the tactic normally used by professionals avoided all combat operations inside villages. The witness Landry, who was an ECMM monitor from February to August 1993, also explained that in “this kind of cleansing operation, especially for an area of tactical significance [...], you would destroy certain buildings or houses, [...] those areas which contained some sort of military munitions but it was quite usual [...] to actually go ahead and burn a village”. He went to Ahmici on 16 April and noted however that there was no longer any military presence there in the evening of 16 April whereas that morning he had noticed a high concentration of HVO troops on the main roads linking Vitez and Zenica. According to that witness: “if this village did have some tactical importance, perhaps it would have been for the HVO to be able to consolidate their position and to maintain some sort of observation post or stop post for the military operations”. And he added: “it is very difficult for me to say from a military perspective, to say what was the military reason to carry out such a carnage”. [...]

409. Lieutenant-Colonel Thomas, UNPROFOR commander at the material time, went to Ahmici on 17 April 1993 and stated that he saw no evidence suggesting that there had been a conflict between two separate military entities, nor any evidence of resistance such as trenches, sandbags or barbed wire indicating the presence in the village of an armed force ready for combat. Furthermore, the bodies he saw were not in uniform and not a single weapon was found in the destroyed buildings. On the contrary, there were women and children amongst the bodies strewn on the ground. [...] In its second periodical report on the human rights situation on the territory of the former Yugoslavia, the Commission on Human Rights even found that “by all accounts, *including those of the local Croat HVO commander and international observers*, this village contained no legitimate military targets and there was no organised resistance to the attack”. The accused himself admitted before the Trial Chamber that the “villagers of Ahmici, that is Bosniak Muslims,” had been the victims of the attack without there having been any attempt to distinguish between the civilian population and combatants.
410. The Trial Chamber is therefore convinced beyond any reasonable doubt that no military objective justified these attacks.

ii) The discriminatory nature of the attack

411. Although the village of Ahmici had no strategic importance which justified the fighting, it was however of particular significance for the Muslim community in Bosnia. Many imams and mullahs came from there. For that reason, Muslims in Bosnia considered Ahmici to be a holy place. In that way, the village of Ahmici symbolised Muslim culture in Bosnia. The witness Watters was certain that Ahmici had been chosen as a target for that reason.

412. The eyewitnesses who saw the attack all describe the same method of attack. [...] Some time after the artillery shots, soldiers organised in groups of between five and ten went into each Muslim house shouting insults against the Muslims, referring to them as "balijas". The groups of soldiers sometimes forced the inhabitants out of their houses, without however allowing them the time to dress. Most of them were still in their night-clothes, some not even having had time to put anything on their feet before fleeing. The soldiers killed the men of fighting age at point blank range and set fire to the Muslims' houses and stables with incendiary bullets, grenades and petrol. Some houses were torched before their inhabitants even had a chance to get out. [...]

iv) Murders of civilians

414. Most of the men were shot at point blank range. Several witnesses described how the men of their families had been rounded up and then killed by Croatian soldiers. [...] The international observers also saw bodies lying in the road, many of whom had been killed by a bullet to the head fired at short range.
415. Twenty or so civilians were also killed in Donji Ahmici as they tried to flee the village. The fleeing inhabitants had to cross an open field before getting to the main road. About twenty bodies of people killed by very precise shots were found in the field. Military experts concluded that they had been shot by marksmen.
416. Other bodies were found in the houses so badly charred they could not be identified and in positions suggesting that they had been burned alive. The victims included many women and children. The British UNPROFOR battalion reported that: "[o]f the 89 bodies which have been recovered from the village, most are those of elderly people, women, children and infants". An ECMM observer said he had seen the bodies of children who, from their position, seemed to have died in agony in the flames: "some of the houses were absolute scenes of horror, because not only were the people dead, but there were those who were burned and obviously some had been – according to what the monitors said, they had been burned with flame launchers, which had charred the bodies and this was the case of several of the bodies".
417. According to the ECMM report, at least 103 people were killed during the attack on Ahmici.

v) Destruction of dwellings

418. According to the Centre for Human Rights in Zenica, 180 of the existing 200 Muslim houses in Ahmici were burned during the attack. The Commission on Human Rights made the same finding in its report dated 19 May 1993. Prosecution exhibit P117 also showed that nearly all the Muslim houses had been torched, whereas all the Croat houses had been spared. [...]

vi) Destruction of institutions dedicated to religion

419. Several religious edifices were destroyed. The Defence did not deny the destruction of the mosque at Donji Ahmici or of the matif mesjid at Gornji Ahmici.

However, it did maintain that the reason for this destruction was that “the school and church in Ahmici became locations of fighting following the attack by the Fourth Military Police Battalion”.

420. Conversely, the Prosecutor contended that “both mosques were deliberately mined and given the careful placement of the explosives inside the buildings, they must have been mined after HVO soldiers had control of the buildings”.
421. The Trial Chamber notes at the outset that according to the witness Stewart, it was barely plausible that soldiers would have taken refuge in the mosque since it was impossible to defend. Furthermore, the mosque in Donji Ahmici was destroyed by explosives laid around the base of its minaret. [...] The destruction of the minaret was therefore premeditated and could not be justified by any military purpose whatsoever. The only reasons to explain such an act were reasons of discrimination. [...]

vii) Plunder

424. The soldiers also set fire to the stables and slaughtered the livestock as the accused noted himself when he visited the site on 27 April. [...] The victims of these thefts were always Muslim. [...]

c) Conclusion

425. The methods of attack and the scale of the crimes committed against the Muslim population or the edifices symbolising their culture sufficed to establish beyond reasonable doubt that the attack was aimed at the Muslim civilian population. [...]
426. Witness Baggesen said of the attack on Ahmici: “We think that this operation, military operation against the civilian population was to scare them and to show what would happen to other villages and the Muslim inhabitants in other villages if they did not move out. So I think this was an example to show”, especially given what Ahmici symbolised for the Muslim community.
427. The Commission on Human Rights noted that all the Muslims had fled from Ahmici. Only a few Croats had remained. According to the witness Kajmovic, the Ahmici Muslim population had completely disappeared in 1995. According to the Centre for Human Rights in Zenica, the four Muslim families living in Nadioci had been exterminated. [...]
428. All that evidence enables the Trial Chamber to conclude without any doubt that the villages of Ahmici, Pirici, Santici and Nadioci had been the object of a planned attack on the Muslim population on 16 April 1993. [...]

IV. FINAL CONCLUSIONS

744. The Trial Chamber concludes that the acts ascribed to Tihomir Blaskic occurred as part of an international armed conflict because the Republic of Croatia exercised

total control over the Croatian Community of Herceg-Bosna and the HVO and exercised general control over the Croatian political and military authorities in central Bosnia.

745. The accused was appointed by the Croatian military authorities. Following his arrival in Kiseljak in April 1992, he was designated chief of the Central Bosnia Operative Zone on 27 June 1992 and remained there until the end of the period covered by the indictment. From the outset, he shared the policy of the local Croatian authorities. For example, he outlawed the Muslim Territorial Defence forces in the municipality of Kiseljak.
746. From May 1992 to January 1993, tensions between Croats and Muslims continued to rise. At the same time, General Blaskic reinforced the structure of the HVO armed forces with the agreement of the Croatian political authorities.
747. In January 1993, the Croatian political authorities sent an ultimatum to the Muslims, *inter alia*, so as to force them to surrender their weapons. They sought to gain control of all the territories considered historically Croatian, in particular the Lasva Valley. Serious incidents then broke out in Busovaca and Muslim houses were destroyed. After being detained, many Muslim civilians were forced to leave the territory of the municipality.
748. Despite the efforts of international organisations, especially the ECMM and UNPROFOR, the atmosphere between the communities remained extremely tense.
749. On 15 April 1993, the Croatian military and political authorities, including the accused, issued a fresh ultimatum. General Blaskic met with the HVO, military police and Vitezovi commanders and gave them orders which the Trial Chamber considers to be genuine attack orders. On 16 April 1993, the Croatian forces, commanded by General Blaskic, attacked in the municipalities of Vitez and Busovaca.
750. The Croatian forces, both the HVO and independent units, plundered and burned to the ground the houses and stables, killed the civilians regardless of age or gender, slaughtered the livestock and destroyed or damaged the mosques. Furthermore, they arrested some civilians and transferred them to detention centres where the living conditions were appalling and forced them to dig trenches, sometimes also using them as hostages or human shields. The accused himself stated that twenty or so villages were attacked according to a pattern which never changed. The village was firstly "sealed off". Artillery fire opened the attack and assault and search forces organised into groups of five to ten soldiers then "cleansed" the village. The same scenario was repeated in the municipality of Kiseljak several days later. The Croatian forces acted in perfect co-ordination. The scale and uniformity of the crimes committed against the Muslim population over such a short period of time has enabled the conclusion that the operation was, beyond all reasonable doubt, planned and that its objective was to make the Muslim population take flight.

751. The attacks were thus widespread, systematic and violent and formed part of a policy to persecute the Muslim populations.
752. To achieve the political objectives to which he subscribed, General Blaskic used all the military forces on which he could rely, whatever the legal nexus subordinating them to him.
753. He issued the orders sometimes employing national discourse and with no concern for their possible consequences. In addition, despite knowing that some of the forces had committed crimes, he redeployed them for other attacks.
754. [...] The end result of such an attitude was not only the scale of the crimes, which the Trial Chamber has explained, but also the realisation of the Croatian nationalists' goals – the forced departure of the majority of the Muslim population in the Lasva Valley after the death and wounding of its members, the destruction of its dwellings, the plunder of its property and the cruel and inhuman treatment meted out to many. [...]

VI. DISPOSITION

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER, in a unanimous ruling of its members,

FINDS Tihomir Blaskic GUILTY:

of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, in the municipalities of Vitez, Busovaca and Kiseljak [...] between 1 May 1992 and 31 January 1994 (count 1) for the following acts:

- attacks on towns and villages;
- murder and serious bodily injury;
- the destruction and plunder of property and, in particular, of institutions dedicated to religion or education;
- inhuman or cruel treatment of civilians and, in particular, their being taken hostage and used as human shields;
- the forcible transfer of civilians;

and by these same acts, in particular, as regards an international armed conflict, General Blaskic committed:

- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of Additional Protocol I: unlawful attacks on civilians (count 3);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects (count 4);
- a grave breach, under Article 2(a) of the Statute: wilful killing (count 5);

- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: murder (count 6);
- a crime against humanity, under Article 5(a) of the Statute: murder (count 7);
- a grave breach under Article 2(c) of the Statute: wilfully causing great suffering or serious injury to body or health (count 8);
- a violation of the laws or customs of war under Article 3 and recognised by Article 3(1)(a) of the Geneva Conventions: violence to life and person (count 9);
- a crime against humanity under Article 5(i) of the Statute: inhumane acts (count 10);
- a grave breach under Article 2(d) of the Statute: extensive destruction of property (count 11);
- a violation of the laws or customs of war under Article 3(b) of the Statute: devastation not justified by military necessity (count 12);
- a violation of the laws or customs of war under Article 3(e) of the Statute: plunder of public or private property (count 13);
- a violation of the laws or customs of war under Article 3(d) of the Statute: destruction or wilful damage done to institutions dedicated to religion or education (count 14);
- a grave breach under Article 2(b) of the Statute: inhuman treatment (count 15);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 16);
- a grave breach under Article 2(h) of the Statute: taking civilians as hostages (count 17);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(b) of the Geneva Conventions: taking of hostages (count 18);
- a grave breach, under Article 2(b) of the Statute: inhuman treatment (count 19);
- a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 3(1)(a) of the Geneva Conventions: cruel treatment (count 20),

In any event, as a commander, he failed to take the necessary and reasonable measures which would have allowed these crimes to be prevented or the perpetrators thereof to be punished. [...] and therefore,

SENTENCES Tihomir Blaskic to forty-five years in prison; [...].

B. Appeals Chamber

[Source: ICTY, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-A; Appeals Chamber, Decision of 29 July 2004; available on <http://www.un.org/icty>; footnotes omitted]

IN THE APPEALS CHAMBER

PROSECUTOR

v.

TIHOMIR BLASKIC

JUDGEMENT

[...]

III. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 7 OF THE STATUTE [...]

A. Individual Criminal Responsibility under Article 7(1) of the Statute [...]

41. Having examined the approaches of national systems as well as International Tribunal precedents, the Appeals Chamber considers that none of the Trial Chamber's [...] articulations of the *mens rea* for ordering under Article 7(1) of the Statute, in relation to a culpable mental state that is lower than direct intent, is correct. The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law. The Trial Chamber does not specify what degree of risk must be proven. Indeed, it appears that under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur. The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.
42. The Appeals Chamber therefore holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. [...]

B. Command Responsibility under Article 7(3) of the Statute

53. In this section, the Appeals Chamber will only address alleged legal errors concerning Article 7(3) of the Statute, and will leave contentions raised by the Appellant in his second ground of appeal, concerning whether the facts of the case support a finding that the Appellant had effective control in the Central Bosnia Operative Zone (CBOZ), to the parts of the Judgement where the factual grounds of appeal are considered. [...]

2. The standard of “had reason to know” [...]

61. The Appeals Chamber notes that the Trial Chamber concluded that:
 if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

At another place in the Trial Judgement, the Trial Chamber “holds, again in the words of the Commentary, that ‘[t]heir role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose.’” One of the duties of a commander is therefore to be informed of the behaviour of his subordinates.

62. The Appeals Chamber considers that the *Celebici* Appeal Judgement has settled the issue of the interpretation of the standard of “had reason to know.” In that judgement, the Appeals Chamber stated that “a superior will be criminally responsible through the principles of superior responsibility only *if information was available to him* which would have put him on notice of offences committed by subordinates.” Further, the Appeals Chamber stated that “[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision (Article 7(3)) as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish.” There is no reason for the Appeals Chamber to depart from that position. The Trial Judgement’s interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.
63. As to the argument of the Appellant that the Trial Chamber based command responsibility on a theory of negligence, the Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that “it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law.” It expressed that “[r]eferences to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought....” The Appeals Chamber expressly endorses this view.
64. The appeal in this respect is allowed, and the authoritative interpretation of the standard of “had reason to know” shall remain the one given in the *Celebici* Appeal Judgement, as referred to above. [...]

IV. ALLEGED ERRORS OF LAW CONCERNING ARTICLE 5 OF THE STATUTE

A. Common Statutory Elements of Crimes against Humanity

94. The Appellant submits that the Trial Chamber “erred in several significant respects in construing and applying the substantive legal standards of Article 5.” Generally, he claims that:

[the] Trial Chamber deviated from established principles of Tribunal and/or customary law by: (1) failing to require that [the] Appellant possessed the requisite knowledge of the broader criminal attack necessary to establish a crime against humanity; (2) failing to define the *actus reus* of the crime of persecution in a sufficiently narrow fashion in accordance with the principles of legality and specificity; and (3) failing to require that [the] Appellant possessed the requisite specific discriminatory intent necessary to establish the crime of persecution.

1. Requirement that the acts of the accused must take place in the context of a widespread or systematic attack [...]

98. It is well established in the jurisprudence of the International Tribunal that in order to constitute a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population. This was recognized by the Trial Chamber, which stated: “there can be no doubt that inhumane acts constituting a crime against humanity must be part of a systematic or widespread attack against civilians.”

99. The Trial Chamber then stated that the “systematic” character:

refers to four elements which for the purposes of this case may be expressed as follows:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

The Trial Chamber went on to state that the plan “need not necessarily be declared expressly or even stated clearly and precisely” and that it could be surmised from a series of various events, examples of which it listed.

100. The Appeals Chamber considers that it is unclear whether the Trial Chamber deemed the existence of a plan to be a legal element of a crime against humanity. In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant, but is not a legal element of the crime. [...]

2. Requirement that the attack be directed against a civilian population [...]

105. [...] The legal requirement under Article 5 of the Statute that the attack in question be directed against a civilian population was elaborated upon in the *Kunarac* Appeal Judgement, wherein the Appeals Chamber stated that:

the use of the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.

106. The Appeals Chamber in *Kunarac* further stated:

the expression “directed against” is an expression which “specifies that in the context of a crime against humanity the civilian population is the primary object of the attack”. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.

107. In this case, the Trial Chamber correctly recognized that a crime against humanity applies to acts directed against any civilian population. However, it stated that “the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed.” The Appeals Chamber considers that both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity.

108. The Trial Chamber concluded:

Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore wear [*sic*] uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian. Finally, it can be concluded that the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.

109. Before determining the scope of the term “civilian population”, the Appeals Chamber deems it necessary to rectify the Trial Chamber’s statement, contained

in paragraph 180 of the Trial Judgement, according to which “[t]argeting civilians or civilian property is an offence when not justified by military necessity.” The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.

110. In determining the scope of the term “civilian population,” the Appeals Chamber recalls its obligation to ascertain the state of customary law in force at the time the crimes were committed. In this regard, it notes that the Report of the Secretary General states that the Geneva Conventions “constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts.” Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law. As a result, they are relevant to the consideration at issue under Article 5 of the Statute, concerning crimes against humanity.
111. Article 50, paragraph 1, of Additional Protocol I states that a civilian is “any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” The Appeals Chamber notes that the imperative “in case of doubt” is limited to the expected conduct of a member of the military. However, when the latter’s criminal responsibility is at issue, the burden of proof as to whether a person is a civilian rests on the Prosecution. [...]
113. Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic. The Trial Chamber was correct in this regard.
114. However, the Trial Chamber’s view that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian may be misleading. The ICRC Commentary is instructive on this point and states:

All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of quasi-combatants, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant

throughout the duration of the hostilities (or in any case, until he is permanently demobilized by the responsible command referred to in paragraph 1), whether or not he is in combat, or for the time being armed. If he is wounded, sick or shipwrecked, he is entitled to the protection of the First and Second Conventions (Article 44, paragraph 8), and, if he is captured, he is entitled to the protection of the Third Convention (Article 44, paragraph 1).

As a result, the specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.

115. The Trial Chamber also stated that the “presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population.” The ICRC Commentary on this point states:

... in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.

Thus, in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.

116. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in part in its characterization of the civilian population and of civilians under Article 5 of the Statute. [...]

4. Requirement that the accused has knowledge that his acts formed part of the broader criminal attack

121. The Appellant submits that the Prosecution must establish that the accused knew of the existence of a widespread or systematic attack against a civilian population and that his acts form part of the attack. According to the Appellant, the Trial Chamber failed to determine whether and to what extent he may have known of the attack and the fact that his acts were a part thereof. Instead, he claims, the Trial Chamber applied a standard of recklessness which is not supported in law, and limited its consideration to the extent to which the Appellant may have been aware of the political context in which his acts fit, a standard below that required by the definition of crimes against humanity. [...]
124. The Appeals Chamber considers that the *mens rea* of crimes against humanity is satisfied when the accused has the requisite intent to commit the underlying offence(s) with which he is charged, and when he knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack. Moreover, the Appeals Chamber further considers that:

[f]or criminal liability pursuant to Article 5 of the Statute [to attach], “the motives of the accused for taking part in the attack are irrelevant and a crime against humanity

may be committed for purely personal reasons.” Furthermore, the accused need not share the purpose or goal behind the attack. It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.

125. In this case, the Trial Chamber referred to the *Tadic* Appeal Judgement, according to which “the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern.” It then stated the following:

The accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context.

Moreover, the nexus with the institutional or *de facto* regime, on the basis of which the perpetrator acted, and the knowledge of this link, as required by the case-law of the Tribunal and the ICTR and restated above, in no manner require proof that the agent had the intent to support the regime or the full and absolute intent to act as its intermediary so long as proof of the existence of direct or indirect malicious intent or recklessness is provided. Indeed, the Trial Chambers of this Tribunal and the ICTR as well as the Appeals Chamber required only that the accused “knew” of the criminal policy or plan, which in itself does not necessarily require intent on his part or direct malicious intent (“... the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective”). There may also be indirect malicious intent (the agent did not deliberately seek the outcome but knew that it would be the result) or recklessness, (“the outcome is foreseen by the perpetrator as only a probable or possible consequence”). In other words, knowledge also includes the conduct “of a person taking a deliberate risk in the hope that the risk does not cause injury”.

It follows that the *mens rea* specific to a crime against humanity does not require that the agent be identified with the ideology, policy or plan in whose name mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan. This specifically means that it must, for example, be proved that:

- the accused willingly agreed to carry out the functions he was performing;
- that these functions resulted in his collaboration with the political, military or civilian authorities defining the ideology, policy or plan at the root of the crimes;
- that he received orders relating to the ideology, policy or plan; and lastly
- that he contributed to its commission through intentional acts or by simply refusing of his own accord to take the measures necessary to prevent their perpetration.

126. In relation to the *mens rea* applicable to crimes against humanity, the Appeals Chamber reiterates its case-law pursuant to which knowledge on the part of the accused that there is an attack on the civilian population, as well as knowledge that his act is part thereof, is required. The Trial Chamber, in stating that it “suffices

that he knowingly took the risk of participating in the implementation of the ideology, policy or plan,” did not correctly articulate the *mens rea* applicable to crimes against humanity. Moreover, as stated above, there is no legal requirement of a plan or policy, and the Trial Chamber’s statement is misleading in this regard. Furthermore, the Appeals Chamber considers that evidence of knowledge on the part of the accused depends on the facts of a particular case; as a result, the manner in which this legal element may be proved may vary from case to case. Therefore, the Appeals Chamber declines to set out a list of evidentiary elements which, if proved, would establish the requisite knowledge on the part of the accused. [...]

128. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in part in its articulation of the *mens rea* applicable to crimes against humanity. [...]

VII. ALLEGED ERRORS CONCERNING THE APPELLANT’S RESPONSIBILITY FOR CRIMES COMMITTED IN THE AHMICI AREA

304. The Trial Chamber found the Appellant responsible for having ordered a military attack on Ahmici and the neighbouring villages of Santici, Pirici, and Nadioci, which resulted in the following crimes being committed against the Muslim civilian population: (i) persecution (count 1); (ii) unlawful attacks upon civilians and civilian objects (counts 3 to 4); (iii) wilful killing (counts 5 to 10); (iv) destruction and plunder of property of Bosnian Muslim dwellings, buildings, businesses, private property and livestock (counts 11 to 13); and (v) destruction of institutions dedicated to religion or education (count 14). [...]

A. The Appellant’s responsibility under Article 7(1) of the Statute [...]

2. The Appeals Chamber’s findings

324. The Trial Chamber convicted the Appellant pursuant to Article 7(1) of the Statute for crimes that targeted the Muslim civilian population and were perpetrated as a result of his *ordering* the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Dzokeri (Jokers), the Vitezovi, and the Domobrani to offensively attack Ahmici and the neighbouring villages. The Appeals Chamber considers that the Appellant’s conviction under Article 7(1) of the Statute is based upon the following findings reached by the Trial Chamber: (i) that the attack was organised, planned at the highest level of the military hierarchy and targeted the Muslim civilian population in Ahmici and the neighbouring villages; (ii) that the Military Police, the Jokers, the Domobrani, and regular HVO (including the Viteska Brigade) took part in the fighting, and no military objective justified the attacks; and (iii) that the Appellant had “command authority” over the Viteska Brigade, the Domobrani, the 4th MP Battalion, and the Jokers during the period in question.

(a) *The orders issued by the Appellant*

325. The Prosecution's case was that the Appellant ordered the Viteska Brigade, the Nikola Subic Zrinski Brigade, the 4th MP Battalion, the Jokers, the Vitezovi, and the Domobrani to offensively attack the area of Ahmici, destroy and burn the Muslims' houses, kill Muslim civilians, and destroy their religious institutions. As part of his defence at trial, the Appellant put forward three orders issued by him following a military intelligence report dated 14 March 1993, which indicated the possibility of an attack by the ABiH on Ahmici in order to cut off Busovaca and Vitez.
326. With respect to D267, addressed to the 4th MP Battalion, the Vitezovi, and the HVO Operative Zone Brigades, the Trial Chamber concluded that "[t]he reasons relied upon in this order were: combat operations to prevent terrorism aimed at the HVO, and ethnic cleansing of the region's Croats by extremist Muslim forces." [...]
329. The Trial Chamber found that D269 was "very clearly" an order to attack, and that it was addressed to the Viteska Brigade, the 4th MP Battalion, the forces of the Nikola Subic Zrinski Brigade and the forces of the civilian police which "were recognised on the ground as being those which had carried out the attack." The Trial Chamber also found that the time set out in the order to commence hostilities corresponded to the start of fighting on the ground.
330. The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack." The order defines the type of military activity as a blockade in the territory of Kruscica, Vranjska, and D. Vecerska (Ahmici and the neighbouring villages are not specifically mentioned), and it addresses the Viteska Brigade and the Tvrtko special unit, but not the Jokers or the Military Police which are only mentioned in item 3 of the order in the following terms:
- [i]n front of you are the forces of the IV Battalion VP, behind you are your forces, to the right of you are the forces of the unit N.S. Zrinski, and to the left of you are the forces of the civilian police.
331. As noted above, the Trial Chamber had concluded that since the Ahmici area had no strategic importance, no military objective justified the attack, and determined that it was unnecessary to analyze the reasons given by the Appellant for issuing D269. The Trial Chamber concluded that nothing had been adduced to support the claim that an imminent attack justified the issuing of D269. The Appeals Chamber notes that the Trial Chamber gave no weight to the argument that the road linking Busovaca and Travnik had a strategic significance, and with respect to the fact that ABiH soldiers were reported travelling towards Vitez, it concluded that "the fact that these soldiers were drinking highlighted the fact that the soldiers were on leave and were not preparing to fight in the municipality of Vitez".

332. The Appeals Chamber considers that the Trial Chamber's assessment of D269, as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review. The Appeals Chamber considers that the Trial Chamber's assessment was "wholly erroneous".
333. The Appeals Chamber considers that the trial evidence does not support the Trial Chamber's conclusion that the ABiH forces were not preparing for combat in the Ahmici area. In addition, the Appeals Chamber notes that additional evidence admitted on appeal shows that there was a Muslim military presence in Ahmici and the neighbouring villages, and that the Appellant had reason to believe that the ABiH intended to launch an attack along the Ahmici-Santici-Dubravica axis. Consequently, the Appeals Chamber considers that there was a military justification for the Appellant to issue D269.
334. The Appeals Chamber further notes that in light of the planned nature, scale, and manner in which crimes were committed in the Vitez municipality on 16 April 1993, the Trial Chamber concluded that D269 corresponded to the start of fighting in the Ahmici area, and that it instructed all the troops mentioned therein to coordinate an offensive attack and commit the crimes in question. The Appeals Chamber has failed to find evidence in the record which shows that the Appellant issued D269 with the "clear intention that the massacre would be committed" during its implementation, or evidence that the crimes against the Muslim civilian population in the Ahmici area were committed in response to D269.
335. In light of the analysis of the Trial Chamber's interpretation of D269 and on the basis of the relevant evidence before the Trial Chamber, the Appeals Chamber concludes that no reasonable trier of fact could have reached the conclusion beyond reasonable doubt that D269 was issued "with the clear intention that the massacre would be committed," or that it gave rise to the crimes committed in the Ahmici area on 16 April 1993. The Appeals Chamber stresses that the additional evidence heard on appeal confirms that there was a military justification for issuing D269. The additional evidence shows that D269 was a lawful order, a command to prevent an attack, and did not instruct the troops mentioned therein to launch an offensive attack or commit crimes. [...]

(c) *New evidence suggests that individuals other than the Appellant planned and ordered the commission of crimes in the Ahmici area* [...]

(d) *Whether the Appellant was aware of the substantial likelihood that civilians would be harmed* [...]

344. The Trial Chamber concluded that since the Appellant knew that some of the troops engaged in the attack on Ahmici and the neighbouring villages had previously participated in criminal acts against the Muslim population of Bosnia or had criminals within their ranks, when ordering those troops to launch an

attack on 16 April 1993 pursuant to D269, the Appellant deliberately took the risk that crimes would be committed against the Muslim civilian population in the Ahmici area and their property. The Trial Chamber held that:

[e]ven if doubt were still cast in spite of everything on whether the accused ordered the attack with the clear intention that the massacre would be committed, he would still be liable under Article 7(1) of the Statute for ordering the crimes... [A]ny person who, in ordering an act, knows that there is a risk of crimes being committed and accepts that risk, shows the degree of intention necessary (recklessness) [*le dol éventuel* in the original French text] so as to incur responsibility for having ordered, planned or incited the commitment of the crimes. In this case, the accused knew that the troops which he had used to carry out the order of attack of 16 April had previously been guilty of many crimes against the Muslim population of Bosnia.

345. The Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent. It has stated that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to the finding outlined above. Therefore, the Appeals Chamber will apply the correct legal standard to determine whether the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes which occurred in the Ahmici area on 16 April 1993.
346. The evidence underlying the finding in paragraph 474 of the Trial Judgement consists of orders issued by the Appellant with the aim of deterring criminal conduct, i.e., orders prohibiting looting, the burning of Muslim houses, and instructing the identification of soldiers prone to criminal conduct. The analysis of the evidence relied upon by the Trial Chamber supports the conclusion that concrete measures had been taken to deter the occurrence of criminal activities, and for the removal of criminal elements once they had been identified. For instance, approximately a month before the attack of 16 April 1993 took place, the Appellant had ordered the commanders of HVO brigades and independent units to identify the causes of disruptive conduct, and to remove, arrest and disarm conscripts prone to criminal conduct.
347. The Appeals Chamber considers that the orders and reports outlined above, may be regarded at most, as sufficient to demonstrate the Appellant's knowledge of the mere possibility that crimes could be committed by some elements. However, they do not constitute sufficient evidence to prove, under the legal standard articulated by the Appeals Chamber, awareness on the part of the Appellant of a substantial likelihood that crimes would be committed in the execution of D269.
348. Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence and the additional evidence admitted on appeal prove beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in the Ahmici area on 16 April 1993.

B. The Appellant's responsibility under Article 7(3) of the Statute [...]

2. The Appeals Chamber's findings

372. The Appeals Chamber notes that besides finding the Appellant guilty under Article 7(1) of the Statute, the Trial Chamber also entered a conviction against the Appellant for his superior criminal responsibility under Article 7(3) of the Statute. The Trial Chamber stated:

[i]n the final analysis, the Trial Chamber is convinced that General Blaskic ordered the attacks that gave rise to these crimes. *In any event, it is clear that he never took any reasonable measure to prevent the crimes being committed or to punish those responsible for them.* [...]

375. It is settled in the jurisprudence of the International Tribunal that the ability to exercise effective control is necessary for the establishment of superior responsibility. The threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute is the effective control over a subordinate in the sense of material ability to prevent or punish criminal conduct. The Appeals Chamber will discuss whether the Appellant wielded effective control over the troops that perpetrated the crimes in the Ahmici area.

376. The Trial Chamber found that the Appellant had "command authority" over the 4th MP Battalion and the Jokers during the period in question.

[...]

419. The Appeals Chamber has admitted as additional evidence on appeal documents that contain information on those allegedly responsible for the crimes committed in the Ahmici area; this evidence supports the conclusion that the Appellant was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him. [...]

420. The Appeals Chamber considers that the trial evidence assessed together with the additional evidence admitted on appeal shows that the Appellant took the measures that were reasonable within his material ability to denounce the crimes committed, and supports the conclusion that the Appellant requested that an investigation into the crimes committed in Ahmici be carried out, that the investigation was taken over by the SIS Mostar, that he was not informed of the results of the investigation, and that the names of the perpetrators were not disclosed to him.

421. For the foregoing reasons, and having examined the legal requirements for responsibility under Article 7(3) of the Statute, the Appeals Chamber concludes that the Appellant lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on 16 April 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.

422. In light of the foregoing, the Appeals Chamber is not satisfied that the trial evidence, assessed together with the additional evidence admitted on appeal,

proves beyond reasonable doubt that the Appellant is responsible under Article 7(3) of the Statute for having failed to prevent the commission of crimes in Ahmici, Santici, Pirici, and Nadioci on 16 April 1993 or to punish the perpetrators.

[...]

XI. ALLEGED ERRORS CONCERNING THE APPELLANT'S RESPONSIBILITY FOR DETENTION-RELATED CRIMES

574. The Trial Judgement addressed Counts 15 to 20 of the Second Amended Indictment in a section entitled "detention-related crimes", as they all entail a deprivation of freedom. During the course of the conflict in Central Bosnia, HVO forces detained Bosnian Muslims – both civilians and prisoners of war – in various facilities. The Trial Chamber found that non-combatant Bosnian Muslims, both civilians and prisoners of war, were detained during the conflict in the Lasva Valley region of Central Bosnia, and in Vitez in particular. The Trial Chamber concluded that the Appellant knew of the circumstances and conditions under which the Bosnian Muslims were being detained and the treatment they received, and was "persuaded beyond all reasonable doubt that [the Appellant] had reason to know that violations of international humanitarian law were being perpetrated." The Trial Chamber found the Appellant guilty on all counts relating to detention-related crimes pursuant to Articles 2 and 3 of the Statute, either pursuant to Article 7(1) or to Article 7(3) of the Statute, or pursuant to both.

[...]

B. Counts 17 and 18: Hostage-taking

635. The Trial Chamber convicted the Appellant of taking hostages, first for use in prisoner exchanges, and second in order to deter ABiH military operations against the HVO. It is unclear whether the Trial Chamber made this conviction pursuant to Article 7(1) or Article 7(3) of the Statute.
636. The Appellant does not deny that hostages were taken and does not appeal against this finding as a separate ground of appeal *per se*. Rather, the Appellant argues in respect of the hostage-taking convictions that the Trial Judgement is "extremely vague," that there was no finding that he ordered the taking of hostages, and that he presumes that he was convicted of the charges on the basis of Article 7(3) of the Statute. The position of the Prosecution is that the Appellant was in fact convicted of hostage-taking under Article 7(1) of the Statute, even though the Trial Chamber found that the Appellant did not expressly order that hostages be taken.
637. The Appeals Chamber however emphasises that the Trial Chamber itself found that the Appellant did not order that hostages be taken or used. Instead, the Trial Judgement stated that the Appellant ordered the defence of Vitez and thereby "deliberately ran the risk that many detainees might be taken hostage for this purpose." The Appeals Chamber considers that the Appellant was convicted for

hostage-taking pursuant to Article 7(1) of the Statute, and that no finding was made under Article 7(3) of the Statute in relation to these counts. As a result, the Appeals Chamber declines to consider Article 7(3) responsibility any further.

638. Hostage-taking as a grave breach of the Geneva Conventions and as a violation of the laws or customs of war was considered by the Trial Chamber in this case, and in the *Kordic* and *Cerkez* Trial Judgement. In the latter case, the following was stated:

It would, thus, appear that the crime of taking civilians as hostages consists of the unlawful deprivation of liberty, including the crime of unlawful confinement ...

The additional element ... is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a "threat either to prolong the hostage's detention or to put him to death". In the Chamber's view, such a threat must be intended as a coercive measure to achieve the fulfilment of a condition.

639. The Appeals Chamber agrees that the essential element in the crime of hostage-taking is the use of a threat concerning detainees so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person. The crime of hostage-taking is prohibited by Common Article 3 of the Geneva Conventions, Articles 34 and 147 of Geneva Convention IV, and Article 75(2)(c) of Additional Protocol I. [...]

2. Hostage-taking in the defence of Vitez

641. In convicting the Appellant of hostage-taking, the Trial Chamber relied on the testimony of Witness Mujezinovic. Witness Mujezinovic testified at trial that, on 19 April 1993, he was taken to a meeting with Cerkez, the Commander of the Vitez Brigade. At that meeting, Witness Mujezinovic was instructed by Cerkez to contact ABiH commanders and Bosnian leaders, and to tell them that the ABiH was to halt its offensive combat operations on the town of Vitez, failing which the 2,223 Muslims detainees in Vitez (expressly including women and children) would all be killed. Witness Mujezinovic was further instructed to appear in a television broadcast to repeat that threat, and to tell the Muslims of Stari Vitez to surrender their weapons. The threats were repeated the following morning.

642. The Trial Chamber concluded that the detainees were "threatened with death" in order to prevent the ABiH advance on Vitez. The Appellant has not contended that these events did not occur. However, the Trial Chamber further concluded the following, since Cerkez was the commander of the Vitez Brigade, and since he was under the direct command of the Appellant:

The Trial Chamber concludes that although General Blaskic did not order that hostages be taken, it is inconceivable that as commander he did not order the defence of the town where his headquarters were located. In so doing, Blaskic deliberately ran the risk that many detainees might be taken hostage for this purpose. [...]

644. The Trial Chamber itself found that the Appellant did not order that hostages be used to repel the attack on Vitez, only that he ordered the defence of Vitez. However, the Trial Chamber's further finding that the Appellant can accordingly be held accountable for the crime of hostage-taking is problematic for two reasons. First, the Appeals Chamber disagrees that the Appellant's order to defend Vitez necessarily resulted in his subordinate's illegal threat. It does not follow, by virtue of his legitimate order to defend an installation of military value, that the Appellant incurred criminal responsibility for his subordinate's unlawful choice of how to execute the order. There is no necessary causal nexus between an order to defend a position and the taking of hostages.
645. Second, the Trial Chamber based its conclusion that the Appellant was responsible for the hostage-taking on its finding that he "deliberately ran the risk that many detainees might be taken hostage for this purpose." As stated above, the Appeals Chamber has articulated the *mens rea* applicable to ordering a crime under Article 7(1) of the Statute, in the absence of direct intent: a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order has the requisite *mens rea* for establishing liability for ordering the crime under Article 7(1) of the Statute. Ordering with such awareness has to be regarded as accepting that crime. The Trial Chamber did not apply this standard in relation to its findings concerning the taking of hostages.
646. The Appeals Chamber finds that there was insufficient evidence for the Trial Chamber to conclude that the Appellant ordered the defence of Vitez with the awareness of the substantial likelihood that hostages would be taken. The Trial Chamber's finding that the Appellant was on notice that HVO troops were likely to take hostages in order to defend Vitez, or that the Appellant was aware of the threats made by others in that regard, is not supported by the trial evidence. The Appeals Chamber finds that this evidence does not prove beyond reasonable doubt that he was aware of a substantial likelihood that crimes would be committed in the execution of his orders. The findings of the Trial Chamber with respect to hostage-taking are overturned. In light of these conclusions, the Appeals Chamber declines to consider the argument as to the credibility of the single witness, and grants this ground of appeal. The Appellant's convictions for Counts 17 and 18 are reversed.

C. Counts 19 and 20: Human Shields

647. The Trial Chamber found that the Appellant ordered the use of detainees as human shields to protect the headquarters of the Appellant at the Hotel Vitez on 20 April 1993. The Appeals Chamber notes that no finding was made under Article 7(3) of the Statute in relation to this count, and it will not consider this mode of responsibility in that respect.
648. The Trial Chamber also found that detainees were used as human shields in January or February 1993 to prevent the ABiH from firing on HVO positions.

As regards the use of detainees as human shields in January or February 1993, however, the Trial Chamber did not make a finding establishing the Appellant's criminal responsibility, and the Appeals Chamber therefore does not consider it any further. As regards the use of human shields on 19 and 20 April 1993, on the other hand, the Trial Chamber found that the Prosecution did not prove beyond reasonable doubt that the detainees at Dubravica school and the Vitez Cultural Centre (excluding the Hotel Vitez) were used as protection against attack. The Trial Judgement entered no conviction for crimes committed against detainees in those particular locations, and the Appeals Chamber is barred from considering these allegations any further in the absence of an appeal from the Prosecution.

649. The Trial Chamber did, however, find that on 20 April 1993, the villagers of Gacice were used as human shields to protect the HVO headquarters in the Hotel Vitez, which "inflicted considerable mental suffering upon the persons involved." In convicting the Appellant on Counts 19 and 20, the Trial Chamber's reasoning was the following: first, the detainees (numbering 247) were detained in front of the Appellant's headquarters for two and a half to three hours. Second, the Appellant was present in the building for a large part of the afternoon. Third, the ABiH on 20 April 1993 began an offensive of which the Appellant was aware. The Trial Chamber was "therefore convinced beyond all reasonable doubt that on 20 April 1993 General Blaskic ordered civilians from Gacice village to be used as human shields in order to protect his headquarters." [...]
652. The Appeals Chamber notes that Article 23 of Geneva Convention III provides as follows:

No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations.

It also considers that Article 28 of Geneva Convention IV provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." Article 83 of the same Convention provides that the 'Detaining Power' "shall not set up places of internment in areas particularly exposed to the dangers of war." Furthermore, Article 51 of Additional Protocol I, relating to the protection of the civilian population in international armed conflicts, provides as follows:

[T]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

653. The use of prisoners of war or civilian detainees as human shields is therefore prohibited by the provisions of the Geneva Conventions, and it may constitute inhuman or cruel treatment under Articles 2 and 3 of the Statute respectively where the other elements of these crimes are met.

654. The Trial Chamber convicted the Appellant for ordering the use of detainees as human shields. This finding is partly premised upon the alleged shelling of the Hotel Vitez and the need to protect the HVO headquarters from that shelling. There is also evidence of ABiH shelling of that location in the days before as well as on 20 April 1993. While there is evidence to suggest that the shelling on 20 April was not as heavy as it had been over the preceding days, a factual finding that the Hotel Vitez was actually being shelled at all on 20 April is not required in order to establish that detainees were unlawfully being used as human shields in anticipation of such shelling, contrary to the submission of the Appellant. Using protected detainees as human shields constitutes a violation of the provisions of the Geneva Conventions regardless of whether those human shields were actually attacked or harmed. Indeed, the prohibition is designed to protect detainees from being exposed to the risk of harm, and not only to the harm itself. To the extent that the Trial Chamber considered the intensity of the shelling of Vitez on 20 April 1993, that consideration was superfluous to an analysis of a breach of the provisions of the Geneva Conventions, but may be relevant to whether the use of the protected detainees as human shields amounts to inhuman treatment for the purposes of Article 2 of the Statute. [...]
656. [...] Witness Hrustic testified [...] in response to the question as to whether her conclusion that she was used as a human shield was based on the statement made by the soldier, that she believed that she and the other detainees were gathered around the Hotel Vitez to be used as human shields:
- Let me tell you, the moment that we were brought there with the children and with the men, knowing that there were people dead in the village, knowing a little of what had happened to the other villages, and seeing the fires, the shelling and everything, and what the soldier said, 'you sit there for a time and let your people shell you now, because they have been shelling us so far', and knowing that the hotel was a military base for a long time before that day, we could have expected shelling. At this point in time, I believe that we were brought there as a human shield because there were not many Croatian soldiers in the hotel, and then we were taken back. At that moment, at that time, I did not care whether I would die there or somewhere else. [...]
658. In determining whether the Appellant ordered the use of human shields, the Appeals Chamber has accepted the detainees were detained in front of the Hotel Vitez (which had been shelled in the preceding days) for up to three hours. However, the presence of the Appellant in the Hotel Vitez for a large part of the afternoon is of limited value as circumstantial evidence. It remains for the Appeals Chamber to consider whether or not the findings of the Trial Chamber were such that they could have been made by a reasonable trier of fact.
659. The Appeals Chamber holds that the reasoning of the Trial Chamber in finding the Appellant responsible for ordering the use of civilian detainees as human shields is flawed, although it does not undermine the conviction. The Trial Chamber had no evidence before it suggesting that the Appellant ordered that detainees be used as human shields. Instead, the Trial Chamber inferred that the Appellant had actually ordered that civilians from Gacice village be used as human shields

because the installations allegedly being protected by the detainees' presence contained his headquarters, and because of his proximity to that location. A factual conclusion that detainees were used as human shields on a particular occasion (which is one that a reasonable trier of fact could have made) does not lead to the inference that the Appellant positively ordered that to be done.

660. A conviction under Article 7(1) is not, however, limited to the positive act of ordering. The Appeals Chamber notes that the Appellant was indicted by the Second Amended Indictment for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful and inhumane treatment of Bosnian Muslims. The Second Amended Indictment therefore fairly charges the Appellant with other forms of participation under Article 7(1) of the Statute in addition to the positive act of ordering. In particular, criminal responsibility for an omission pursuant to Article 7(1) of the Statute is expressly envisaged by the Second Amended Indictment. [...]
662. In the absence of evidence that the Appellant positively ordered the use of detainees as human shields to protect the Hotel Vitez, and in light of the foregoing analysis of the Second Amended Indictment, the Appeals Chamber will now consider whether the Appellant's criminal responsibility for endorsing the use of human shields is better expressed as an omission.
663. Although criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement, as is demonstrated by the responsibility of a commander who fails to punish a subordinate even though the commander himself did not act positively (i.e. under the doctrine of command responsibility). There is a further exception to the general rule requiring a positive act: perpetration of a crime by omission pursuant to Article 7(1), whereby a legal duty is imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates. Wilful failure to discharge such a duty may incur criminal responsibility pursuant to Article 7(1) of the Statute in the absence of a positive act.
664. The distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute. [...]
666. In order to be responsible for the omission under Article 2, the Appellant must have been aware of the use of the detainees as human shields. The Trial Chamber concluded that the Appellant knew that the detainees were outside his headquarters, and were being used as human shields. In arriving at this conclusion, the Trial Chamber relied on evidence that Vitez and the Hotel Vitez were shelled around 20 April 1993; that on 20 April 1993, 247 Muslim men, women and children from the village of Gacice were directed to a place in front of the Hotel Vitez following an HVO attack on their village, that the men were led off elsewhere, that one of the soldiers said to some of them that they were to sit

and be shelled by ABiH forces, that the detainees were surveilled [*sic*] by soldiers inside the Hotel Vitez and that whoever moved would be shot, and that the detainees (excluding the men) were returned to the village after about two and a half to three hours. The Trial Chamber also accepted evidence that there were many HVO soldiers in and around the Hotel Vitez, which had a glass façade, and that one of the HVO soldiers told one of the detainees in front of the Hotel Vitez that he would go and tell the ‘commander’; and that the officer responsible for operations under the Appellant implicitly admitted that the detainees were put in danger. Despite his presence in his headquarters in the Hotel Vitez for a large part of the afternoon, the Appellant claimed that he knew nothing of it. The Appeals Chamber concludes that the Trial Chamber’s finding that the Appellant knew of the use of the detainees as human shields is one that a reasonable trier of fact could have made. [...]

670. The Appeals Chamber concludes that the Appellant’s conviction for the use of human shields under Counts 19 and 20 was correct in substance. However, in the absence of proof that he positively ordered the use of human shields, the Appellant’s criminal responsibility is properly expressed as an omission pursuant to Article 7(1) as charged in the Second Amended Indictment. The Appeals Chamber accordingly finds that the elements constituting the crime of inhuman treatment have been met: there was an omission to care for protected persons which was deliberate and not accidental, caused serious mental harm, and constituted a serious attack on human dignity. The Appellant is accordingly guilty under Article 7(1) for the inhuman treatment of detainees occasioned by their use as human shields.
671. The Appeals Chamber has above considered the sole distinguishing element between Article 2 (inhuman treatment) and Article 3 (cruel treatment): that the former contains the protected person status of the victim as an element not present in the latter. Also considered above is the definition of “protected person” provided by Article 4 of Geneva Convention IV and how it has been extended to the apply to bonds of ethnicity. The Appeals Chamber considers that the Bosnian Muslim detainees used as human shields were protected persons for the purposes of this distinction. A conviction for cruel treatment under Article 3 does not require proof of a fact not required by Article 2; hence the Article 3 conviction under Count 20 must be dismissed. [...]

XIII. DISPOSITION

For the foregoing reasons, THE APPEALS CHAMBER [...]

SENTENCES the Appellant to 9 (nine) years imprisonment to run as of this day [...].

DISCUSSION

I. Grave breaches of the Geneva Conventions

(*Trial Chamber, paras 127-158*)

1. a. Who is a “protected person” under Convention IV? Which civilians are not “protected civilians” (GC IV, Arts 4 and 147)
- b. Does the Chamber respect the terms of Art. 4 of Convention IV when it replaces the nationality criterion with that of ethnicity for “determining loyalties or commitments” (*Trial Chamber, para. 128*), thereby determining the status of protected persons?
- c. (*Trial Chamber, paras 134-146*) In the specific context of the former Yugoslavia, is it preferable to look for the “purpose and goal of the Convention” instead of applying it literally, and is this in the interest of the victims? Would it have been in line with the purpose and goal of Art. 4 to consider Bosnian Muslims as not having the status of protected persons during attacks led by the HVO, since Bosnia-Herzegovina and Croatia were fighting against a common enemy? Is the ICTY’s interpretation compatible with the principle of *nullum crimen sine lege*?
- d. Does the allegiance criterion, taken as the determining factor, apply only to the former Yugoslavia? Only to inter-ethnic conflicts? To all international conflicts?
- e. For the belligerents and humanitarian actors who need to apply international humanitarian law (IHL), is it easier and more practical to apply the criterion of allegiance or that of nationality? If you were a civilian detainee, would you state to the detaining power your lack of allegiance to it in order to obtain the treatment prescribed for protected persons?
2. What are the laws and customs of war? What is the difference between violations of these (ICTY Statute, Art. 3) and grave breaches (ICTY Statute, Art. 2)?
3. a. (*Trial Chamber, para. 152*) Must an act be intentional for it to be a grave breach, or is negligence sufficient? According to the Conventions and Protocol I? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85(1)) According to the Statute of the ICTY [See **Case No. 210**, UN, Statute of the ICTY [Part C.]]? According to the Statute of the ICC? (ICC Statute, Art. 30 [See **Case No. 23**, The International Criminal Court])
- b. Is recklessness or serious criminal negligence sufficient for the commission of all the breaches set out in paras 151 to 158 of the Trial Chamber judgement? Even for wilful killing?

II. Violations of the laws and customs of war

(*Trial Chamber, paras 179-187*)

4. a. (*Trial Chamber, para. 179*) Must an act be intentional to constitute a violation of the laws or customs of war within the meaning of Art. 3 of the ICTY Statute? A war crime under Art. 8(2)(b) of the ICC Statute? (ICC Statute, Art. 30 [See **Case No. 23**, The International Criminal Court])
- b. Is recklessness or serious criminal negligence sufficient for the commission of all the breaches set out in paras 180 to 187 of the Trial Chamber judgement? Even for murder?
5. (*Trial Chamber, paras 152 and 179*) Is “recklessness” a form of intent or negligence within the meaning of civil law (Romano-Germanic) legal systems?

III. Crimes against humanity

6.
 - a. (*Trial Chamber, paras 66-72*) Which elements constitute a crime against humanity? In customary international law? According to the terms of the ICTY Statute?
 - b. Is the existence of an armed conflict an element of the definition of a crime against humanity? Only in the case of the ICTY prosecuting the perpetrators of that crime? If a crime against humanity can be committed outside the context of an armed conflict, is it a violation of IHL? Of international human rights law?
 - c. (*Appeals Chamber, paras 105-116*) Is the concept of “civilian population” the same as an element of crimes against humanity and under IHL? Under IHL, is a member of armed forces or resistance movements a legitimate target while he or she is not directly participating in hostilities? If yes, when does the presence of such persons make a population lose its civilian character? Is the presumption of civilian status applicable in criminal trials?
 - d. (*Appeals Chamber, paras 121-128*) In which ways do the views of the Trial Chamber and the Appeals Chamber differ with regard to the *mens rea* necessary for a crime against humanity?
7. Classify the facts described in paragraphs 384 to 428 of the Trial Chamber judgement and paragraphs 574 to 671 of the Appeals Chamber judgement as either a grave breach (ICTY Statute, Art. 2), a violation of the laws and customs of war (ICTY Statute, Art. 3) or a crime against humanity (ICTY Statute Art. 5). Are all the described acts criminalized by the Statute? Could certain acts simultaneously constitute, for example, a grave breach and a crime against humanity?

IV. Attacks against the civilian population

8. If an attack causes civilian victims “the number of which may even exceed that of the hostile soldiers” (*Trial Chamber, para. 406*), would these victims be admissible “collateral casualties” or would the principles of proportionality and distinction be violated?
9. (*Trial Chamber, paras 402-410*) According to IHL, if no military objective justified the attack on the village of Ahmici, was it lawful to attack it? To occupy it? (P I, Art. 52(2))
10. (*Trial Chamber, para. 416*) Are attacks by flame launchers lawful under IHL? Are they incendiary weapons in the sense of Protocol III to the 1980 Conventional Weapons Convention? Were the States engaged in this conflict bound by that Protocol? If yes, would the use of flame launchers have been authorized against combatants? If, hypothetically, the use of this weapon was prohibited by IHL, would the ICTY have been able to punish the accused for using it? [See **Document No. 11**, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and **Document No. 14**, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)] Does it matter, in this case, whether flame launchers as such are prohibited, restricted or lawful?
11. If only the Muslims were massacred in the municipality of Vitez, and only the Muslim houses and mosques were destroyed, could it be a case of genocide? Even if “only” “twenty or so villages” were thus attacked (*Trial Chamber, para. 750*)? Is it possible to consider the “Muslim population” (*Trial Chamber, para. 425*) of Ahmici as a “national, ethnical, racial or religious group” (ICTY Statute, Art. 4)? May the Chamber’s discussion on the “ethnic background” (*Trial Chamber, para. 127*) of the victims, in the context of the definitions of protected persons, lead us to the conclusion that the victims all belong to the same “ethnic group”? What element is missing for there to be a crime of persecution?

V. Criminal responsibility

12. a. (*Appeals Chamber, paras 42-64*) What is necessary for a commander to be held responsible for acts committed by others? According to the Appeals Chamber, how should the mental element “had reason to know” be interpreted? May a standard of *mens rea* that is lower than direct intent apply in relation to ordering under Art. 7(1) of the ICTY Statute? To command responsibility under Art. 7(3) of the ICTY Statute?
- b. (*Appeals Chamber, paras 324-670*) When is a commander who orders forces to carry out a lawful operation, and who knows they may possibly be committing war crimes during that operation, responsible for those crimes: under Art. 7(1) of the ICTY Statute? Under Art. 7(3) of the ICTY Statute?
- c. (*Appeals Chamber, paras 647-670*) When may a commander, under Art. 7(1) of the ICTY Statute, be responsible by omission for a crime committed by subordinates? Where is the difference between responsibility in that case and under Art. 7(3) of the ICTY Statute?

Case No. 217, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic

[Source: ICTY, The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23 and IT-96-23/1, Appeals Chamber, Judgement, 12 June 2002; available on <http://www.icty.org>; footnotes partially reproduced.]

[N.B.: The Judgement rendered on 22 February 2001 by Trial Chamber II is available on <http://www.icty.org>]

[See also **Case No. 210**, UN, Statute of the ICTY]

IN THE APPEALS CHAMBER [...]**Judgement of:****12 June 2002****PROSECUTOR****v.****DRAGOLJUB KUNARAC****RADOMIR KOVAC****AND****ZORAN VUKOVIC****JUDGEMENT**

[...]

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

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

HEREBY RENDERS ITS JUDGEMENT. [...]

INTRODUCTION [...]**C. Findings of the Appeals Chamber****1. Convictions**

32. The Appeals Chamber finds that it is unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal set out [...]. Therefore, the Appeals Chamber dismisses the appeals of each of the Appellants on their convictions, as well as all common grounds of appeal.

2. Sentencing

33. [...] The Appeals Chamber rejects the other grounds of appeal against sentence of the Appellants Kunarac and Vukovic and all those of the Appellant Kovac, on the basis that the Trial Chamber came to reasonable conclusions and that no discernible errors have been identified. [...]

V. GROUNDS OF APPEAL RELATING TO THE TRIAL CHAMBER'S DEFINITION OF THE OFFENCES

A. Definition of the Crime of Enslavement (Dragoljub Kunarac and Radomir Kovac) [...]

2. Discussion

116. After a survey of various sources, the Trial Chamber concluded "that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person". [footnote 143: Trial Judgement, para. 539] It found that "the actus reus of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person", and the "*mens rea* of the violation consists in the intentional exercise of such powers". [footnote 144: *Ibid.*, para. 540]
117. The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention [available on <http://www.ohchr.org>] and often referred to as "chattel slavery", has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.
118. The Appeals Chamber will however observe that the law does not know of a "right of ownership over a person". [footnote 147: Trial Judgement, para. 539. See also Article 7(2)(c) of the Statute of the International Criminal Court, adopted in Rome on 17 July 1998 [See **Case No. 23**, The International Criminal Court [Part A.]]] Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred.
119. The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment,

psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour”. [footnote 148: Trial Judgement, para. 543. See also Trial Judgement, para. 542] Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand. In this respect, the Appeals Chamber would also like to refer to the finding of the Trial Chamber in paragraph 543 of the Trial Judgement stating:

The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the mere ability to do so is insufficient; such actions actually occurring could be a relevant factor.

However, this particular aspect of the Trial Chamber’s Judgement not having been the subject of argument, the Appeals Chamber does not consider it necessary to determine the point involved.

120. In these respects, the Appeals Chamber rejects the Appellants’ contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.
121. The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. [footnote 149: Judgement, para. 542] The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.
122. Lastly, as far as the *mens rea* of the crime of enslavement is concerned, the Appeals Chamber concurs with the Trial Chamber that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership. [footnote 150: *Ibid.*, para. 540] It is not required to prove that the accused intended to detain the victims

under constant control for a prolonged period of time in order to use them for sexual acts.

123. Aside from the foregoing, the Appeals Chamber considers it appropriate in the circumstances of this case to emphasise the citation by the Trial Chamber of the following excerpt from the Pohl case: [footnote 151: *US v Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10*, Vol 5, (1997), pp. 958-970]

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.

The passage speaks of slavery; it applies equally to enslavement.

124. For the foregoing reasons, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed. The Appellants' contentions are therefore rejected; the appeal relating to the definition of the crime of enslavement fails.

B. Definition of the Crime of Rape [...]

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, [footnote 156: Trial Judgement, paras 447-456] the Trial Chamber concluded:

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

[footnote 157: *Ibid.*, para. 460]

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape. [footnote 158: See, e.g., *Furundzija Trial* Judgement, para. 185 [available on <http://www.icty.org>] Prior attention has focused on force as the defining characteristic of rape. Under this line of reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. [footnote 159: Trial Judgement, para. 458] In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim". [footnote 160: *Ibid.*, para. 438] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.
130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the threat". [footnote 161: California Penal Code 1999, Title 9, Section 261(a)(6). [...]] While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.
131. Under the chapter entitled "Crimes Against Sexual Self-Determination," German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority. The absence of consent is not an element of the crime. Increasingly, the state and national laws of the United States – designed for circumstances far removed from war contexts – support this line of reasoning. [...]
132. For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.
133. In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible. The Appellants' grounds of appeal relating to the definition of the crime of rape therefore fail. [...]

VII. CUMULATIVE CONVICTIONS [...]

B. The Instant Convictions [...]

2. Intra-Article Convictions under Article 5 of the Statute

(a) *Rape and Torture*

179. The Appeals Chamber will now consider the Appellants' arguments regarding intra-Article convictions. The Appellants contend that the Trial Chamber erred by entering convictions for both torture under Article 5(f) and rape under Article 5(g) of the Statute on the theory that neither the law nor the facts can reasonably be interpreted to establish distinct crimes. The Trial Chamber found that the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible. [footnote 242: See Trial Judgement, para. 557] As its earlier discussion of the offences of rape and torture make clear, the Appeals Chamber agrees. The issue of cumulative convictions hinges on the definitions of distinct offences under the Statute which are amplified in the jurisprudence of the Tribunal. That torture and rape each contain a materially distinct element not contained by the other disposes of this ground of appeal. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime. [...]
181. In the *Celebici* Trial Judgement, the Trial Chamber considered the issue of torture through rape. [footnote 245: *Celebici* Trial Judgement, paras 475-496 [available on <http://www.icty.org>].] The Appeals Chamber overturned the Appellant's convictions under Article 3 of the Statute as improperly cumulative in relation to Article 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that torture may be committed through rape. And the United Nations Special Rapporteur on Torture listed forms of sexual assault as methods of torture. [footnote 246: *Ibid.*, para. 491, [...]]
182. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present. Summarising the international case-law, the Trial Chamber in the *Celebici* case concluded that "rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture". [footnote 247: *Celebici* Trial Judgement, para. 489] By way of illustration, the Trial Chamber discussed the facts of two central cases, *Fernando and Raquel Mejia v Peru* from the Inter-American Commission and *Aydin v Turkey* from the European Commission for Human Rights. [footnote 248: *Fernando and Raquel Mejia v Peru*, Case No. 10,970, Judgement of 1 March 1996, [...], *Inter-American Yearbook on Human Rights*, 1996, p. 1120 [available in *Annual Report 1995*, <http://www.cidh.org>] and *Aydin v Turkey*, Opinion of the European Commission of Human Rights, 7 March 1996, reprinted in *European Court of Human Rights*, ECHR 1997-VI, p. 1937, paras 186 and 189]

183. [...] [T]he Trial Chamber in the *Celebici* case observed that “one must not only look at the physical consequences, but also at the psychological and social consequences of the rape”. [footnote 251: *Celebici* Trial Judgement, para. 486] [...]
185. In the circumstances of this case, the Appeals Chamber finds the Appellants’ claim entirely unpersuasive. The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and coordinated commission of rapes was carried out with breathtaking impunity over a long period of time. Nor did the age of the victims provide any protection from such acts. (Indeed, the Trial Chamber considered the youth of several of the victims as aggravating factors.) Whether roused from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case, the Appeals Chamber finds that all the elements of rape and torture are met. The Appeals Chamber rejects, therefore, the appeal on this point.

(b) Rape and Enslavement

186. Equally meritless is the Appellants’ contention that Kunarac’s and Kovac’s convictions for enslavement under Article 5(c) and rape under Article 5(g) of the Statute are impermissibly cumulative. That the Appellants also forced their captives to endure rape as an especially odious form of their domestic servitude does not merge the two convictions. As the Appeals Chamber has previously explained in its discussion of enslavement, it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape. The Appeals Chamber, therefore, rejects this ground of appeal.

3. Article 3 of the Statute [...]

(b) Intra-Article Convictions under Article 3 of the Statute [...]

194. Article 3 of the Statute, as the Appeals Chamber has previously observed, also prohibits other serious violations of customary international law. The Appeals Chamber in the *Tadic* Jurisdiction Decision outlined four requirements to trigger Article 3 of the Statute [See Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 94]]:

(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature...; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values ..; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]

[R]ape is a “serious” war crime under customary international law entailing “individual criminal responsibility,” [...].

195. In keeping with the jurisprudence of the Tribunal, the Appeals Chamber concludes that rape meets these requirements and, therefore, constitutes a recognised war crime under customary international law, which is punishable under Article 3 of the Statute. The universal criminalisation of rape in domestic jurisdictions, the explicit prohibitions contained in the fourth Geneva Convention and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights, all lead inexorably to this conclusion. [...]

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC) [...]

B. Convictions under Counts 1 to 4

1. Rapes of FWS-75 and D.B.

(a) Submissions of the Parties

(i) The Appellant (Kunarac) [...]

211. [...] [T]he Appellant argues that the Trial Chamber erred in finding that he possessed the requisite *mens rea* in relation to the rape of D.B.. The Appellant concedes that he had sexual intercourse with D.B. but denies being aware that D.B.'s consent was vitiated because of Gaga's threats, and stresses that D.B. initiated the sexual contact with him and not vice versa, because, until that moment, he had no interest in having sexual intercourse with her. Further, the Appellant alleges that the Trial Chamber erred in reaching the conclusion that he had committed the crimes with a discriminatory intent solely on the basis of the testimony of a single witness stating that, when he raped women, the Appellant told them that they would give birth to Serb babies or that they should "enjoy being fucked by a Serb".

(ii) The Respondent [...]

214. [...] [T]he Respondent recalls FWS-183's testimony that while a soldier was raping her after she had just been raped by the Appellant, "... he – Zaga (the Appellant) – was saying that I would have a son and that I would not know whose it was, but the most important thing was it would be a Serb child". The Respondent submits that the evidence provides a firm basis for the Trial Chamber's finding that the Appellant committed crimes for a discriminatory purpose.

(b) Discussion [...]

218. [...] [T]he Trial Chamber correctly inferred that the Appellant had a discriminatory intent on the basis, *inter alia*, of the evidence of FWS-183 regarding comments made by the Appellant during the rapes in which he was involved. [...] The special circumstances and the ethnic selection of victims support the Trial Chamber's conclusions. For these reasons, this part of the grounds of appeal must fail. [...]

E. Convictions under Counts 18 to 20 – Rapes and Enslavement of FWS-186 and FWS-191

1. Submissions of the Parties

(a) *The Appellant (Kunarac)* [...]

251. The Appellant denies that FWS-191 was his personal property. He stresses that FWS-191 stated at trial that the Appellant protected her from being raped by a drunken soldier who had offered money to be with her. Furthermore, the Appellant contends that he did not have any role in keeping FWS -191 at the house in Trnovace because that house was the property of DP 6. He states that FWS-191 had asked DP 6 if she could stay in the house and that DP 6 had offered her security, explaining that if they left the house she and FWS-186 “would be raped by others”.

(b) *The Respondent* [...]

253. As to the crime of enslavement, the Prosecutor argues that the Trial Chamber identified a comprehensive range of acts and omissions demonstrating the Appellant’s exercise of the rights of ownership over FWS-186, thus satisfying the criteria of enslavement. [...] In the view of the Prosecutor, there is no contradiction in the finding of the Trial Chamber that the Appellant forbade other men to rape FWS-191. Rather, it submits, this fact indicates a level of control and ownership consistent with the crime of enslavement.

2. Discussion [...]

255. Lastly, as to the crime of enslavement, the Trial Chamber found that the women at Trnovace “were not free to go where they wanted to even if, as FWS-191 admitted, they were given the keys to the house at some point”. [footnote 337: Trial Judgement, para. 740] In coming to this finding, the Trial Chamber accepted that “... the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub Kunarac and DP 6, even if they had attempted to leave the house...”. [footnote 338: *Ibid.*] The Appeals Chamber considers that, in light of the circumstances of the case at bar in which Serb soldiers had exclusive control over the municipality of Foca and its inhabitants, and of the consistent testimony of the victims, the findings of the Trial Chamber are entirely reasonable. For the foregoing reasons, this ground of appeal fails.

F. Conclusion

For the foregoing reasons, the appeal of the Appellant Kunarac on factual findings is dismissed.

IX. ALLEGED ERRORS OF FACT (RADOMIR KOVAC) [...]

B. Conditions in Radomir Kovac's Apartment

1. Submissions of the Parties

(a) *The Appellant (Kovac)*

261. The Appellant contends that the Trial Chamber erred in not evaluating the evidence as to the *manner* in which, whilst at his apartment, FWS-75, FWS-87, A.S. and A.B. were allegedly subjected to rape and degrading and humiliating treatment, and, at times, slapped and exposed to threats. [...] He also contends that it was not, as the Trial Chamber has found, proved beyond reasonable doubt that he completely ignored the girls' diet and hygiene and that they were sometimes left without food. He maintains that the girls had access to the whole apartment, that they could watch television and videos, that they could cook and eat together with him and Jagos Kostic, and that they went to cafés in town.

(b) *The Respondent*

262. The Respondent argues that it was open to the Trial Chamber, on the basis of the evidence presented at trial, to conclude that FWS-75, FWS-87, A.S. and A.B. were detained in the Appellant's apartment and subjected to assault and rape. [...]

2. Discussion

263. The Appeals Chamber notes that the Trial Chamber discussed what the Appellant stated in his defence at trial. [footnote 362: Trial Judgement, paras 151-157] Further, the Trial Chamber discussed at length the conditions in the Appellant's apartment, [footnote 363: *Ibid.*, paras 750-752] with reference to the specific abuses suffered by the victims. [footnote 364: *Ibid.*, paras 757-759, 761-765 and 772-773] The proof accepted by the Trial Chamber describes in detail the manner in which the lives of the victims unfolded in the Appellant's apartment and in which physically humiliating treatment was meted out to them. The Appeals Chamber considers that the relevant findings of the Trial Chamber were carefully considered and that the correct conclusions were drawn in the Trial Judgement. The ground of appeal is obviously ill-founded and is therefore dismissed. [...]

H. Conclusion

290. For the foregoing reasons, the appeal of the Appellant Kovac on factual findings is dismissed. [...]

XII. DISPOSITION

For the foregoing reasons:

A. The Appeals of Dragoljub Kunarac against Convictions and Sentence**1. Convictions**

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his convictions. [...]

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his sentence; [...]

Accordingly, the Appeals Chamber AFFIRMS the sentence of 28 years' imprisonment as imposed by the Trial Chamber.

B. The Appeals of Radomir Kovac against Convictions and Sentence**1. Convictions**

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kovac against his convictions. [...]

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kovac against his sentence; [...]

Accordingly, the Appeals Chamber AFFIRMS the sentence of 20 years' imprisonment as imposed by the Trial Chamber [...]

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

DISCUSSION

1. According to customary international law, is enslavement a crime against humanity? According to customary international humanitarian law (IHL)? Has this crime been codified in instruments other than the statutes of the ICTY and the International Criminal Court (ICC)? (Art. 6(c) of the Statute of the Nuremberg Military Tribunal [available at www.icrc.org]; Art. 5(c) of the ICTY Statute [See **Case No. 210**, UN, Statute of the ICTY]; Arts 7(1)(c) and 7 (2)(c) of the ICC Statute [See **Case No. 23**, The International Criminal Court])
2.
 - a. Is the ban on slavery more a question of international human rights law? (Art. 8(1) of the International Covenant on Civil and Political Rights [available at <http://www.ohchr.org>]) Is it a non-derogable human right?
 - b. Does IHL address slavery as such? (P I, Art. 4(2)(f))
 - c. Does the fact that only Protocol II explicitly bans slavery mean that it remains legal during international armed conflicts? Or does Protocol II only act as a reminder that slavery "remain[s] prohibited at any time and in any place whatsoever"? (P II, Art. 4(2))

3. During international armed conflicts, is rape committed by one of the belligerents outlawed by IHL? By IHL applicable to non-international armed conflicts? (GC I-IV, Art. 3; GC I-IV, Arts 50/51/130/147 respectively; GC IV, Art. 27(2); P I, Art. 76(1); P II, Art. 4(2)(e))
4. Is rape a war crime? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85) Is it also a crime against humanity? Was the inclusion of rape as a crime against humanity in the Statutes of the ICTY and the ICTR an innovation? Today, with regard to international case-law and the ICC Statute, may this development of IHL be seen as having a customary component? (Art. 5(g) of the ICTY Statute [*See Case No. 210*, UN, Statute of the ICTY]; Art. 3(g) of the ICTR Statute [*See Case No. 230*, UN, Statute of the ICTR]; Art. 7(1)(g) of the ICC Statute [*See Case No. 23*, The International Criminal Court; *See also Case No. 234*, ICTR, The Prosecutor v. Jean-Paul Akayesu]) Can rape only be considered as a crime against humanity if conditions specific to crimes against humanity are fulfilled? Which ones? If these conditions are not fulfilled, is it then a war crime?

Case No. 218, ICTY, The Prosecutor v. Galić**A. Trial Chamber, Judgement and Opinion**

[Source: ICTY, Prosecutor v. Stanislav Galić, Judgement and opinion, Trial Chamber, 5 December 2003; IT-98-29-T; available on www.icty.org. Footnotes partially omitted]

IN TRIAL CHAMBER I**Judgement of:****5 December 2003****PROSECUTOR****v.****STANISLAV GALIĆ****JUDGEMENT AND OPINION****I. INTRODUCTION**

1. Trial Chamber I of the International Tribunal (the “Trial Chamber”) is seized of a case which concerns events surrounding the military encirclement of the city of Sarajevo in 1992 by Bosnian Serb forces. [...]
3. In the course of the three and a half years of the armed conflict in and around Sarajevo, [...] Major-General Stanislav Galić, [...] was the commander for the longest period, almost two years, from around 10 September 1992 to 10 August 1994. The Prosecution alleges that over this period he conducted a protracted campaign of sniping and shelling against civilians in Sarajevo. [...]

II. APPLICABLE LAW [...]**1. Prerequisites of Article 3 of the Statute [...]**

11. According to the [...] Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions (“the *Tadić* conditions”) must be satisfied: [See **Case No. 211**, ICTY, The Prosecutor v. Tadić [Part A.]]
 - (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 must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. [...]

12. The Indictment charges the Accused with violations of the laws or customs of war under Article 3 of the Statute, namely with one count of “unlawfully inflicting terror upon civilians” (Count 1) and with two counts of “attacks on civilians” (Counts 4 and 7) pursuant to Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949. These offences are not expressly listed in Article 3 of the Statute. Starting with the crime of attack on civilians, the Trial Chamber will determine whether the offence can be brought under Article 3 of the Statute by verifying that the four *Tadić* conditions are met. The Trial Chamber will also inquire into the material and mental elements of the offence. It will then repeat this exercise for the crime of terror.

2. Attack on Civilians as a Violation of the Laws or Customs of War [...]

(b) First and Second *Tadić* Conditions

16. Counts 4 and 7 of the Indictment are clearly based on rules of international humanitarian law, namely Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. Both provide, in relevant part, that: “The civilian population as such, as well as individual civilians, shall not be made the object of attack.” The first *Tadić* condition, that the violation must constitute an infringement of a rule of international humanitarian law, is thus fulfilled.
17. As for the second *Tadić* condition, that the rule must be customary in nature or, if it belongs to treaty law, that the required conditions must be met, the Prosecution claims that the parties to the conflict were bound by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II as a matter of both treaty law and customary law. [...]
19. The jurisprudence of the Tribunal has already established that the principle of protection of civilians has evolved into a principle of customary international law applicable to all armed conflicts. Accordingly, the prohibition of attack on civilians embodied in the above-mentioned provisions reflects customary international law.
20. Moreover, as explained below, the same principle had also been brought into force by the parties by convention. [...]
22. The Trial Chamber does not deem it necessary to decide on the qualification of the conflict in and around Sarajevo. It notes that the warring parties entered into several agreements under the auspices of the ICRC. The first of these was the 22 May Agreement, [See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] by which the parties undertook to protect the civilian population from the effects of hostilities and to respect the principle prohibiting attacks against the civilian population. With regard to the conduct of hostilities, they agreed to bring into force, *inter alia*, Articles 35 to 42 and 48 to 58 of Additional Protocol I. [...]

(c) Third Tadić Condition [...]

27. The act of making the civilian population or individual civilians the object of attack [...], resulting in death or injury to civilians, transgresses a core principle of international humanitarian law and constitutes without doubt a serious violation of the rule contained in the relevant part of Article 51(2) of Additional Protocol I. It would even qualify as a grave breach of Additional Protocol I. It has grave consequences for its victims. The Trial Chamber is therefore satisfied that the third *Tadić* condition is fulfilled.

(d) Fourth Tadić Condition

28. In accordance with the fourth *Tadić* condition, a violation of the rule under examination must incur, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
29. The Appeals Chamber has found 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.” [See Case No. 211, ICTY, The Prosecutor v. Tadić, [Part A., para. 184]] It has further expressly recognized that customary international law establishes that a violation of the principle prohibiting attacks on civilians entails individual criminal responsibility. [See Case No. 219, ICTY, The Prosecutor v. Strugar [Part A., para. 10]]
30. It should be noted that the intention of the States parties to Additional Protocol I to criminalize violations of Article 51(2) of Additional Protocol I is evidenced by the fact, mentioned above, that an attack on civilians is considered a grave breach of the Protocol, as defined by Article 85(3)(a) therein. The Trial Chamber has also noted that the “Programme of Action on Humanitarian Issues” [i.e. identical unilateral declarations signed by the parties at a conference held in London on 27 August 1992] recognized that those who committed or ordered the commission of grave breaches were to be held individually responsible.
31. Moreover, national criminal codes have incorporated as a war crime the violation of the principle of civilian immunity from attack. This war crime was punishable under Article 142 of the 1990 Penal Code of the Socialist Federal Republic of Yugoslavia. In the Republic of Bosnia-Herzegovina it was made punishable by a decree-law of 11 April 1992. National military manuals also consistently sanction violations of the principle. [...]

(e) Material and Mental Elements [...]

(ii) Discussion [...]

42. [...] In the Blaskić case [See Case No. 216, ICTY, The Prosecutor v. Blaskić] the Trial Chamber observed in relation to the *actus reus* that “the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. [...] Targeting civilians or civilian property is an offence when not justified

by military necessity." On the *mens rea* it found that "such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". [...]

44. The Trial Chamber does not however subscribe to the view that the prohibited conduct set out in the first part of Article 51(2) of Additional Protocol I is adequately described as "targeting civilians when not justified by military necessity". This provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity. [...]
47. [...] According to Article 50 of Additional Protocol I, "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I." For the purpose of the protection of victims of armed conflict, the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict. It is a matter of evidence in each particular case to determine whether an individual has the status of civilian.
48. The protection from attack afforded to individual civilians by Article 51 of Additional Protocol I is suspended when and for such time as they directly participate in hostilities. To take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel or *matériel* of the enemy armed forces. [...]
50. The presence of individual combatants within the population does not change its civilian character. In order to promote the protection of civilians, combatants are under the obligation to distinguish themselves at all times from the civilian population; the generally accepted practice is that they do so by wearing uniforms, or at least a distinctive sign, and by carrying their weapons openly. In certain situations it may be difficult to ascertain the status of particular persons in the population. The clothing, activity, age, or sex of a person are among the factors which may be considered in deciding whether he or she is a civilian. A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status. The Commentary to Additional Protocol I explains that the presumption of civilian status concerns "persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked". The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant.
51. As mentioned above, in accordance with the principles of distinction and protection of the civilian population, only military objectives may be lawfully

attacked. A widely accepted definition of military objectives is given by Article 52 of Additional Protocol I [...].

53. In light of the discussion above, the Trial Chamber holds that the prohibited conduct set out in the first part of Article 51(2) is to direct an attack (as defined in Article 49 of Additional Protocol I) against the civilian population and against individual civilians not taking part in hostilities.
54. The Trial Chamber will now consider the mental element of the offence of attack on civilians, when it results in death or serious injury to body or health. Article 85 of Additional Protocol I explains the intent required for the application of the first part of Article 51(2). It expressly qualifies as a grave breach the act of *wilfully* “making the civilian population or individual civilians the object of attack”. The Commentary to Article 85 of Additional Protocol I explains the term as follows:

wilfully: the accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.

The Trial Chamber accepts this explanation, according to which the notion of “*wilfully*” incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts “*wilfully*”.

55. For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.
56. In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:
1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
57. [...] [T]he Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians. It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I. This prohibition reflects a well-established rule of customary law applicable in all armed conflicts.

58. One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack. [...]
60. The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.
61. As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack. [...]

3. Terror against the Civilian Population as a Violation of the Laws or Customs of War [...]

(c) Discussion [...]

(i) Preliminary remarks

91. [...] In its interpretation of provisions of the Additional Protocols and of other treaties referred to below, the Majority will apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, namely that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." No word in a treaty will be presumed to be superfluous or to lack meaning or purpose.
92. The Majority also acknowledges the importance of the principle found in Article 15 of the 1966 International Covenant on Civil and Political Rights, which states, in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission

which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.”

93. The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means “that penal statutes must be strictly construed” and that the “paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.” [...]

(ii) *First and Second Tadić Conditions* [...]

96. Thus the first two *Tadić* conditions are met: Count 1 bases itself on an actual rule of international humanitarian law, namely the rule represented by the second part of the second paragraph of Article 51 of Additional Protocol I. As for the rule’s applicability in the period covered by the Indictment, the rule had been brought into effect at least by the 22 May Agreement, which not only incorporated the second part of 51(2) by reference, but repeated the very prohibition “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” in the agreement proper.

97. The Majority emphasizes that it is not required to pronounce on whether the rule in question is also customary in nature. As stated above, it belongs to “treaty law”. This is enough to fulfil the second *Tadić* condition as articulated by the Appeals Chamber. [...]

(iv) *Fourth Tadić Condition*

113. The Majority now comes to examine the fourth *Tadić* condition, namely whether a serious violation of the prohibition against terrorizing the civilian population entails, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. The issue here, in particular, is whether the intent to spread terror had already been criminalized by 1992. The Majority reiterates that it takes no position on whether a customary basis exists for a crime of terror as a violation of the laws or customs of war. Its discussion below amounts to a survey of statutory and conventional law relevant to the fulfilment of the fourth *Tadić* condition.
114. To the Majority’s knowledge, the first conviction for terror against a civilian population was delivered in July 1947 by a court-martial sitting in Makassar in the Netherlands East-Indies (N.E.I.). [...]
116. The list of war crimes in the aforementioned N.E.I. statute reproduced with minor changes a list of war crimes proposed in March 1919 by the so-called Commission on Responsibilities, a body created by the Preliminary Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies during the 1914-1918 war. [...] The Commission’s list of war crimes had

“Murders and massacres; systematic terrorism” of civilians as one item (the first in the list). [...]

118. Australia’s War Crimes Act of 1945 made reference to the work of the Commission on Responsibilities and included “systematic terrorism” in its category of war crimes.
119. The next relevant appearance of a prohibition against terror was in Article 33 of the 1949 Geneva Convention IV [...]. Purely by operation of Article 33, civilians in territory not occupied by the adversary are not protected against “measures of intimidation or of terrorism” which the adversary might decide to direct against them.
120. The most important subsequent development on the international stage was the unopposed emergence of Article 51(2) of Additional Protocol I (and of the identical provision in the second Protocol) [...]. [...]
121. The Majority now turns to consider a legislative development in the region relevant to this Indictment. [...]
124. The 22 May 1992 Agreement states in its section on “Implementation” that each party “undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to *punish those* responsible in accordance with the law in force.” Clearly the parties intended that serious violations of international humanitarian law would be prosecuted as criminal offences committed by individuals.
125. The developments reviewed so far demonstrate that, by the time the second part of 51(2) was added verbatim to the 22 May Agreement it already had a significant history of usage by direct or indirect reference in the region of the former Yugoslavia. [...]
128. The same conclusion is reached by another line of reasoning. [...] The Majority finds in Article 85’s [of Protocol I] universal acceptance in the Diplomatic Conference clear proof that certain violations of Article 51(2) of Additional Protocol I had been criminalized. [...]
129. Because the alleged violations would have been subject to penal sanction in 1992, both internationally and in the region of the former Yugoslavia including Bosnia-Herzegovina, the fourth *Tadić* condition is satisfied.
130. [...] The Majority expresses no view as to whether the Tribunal also has jurisdiction over other forms of violation of the rule, such as the form consisting only of threats of violence, or the form comprising acts of violence not causing death or injury. [...]
133. In conclusion, the crime of terror against the civilian population in the form charged in the Indictment is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.
134. The Majority rejects the Parties' submissions that actual infliction of terror is an element of the crime of terror. [...]
135. With respect to the "acts of violence", these do not include legitimate attacks against combatants but only unlawful attacks against civilians.
136. "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime.
137. [...] The Majority accepts the Prosecution's rendering of "terror" as "extreme fear". The *travaux préparatoires* of the Diplomatic Conference do not suggest a different meaning. [...]

C. Cumulative Charging and Convictions [...]

2. Cumulative Convictions [...]

158. According to the Appeals Chamber it is permissible to enter cumulative convictions under different statutory provisions to punish the same criminal acts if "each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not contained in the other." [footnote 270: Celebici Appeal Judgement, para. 412] If it is not the case that each statutory provision involved has a materially distinct element, a conviction should be entered only under the more specific provision, namely the one with the additional element. [footnote 271: Celebici Appeal Judgement, para. 413] [...]
162. Applying the aforementioned test, convictions for the crimes of terror and attack on civilians under Article 3 of the Statute based on the same conduct are not permissible. The legal elements are the same except that the crime of terror contains the distinct material element of "primary purpose of spreading terror." This makes it more specific than the crime of attack on civilians. Therefore, if all relevant elements were proved, a conviction should be entered for Count 1 only.

[...]

D. Theories of Responsibility under Article 7 of the Statute

165. The Indictment alleges that General Galić, as commander of the SRK (Sarajevo Romanija Corps), and pursuant to Article 7(1) of the Statute, bears individual criminal responsibility for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of the campaign of shelling and sniping against the civilian population of Sarajevo. The Accused is also alleged to bear individual criminal responsibility pursuant to Article 7(3) of the Statute for the conduct of his subordinates. [...]

1. Individual Responsibility under Article 7(1) of the Statute [...]

168. The Trial Chamber considers, briefly, the case-law of the International Tribunals which elaborates the elements of the various heads of individual criminal responsibility in Article 7(1) of the Statute. Considering them in the order in which they appear in the Statute, “planning” has been defined to mean that one or more persons designed the commission of a crime, at both the preparatory and execution phases, and the crime was actually committed within the framework of that design by others. “Instigating” means prompting another to commit an offence, which is actually committed. It is sufficient to demonstrate that the instigation was “a clear contributing factor to the conduct of other person(s)”. It is not necessary to demonstrate that the crime would not have occurred without the accused’s involvement. “Ordering” means a person in a position of authority using that authority to instruct another to commit an offence. The order does not need to be given in any particular form. “Committing” means that an “accused participated, physically or otherwise directly, in the material elements of a crime under the Tribunal’s Statute”. Thus, it “covers first and foremost the physical perpetration of a crime by the offender himself.” “Aiding and abetting” means rendering a substantial contribution to the commission of a crime. These forms of participation in a crime may be performed through positive acts or through culpable omission. It has been held in relation to “instigating” that omissions amount to instigation in circumstances where a commander has created an environment permissive of criminal behaviour by subordinates. The Defence contests the applicability of that case-law and considers that “in all the cases (under Article 7(1)) a person must undertake an action that would contribute to the commission of a crime”.
169. In the Majority’s opinion, a superior may be found responsible under Article 7(1) where the superior’s conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) (see further below) the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the

superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary. [...]

2. Article 7(3) of the Statute

173. The case-law of the International Tribunal establishes that the following three conditions must be met before a person can be held responsible for the criminal acts of another under Article 7(3) of the Statute: (1) a superior-subordinate relationship existed between the former and the latter; (2) the superior knew or had reason to know that the crime was about to be committed or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator. The Appeals Chamber has said that control must be effective for there to be a relevant relationship of superior to subordinate. Control is established if the commander had "the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." The Appeals Chamber emphasised that "in general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a Court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced."
174. In the absence of direct evidence of the superior's actual knowledge of the offences committed by his or her subordinates, this knowledge may be established through circumstantial evidence. [...] The Trial Chamber also takes into consideration the fact that the evidence required to prove such knowledge for a commander operating within a highly disciplined and formalized chain of command with established reporting and monitoring systems is not as high as for those persons exercising more informal types of authority.
175. In relation to the superior's "having reason to know" that subordinates were about to commit or had committed offences, "a showing that a superior had some general information in his possession which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he had 'reason to know'." [...] [P]ast behaviour of subordinates or a history of abuses might suggest the need to inquire further. [...]
177. Finally, in cases where concurrent application of Articles 7(1) and 7(3) is possible because the requirements of the latter form of responsibility are satisfied alongside those of the former, the Trial Chamber has the discretion to choose the head of responsibility most appropriate to describe the criminal responsibility of the accused.

III. FACTUAL AND LEGAL FINDINGS [...]

C. Was there a Campaign of Sniping and Shelling by SRK Forces against Civilians? [...]

208. The Majority wishes to clarify at this point its reasoning in moving from the level of specific scheduled incidents to the level of a general campaign. It would be implausible to claim that 24 sniping attacks and 5 shelling attacks amounted to a "campaign" [...]. The Majority makes no such claim. Spread out over a period of two years, the total of proved attacks, if any, could not in itself represent a convincing "widespread" or "systematic" manifestation of sniping and shelling of civilians. Therefore, the evidence which demonstrates whether the alleged scheduled incidents, if proved attacks, were not isolated incidents but representative of a campaign of sniping and shelling as alleged by the Prosecution is examined with no less due attention. [...]

1. General Evidence of Sniping and Shelling at Civilians in ABiH-held Areas of Sarajevo during the Indictment Period

210. The city of Sarajevo came under extensive gunfire and was heavily shelled during the Indictment Period. This is documented by UN reports, and other UN sources, which offer general assessments of the death or injury of Sarajevo civilians in the course of such attacks. [...]

211. The Defence submits however that the evidence suggests that the ABiH (Muslim Army of Bosnia-Herzegovina) carried out attacks against their own civilians to attract sympathy of the international community. The Prosecution accepts that the Trial Record discloses that elements sympathetic or belonging to the ABiH may have attacked the Muslim population of Sarajevo although it argues that this evidence was inconclusive. [...] [A] Canadian officer with the UNPROFOR (United Nations Protection Force) testified that it was "'common knowledge' that [investigations carried out by the United Nations] strongly pointed to the fact that the Muslim forces did, on occasion, shell their own civilians" though, "for political reasons," that information was not made public. [...] According to Michael Rose, the British general who commanded UNPROFOR forces in Bosnia-Herzegovina from January 1994 to January 1995, what "was certain is that the Bosnian government forces would, from time to time, fire at the Serbs, at particular moments of political importance, in order to draw back fire on to Sarajevo so that the Bosnian government could demonstrate the continuing plight of the people in Sarajevo".

212. On other occasions, UN sources also attributed civilian injuries and deaths to SRK actions, including deliberate targeting. According to General Francis Briquemont, who commanded UN forces in Bosnia-Herzegovina from 12 July 1993 to 24 January 1994, "There is no doubt that during the shelling" of Sarajevo by the SRK, "civilians were hit." [...]

215. John Ashton, who arrived in Sarajevo in July 1992 as a photographer, remembered that during his stay in Sarajevo, "The majority of things – the targets I saw were civilian targets. I saw a lot of people go out to water lines. These were targeted specifically. And I saw people try to cut down trees. I saw snipers actually shoot at people." Morten Hvaal, a Norwegian journalist covering the conflict from September 1992 to August 1994, witnessed civilians being shot at "more or less every day, if not every day" and estimated that he saw, or arrived within 30 minutes of, "50 to a hundred" instances where civilians were actually hit by small-arms fire. [...]
218. Ashton testified about fire-fighters targeted when tending fires started by shelling. [...]
219. Ambulances were also targeted. They were sometimes driven at night, without flashing their lights, and not on main roads to avoid being fired upon. Witness AD, an SRK soldier, testified that the Commander of the Ilijas Brigade gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries further north from the city, in Mrakovo.
220. Hvaal testified that during the Indictment Period he attended funerals several times a week and saw that the Bosnian Serb army would shell them. [...]
221. According to UN military personnel, trams were also deliberately targeted by Bosnian Serb forces. [...]
222. Civilians in ABiH-held areas of Sarajevo deferred even basic survival tasks to times of reduced visibility, such as foggy weather or night time, because they were targeted otherwise. [...]

2. Sniping and Shelling of Civilians in Urban ABiH-held Areas of Sarajevo

(a) General Grbavica Area [...]

(i) Scheduled Sniping Incident 5

247. Milada Halili and her husband Sabri Halili testified that on the morning of 27 June 1993, at around noon, they were walking with Almasa Konjhodzic, Milada's mother, to the PTT building. [...] Milada Halili, who was a bit ahead, ran across the intersection behind a barrier of containers which had been set up to protect against shooting from Grbavica. Frightened by the shot, Almasa Konjhodzic lost her balance and fell. Sabri Halili helped her to her feet and they continued. They had walked ten metres when Almasa Konjhodzic was struck by a bullet. Sabri Halili turned to see a pool of blood beneath his mother-in-law. The victim was taken to hospital where she died from the wound.
248. The Trial Chamber accepts the description of the incident as recounted by the witnesses and is satisfied that the victim was a civilian. The victim were [sic] wearing civilian clothes. Although Sabri Halili was a member of the ABiH, he was off-duty that day and was not dressed in uniform or carrying weapons. [...]

253. The Majority therefore finds that Almasa Konjhodzic, a civilian, was deliberately targeted and killed by a shot fired from SRK-controlled territory in Grbavica. [...]

(ii) *Scheduled Sniping Incident 6*

352. Sadiha Sahinovic testified that on 11 July 1993, at about 2 or 3pm, she went with her friend Munira Zametica to fetch water at the Dobrinja river. Sniping had gone on throughout the day. Sahinovic explained that she and Zametica found shelter with a group of 6, 7 persons in an area under the bridge where the river ran. They did not dare to approach the riverbank until Zametica overcame her hesitation and approached the riverbank. She was filling her bucket with water when she was shot. It was too dangerous for Sahinovic and for Vahida Zametica, the 16-year-old daughter of the victim who came to assist once alerted of the incident, to leave the protection of the bridge. The victim was lying face down in the river, blood coming out of her mouth. Vahida heard the shooting continue and saw the bullets hitting the water near her mother. ABiH soldiers passing by the bridge saw what had happened, positioned themselves on the bridge behind sandbags and shot into the direction of the Orthodox Church. The victim was pulled out of the water and taken to hospital; she died later that afternoon.
353. The Defence claims that the victim could not have been hit from "VRS" positions because the Dobrinja River or the victim could not be seen from there; the Defence argues that ABiH soldiers had fortified positions on the bridge, that combat was ongoing at the time the incident occurred and that the victim was hit by a stray bullet.
354. Sahinovic testified that the bullets directed at the victim originated from the Orthodox Church in Dobrinja. She, like the victim's daughter, indicated that shooting at the river always originated from the Orthodox Church. This is both consistent with the side of the bridge at which those who had come to fetch water had taken shelter as with the observations in respect of continuing fire which prevented those present from removing the victim from the riverbank. SRK firing positions on the tower of the Orthodox Church and nearby high-rise buildings were confirmed by several witnesses. [...]
355. The Trial Chamber also rejects the defence's claim that ABiH soldiers at that time held fortified positions on the bridge and that the victim was hit by a stray bullet fired during combat. Reliable testimony establishes that ABiH soldiers passed by after the event and only then opened return fire in the direction of the Orthodox Church. In the present case, the activity the victim was engaged in, the fact that civilians routinely fetched water at this location and her civilian clothing were indicia of the civilian status of the victim. At a distance of 1100 metres (as determined by Hinchcliffe), the perpetrator would have been able to observe the civilian appearance of Zametica, a 48-year-old civilian woman, if he was well equipped, or if no optical sight or binoculars had been available, the circumstances were such that disregarding the possibility that the victim was civilian was reckless. Furthermore, the perpetrator repeatedly shot toward the

victim preventing rescuers from approaching her. The Trial Chamber concludes that the perpetrator deliberately attacked the victim. The mere fact that at the distance of 1100 metres the chance of hitting a target deteriorates does not change this conclusion. The suggestion by the Defence that the cause of death should be doubted in the absence of specific forensic medical information is also rejected. The course of events sufficiently proves that Zametica's death was a consequence of direct fire opened on her.

356. The Trial Chamber finds that Munira Zametica, a civilian, was deliberately shot from SRK-held territory. [...]

(vi) *Scheduled Shelling Incident 1*

372. On 1 June 1993, some residents of Dobrinja decided to organize a football tournament in the community of Dobrinja IIB. It was a beautiful, sunny day. Being aware of the danger of organising such an event, the residents looked for a safe place to hold the tournament. The football pitch was set up in the corner of a parking lot, which was bounded by six-storey apartment blocks on three sides and on the fourth side, which faced the north, by Mojmiilo hill, and was not visible from any point on the SRK side of the confrontation line. Around 200 spectators, among whom were women and children, gathered to watch the teams play. [...]
373. The first match of the tournament began at around 9 am and the second one started an hour later. Some minutes after 10 am, during the second match, two shells exploded at the parking lot. Ismet Fazlic, a member of the civil defence, was the referee of the second game. [...]
376. [...] The Majority [...] finds that there is sufficient specific and credible evidence to conclude that it has been shown beyond reasonable doubt that the explosion of 1 June 1993 in Dobrinja killed over 10 persons and injured approximately 100 others.
377. The Defence submits that the shells were not deliberately fired by SRK forces upon civilians. [...]
387. [...] Had the SRK forces launched two shells into a residential neighbourhood at random, without taking feasible precautions to verify the target of the attack, they would have unlawfully shelled a civilian area. The Majority notes that there is no evidence on the Trial Record that suggests that the SRK was informed of the event taking place in the parking lot. However, had the SRK troops been informed of this gathering and of the presence of ABiH soldiers there, and had intended to target these soldiers, this attack would nevertheless be unlawful. Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated. In light of its finding regarding the source and direction of fire, and taking account of the evidence that the neighbourhood of Dobrinja, including the area of the parking

lot, was frequently shelled from SRK positions, the Majority finds that the first scheduled shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area. [...]

g) Stari Grad Area

[...]

(ii) Scheduled Shelling 5

a. Description of the Incident

438. Witnesses testified that on 5 February 1994, around noon, many people were shopping in the Markale open-air market, when a single explosion shook the area. [...] Residents and by-passers in the area [...] testified about hearing a loud explosion, which injured and killed a number of people present at the market. People present in the market transported victims of the blast to local hospitals, and the evacuation of the victims was completed by 12:40 hours.
439. Edin Suljic, on behalf of a local investigative team set up to investigate the incident, and Afzaal Niaz, on behalf of the UN, visited the hospitals and the morgue where the victims of the blast were taken. They each counted over 60 persons killed and over 140 persons injured. [...]

h. Conclusion on Deliberateness of the Attack

494. Evidence in the Trial Record establishes that a target, such as Markale market, can be hit from a great distance with one shot if the area is pre-recorded. Niaz testified that in the four months preceding the incident at Markale market, about 10 to 12 mortar shells fell around Markale market and that most of them were of a 120 mm calibre and originated from the direction north-northeast of Sedrenik. The UNMOs who wanted to investigate these attacks were not allowed access to the northeast area of the city controlled by the SRK. After the Markale incident, Hamill visited an SRK representative positioned in the northeastern area of the city, Colonel Cvetkovic, who confirmed to him that there were a number of 120 mm mortars in Mrkovici and along the estimated direction of fire to the north-northeast of Markale.
495. The Majority is convinced that the mortar shell which struck Markale was fired deliberately at the market. That market drew large numbers of people. There was no reason to consider the market area as a military objective. Evidence was presented in relation to the status of the "December 22" building located by the market, which manufactured uniforms for the police and the army. It is unclear whether manufacturing was still on-going at the time of the incident but in any case it is not reasonable to consider that the employees of such a manufacturing plant would be considered legitimate targets.
496. In sum, the Majority finds beyond reasonable doubt that the 120 mm mortar shell fired at Markale market on 5 February 1994, which killed over 60 persons and

wounded over 140 others, was deliberately fired from SRK-controlled territory. [...]

4. Pattern of Fire into ABiH-held Areas of Sarajevo

561. A general pattern of fire was noticed in Sarajevo during the Indictment Period. The evidence is that the shelling of the city was fierce in 1992 and 1993. Mole, Senior UNMO from September to December 1992, testified that throughout the three months he spent in Sarajevo, there was not a single day where there were no shell impacts in the city. There was continual background noise of small arms and mortars and artillery. [...] Tucker, a British officer who served as assistant to general Morillon from October 1992 to March 1993, added that “there was daily random shelling of various parts of the city. There was constant sniper fire and there were intense periods of small arms and artillery fire around the perimeter from time to time as attacks by one side or the other continued. It was a horrible situation”. [...]

5. Were Sniping and Shelling Attacks on Civilians in ABiH-held Areas of Sarajevo Committed with the Aim to Spread Terror?

564. The Prosecution alleges that the underlying reason for the “campaign” of sniping and shelling was that of terrorizing the civilian population of Sarajevo. [...]
566. Tucker explained that indeed “from about December 1992 onwards, the Bosnian Serb side wanted peace. They wanted an overall cease-fire in order to consolidate the territory of which they had taken control of.” The Bosnians, on the other hand, could not accept a cease-fire which “meant accepting the status quo.” Rose also said that it was true that “the forces commanded by General Galić wished not to have war, on the contrary, to have global cease-fire.” He added though, that the Bosnian Serb Army “was in the military ascendancy and that it was in their interest to halt the fighting at the moment, politically.” Rose added that the international community had some difficulties in accepting peace-plans: “There was certainly a desire amongst the international community not to reward the aggressor.” In re-examination, the witness repeated that “the Serbs could never be described as peace mongers. They were the aggressors. They had taken much of Sarajevo as well as Bosnia”.
567. That evidence is supported by other evidence in the Trial Record from a considerable number of UN military personnel that, as early as autumn 1992, sniping and shelling fire onto the city of Sarajevo from SRK-held territories was not justified by military necessity, but rather was aimed at terrorizing the civilian population in ABiH-held areas of Sarajevo. [...]
571. Witness Y, a member of the UNPROFOR posted in Sarajevo in the first part of 1993, explained that in his opinion “the objective they [SRK forces] pursued was to make every inhabitant in Sarajevo feel that nobody was sheltered or protected from [...] the shooting and that the shooting was not aimed at military objectives but rather to increase the helplessness of the population [...] and was

aimed at cracking them and to make them collapse, nervously speaking[.]”He reiterated the same comment with regard to sniping: “The idea was to exercise psychological pressure, and there we realised that the objectives were very specifically civilian ones.” [...]

573. General Van Baal, UNPROFOR Chief of Staff in Bosnia-Herzegovina in 1994, testified that sniping in Sarajevo was “without any discrimination, indiscriminately shooting defenceless citizens, women, children, who were unable to protect and defend themselves, at unexpected places and at unexpected times” and that this led him to conclude that its objective was to cause terror; he specified that women and children were the predominant target. A similar assessment was provided by Francis Briquemont, Commander of UN forces in BiH from July 1993 to January 1994, for whom “the objectives [of the campaign] were basically civilians in order to put pressure on the population”. He added that in a number of cases, either experienced by himself personally or by others, the SRK conducted what he called “quasi-sniping or playing at snipers,” a tactic of hitting a target with the aim of actually not neutralising it; this terrorised the population. [...]

6. Number of Civilians Killed or Injured in ABiH-controlled Parts of Sarajevo during the Indictment Period [...]

579. According to the TabEAU Report, the minimum number of persons killed within the confrontation line in Sarajevo during the Indictment Period was 3,798, of whom 1,399 were civilians. The minimum number of wounded for the same period was 12,919, including 5,093 civilians. [...]
581. The Trial Chamber considers that the main conclusions of the TabEAU Report are supported by other evidence in the Trial Record. [...]

7. Conclusion on whether there was a Campaign of Sniping and Shelling in Sarajevo by SRK Forces [...]

583. The Trial Chamber stated earlier that it understood the term “campaign” in the context of the Indictment to cover military actions in the area of Sarajevo involving widespread or systematic shelling and sniping of civilians resulting in civilian death or injury. The Majority believes that such a campaign existed for the reasons given below. [...]
593. In view of the evidence in the Trial Record it has accepted and weighed, the Majority finds that the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition. The attacks on civilians had no discernible significance in military terms. They occurred with greater frequency in some periods, but very clearly the message which they carried was that no Sarajevo civilian was safe anywhere, at any time of day or night. The evidence shows that the SRK attacked civilians, men and women, children and elderly in particular while engaged in typical civilian activities or where expected to be found, in a similar pattern of conduct throughout the city of Sarajevo. [...]

D. Legal Findings

1. Offences under Article 3 of the Statute

595. In the present instance, it is not disputed that a state of armed conflict existed between Bosnia-Herzegovina and its armed forces on the one hand, and the Republika Sprska and its armed forces, on the other. There is no doubt, from a reading of the factual part of this Judgement, that all the criminal acts described therein occurred not only within the framework of, but in close relation to, that conflict.
596. The Trial Chamber is satisfied beyond reasonable doubt that the crime of attack on civilians within the meaning of Article 3 of the Statute was committed against the civilian population of Sarajevo during the Indictment Period. In relation to the *actus reus* of that crime, the Trial Chamber finds that attacks by sniping and shelling on the civilian population and individual civilians not taking part in hostilities constitute acts of violence. These acts of violence resulted in death or serious injury to civilians. The Trial Chamber further finds that these acts were wilfully directed against civilians, that is, either deliberately against civilians or through recklessness.
597. The Majority is also satisfied that crime of terror within the meaning of Article 3 of the Statute was committed against the civilian population of Sarejevo during the Indictment Period. In relation to the *actus reus* of the crime of terror as examined above, the Trial Chamber has found that acts of violence were committed against the civilian population of Sarajevo during the Indictment Period. The Majority has also found that a campaign of sniping and shelling was conducted against the civilian population of ABiH-held areas of Sarajevo with the primary purpose of spreading terror.
- [...]

IV. CRIMINAL RESPONSIBILITY OF GENERAL GALIĆ

A. Introduction [...]

3. The Role of General Galić

609. There is no dispute between the parties that General Galić, as Corps commander, was in charge of continuing the planning and execution of the military encirclement of Sarajevo. At the time of General Galić's appointment as commander of the SRK, the military encirclement of Sarajevo was achieved. [...]
610. [...] The Prosecution submits in particular that after the Accused assumed command of the SRK in September 1992, there was no perceptible change in the campaign of sniping and shelling. According to the Prosecution, the Accused thus became the implementor of a pre-existing strategy and participated in both the legitimate military campaign against the ABiH and the unlawful attacks directed against the civilian population in Sarajevo. [...]

612. The Indictment alleges that General Galić is criminally responsible for his participation in the crimes pursuant to Article 7(1) of the Statute. [...] [T]he Prosecution [...] alleges that evidence concerning General Galić's knowledge of crimes committed in Sarajevo by forces under his command, the high degree of discipline he enjoyed from his subordinates and his failure to act upon knowledge of commission of crimes "establishes beyond reasonable doubt that the targeting of civilians was ordered by him". [...]

B. Was General Galić in Effective Command of the SRK Forces throughout the Relevant Period? [...]

2. Conclusions about the Effectiveness of the Command and Control of the Chain of Command

659. The Trial Chamber has no doubt that General Galić was an efficient and professional military officer. Upon his appointment, he finalised the composition and organisation of the SRK. General Galić gave the impression to his staff and to international personnel that he was in control of the situation in Sarajevo.

660. General Galić was present on the battlefield of Sarajevo throughout the Indictment Period, in close proximity to the confrontation lines, which remained relatively static, and he actively monitored the situation in Sarajevo. General Galić was perfectly cognisant of the situation in the battlefield of Sarajevo. The Trial Record demonstrates that the SRK reporting and monitoring systems were functioning normally. General Galić was in a good position to instruct and order his troops, in particular during the Corps briefings. Many witnesses called by the Defence gave evidence in relation to the fact that the orders went down the chain of command normally. They recalled in particular that orders were usually given in an oral form, the communication system of the SRK being good.

661. There is a plethora of evidence from many international military personnel that the SRK personnel was competent, and under that degree of control by the chain of command which typifies well-regulated armies. That personnel concluded that both sniping and shelling activity by the SRK was under strict control by the chain of command from observation of co-ordinated military attacks launched in the city of Sarajevo in a timely manner, of the speedy implementation of cease-fire agreements, of threats of attacks followed by effect, or of the type of weaponry used. The Trial Chamber is convinced that the SRK personnel was under normal military command and control.

662. On the basis of the Trial Record, the Trial Chamber is also satisfied beyond reasonable doubt that General Galić, as a Corps commander, had the material ability to prosecute and punish those who would go against his orders or had violated military discipline, or who had committed criminal acts.

663. The Trial Chamber finds that the Accused General Galić, commander of the Sarajevo Romanija Corps, had effective control, in his zone of responsibility, of the SRK troops. [...]

C. Did General Galić Know of the Crimes Proved at Trial? [...]**7. Conclusions about General Galić's Knowledge of Criminal Activity of the SRK**

700. Although it has found that the reporting and monitoring system of the SRK was good, the Trial Chamber cannot discount the possibility that General Galić was not aware of each and every crime that had been committed by the forces under his command. [...]
701. The Trial Chamber recalls however that the level of evidence to prove such knowledge is not as high for commanders operating within a highly disciplined and formalised chain of command as for those persons exercising more informal types of authorities, without organised structure with established reporting and monitoring systems. The Trial Chamber has found that the SRK's chain of command functioned properly. [...]
702. [...] First, there is a plethora of credible and reliable evidence that General Galić was informed personally that SRK forces were involved in criminal activity. The Accused's responses to formal complaints delivered to him form the backdrop of his knowledge that his subordinates were committing crimes, some of which are specifically alleged in the Indictment. Not only General Galić was informed personally about both unlawful sniping and unlawful shelling activity attributed to SRK forces against civilians in Sarajevo, but his subordinates were conversant with such activity. The Trial Chamber has no doubt that the Accused was subsequently informed by his subordinates. [...]
705. The Trial Chamber finds that General Galić, beyond reasonable doubt, was fully appraised of the unlawful sniping and shelling at civilians taking place in the city of Sarajevo and its surroundings. [...]

D. Did General Galić Take Reasonable Measures upon his Knowledge of Crime? [...]**2. Conclusions**

717. General Galić may have issued orders to abstain not to attack civilians [*sic*]. The Trial Chamber is concerned that, as examined in Part III of this Judgement, civilians in Sarajevo were nevertheless attacked from SRK-controlled territories. Although SRK officers were made aware of the situation on the field, acts of violence against civilians in Sarajevo continued over an extended period of time.
718. There is also some evidence that General Galić conveyed instructions to the effect of the respect of the 1949 Geneva Conventions. The testimonies of DP35 and DP14, both SRK officers, reveal however the extent of the lack of proper knowledge in relation to the protection of civilians. In particular, the statement from DP35, an SRK battalion commander, that a civilian must necessarily be 300 metres away from the confrontation line in order not to be shot at gives rise to concern. In an urban battlefield, it is almost impossible to guarantee that civilians will remain at least 300 meters away from a frontline. Witness DP34 also testified

that information about formal protests against unlawful sniping or shelling was never relayed to him. [...]

723. In view of the above, the Trial Chamber finds that the Accused did not take reasonable measures to prosecute and punish perpetrators of crimes against civilians. [...]

F. Conclusion: Does General Galić Incur Criminal Responsibility under Article 7(1) of the Statute?

730. This conclusion expresses the view of a majority of the Trial Chamber. Judge Nieto Navia dissents and expresses his view in the appended separate and dissenting opinion to this Judgement. [...]

2. Did General Galić Order the Commission of Crimes Proved at Trial? [...]

749. In sum, the evidence impels the conclusion that General Galić, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) failed to prevent the commission of crime and punish the perpetrators thereof upon that knowledge, furthered a campaign of unlawful acts of violence against civilians through orders relayed down the SRK chain of command and that he intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo. The Majority finds that General Galić is guilty of having ordered the crimes proved at trial. [...]

VI. DISPOSITION

769. FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, and having excluded from consideration those incidents which the Prosecution has failed to prove exemplary of the crimes charged in the Indictment, the Trial Chamber, Judge Nieto-Navia dissenting, makes the following disposition in accordance with the Statute and Rules:

Stanislav Galić is found GUILTY on the following counts, pursuant to Article 7(1) of the Statute of the Tribunal:

COUNT 1: Violations of the Laws or Customs of War (acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

[...]

The finding of guilt on count 1 has the consequence that the following counts are DISMISSED:

COUNT 4: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

COUNT 7: Violations of the Laws or Customs of War (attack on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) under Article 3 of the Statute of the Tribunal.

The Trial Chamber, by Majority, hereby SENTENCES Stanislav Galić to a single sentence of 20 (twenty) years of imprisonment. [...]

Done on the Fifth Day of December 2003 in English and French, the English text being authoritative.

At The Hague, The Netherlands

Judge Amin El Mahdi;

Judge Alphonse Orie Presiding;

Judge Rafael Nieto-Navia.

VII. SEPARATE AND PARTLY DISSENTING OPINION OF JUDGE NIETO-NAVIA [...]

A. Introduction [...]

2. I begin by reviewing facts of importance in understanding the context of the conflict in Sarajevo during the Indictment Period. I will then explain why I disagree with conclusions found in the Judgment regarding certain incidents involving civilians and why I conclude that the evidence does not establish that the SRK waged a campaign of purposefully targeting civilians throughout the Indictment Period. Finally, I will discuss the law applicable to this case and present my conclusions concerning the appropriate legal findings.

B. Preliminary remarks regarding the conflict in Sarajevo [...]

2. Available weapons

4. Both parties to the conflict took advantage of the chaotic conditions during the first months of 1992 to seize weapons such as pistols and mortars left behind in military barracks after the JNA (Yugoslav Peoples' Army) departed from the city. The evidence indicates that, prior to April 1992, there was a factory manufacturing optical sights for rifles in Sarajevo which may have continued to operate during the conflict. It appears that there had been specialised sniping units within the JNA and that both the ABiH and the SRK had taken possession of some of their special rifles. The Trial Record contains very little evidence though indicating that the SRK used these specialised weapons during the conflict. Furthermore, SRK soldiers appearing before the Trial Chamber explained that they were not aware of sniper units operating within the SRK and no evidence was tendered indicating that such weapons had been used in specific incidents during the Indictment Period. [...]

3. The role of UNMOs

5. The UN was present in Sarajevo during the conflict through UNPROFOR and UNMO (United Nations Military Observers) representatives. Although UNMOs were charged with monitoring military exchanges between both belligerents, they concentrated their surveillance in practice on the SRK by setting up a greater number of observation posts along the SRK confrontation line than within the city. It was difficult for the UNMOs to accomplish their task effectively since they were understaffed. Their mission was further complicated by the use made by the ABiH of mobile mortars. As a result, discrepancies between UNMO reports about observed military exchanges were relatively frequent. [...]

5. Living conditions within the city

7. The evidence indicates that the SRK permitted humanitarian aid and buses transporting civilians who wished to leave the city to pass through its checkpoints. Secure corridors, otherwise known as “blue roads,” were established to allow humanitarian convoys and civilians to enter the city. Inspectors were posted along these roads to check that humanitarian convoys were not used to smuggle military equipment. The evidence suggests though that some of these convoys, which were escorted by armoured personnel carriers belonging to the UNHCR, were misused to transport weapons and ammunition into the city.
8. Although Sarajevo was the focal point of an ongoing war, the Trial Record does not disclose that the population within the city suffered from widespread starvation or a generalized shortage of medicine. There were some problems with access to running water and electricity because of damage done by the fighting to power lines and water pipes. According to one UN representative, certain local BiH leaders delayed needed repairs of the utility networks in order to attract international sympathy. It appears though that in areas under the effective control of the BiH Presidency, utilities were repaired promptly. Furthermore, there is no evidence establishing that the SRK obstructed these repairs or wilfully interrupted the water or electric supply. On one occasion, the supply of electricity was interrupted for three months because both the ABiH and the SRK would not guarantee the safety of repair teams who needed access to power lines near the confrontation lines. The Trial Record also discloses that a number of civilians wishing to escape from the city and its living conditions were blocked by the ABiH in order to preserve the morale of troops.

6. The difficulty of waging war in the urban environment of Sarajevo

(a) Sizeable ABiH presence inside the city

9. The evidence reveals the difficulties faced by a commander in avoiding civilian casualties when waging a war in the urban context of Sarajevo. The ABiH had posted during the conflict approximately 45,000 troops inside the city, representing a sizeable minority of Sarajevo’s estimated 340,000 inhabitants. This dense military presence inside the city significantly increased the likelihood

of harming nearby civilians when attacking ABiH targets, particularly when available weapons such as mortars were used. As a UN representative explained, waging war under these circumstances is “a soldier’s worst nightmare.” Another UN representative concurred, testifying that “two parties are waging war (in the city) and both are using artillery and mortar. I think that it is impossible, with what I experienced there, to avoid certain civilian neighbourhoods.”

10. The SRK also encountered difficulties in distinguishing between military and civilian targets. ABiH troops inside the city were not always uniformed during the Indictment Period. Furthermore, attacks were launched against the SRK from mobile mortars positioned in civilian areas of Sarajevo and the ABiH sheltered military resources in civilian areas, including in civilian buildings and in the immediate vicinity of the Kosevo hospital in Sarajevo. It also made use of available vehicles in the city, including those belonging to civilians, to transport military assets without systematically identifying these trucks and cars as belonging to the military.

(b) *Attacks launched against the SRK from protected facilities*

11. The ABiH fired from within and from the immediate vicinity of civilian facilities. For example, mortars were fired from the grounds of the Kosevo hospital, whose medical supply line was also misused for the purpose of replenishing military stocks of gunpowder and fuses. Tank and mortar attacks were launched against the SRK from the immediate vicinity of the PTT building, which was occupied by UN personnel. The evidence also suggests that SRK positions may have been fired upon from schools, places of worship and cemeteries in the city. [...]

7. *Attacks on civilian targets*

15. Civilians in both SRK and ABiH-controlled parts of the city were harmed during the conflict. Furthermore, complaints were lodged with both the SRK and the ABiH regarding the targeting of civilians with mortars or heavy weaponry. The evidence from UN representatives posted in Sarajevo also strongly suggests that the ABiH at times attacked civilians in parts of the city under its control.

8. *Role of the media*

16. The media played a pivotal role in the conflict because of the manner in which it reported on the situation in Sarajevo. The evidence establishes that the press at times unfairly singled out Serbian military forces for blame. For example, BBC News reported on one occasion that Serbian forces were shelling the airport when UN representatives had observed that this fire originated from ABiH positions on Mount Igman. The information reported by the press was particularly important since many UN assessments of the situation in the city relied, at least in part, on these news sources. A senior UN representative posted in the city had concluded that the Muslim population “had the entire world press on their side so that (the ABiH sometimes launched attacks against the

SRK in order to draw counter-fire)... in order to create an unfavourable image of the Serbs," adding that reports from UN observers contributed to this negative image. Another senior UN representative remembered witnessing a particular incident during which he had concluded that the ABiH had staged an attack on the BiH Presidency during the visit of a British official to draw international attention. Other senior UN observers echoed this sentiment, explaining that they felt that the media regarded the ABiH as the beleaguered party. This media spotlight governed to a certain extent the SRK's conduct during the conflict.

C. Scheduled and unscheduled incidents [...]

97. For the above reasons, I am not satisfied that the Prosecution has established beyond a reasonable doubt that the SRK fired the shell which exploded in Markale market on 5 February 1994. I do not reach this conclusion idly because the ABiH, as well as the SRK, had access during the conflict to 120 millimetre mortars, which are weapons which can be transported with relative ease. Finally, I note that my conclusion about the origin of fire also finds support in the special UN team's official finding, communicated to the UN Security Council, that there "is insufficient physical evidence to prove that one party or the other fired the mortar bomb." [...]

D. Conduct of a campaign

104. I now consider whether the SRK conducted a campaign of purposefully targeting civilians in Sarajevo throughout the Indictment Period by examining issues related to the number of persons killed. I recognize the potential for such a discussion, in its mathematical abstraction of the underlying human suffering, to be misinterpreted as trivializing the individual stories of hardship and sorrow told by every resident of Sarajevo who testified before the Trial Chamber.
105. As seen earlier, the number of persons living in Sarajevo during the conflict was in the order of 340,000, including 45,000 soldiers posted inside the city. The Prosecution presented evidence in the form of a report from three demographic experts regarding the number of these residents injured or killed during the 23 months of the Indictment Period in ABiH-controlled areas. After reviewing extensive sources, the experts concluded that a minimum of 5,093 civilians had been injured and a minimum 1,399 civilians had been killed due to shelling and shooting, although they did not specify the fraction of these casualties which had resulted from deliberate targeting. They also concluded that the minimum total number of civilians and soldiers killed was 3,798 and estimated that this figure understated by about 600 the actual total number of persons killed. Civilian casualties were not spread uniformly over the Indictment Period and fell significantly over time. The monthly number of civilians killed was 105 during the last four months of 1992 and decreased to 63.50 for 1993. This monthly average fell further to 28.33 in the first 6 months of 1994, though the Prosecution's experts warned that this last figure probably understated the true average due to the limitations of the sources consulted.

106. An army characterized by the level of competence and professionalism ascribed to the SRK by the Prosecution would be expected, when conducting during 23 months a campaign of purposefully targeting civilians living in a city of 340,000, to inflict a high number of civilian casualties in relation to the city's total population, accompanied by high monthly averages of civilians killed. The results obtained by the Prosecution's demographic experts indicate otherwise. As seen above, the figures for civilians injured and killed were on the order of 5,093 and 1,399, respectively, in a city of 340,000 inhabitants which had been the focal point of an ongoing war during the 23 months of the Indictment Period. Furthermore, the monthly number of civilian casualties dropped significantly over this same period. I therefore conclude that the evidence does not establish that the SRK conducted a campaign of purposefully targeting civilians in the city throughout the Indictment Period.
107. My conclusion finds support in the evidence regarding the conduct of the SRK leadership, which relinquished voluntarily control of the airport, authorized the establishment of "blue routes" to allow for the distribution of humanitarian supplies in the city, entered into anti-sniping agreements and agreed to the establishment of the TEZ (Total Exclusion Zone Agreement). Furthermore, I note that Serbian authorities affiliated with the SRK in Bosnia-Herzegovina entered into two agreements and issued two declarations at the beginning of the Indictment Period, including one dated 13 May 1992, stating their commitment to abide by the principles of international humanitarian law. [See Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] According to one SRK soldier, the 13 May 1992 declaration, issued by the Presidency of Republika Srpska, had been read out to SRK troops and had been implemented "to a high extent" during the conflict.

E. Considerations related to the applicable law

1. Terror against the civilian population as a violation of the laws or customs of war

108. The Majority finds that the Trial Chamber has jurisdiction by way of Article 3 of the Statute to consider the offence constituted of "acts of violence willfully directed at a civilian population or against individual civilians causing death or serious injury to body or health of individual civilians[,] with the primary purpose of spreading terror among the civilian population." I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal.
109. In his Report to the Security Council regarding the establishment of the Tribunal, the Secretary-General explained that "the application of the [criminal law] principle of *nullum crimen sine lege* requires that the international tribunal should apply rules which are beyond any doubt part of customary law." The Secretary-General's Report therefore lays out the principle that the Tribunal cannot create new criminal offences, but may only consider crimes already well-established in

international humanitarian law. Such a conclusion accords with the imperative that “under no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalizing an act which had not until the present time been regarded as criminal.”

110. In a recent decision, the Appeals Chamber considered this principle to determine the circumstances under which an offence will fall within the jurisdiction of the Tribunal. It concluded that “the scope of the Tribunal’s jurisdiction *ratione materiae* [or subject-matter jurisdiction] may ... be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal’s power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed.” With respect to *ratione personae* or personal jurisdiction, the Appeals Chamber found that the Secretary-General’s Report did not contain any express limitation concerning the nature of the law which the Tribunal may apply, but concluded “that the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal’s jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.”
111. Thus, an offence will fall within the jurisdiction of the Tribunal only if it existed as a form of liability under international customary law. When considering an offence, a Trial Chamber must verify that the provisions upon which a charge is based reflect customary law. Furthermore, it must establish that individual criminal liability attaches to a breach of such provisions under international customary law at the time relevant to an indictment in order to satisfy the *ratione personae* requirement. Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, a Trial Chamber must finally confirm that this offence was defined with sufficient clarity under international customary law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.
112. The Accused is charged pursuant to Article 3 of the Statute with “unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949.” Since such an offence has never been considered before by this Tribunal, it would seem important to determine whether this offence existed as a form of liability under international customary law in order to confirm that it properly falls within the jurisdiction of this Trial Chamber. The Majority repeatedly retreats from pronouncing itself though on the customary nature of this offence and, in particular, does not reach any stated conclusion on whether such an offence would attract individual criminal responsibility for acts committed during the Indictment Period under international customary law. Instead, it argues that such individual criminal responsibility attaches by operation of conventional law. In support of this conclusion, it observes that the parties to the conflict had entered

into an agreement dated 22 May 1992 in which they had committed to abide by Article 51 of the Additional Protocol I, particularly with respect to the second part of the second paragraph of that article which prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”

113. The signing of the 22 May Agreement does not suffice though to satisfy the jurisdictional requirement that the Trial Chamber may only consider offences which are reflected in international customary law. Even if I accepted – *quod non* – that the Trial Chamber has the necessary *ratione materiae* to consider the offence of inflicting terror on a civilian population by virtue of the signing of the 22 May Agreement, the *ratione personae* requirement would still have to be satisfied, meaning that this offence must have attracted individual criminal responsibility under international customary law for acts committed at the time of the Indictment Period. The Prosecution and the Majority cited few examples indicating that the criminalization of such an offence was an admitted state practice at such a time. In my view, these limited references do not suffice to establish that this offence existed as a form of liability under international customary law and attracted individual criminal responsibility under that body of law. I therefore conclude that the offence of inflicting terror on a civilian population does not fall within the jurisdiction of this Trial Chamber. By concluding otherwise without establishing that the offence of inflicting terror on a civilian population attracted individual criminal responsibility under international customary law, the Majority is furthering a conception of international humanitarian law which I do not support.

F. Legal Findings [...]

3. Article 7

(a) Article 7(1)

116. The Majority concludes that the Accused ordered his forces to attack civilians in Sarajevo deliberately, thereby finding him criminally responsible under Article 7(1) of the Statute. This conclusion rests entirely on inferences, since no witness testified to hearing the Accused issue such orders and no written orders were tendered which would indicate that he so instructed his troops. The evidence, in fact, explicitly supports a conclusion that the Accused did not order such attacks. For example, he personally instructed his troops in writing to respect the Geneva Conventions and other instruments of international humanitarian law. [...] Furthermore, the Accused launched internal investigations on at least two occasions when alerted by UN representatives about possible attacks on civilians by his forces. I conclude therefore that the Trial Record does not support a finding that the Accused issued orders to attack civilians in Sarajevo deliberately and dissent from the Majority's conclusion that he incurs criminal responsibility under Article 7(1) of the Statute. [...]
119. Finally, when examining the jurisprudence of the Tribunal relevant to the elements of the various heads of individual criminal responsibility under Article 7(1), the

Majority had explained that the act of ordering refers “to a person in a position of authority using that authority to instruct another to commit an offence.” It had then explained that where a superior “under duty to suppress unlawful behaviour of subordinates of which he has notice does nothing to suppress that behaviour, the conclusion is allowed that that person, by ... culpable omissions, directly participated in the commission of crimes through one or more of the modes of participation described in Article 7(1).” Such an interpretation of Article 7(1) then does not exclude the possibility that a superior may be deemed to have “ordered” a subordinate to commit a crime by “culpable omission.” This latter notion, though understated, exerts on the Majority’s conclusion concerning the Accused’s criminal responsibility a perceptible influence which can be felt throughout its prose. For example, the Majority argues that

[t]he evidence is compelling that *failure* to act for a period of approximately twenty-three months by a corps commander who has substantial knowledge of crimes committed against civilians by his subordinates and is reminded on a regular basis of his duty to act upon that knowledge *bespeaks of a deliberate intent to inflict acts of violence on civilians*.

In another instance, the Majority argues in the very paragraph where it concludes that the Accused ordered the crimes proven at trial that

the evidence impels the conclusion that General Galić, although put on notice of crimes committed by his subordinates over whom he had total control, and who consistently and over a long period of time (twenty-three months) *failed to prevent the commission of a crime and punish the perpetrators thereof* upon that knowledge, *furthered* a campaign of unlawful acts of violence against civilians ... and ... *intended to conduct* that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo.

According to the Majority therefore, the Accused’s “failure to act” or “failure to prevent the commission of a crime” during the Indictment Period contributes to the conclusion that he ordered the commission of the crimes proven at trial. I fail to understand though how the Accused may be found responsible for ordering the commission of a crime on the basis of his failure to act or of an omission, be it a “culpable one.”

(b) Article 7(3)

120. The elements of individual criminal responsibility under Article 7(3) of the Statute are firmly established by the jurisprudence of the Tribunal. Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates: (1) the existence of a superior-subordinate relationship, (2) the superior knew or had reason to know that the subordinate was about to commit such acts or had done so, and (3) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. I am satisfied that the Trial Record establishes that all three conditions have been met and conclude that the Accused is guilty of the crimes of unlawful attacks against civilians, murder and inhumane acts under Article 7(3) of the Statute. [...]

Rafael Nieto-Navia Judge

Done this fifth day of December 2003, At The Hague, The Netherlands.

B. Appeals Chamber, Judgement

[Source: ICTY, Prosecutor v. Stanislav Galic, Judgement, Appeals Chamber, 30 November 2006, IT-98-29-A; available at www.icty.org. Footnotes omitted.]

**IN THE APPEALS CHAMBER
PROSECUTOR
v.
STANISLAV GALIC
JUDGEMENT**

[...]

VII. GROUNDS 5, 16 AND 7: THE CRIME OF ACTS OR THREATS OF VIOLENCE THE PRIMARY PURPOSE OF WHICH IS TO SPREAD TERROR AMONG THE CIVILIAN POPULATION

69. The crime charged under Count 1 of the Indictment pursuant to Article 3 of the Statute and on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II is the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population. It encompasses the intent to spread terror when committed by combatants in a period of armed conflict. The findings of the Appeals Chamber with respect to grounds five, sixteen and seven will therefore not envisage any other form of terror.

[...]

B. Ground 7: the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as a crime punishable under Article 3 of the Statute

79. Galić argues under his seventh ground of appeal that the Trial Chamber violated the principle of *nullum crimen sine lege* in convicting him under Count 1. He argues that the International Tribunal has no jurisdiction over the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population as “there exists no international crime of terror”. He submits that the Trial Chamber erred in considering treaty law to be sufficient to give jurisdiction to the Tribunal, which may only exercise jurisdiction over crimes under customary international law. In particular, he submits that the Trial Chamber erred in finding that the 22 May 1992 Agreement was binding upon the parties to the conflict. Further, he challenges the Trial Chamber’s finding with regard to the elements of the crime. Finally, he argues that the Prosecution has not proved that the acts of

“sniping” and “shelling” were carried out with the primary purpose of spreading terror among the civilian population.

[...]

1. Whether a crime under Article 3 of the Statute must be grounded in customary international law or can be based on an applicable treaty

81. Pursuant to Article 1 of the Statute, the International Tribunal has jurisdiction over “serious violations of international humanitarian law”. What is encompassed by “international humanitarian law” is however not specified in the Statute. [...]
82. When first seized of the issue of the scope of its jurisdiction *ratione materiae*, the International Tribunal interpreted its mandate as applying not only to breaches of international humanitarian law based on customary international law but also to those based on international instruments entered into by the conflicting parties – including agreements concluded by conflicting parties under the auspices of the ICRC to bring into force rules pertaining to armed conflicts – provided that the instrument in question is:
 - (i) [...] unquestionably binding on the parties at the time of the alleged offence; and
 - (ii) [...] not in conflict with or derogat[ing] from peremptory norms of international law, as are most customary rules of international humanitarian law.
83. However, while conventional law can form the basis for the International Tribunal’s jurisdiction, provided that the above conditions are met, an analysis of the jurisprudence of the International Tribunal demonstrates that the Judges have consistently endeavoured to satisfy themselves that the crimes charged in the indictments before them were crimes under customary international law at the time of their commission and were sufficiently defined under that body of law. This is because in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise and customary international law must be looked at for the definition of those elements. [...]
85. The Appeals Chamber rejects Galić’s argument that the International Tribunal’s jurisdiction for crimes under Article 3 of the Statute can only be based on customary international law. However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal’s jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.

2. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

[...]

(a) *The prohibition of terror against the civilian population in customary international law*

87. In the present case, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute, on the basis of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, both of which state:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

[...] The purposes of Additional Protocols I and II [...] were to “reaffirm and develop the provisions protecting the victims of armed conflicts” and “to ensure a better protection for the victims” of armed conflicts. Additional Protocol II, further, is considered to embody the “fundamental principles on protection for the civilian population”. Articles 51(2) of Additional Protocol I and 13(2) of Additional Protocol II, in essence, contribute to the purpose of those treaties. They do not contain new principles but rather codify in a unified manner the prohibition of attacks on the civilian population. The principles underlying the prohibition of attacks on civilians, namely the principles of distinction and protection, have a long-standing history in international humanitarian law. These principles incontrovertibly form the basic foundation of international humanitarian law and constitute “intransgressible principles of international customary law”. As the Appeals Chamber has held in previous decisions, the conventional prohibition on attack on civilians contained in Articles 51 of Additional Protocol I and 13 of Additional Protocol II constitutes customary international law. In so holding, the Appeals Chamber has made no distinction within those articles as to the customary nature of each of their respective paragraphs. In light of the above, and considering that none of the States involved in the Diplomatic Conference leading to the adoption of both Protocols expressed any concern as to the first three paragraphs of Article 51 of Additional Protocol I, and as Article 13 of Additional Protocol II was adopted by consensus, the Appeals Chamber considers that, at a minimum, Article 51(1), (2) and (3) of Additional Protocol I and Article 13 of Additional Protocol II in its entirety constituted an affirmation of existing customary international law at the time of their adoption. The Appeals Chamber therefore affirms the finding of the Trial Chamber that the prohibition of terror, as contained in the second sentences of both Article 51 (2) of Additional Protocol I and Article 13(2) of Additional Protocol II, amounts to “a specific prohibition within the general (customary) prohibition of attack on civilians”.

88. The Appeals Chamber found further evidence that the prohibition of terror among the civilian population was part of customary international law from at least its inclusion in the second sentences of both Article 51 (2) of Additional Protocol I and Article 13(2) of Additional Protocol II. The 1923 Hague Rules on Warfare prohibited “[a]ny air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants”. Similarly, the 1938 Draft Convention for the Protection of

Civilian Populations against New Engines of War expressly prohibited “[a]erial bombardment for the purpose of terrorising the civilian population”. Even more importantly, Article 33 of Geneva Convention IV, an expression of customary international law, prohibits in clear terms “measures of intimidation or of terrorism” as a form of collective punishment, as they are “opposed to all principles based on humanity and justice”. Further, Article 6 of the 1956 New Delhi Draft Rules for protection of civilians states that “[a]ttacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited.” More recently, Article 6 of the 1990 Turku Declaration of Minimum Humanitarian Standards envisaged that “[a]cts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited”.

89. Another indication of the customary international law nature of the prohibition of terror at the time of the events alleged in this case can be found in the number of States parties to Additional Protocols I and II by 1992. Also, references to official pronouncements of States and their military manuals further confirm the customary international nature of the prohibition. With respect to official pronouncements, the Appeals Chamber notes that the United States, a non-party to Additional Protocol I, expressed in 1987 through the deputy Legal Adviser to the US Department of State its support for the “principle that the civilian population as such, as well as individual citizens, not be the objects of acts or threats of violence the primary purpose of which is to spread terror amongst them”. Similarly, in 1991, in response to an inquiry of the ICRC as to the application of international humanitarian law in the Gulf region, the US Department of the Army pointed out that its troops were acting in respect of the prohibition of acts or threats of violence the main purpose of which was to spread terror among the civilian population. With respect to military manuals, the Appeals Chamber notes that a large number of countries have incorporated provisions prohibiting terror as a method of warfare, some of them in language similar to the prohibition set out in the Additional Protocols, or even verbatim.
90. In light of the foregoing, the Appeals Chamber finds that the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.

(b) *The criminalisation of the prohibition of terror against the civilian population*

91. The crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was charged under Article 3 of the Statute. The conditions that must be fulfilled for a violation of international humanitarian law to be subject to Article 3 of the Statute are (“*Tadić* conditions”): [See Part A. of this Case, or **Case No. 211**, ICTY, *The Prosecutor v. Tadić* [Part A., para. 94]]
92. Individual criminal responsibility under the fourth *Tadić* condition can be inferred from, *inter alia*, state practice indicating an intention to criminalise the

prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals.

93. The first reference to terror against the civilian population as a war crime, as correctly noted by the Trial Chamber, is found in the 1919 Report of the Commission on Responsibilities, created by the Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies in World War 1. The Commission found evidence of the existence of “a system of terrorism carefully planned and carried out to the end”, stated that the belligerents employed “systematic terrorism”, and listed among the list of war crimes “systematic terrorism”. Although the few trials organised on that basis in Leipzig did not elaborate on the concept of “systematic terrorism”, this is nonetheless an indication that, in 1919, there was an intention to criminalise the deliberate infliction of terror upon the civilian population. Further, in 1945, Australia’s War Crimes Act referred to the work of the 1919 Commission on Responsibilities and included “systematic terrorism” in its list of war crimes.
94. With respect to national legislation, the Appeals Chamber notes that numerous States criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction. The Norwegian Military Penal Code of 1902, as amended, provides that “[a]nyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [the four Geneva Conventions and the two Additional Protocols of 1977] is liable to imprisonment.” The 1962 Geneva Conventions Act of Ireland, for example, provides that any “minor breach” of the Geneva Conventions, including violations of Article 33 of Geneva Convention IV, is a punishable offence”.
95. The Appeals Chamber also notes that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols. The Criminal Codes of the Czech Republic and the Slovak Republic, for example, criminalise “terroris[ing] defenceless civilians with violence or the threat of violence”. Further, numerous States have incorporated provisions that criminalise terrorisation of civilians in time of war. The Penal Code of Cote d’Ivoire, for example, provides that measures of terror in time of war or occupation amount to a “crime against the civilian population”. The Penal Code of Ethiopia punishes anyone who organises, orders or engages in “measures of intimidation or terror” against the civilian population in time of war, armed conflict or occupation. During the relevant period, the Netherlands included “systematic terrorism” in its list of war crimes that carried criminal penalties.
96. The Appeals Chamber also notes the references by the Trial Chamber to the laws in force in the former Yugoslavia at the time of the commission of the offences charged, particularly Article 125 (“War Crime Against the Civilian Population”) in Chapter XI (“Criminal Offences Against Humanity and International Law”)

of the 1960 Criminal Code of the Republic of Yugoslavia and the superseding Article 142 ("War Crime Against the Civilian Population") in Chapter XVI ("Criminal Offences Against Humanity and International Law") of the 1976 Criminal Code, both of which criminalise terror against the civilian population, and provisions of Yugoslavia's 1988 "[Armed Forces] Regulations on the Application of International Laws of War", which incorporated the provisions of Additional Protocol I, following Yugoslavia's ratification of that treaty on 11 March 1977. Those provisions not only amount to further evidence of the customary nature of terror against the civilian population as a crime, but are also relevant to the assessment of the foreseeability and accessibility of that law to Galić.

97. In addition to national legislation, the Appeals Chamber notes the conviction in 1997 by the Split County Court in Croatia for acts that occurred between March 1991 and January 1993, under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, including "a plan of terrorising and mistreating the civilians", "open[ing] fire from infantry arms [...] with only one goal to terrorise and expel the remaining civilians", "open[ing] fire from howitzers, machine guns, automatic rifles, anti-aircraft missiles only to create the atmosphere of fear among the remaining farmers", and "carrying out the orders of their commanders with the goal to terrorise and threaten with the demolishing of the Peruca dam". [See Case No. 224, Croatia, Prosecutor v. Rajko Radulović and Others]
98. In light of the foregoing, the Appeals Chamber finds, by majority, Judge Schomburg dissenting, that customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, from at least the period relevant to the Indictment.

3. The elements of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population

99. Galić argues under his fifth ground of appeal that although he stood trial under Count 1 for terror against the civilian population including as one of its elements the infliction of terror against the civilian population, he was convicted and sentenced for a different offence which did not require the infliction of terror against the civilian population, but merely the intent to spread terror among the civilian population. He argues that the Trial Chamber thereby impermissibly departed from the Indictment. [...] Under the present ground of appeal, Galić again argues that it was not proven that "terror as such was inflicted upon the civilian population" [...]. He argues [...] that the Trial Chamber erred both specifically when it found that infliction of terror against the civilian population is not an element of the crime and generally in identifying the elements of the crime. [...]
101. Having found that the prohibition on terror against the civilian population in the Additional Protocols was declaratory of customary international law, the Appeals Chamber will base its analysis of the elements of the crime under consideration

under Count 1 on the definition found therein: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”

(a) *Actus reus*

102. The Appeals Chamber has already found that the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population falls within the general prohibition of attacks on civilians. The definition of terror of the civilian population uses the terms “acts or threats of violence” and not “attacks or threats of attacks.” However, the Appeals Chamber notes that Article 49(1) of Additional Protocol I defines “attacks” as “acts of violence”. Accordingly, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population can comprise attacks or threats of attacks against the civilian population. The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary; the primary concern, as explained below, is that those acts or threats of violence be committed with the specific intent to spread terror among the civilian population. Further, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of “extensive trauma and psychological damage” being caused by “attacks [which] were designed to keep the inhabitants in a constant state of terror”. Such extensive trauma and psychological damage form part of the acts or threats of violence.

(b) *Mens rea and result requirement*

103. As the Trial Chamber correctly noted, a plain reading of Article 51(2) of Additional Protocol I does not support a conclusion that the acts or threats of violence must have actually spread terror among the civilian population. [...] [T]he *travaux préparatoires* to Additional Protocol I clearly establish that there had been attempts among the delegations to replace the original wording from intent to spread terror among the civilian population to actual infliction of terror on the civilian population but that this proposed change was not accepted. [...]
104. [T]he Appeals Chamber finds that actual terrorisation of the civilian populations is not an element of the crime. The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. Further, the Appeals Chamber finds that a plain reading of Article 51(2) suggests that the purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian

population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing and duration.

[...]

109. In light of the foregoing, this part of Galić's ground of appeal is dismissed.

XVIII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER,**

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

[...]

DISMISSES Galić's appeal;

ALLOWS, by majority, Judge Pocar partially dissenting and Judge Meron dissenting, the Prosecution's appeal, **QUASHES** the sentence of twenty years' imprisonment imposed on Galić by the Trial Chamber and **IMPOSES** a sentence of life imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period Galić has already spent in detention;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Galić is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

[...]

XXII. SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

[...]

2. [...] I cannot agree with the majority of the bench which affirmed Galić's conviction under Count 1 for the crime of "acts and threats of violence the primary purpose of which is to spread terror among the civilian population" ("terrorization against a civilian population"). In my view, there is no basis to find that this prohibited conduct as such was penalized beyond any doubt under customary international criminal law at the time relevant to the Indictment. Rather, I would have overturned Galić's conviction under Count 1 and convicted him under Counts 4 and 7 for the same underlying criminal conduct, taking into account the acts of terrorization against a civilian population as an aggravating factor in sentencing [...].

C. The Applicability of the “Crime of Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population” to the Present Case

[...]

2. Article 3 of the Statute and “Acts and Threats of Violence the Primary Purpose of Which is to Spread Terror Among the Civilian Population”

7. It is generally accepted that the existence of customary law has primarily to be deducted from the practice and *opinio juris* of states. There can be no doubt – as explained in the Judgement – that the prohibition of acts and threats of violence the primary purpose of which is to spread terror among the civilian population, as set out in Article 51(2), 2nd Sentence of Additional Protocol I and Article 13(2), 2nd Sentence of Additional Protocol II, was part of customary international law. The violation of this prohibition by Galić clearly fulfilled the first three *Tadić* conditions. However, the core question of this case is whether the fourth *Tadić* condition was met as well, that is, whether the aforementioned prohibition was penalized, thus attaching individual criminal responsibility to Galić.
8. The Judgement comes to the conclusion that the fourth *Tadić* condition was satisfied, stating “that numerous states criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction” and “that numerous States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols”. Upon further analysis, it is questionable whether these claims are accurate. Indeed, the temporal point of departure when determining whether there was state practice must be the time period relevant to the Indictment, which charged Galić for acts committed between 1992 and 1994.
9. **Ireland**, mentioned in paragraph 94 of the Judgement, only penalized violations of the Additional Protocols in 1998. The reference to Ireland’s Geneva Convention Act of 1962 is thus misguided. [...]
10. The Appeals Chamber was thus only able to establish with certainty that just an extraordinarily limited number of states at the time relevant to the Indictment had penalized terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols, these being **Côte D’Ivoire**, the then **Czechoslovakia**, **Ethiopia**, the **Netherlands**, **Norway** and **Switzerland**. It is doubtful whether this can be viewed as evidence of “extensive and virtually uniform” state practice on this matter. [...]
12. In any event, it is not sufficient to simply refer to a “continuing trend of nations criminalising terror as a method of warfare” when this trend, if it can be identified as such, is of no relevance to the time period in which Galić’s criminal conduct falls.

[...]

16. Finally, it must be considered that the Trial Chamber made no finding as to the nature of the conflict being international or non-international at that time. However, an additional finding would have been required by the Appeals Chamber even though the relevant provisions of Additional Protocol I (applying to international armed conflicts) and Additional Protocol II (applying to non-international armed conflicts) are identical. At least, pursuant to the view of the majority which is based primarily on an interpretation of the Additional Protocols, the Appeals Chamber should have made a much more detailed determination of why according to the opinion of the majority both the relevant provisions of Additional Protocol I and Additional Protocol II would amount to international customary law.

[...]

18. What then is supposed to be the foundation of state practice, apart from the few states mentioned above? Moreover, while noting that *de jure* all member States of the United Nations are on an equal footing, I nevertheless observe that none of the permanent members of the Security Council or any other prominent state have penalized terrorization against a civilian population.
19. With regard to *opinio juris*, it is undisputed, as mentioned above, that there were many statements by states concerning the *prohibition* of acts and threats of violence the primary purpose of which is to spread terror among the civilian population but not referring to its penalization. [...]
20. In addition, and even though I am fully aware of Article 10 [stating "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."] of the Statute of the International Criminal Court, it must be pointed out that the Rome Statute does not have a provision referring to terrorization against a civilian population. If indeed this crime was beyond doubt part of customary international law, in 1998 (!) states would undoubtedly have included it in the relevant provisions of the Statute or in their domestic legislation implementing the Statute.
21. To be abundantly clear: The conduct prohibited by Article 51(2), 2nd sentence of Additional Protocol I and Article 13(2), 2nd sentence of Additional Protocol II, namely, acts and threats of violence the primary purpose of which is to spread terror among the civilian population, should be penalized as a crime *sui generis*. However, this Tribunal is not acting as a legislator; it is under the obligation to apply only customary international law applicable at the time of the criminal conduct, in this case the time between 1992 and 1994. [...] The International Tribunal is required to adhere strictly to the principle of *nullum crimen sine lege praevia* and must ascertain that a crime was "beyond any doubt part of customary law." It would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes – thus

highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place.

22. It is even less understandable in the present case why the majority chose this wrong approach when it would have been possible to arrive at the same result in an undisputable way: i.e. overturn Galić's conviction under Count 1 and convict him under Counts 4 and 7 for the same underlying criminal conduct, namely the campaign of shelling and sniping, constituting the crime of attacks on civilians, this offence being without any doubt part of customary international law. In light of the finding of the Trial Chamber, which held that Galić "intended to conduct that campaign with the primary purpose of spreading terror within the civilian population of Sarajevo", it would have been furthermore possible to consider this an aggravating circumstance in sentencing [...].

DISCUSSION

I. Qualification of the conflict

1. a. (*Trial Chamber, paras 12-31, 96-129*) Does the Trial Chamber qualify the conflict around Sarajevo as international or non-international? Would it have had to do so if unable to refer to the Agreement of 22 May 1992? In order to establish that the acts Galić is accused of are prohibited by IHL? In order to establish the criminalization of such acts?
- b. Does the Agreement of 22 May 1992 make the conflict an international armed conflict? According to the Majority of the Trial Chamber? (GC I-IV, Art. 3(3) and (4))
- c. (*Trial Chamber, Dissenting opinion of Judge Nieto-Navia, paras 108-113*) Does Judge Nieto-Navia qualify the conflict? According to his theory, should he have done so?

II. Attacks against civilians

2. (*Trial Chamber, paras 12-31*) Do both treaty-based and customary IHL prohibit attacks on civilians in both international and non-international conflicts? Do both criminalize them? Does the International Tribunal have jurisdiction? Under customary international law? Treaty-based law? Without the Agreement of 22 May 1992, would the Tribunal have jurisdiction over the crime of attack on civilians? (P I, Art. 51(2); P II, Art. 13(2))
3. (*Trial Chamber, para. 44*) May military necessity justify the targeting of civilians?
4. (*Trial Chamber, paras 47-51*) When will a person not be held liable for the crime of attack on civilians? What if the person attacked was directly participating in hostilities? When is a person considered to be directly participating in hostilities? Does IHL provide the same answers to those questions in international and in non-international armed conflicts? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Arts 50 and 51(3); P II, Art. 13)
5. (*Trial Chamber, paras 16-61*) What are the elements that the Trial Chamber found specific to the crime of attack on civilians?
6. (*Trial Chamber, paras 53-56*) Can an individual be convicted of the crime of attack on civilians if he or she had doubts as to the combatant or civilian status of the person or persons attacked? If he or she was not, but should have been, aware of the civilian status of the persons attacked? How can the possibility of attacking civilians be accepted (para. 54) by an attacker who is not aware (but should

have been aware) of their status (para. 55)? Is this recklessness? According to the Trial Chamber? According to the ICRC Commentary?

7. (*Trial Chamber, paras 57-61*) When is an indiscriminate attack a crime of attack on civilians? Is an indiscriminate attack an attack on civilians or may it simply provide evidence for the necessary *mens rea*? When is an attack expected to cause excessive incidental effects upon civilians a crime of attack on civilians? Do indiscriminate attacks and attacks expected to cause excessive incidental effects upon civilians constitute war crimes as such? Or are they criminalized only when they amount to direct attacks on civilians?

III. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population

8.
 - a. (*Appeals Chamber, paras 87-90 and 91-98*) What is the difference between the prohibition of an act and its criminalization? Is an act prohibited under IHL necessarily criminalized under international criminal law? Do the *Tadić* conditions reflect this difference?
 - b. (*Trial Chamber, paras 113-137*) Are all forms of violations of the second sentence of Art. 51(2) of Protocol I criminalized? By Protocol I? By customary international law? By the Agreement of 22 May 1992? [See **Case No. 204**, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B.]] (P I, Art. 85(3)(a))
9. (*Trial Chamber, paras 94-137; Dissenting opinion of Judge Nieto-Navia, paras 108-113*) Do both treaty-based and customary IHL prohibit the use of terror against the civilian population in both international and non-international conflicts? Do both criminalize it? Does the ICTY have jurisdiction? Under customary international law? Under treaty-based law? Would the Tribunal have jurisdiction over the crime of attack on civilians without the Agreement of 22 May 1992? On which of those questions does Judge Nieto-Navia differ from the Majority? Do you agree with the Majority's findings on what constitutes a crime of terror? (P I, Art. 51(2); P II, Art. 13(2))
10. (*Trial Chamber, paras 133, 158 and 162*) Which elements did the Trial Chamber find to be specific to the crime of terror against the civilian population? Which additional mental element of a crime of terror differentiates it from the crime of attack on civilians?
11. (*Trial Chamber, para. 134; Appeals Chamber, paras 103-104*)
 - a. For acts or threats of violence to amount to a crime, is it necessary that they actually cause terror among the civilian population? According to the Trial and Appeals Chambers? Does the Appeals Chamber contradict itself when it adds that "extensive trauma and psychological damage form part of the acts or threats of violence" (*para. 102*)?
 - b. If there is no requirement that a threat of violence must actually cause terror, does such a threat fulfil the third *Tadić* condition, i.e. that the violation "must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim"?
12. (*Trial Chamber, para. 135; Appeals Chamber, para. 102*) Does an attack qualify as directed at combatants or military objectives if its primary purpose is to spread terror among the civilian population? Under Art. 51(2) of Protocol I? Under customary IHL? Is it criminalized? What if the attack is indiscriminate, but its primary purpose is to spread terror among the civilian population? May an attack be considered to be directed at a military objective if its primary purpose is to spread terror among the civilian population, taking into account that for an object to be a military objective, the destruction of that object must offer a definite military advantage? (P I, Art. 52(2)).

13. (*Trial Chamber, Dissenting opinion of Judge Nieto-Navia, paras 108-113; Appeals Chamber, paras 81-85*)
 - a. Does Judge Nieto-Navia consider that only violations of customary IHL may be prosecuted before the ICTY (under Art. 3 of its Statute)? Why? Does he disagree with paras 94 and 143 of the ICTY Appeals Chamber Decision on Jurisdiction in the *Tadić* case? [See **Case No. 211**, ICTY, The Prosecutor v. Tadić [Part A.]]
 - b. According to the Appeals Chamber, may treaty-based violations be prosecuted by the Tribunal if they have not reached customary law status? At least if treaty law criminalizes the relevant conduct? Do treaty rules even in the latter case always define less precisely the elements of the prohibition they criminalize?
14. (*Trial Chamber, paras 113-129; Appeals Chamber, 91-98; Partially dissenting opinion of Judge Schomburg*)
 - a. Does the survey by the Majority of the Tribunal of statutory and treaty-based law relevant to the fulfilment of the fourth *Tadić* condition truly not take a position on whether a customary basis exists for a crime of terror (*para. 113*)? Especially in the light of Judge Schomburg's dissenting opinion in the Appeals Judgement? What other basis does the Majority discuss?
 - b. In considering whether the prohibition of terror was criminalized under customary law, should the Trial and Appeals Chambers have dealt with the qualification of the conflict? Does the fact that an act is criminalized when committed during an international armed conflict necessarily mean that the same act is also criminalized if committed during a non-international armed conflict? Do you think that the prohibition of terror is criminalized under customary law in both types of conflict? Because the prohibition is worded the same way in Protocol I and in Protocol II?
15. (*Appeals Chamber, para. 88*) May the Chamber use Art. 33 of Convention IV to attest to the customary nature of Art. 51(2) of Protocol I? Do the two articles cover the same acts? Do they protect the same persons?
16. (*Trial Chamber, paras 158-163*) May an accused be convicted cumulatively for the crime of attack on civilians and for the crime of terror against the civilian population, thus on two counts for the same acts?
17. (*Trial Chamber, paras 208-593; Dissenting opinion of Judge Nieto-Navia, paras 104-107*) Why was it necessary to establish that there was a general campaign of sniping and shelling? For the Majority? For Judge Nieto-Navia? Does the latter agree that such a campaign existed?
18. (*Trial Chamber, para. 247*) Was Sabri Halili a civilian? Is this of any importance for establishing the unlawfulness of the killing of Almasa Konjhodzic? (P I, Art. 50)
19. (*Trial Chamber, paras 373-387*) Was the shelling of the football tournament a violation of IHL even if the Serb forces did not know that such a tournament was taking place? Even if they could not have known? (P I, Art. 51(2), (4) and (5))
20. (*Trial Chamber, paras 564-573*) Was the pattern of shelling and sniping of Sarajevo by Serb forces not militarily necessary because "the Serbs" were the aggressors? Was the shelling a military necessity because "the Bosnians" refused a cease-fire? Are those elements relevant in a discussion on whether the aim of those attacks was to spread terror?

IV. Galić's criminal responsibility

21. (*Trial Chamber, paras 165-177, 609-749; Dissenting opinion of Judge Nieto-Navia, paras 116-120*)
 - a. When does a commander bear individual responsibility for acts committed by subordinates? Is an omission sufficient? For the Majority of the Chamber? For Judge Nieto-Navia? When does a commander bear command responsibility? What if he bears both forms of responsibility?
 - b. Why is the level of evidence necessary to prove knowledge of criminal activity not as high for commanders operating within a highly disciplined and formalized chain of command as for those persons exercising more informal types of authority? Do you agree with this?
22. (*Trial Chamber, para. 211*) If some attacks on the population of Sarajevo were attributable to the Bosnian government itself, which was in control of the city, would that have relieved Galić of his responsibility for attacks by his forces? What do such attacks by the authorities on their own population tell us about the relevance of violations of IHL in the conflict?
23. Were the factual findings (*paras 609-723*) necessary to hold Galić individually responsible? Why? Does Judge Nieto-Navia in his dissenting opinion (*paras 116-120*) disagree with the factual findings of the Majority or with the legal standard applied?
24. What relevance do the preliminary remarks made by Judge Nieto-Navia in his dissenting opinion (*paras 4-16*) have for the conviction of Galić? For history's judgement?

Case No. 219, ICTY, The Prosecutor v. Strugar

A. Appeals Chamber, Decision on Interlocutory Appeal

[Source: *Prosecutor v. Pavle Strugar*, IT-01-42-AR72 (Decision on Interlocutory Appeal) 22 November 2002 [on lack of jurisdiction over violations of Protocols I and II]; footnotes omitted.]

IN THE APPEALS CHAMBER
Decision on Interlocutory Appeal:
22 November 2002
PROSECUTOR
v.
PAVLE STRUGAR

MIODRAG JOKIC
& OTHERS

[...]

9. Articles 51 and 52 of Additional Protocol I and, to a lesser extent, Article 13 of Additional Protocol II consist of a number of provisions focusing on but not limited to the prohibition of attacks on civilians and civilian objects cited in the relevant counts of the Indictment. [...] [T]he Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined “whether the *principles contained* in the relevant provisions of the Additional Protocols have attained the status of customary international law” (emphasis added), and in particular the principles explicitly stated in the Indictment: the prohibition of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status, and in this it was correct.
10. Therefore [...] the Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

B. Trial Chamber, Judgement

[Source: *Prosecutor v. Pavle Strugar*, IT-01-42-T (Trial Chamber Judgement) 31 January 2005; footnotes partially omitted.]

IN TRIAL CHAMBER II

JUDGEMENT

31 January 2005

PROSECUTOR

v.

PAVLE STRUGAR

1. The Accused, Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples' Army (JNA), is charged in the Indictment with crimes allegedly committed from 6 to 31 December 1991, in the course of a military campaign of the JNA in and around Dubrovnik in Croatia in October, November and December of 1991.
2. The Indictment, as ultimately amended, alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion, and the arts and sciences, were damaged. These allegations support six counts of violations of the laws or customs of war under Article 3 of the Statute of the Tribunal, namely murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, attacks on civilian objects and destruction of institutions dedicated to, *inter alia*, religion, and the arts and sciences. The Accused is charged with individual criminal liability under Article 7(1) of the Statute for allegedly ordering, and aiding and abetting, the aforementioned crimes, as well as with superior responsibility pursuant to Article 7(3) of the Statute for the crimes of his subordinates. The Accused's liability is alleged to arise out of the position he then held as commander of the Second Operational Group (2 OG). It is alleged that it was, *inter alia*, forces of the 3rd Battalion of the 472nd Motorised Brigade (3/472 mtbr) under the command of Captain Vladimir Kovacevic, which unlawfully shelled the Old Town on 6 December 1991. The battalion commanded by Captain Kovacevic was at the time directly subordinated to the Ninth Military Naval Sector (9 VPS), commanded by Admiral Miodrag Jokic, and the 9 VPS, in turn, was a component of the 2 OG, commanded by the Accused. [...]

IV. THE ATTACK ON 6 DECEMBER 1991

[...]

B. The attack on the Old Town on 6 December 1991 – the experience of the residents

99. Well before sunrise, at around 0550 hours on the morning of 6 December 1991, residents of the Old Town of Dubrovnik awoke to the sound of explosions. An

artillery attack had commenced. It continued for most of the day with a brief but not complete lull a little after 1115 hours. Especially in the afternoon, it tended to be somewhat sporadic. Initially, the firing was mainly concentrated on, but not confined to, the area around Mount Srdj, the prominent geographical feature of Dubrovnik located nearly one kilometre to the north of the Old Town. There was a Napoleonic stone fortress, a large stone cross and a communications tower at Srdj. [...]

103. [...] [S]ome shelling occurred on residential areas of Dubrovnik, including the Old Town and on the port of the Old Town, virtually from the outset of the attack, notwithstanding an initial primary concentration on Srdj. However, the focus of the attack came to shift from Mount Srdj to the wider city of Dubrovnik, including the Old Town. [...]
112. The attack on Dubrovnik, including the Old Town, on 6 December 1991 inevitably gave rise to civilian casualties. [...] [T]he Third Amended Indictment charges the Accused only in relation to two deaths and two victims of serious injuries, both alleged to have occurred in the Old Town. [...] Civilian, religious and cultural property, in particular in the Old Town, also suffered heavy damage as a result of the attack.

C. The attack on the Old Town of Dubrovnik on 6 December 1991 – the attackers

113. The Chamber finds that on 6 December 1991, units of the 9 VPS of the JNA [...] attempted to take Mount Srdj, which was the dominant feature and the one remaining position held by Croatian forces on the heights above Dubrovnik. [...]
116. The JNA plan was to take Srdj quickly, certainly before 1200 hours, when a ceasefire was anticipated to come into force in the area. The capitulation of the Croatian defenders of Srdj during the morning appears to have been anticipated by Captain Kovacevic who had the immediate command of the attacking troops and who coordinated the artillery and ground forces from Zarkovica, a position which gave him an excellent overview of both Srdj and Dubrovnik, especially the Old Town.
117. There was no capitulation by the Croatian defenders. The close fighting at Srdj was desperate. [...] At a time after 1400 hours, the JNA troops were permitted to withdraw from Srdj. Withdrawal was also a difficult process and it was not until after 1500 hours that this was completed.
118. The JNA plan to take Srdj had failed. Casualties had been suffered, with five men killed and seven wounded among the [Serbian] troops. JNA artillery continued to fire on Dubrovnik until after 1630 hours, although with noticeably reduced intensity after 1500 hours. [...]
122. At around 0600 hours, the troops advancing on Srdj observed that JNA ZIS cannons opened fire at the lower fortifications around Srdj where Croatian snipers had dug in, and in addition, a mortar barrage was directed at Srdj. [...] Lieutenant Pesic and his soldiers came under fire. This was from two 82mm

mortars which he describes as firing from the area of the tennis courts in Babin Kuk. The T-55 tank supporting Lieutenant Pesic's group at this point also came under lateral fire from the direction of Dubrovnik. In addition to attracting fire from positions in the wider Dubrovnik area, they were also shot at from Srdj as they continued to advance. [...] The Chamber notes that the references to fire from the direction of Dubrovnik, or the wider Dubrovnik, are not evidence of firing from the Old Town. [...] Both the Hotel Libertas and Babin Kuk are well to the northwest of the Old Town. [...]

124. [...] Once the JNA had thus seized control of the Srdj plateau, it came under fierce mortar attack from Croatian forces. Lieutenant Lemal's evidence was that the mortar fire originated in the area of Lapad, which is also well to the northwest of the Old Town. [...]
139. The truth seems to be, in the finding of the Chamber, that there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town. Hence, the few Croatian artillery weapons were able to continue to fire and to concentrate their fire on Srdj, where the few remaining Croatian defenders were underground and the JNA attackers were exposed. [...]
159. [...] [I]t is the Chamber's finding that at that meeting the Accused told [a witness] that he had responded to an attack on his troops in Bosnia and Herzegovina by firing on the city of Dubrovnik. For reasons it explains later, the Chamber finds this to be an admission of the Accused that he ordered the attack on the Srdj feature at Dubrovnik. [...]

F. How did the Old Town come to be shelled?

[...]

3. Did JNA forces fire only at Croatian military positions?

182. Yet a further Defence submission [...] is that any damage to the Old Town on 6 December 1991 was a regrettable but unavoidable consequence of artillery fire of the JNA targeted at Croatian military positions in and in the immediate vicinity of the Old Town. The Defence submits that the attack on the Old Town by the JNA was merely in response to Croatian fire from its positions. [...]
183. By way of general observation, to which the Chamber attaches significant weight, the Chamber notes that by 6 December 1991 there were quite compelling circumstances against the proposition that the Croatian defenders had defensive military positions in the Old Town. To do so was a clear violation of the World Heritage protected status of the Old Town. The Chamber accepts there was a prevailing concern by the citizens of the Old Town not to violate the military free status of the Old Town. That is the view of the Chamber, notwithstanding suggestions in the evidence that at times in earlier stages of the conflict there were violations of this by Croatian defending forces. [...]

193. The Chamber concludes that the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible. It further observes that the witnesses who claimed to have seen weapons located at those positions were at the material time JNA commanders or staff officers, or officers having responsibility for JNA artillery firing on the day. [...] When all factors are weighed, including the directly contradicting evidence, the Chamber is entirely persuaded and finds that there were no Croatian firing positions or heavy weapons in the Old Town or on its walls on 6 December 1991.
194. The further question arises whether, even though there were in truth no Croatian firing positions or heavy weapons in the Old Town, it was believed by those responsible for the JNA shelling of the Old Town that there were. In this regard the primary finding of the Chamber is that the evidence of the existence of such firing positions or heavy weapons is in each case false, not that it is merely mistaken. Even if it were to be assumed for present purposes, however, that one, some or all of the firing positions or heavy weapons referred to in the evidence we have considered was believed to exist in the Old Town or on its walls, the evidence discloses that they were not treated as posing any significant threat to the JNA forces on the day. [...]
195. The Chamber further notes that the evidence of the alleged Croatian firing positions, even were it to be assumed to be true or that it was believed to be true, and if it were accepted in the version which is most favourable to the Defence, would not provide any possible explanation for, or justification of, the nature, extent and duration of the shelling of the Old Town that day, and the variety of positions shelled. In the Chamber's finding the evidence [...] would preclude a finding that the JNA artillery was merely firing at Croatian military targets in the Old Town. There would be simply no relationship in scale between the evidence offered as the reason for the attack, and the JNA artillery response. [...]
203. The [Croatian] firing positions described in the preceding paragraphs are located various distances from the Old Town. All are outside the Old Town. Some of them are so remote from the Old Town that any attempt to neutralise them by the JNA forces, even using the most imprecise weapons, could not affect the Old Town. As regards the positions which are closer to the Old Town, the Chamber heard expert evidence as to which positions in the vicinity of the Old Town, if targeted by the JNA, would give rise to a risk of incidental shelling of the Old Town. [...]
211. In the Chamber's finding, the most that can be made of the evidence of the experts [regarding e.g. weather conditions and weapons] is that if Croatian military positions, outside, but in close proximity to, the Old Town, had in fact been targeted by JNA mortars on 6 December 1991, it is possible that some of the shells fired might have fallen within the Old Town. For reasons already given, few of the possible Croatian military targets considered by the experts were the subject of JNA targeting by mortars, and none of them were the subject of intensive or prolonged firing. In view of the [...] shortcomings of the expert reports and the differences between them, the Chamber is unable to rely

exclusively on one or the other in determining which targets in close proximity to the Old Town could give rise to a risk of incidental shelling of the Old Town. [...]

214. In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces. In part the JNA forces did target Croatian firing and other military positions, actual or believed, in Dubrovnik, but none of them were in the Old Town. These Croatian positions were also too distant from the Old Town to put it in danger of unintended incidental fall of JNA shells targeted at those Croatian positions. It is the finding of the Chamber that the cause of the established extensive and large-scale damage to the Old Town was deliberate shelling of the Old Town on 6 December 1991 [...].

V. JURISDICTION UNDER ARTICLE 3 OF THE STATUTE

A. Existence of an armed conflict and nexus between the acts of the Accused and the armed conflict

215. All the crimes contained in the Indictment are charged under Article 3 of the Statute of this Tribunal. For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be “closely related” to the hostilities. The Appeals Chamber considered that the armed conflict “need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.
216. With regard to the issue of the nature of the conflict, it has been established in the jurisprudence of the Tribunal that Article 3 of the Statute is applicable regardless of the nature of the conflict. [Footnote 746: Tadic Jurisdiction para. 94. See **Case No. 211**, ICTY, *The Prosecutor v. Tadic*] In the present case, while the Prosecution alleged in the Indictment that an *international* armed conflict and partial occupation existed in Croatia at the time of the offences, both parties concur in saying that the nature of the conflict does not constitute an element of any of the crimes with which the Accused is charged. The Chamber will therefore forbear from pronouncing on the matter [...].
217. As will be apparent from what has been said already in this decision, the evidence establishes that there was an armed conflict between the JNA and the Croatian armed forces throughout the period of the Indictment. These were each forces of governmental authorities, whether of different States or within the one State need not be determined. The offences alleged in the Indictment all relate to the shelling of the Old Town of Dubrovnik, which was a significant part of this

armed conflict. It follows that the acts with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.

B. The four *Tadic* conditions

[See **Case No. 211**, ICTY, The Prosecutor v. Tadic [Part A., para. 94]]

218. The Appeals Chamber in the *Tadic* case observed that Article 3 functions as a “residual clause” designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the Tribunal. In the Appeals Chamber’s view, this provision confers on the Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5 of the Statute, on the condition that the following requirements are fulfilled: (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. It is the view of the Chamber that these conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not. Accordingly, the Chamber will discuss whether the offences with which the Accused is charged meet the four *Tadic* conditions.

1. Murder and cruel treatment

219. In the present case, the charges of cruel treatment and murder are brought under common Article 3 (1) (a) of the Geneva Conventions. At the outset, the Chamber notes that the jurisprudence of the Tribunal in relation to common Article 3 is now settled. [...] First, it is well established that Article 3 of the Statute covers violations of common Article 3. [Footnote 752: *Tadic* Jurisdiction decision para. 89. See **Case No. 211**, ICTY, The Prosecutor v. Tadic] The crimes of murder and cruel treatment undoubtedly breach a rule protecting important values and involving grave consequences for the victims. Further, it is also undisputed that common Article 3 forms part of customary international law applicable to both internal and international armed conflicts and that it entails individual criminal responsibility. Thus, the Chamber finds that the four *Tadic* conditions are met in respect of these offences.

2. Attacks on civilians and civilian objects

(a) Attacks on civilians

220. The Chamber notes that Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, on which Count 3 is based, clearly set out a rule of international humanitarian law. Therefore, the first *Tadic* condition is fulfilled. [Footnote 755: Galic Trial Judgement, para. 16. See **Case No. 218**, ICTY, The Prosecutor v. Galic] As regards the second condition, the Chamber recalls the ruling given in the present case and

upheld by the Appeals Chamber, according to which the prohibition of attacks on civilians stated in the Additional Protocols attained the status of customary international law and the Additional Protocols' provisions at issue constitute a reaffirmation and reformulation of the existing customary norms. [...] [T]he prohibition of attacks on civilians is included in both Additional Protocols, of which Protocol I deals with international armed conflicts and Protocol II with non-international armed conflicts. Therefore, the nature of the conflict is of no relevance to the applicability of Article 3 of the Statute. The Chamber thus finds that the second *Tadic* requirement is met.

221. As regards the third *Tadic* requirement, the prohibition of attacks on civilians is one of the elementary rules governing the conduct of war and undoubtedly protects "important values". [Footnote 757: Galic Trial Judgement, para. 27. See Case No. 218, ICTY, The Prosecutor v. Galic] The Chamber considers that any breach of this prohibition encroaches upon the fundamental principle of the distinction between combatants and non-combatants. This principle has developed throughout the history of armed conflict with the purpose of keeping civilians from the danger arising from hostilities. The Chamber points out that attacks on civilians jeopardise the lives or health of persons who do not take active part in combat. [...] Accordingly, the third requirement for the applicability of Article 3 of the Statute is fulfilled.
222. With regard to the fourth *Tadic* condition, the Chamber reiterates the Appeals Chamber's statement that "a violation of (the rule prohibiting attacks on civilians) entails individual criminal responsibility". [Footnote 760: Strugar Appeals Chamber Decision on Jurisdiction, para. 10. See Part A. of this Case.] In addition, the Chamber observes that at the material time there existed "Regulations concerning the Application of the International Law of War to the Armed Forces of SFRY", which provided for criminal responsibility for "war crimes or other serious violations of the law of war" and contained a list of laws binding upon the armed forces of the SFRY, including Additional Protocols I and II.

(b) Attacks on civilian objects

223. The offence of attacking civilian objects is a breach of a rule of international humanitarian law. As already ruled by the Chamber in the present case and upheld by the Appeals Chamber, Article 52, referred to in respect of the count of attacking civilian objects, is a reaffirmation and reformulation of a rule that had previously attained the status of customary international law. [Footnote 762: Strugar Appeals Chamber Decision on Jurisdiction para. 9. See Part A. of this Case.]
224. The Chamber observes that the prohibition of attacks on civilian objects is set out only in Article 52 of Additional Protocol I, referred to in relation to Count 5. Additional Protocol II does not contain provisions on attacking civilian objects. Nonetheless, as the Appeals Chamber found, the rule prohibiting attacks on civilian objects has evolved to become applicable also to conflicts of an internal nature. [...] The Chamber therefore concludes that despite the lack of a provision similar to Article 52 in Additional Protocol II, the general rule prohibiting attacks

on civilian objects also applies to internal conflicts. Accordingly, the first and second jurisdictional requirements are met.

225. As regards the third *Tadic* condition, the Chamber notes that the prohibition of attacks on civilian objects is aimed at protecting those objects from the danger of being damaged during an attack. It further reiterates that a prohibition against attacking civilian objects is a necessary complement to the protection of civilian populations. The Chamber observes that in the [...] 1970 resolution of the General Assembly [on the protection of civilians in “armed conflicts of all types”] the prohibition of making civilian dwellings and installations the object of military operations was listed among the “basic principles for the protection of civilian populations in armed conflicts”. Those principles were reaffirmed because of the “need for measures to ensure the better protection of human rights in armed conflicts”. The General Assembly also emphasised that civilian populations were in “special need of increased protection in time of armed conflicts”. The principle of distinction, which obliges the parties to the conflict to distinguish between civilian objects and military objectives, was considered “basic” by the drafters of Additional Protocol I. [...] All the same, the Chamber recalls that the requirement of seriousness contains also the element of gravity of consequences for the victim. The Chamber is of the view that, unlike in the case of attacks on civilians, the offence at hand may not necessarily meet the threshold of “grave consequences” if no damage occurred. Therefore, the assessment of whether those consequences were grave enough to bring the offence into the scope of the Tribunal’s jurisdiction under Article 3 of the Statute should be carried out on the basis of the facts of the case. The Chamber observes that in the present case it is alleged that the attacks against civilian objects, with which the Accused is charged, did incur damage to those objects. It will thus pursue the examination of the case on the assumption that the attacks as charged in the Indictment did bring about grave consequences for their victims and the third *Tadic* condition is met. The Chamber would only need to return to the analysis of applicability of Article 3 of the Statute if the evidence on the alleged damage were to fail to demonstrate the validity of the Prosecution allegations to such an extent as to render it questionable whether the consequences of the attack were grave for its victims. As will be seen later in this decision, that is not the case.
226. As recalled above, the fourth *Tadic* condition concerns individual criminal responsibility. The Appeals Chamber has found that under customary international law a violation of the rule prohibiting attacks on civilian objects entails individual criminal responsibility. [Footnote 772: Strugar Appeals Chamber Decision on Jurisdiction, para. 10. See Part A. of this Case.] Furthermore, the Chamber recalls its above findings as to the SFRY regulations establishing criminal responsibility for violations of Additional Protocol I.

3. Destruction and devastation of property, including cultural property

227. As to the first and the second *Tadic* conditions, the Chamber observes that Article 3(b) is based on Article 23 of the Hague Convention (IV) of 1907 and the

annexed Regulations. Both The Hague Convention (IV) of 1907 and The Hague Regulations are rules of international humanitarian law and they have become part of customary international law.

228. Recognising that the Hague Regulations were made to apply only to international armed conflicts, the Chamber will now examine whether the prohibition contained in Article 3(b) of the Statute covers also non-international armed conflicts. The rule at issue is closely related to the one prohibiting attacks on civilian objects, even though certain elements of those two rules remain distinct. Both rules serve the aim of protecting property from damage caused by military operations. In addition, the offence of devastation charged against the Accused is alleged to have occurred in the context of an attack against civilian objects. Therefore, and having regard to its conclusion that the rule prohibiting attacks on civilian objects applies to non-international armed conflicts, the Chamber finds no reason to hold otherwise than that the prohibition contained in Article 3 (b) of the Statute applies also to non-international armed conflicts.
229. Turning now to the crime charged under Article 3(d), the Chamber notes that this provision is based on Article 27 of the Hague Regulations. Moreover, protection of cultural property had developed already in earlier codes. The relevant provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 confirm the earlier codes. The Appeals Chamber in the *Tadic* case explicitly referred to Article 19 of the Hague Convention of 1954, as a treaty rule which formed part of customary international law binding on parties to non-international armed conflicts. More generally, it found that the customary rules relating to the protection of cultural property had developed to govern internal strife. The Chamber additionally notes that it is prohibited “to commit any act of hostility directed against [cultural property]” both in Article 53 of Additional Protocol I relating to international armed conflicts and Article 16 of Additional Protocol II governing non-international armed conflicts.
230. In view of the foregoing, the Chamber is satisfied that Article 3(d) of the Statute is a rule of international humanitarian law which not only reflects customary international law but is applicable to both international and non-international armed conflicts. Accordingly, the first and second *Tadic* conditions with regard to Article 3(b) and 3(d) are met.
231. As to the third *Tadic* condition, the Chamber recalls its conclusion that the offence of attacking civilian objects fulfils this condition when it results in damage severe enough to involve “grave consequences” for its victims. It is of the view that, similarly to the attacks on civilian objects, the crime of devastation will fall within the scope of the Tribunal’s jurisdiction under Article 3 of the Statute if the damage to property is such as to “gravely” affect the victims of the crime. Noting that one of the requirements of the crime is that the damage be on a large scale, the Chamber has no doubt that the crime at hand is serious.
232. As regards the seriousness of the offence of damage to cultural property (Article 3 (d)), the Chamber observes that such property is, by definition, of “great

importance to the cultural heritage of every people". [1954 Hague Convention Art 1(a)] It therefore considers that, even though the victim of the offence at issue is to be understood broadly as a "people", rather than any particular individual, the offence can be said to involve grave consequences for the victim. In the *Jokic* case, for instance, the Trial Chamber [...] found that "since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik]." In view of the foregoing, the Chamber finds that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law. Hence, the third *Tadic* condition is satisfied.

233. As to the fourth *Tadic* condition, the Chamber notes that Article 6 of the Charter of the Nuremberg International Military Tribunal already provided for individual criminal responsibility for war crimes, including devastation not justified by military necessity, which is listed in Article 3(b) of the Statute. Concerning Article 3(d) of the Statute, the Chamber recalls that Article 28 of the Hague Convention of 1954 stipulates that "the high contracting parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention." [...] Accordingly, the Chamber finds that Articles 3(b) and 3(d) of the Statute entail individual criminal responsibility. Thus, the fourth *Tadic* condition is fulfilled.

VI. THE CHARGES

A. Crimes against persons (Count 1 and 2)

1. Murder (Count 1)

234. The Indictment charges the Accused with criminal liability for murder as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Tonci Skocko and Pavo Urban. [...]
240. On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary *mens rea* for murder and wilful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result. The Chamber will proceed on this basis. [...]

248. [...] In the Chamber's finding, Tonci Skocko died from haemorrhaging caused by shrapnel wound from a shell explosion in the course of the JNA artillery attack on the Old Town on 6 December 1991.
249. With respect to the *mens rea* required for murder, the Chamber reiterates its findings that the JNA attack on the Old Town was deliberate and that the perpetrators knew it to be populated. The Chamber finds that the perpetrators of the attack can only have acted in the knowledge that the death of one or more of the civilian population of the Old Town was a probable consequence of the attack.
250. On the basis of the foregoing, and leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Tonci Skocko.

B. Attacks on civilians and civilian objects (Counts 3 and 5)

1. Law

[...]

280. The offence of attacks on civilians and civilian objects was defined in earlier jurisprudence as an attack that caused deaths and/or serious bodily injury within the civilian population or damage to civilian objects, and that was "conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". The Appeals Chamber recently clarified some of the jurisprudence relating to the various elements of the crime. First, the Appeals Chamber rejected any exemption on the grounds of military necessity and underscored that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international law. [Footnote 895: Blaskic Appeals Judgement, para. 109 [...]. See **Case No. 216**, ICTY, *The Prosecutor v. Blaskic*] In this respect, the Chamber would observe that on the established facts in the present case, there was no possible military necessity for the attack on the Old Town on 6 December 1991. Further, the Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects. With respect to the scale of the damage required, the Appeals Chamber, while not discussing the issue in detail, appeared to endorse previous jurisprudence that damage to civilian objects be extensive. In the present case however, in light of the extensiveness of the damage found to have been caused, the Chamber finds no need to elaborate further on the issue and will proceed on the basis that if extensive damage is required, it has been established in fact in this case.
281. [...] [T]he issue whether the attack charged against the Accused was directed at military objectives and only incidentally caused damage does not arise in the present case. Therefore, the Chamber does not find it necessary to determine whether attacks incidentally causing excessive damage qualify as attacks directed against civilians or civilian objects.

282. Pursuant to Article 49(1) of Additional Protocol I to the Geneva Conventions “attacks” are acts of violence against the adversary, whether in offence or in defence. According to the ICRC Commentary an attack is understood as a “combat action” and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. The presence of certain non-civilians among the targeted population does not change the character of that population. It must be of a “predominantly civilian nature”. Further, Article 50 (1) of Additional Protocol I provides for the assumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The Chamber reiterates that “civilian property covers any property that could not be legitimately considered a military objective”.
283. The Chamber therefore concludes that the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack. [...] [T]he issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.

2. Findings

284. The Chamber has already found that on 6 December 1991 there was an attack launched by the JNA forces against the Old Town of Dubrovnik. It is also the finding of the Chamber, as recorded earlier, that there were no military objectives within the Old Town and the attack was not launched or maintained in the belief that there were. It is possible that there may have been individuals in the Old Town on 6 December 1991 who were connected with the Croatian defending forces, however, any such persons did not fire on JNA forces or undertake any overt military activity. Their presence could not change the character of the population. It was properly characterised as a civilian population, and the objects located there were civilian objects. As regards the Defence submission concerning alleged military activities of the Crisis Staff, the headquarters of which was located in the Old Town, the Chamber notes that no persuasive evidence has been supplied to the effect that the Crisis Staff was conducting military operations from the Old Town. On the contrary, [...] the Crisis Staff did not deal with issues of defence. [...] [I]ts members did not fight and did not wear uniforms. It was his testimony that the headquarters of the Territorial Defence was in Lapad [an island north-west of Dubrovnik]. There is nothing in the evidence to suggest that the building of the Crisis Staff made “an effective contribution to

military action" or that its destruction would offer "a definite military advantage". Accordingly, the Chamber finds on the evidence in this case that the presence of the Crisis Staff in a building located in the Old Town did not render the building a legitimate military objective. The Chamber would also note that the building in question was not proved to have been damaged during the shelling so that this Defence submission apparently lacks factual foundation.

285. 6 December 1991, the evidence is unequivocal that the Old Town was, as it still is, a living town. Though a protected World Heritage site, it had a substantial resident population of between 7,000 and 8,000, many of whom were also employed in the Old Town, as were very many others who came to the Old Town from the wider Dubrovnik to work. The Old Town was also a centre of commercial and local government activity and religious communities lived within its walls. Because of, and under the terms of, the JNA blockade, some women and children had temporarily left the Old Town, but many remained. In addition, families and individuals displaced by the JNA advance on Dubrovnik had found shelter in the Old Town. Some people from the wider Dubrovnik had also been able to take up temporary residence in the Old Town during the blockade in the belief that its World Heritage listing would give them protection from military attack. The existence of the Old Town as a living town was a renowned state of affairs which had existed for centuries. [...]
286. In addition to this long established and renowned state of affairs, it is clear from the evidence that the JNA forces had both the wider Dubrovnik and the Old Town under direct observation from many positions since its forces had closed in on Dubrovnik in November. The presence and movements of a large civil population, in both the Old Town and the wider Dubrovnik, of necessity would have been obvious to this close military observation. Of course, JNA leaders, including the Accused and Admiral Jokic were directly concerned with negotiations with *inter alia* representatives of the civilian population. Further, one apparent objective of the JNA blockade of Dubrovnik was to force capitulation of the Croatian defending forces by the extreme hardship the civilian population was being compelled to endure by virtue of the blockade. In the Chamber's finding it is particularly obvious that the presence of a large civilian population in the Old Town, as well as in the wider Dubrovnik, was known to the JNA attackers, in particular the Accused and his subordinates, who variously ordered, planned and directed the forces during the attack.
287. One or two particular aspects of the evidence related to the issue of a civilian population in the Old Town, and in the wider Dubrovnik, warrants particular note. On 6 December 1991 the attacking JNA soldiers could hear that a defence or air-raid alarm was sounded at about 0700 hours on 6 December 1991 in Dubrovnik. In his report concerning that day Lieutenant-Colonel Jovanovic, commanding the 3/5 mtbr, purported to assume that after the alarm the city dwellers had hidden in shelters. Hence, as he asserted in evidence, he ordered firing on the basis that anyone who was still moving around in the Dubrovnik residential area was participating in combat activities. This view assumes, of

course, the presence of civilians but seeks to justify the targeting of persons and vehicles moving about on the basis suggested. The view which Lieutenant-Colonel Jovanovic purported to hold on that day does not hold up to scrutiny. Common sense and the evidence of many witnesses in this case, confirms that the population of Dubrovnik was substantially civilian and that many civilian inhabitants had sound reasons for movement about Dubrovnik during the 10 ½ hours of the attack. An obvious example is those trying to reach the wounded or to get them to hospital. Others sought better shelter as buildings were damaged or destroyed. Others sought to reach their homes or places of work. There are many more examples. [...] The presence of civilians within the Old Town was also directly communicated to the JNA at command level by the protests they received on that day from the Crisis Staff. [...]

288. The Chamber has found that the Old Town was extensively targeted by JNA artillery and other weapons on 6 December 1991 and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA. Hence, in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town. The Chamber has, in addition, found that a relatively few military objectives (actual or believed) in the wider city of Dubrovnik, but outside the Old Town, were targeted by JNA forces on 6 December 1991. These were, in most cases, widely separated and in positions distant from the Old Town. Shelling targeted at the Croatian military positions in the wider Dubrovnik, including those closer to the Old Town, and whether actual or believed positions, would not cause damage to the Old Town, for reasons given in this decision. That is so for all JNA weapons in use on 6 December 1991, including mortars. In addition to this, however, the Chamber has found there was also extensive targeting of non-military objectives outside the Old Town in the wider city of Dubrovnik. [...]

C. Crimes against property, including cultural property (Counts 4 and 6)

1. Law on devastation not justified by military necessity (Count 4)

[...]

292. While the crime of "devastation not justified by military necessity" has scarcely been dealt with in the Tribunal's jurisprudence, the elements of the crime of "wanton destruction not justified by military necessity" were identified by the Trial Chamber in the *Kordic* case, and recently endorsed by the Appeals Chamber in that same case, as follows:
- (i) the destruction of property occurs on a large scale;
 - (ii) the destruction is not justified by military necessity; and
 - (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.
293. At least in the context of the present trial this definition appears equally applicable to devastation. The Chamber will adopt this definition, with appropriate adaptations

to reflect “devastation”, for the crime of “devastation not justified by military necessity.” Both the Prosecution and the Defence submit that this should be done.

294. Turning to the first element, that is, that the devastation occurred on a “large scale”, the Chamber is of the view that while this element requires a showing that a considerable number of objects were damaged or destroyed, it does not require destruction in its entirety of a city, town or village. [...]
295. The second requirement is that the act is “not justified by military necessity”. The Chamber is of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. Whether a military advantage can be achieved must be decided, as the Trial Chamber in the *Galic* case held, from the perspective of the “person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.” [Footnote 940: *Galic* Trial Judgement para. 51. See **Case No. 218**, ICTY, *The Prosecutor v. Galic*] [...] Recalling its earlier finding that there were no military objectives in the Old Town on 6 December 1991, the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.
296. According to the consistent case-law of the Tribunal the *mens rea* requirement for a crime under Article 3(b) is met when the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts.
297. In sum, the elements of the crime of “devastation not justified by military necessity”, at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.

2. Law on destruction or wilful damage of cultural property (Count 6)

298. Count 6 of the Indictment charges the Accused with destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, punishable under Article 3(d) of the Statute. [...]
300. This provision has been interpreted in several cases before the Tribunal to date. The *Blaskic* Trial Chamber adopted the following definition:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the

institutions must not have been in the immediate vicinity of military objectives.

[Footnote 943: Blaskic Trial Judgement, para. 185. See **Case No. 216**, ICTY, The Prosecutor v. Blaskic]

301. The *Naletilic* Trial Judgement, while rejecting the *Blaskic* holding that, in order to be protected, the institutions must not have been located in the immediate vicinity of military objectives, held that the elements of this crime with respect to destruction of institutions dedicated to religion would be satisfied if: “(i) the general requirements of Article 3 of the Statute are fulfilled; (ii) the destruction regards an institution dedicated to religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property.”
302. Further, [...] when the acts in question are directed against cultural heritage, the provision of Article 3(d) is *lex specialis*.
303. In order to define the elements of the offence under Article 3(d) it may be useful to consider its sources in international customary and treaty law. Acts against cultural property are proscribed by Article 27 of the Hague Regulations of 1907, by the Hague Convention of 1954, by Article 53 of Additional Protocol I and by Article 16 of Additional Protocol II.
304. Article 27 of the Hague Regulations of 1907 reads [See **Document No. 1**, The Hague Regulations]
305. Article 4 of The Hague Convention of 1954 requires the States Parties to the Convention to: [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]
306. Article 53 of Additional Protocol I reads: [See **Document No. 6**, The First Protocol Additional to the Geneva Conventions]

This text is almost identical in content to the analogous provision in Additional Protocol II (Article 16) the only differences being the absence in the latter of a reference to “other relevant international instruments” and the prohibition on making cultural property the object of reprisals.

307. The Hague Convention of 1954 protects property “of great importance to the cultural heritage of every people.” The Additional Protocols refer to “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” [...] [T]he basic idea [underlying the two provisions] is the same. [...] The Chamber will limit its discussion to property protected by the above instruments (hereinafter “cultural property”).
308. While the aforementioned provisions prohibit acts of hostility “directed” against cultural property, Article 3(d) of the Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property. Therefore, a requisite element of the crime charged in the Indictment is actual damage or destruction occurring as a result of an act directed against this property.
309. The Hague Regulations of 1907 make the protection of cultural property dependent on whether such property was used for military purposes. The Hague Convention of 1954 provides for an obligation to respect cultural property. This obligation has two explicit limbs, viz. to refrain “from any use of the property and its immediate

surroundings for purposes which are likely to expose it to destruction or damage in the event of armed conflict”, and, to refrain “from any act of hostility directed against such property.” [Art. 4(1) Hague Convention] The Convention provides for a waiver of these obligations, however, but only when “military necessity imperatively requires such a waiver.” [*ibid.* Art. 4(2)] The Additional Protocols prohibit the use of cultural property in support of military efforts, but make no explicit provision for the consequence of such a use, i.e. whether it affords a justification for acts of hostility against such property. Further, the Additional Protocols prohibit acts of hostility against cultural property, without any explicit reference to military necessity. However, the relevant provisions of both Additional Protocols are expressed to be “[w]ithout prejudice to” the provisions of the Hague Convention of 1954. This suggests that in these respects, the Additional Protocols may not have affected the operation of the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver. In this present case, no military necessity arises on the facts in respect of the shelling of the Old Town, so that this question need not be further considered. For the same reason, no consideration is necessary to the question of what distinction is intended (if any) by the word “imperatively” in the context of military necessity in Article 4, paragraph 2 of the Hague Convention of 1954.

310. Nevertheless, the established jurisprudence of the Tribunal confirming the “military purposes” exception [Footnote 956: *Blaskic* Trial Judgement, para. 185 [...]]. See *Case No. 216*, ICTY, *The Prosecutor v. Blaskic*] which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaskic* and *Naletilic* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), [...] the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. Therefore, contrary to the Defence submission, the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were “directed against” that cultural property, rather than the military installation or use in its immediate vicinity.
311. As for the *mens rea* element for this crime, the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an acceptable form of *mens rea* for this crime [...].
312. In view of the above, the definition established by the jurisprudence of the Tribunal appears to reflect the position under customary international law. For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the

Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.

3. Findings on Counts 4 and 6

[...]

318. The Chamber finds that of the 116 buildings and structures it listed in the Annex to its Rule 98bis Decision, 52 were destroyed or damaged during the 6 December shelling of the Old Town by the JNA. [...]
319. The nature and extent of the damage to the 52 buildings and structures from the 6 December 1991 attack varied considerably [...].
320. The Chamber also observes that among those buildings which were damaged in the attack, were monasteries, churches, a mosque, a synagogue and palaces. Among the other buildings affected were residential blocks, public places and shops; damage to these would have entailed grave consequences for the residents or the owners, i.e. their homes and businesses suffered substantial damage. [...]
326. In relation to Count 4 specifically, the Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA attack. In this regard, the Chamber has considered the following factors: that 52 individually identifiable buildings and structures were destroyed or damaged; that the damaged or destroyed buildings and structures were located throughout the Old Town and included the ramparts surrounding it; that a large number of damaged houses bordered the main central axis of the Old Town, the Stradun, which itself was damaged, or were in the immediate vicinity thereof; and finally, that overall the damage varied from totally destroyed, i.e. burned out, buildings to more minor damage to parts of buildings and structures.
327. In relation to Count 6 specifically, the Chamber observes that the Old Town of Dubrovnik in its entirety was entered onto the World Heritage List in 1979 upon the nomination of the SFRY. The properties inscribed on the World Heritage List include those which, "because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science." The Chamber is of the view that all the property within the Old Town, i.e. each structure or building, is within the scope of Article 3(d) of the Statute. The Chamber therefore concludes that the attack launched by the JNA forces against the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, in so far as that provision relates to cultural property.

328. In relation to Count 6, there is no evidence to suggest that any of the 52 buildings and structures in the Old Town which the Chamber has found to have been destroyed or damaged on 6 December 1991, were being used for military purposes at that time. [...] As discussed earlier, military necessity can, in certain cases, be a justification for damaging or destroying property. In this respect, the Chamber affirms that in its finding there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991, or in the Old Town or in its immediate vicinity. In the Chamber's finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.
329. As to the *mens rea* element for both crimes the Chamber makes the following observations. In relation to Count 4, the Chamber infers the direct perpetrators' intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town. Similarly, for Count 6, the direct perpetrators' intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA positions at Zarkovica and elsewhere, above the Old Town on 6 December 1991. [...]

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

A. Ordering

[...]

2. Findings

334. The Indictment alleges that on 6 December 1991, the Accused ordered the unlawful artillery and mortar shelling of the Old Town of Dubrovnik conducted by forces under his command, including the forces under the command of Captain Kovacevic, which were directly subordinated to the 9 VPS commanded by Admiral Jokic.
335. The Prosecution submits that "[a]lthough there is no direct evidence of ordering, circumstantial evidence exists such that the conclusion must be drawn that the Accused gave an express or implied order to attack Srdj prior to the attack which was launched on 6 December 1991." It further argues that "an express or implied order by the Accused to attack Srdj on 6 December 1991 had to be an order given with the awareness of the substantial likelihood that the Old Town would also be unlawfully attacked during the course of the attack on Srdj." [...]
338. In the finding of the Chamber the evidence does not, however, establish that there was an express order of the Accused to attack or to fire on the Old Town, or the greater city of Dubrovnik. The relevant order was directed against Srdj. [...]

341. While very substantial provision was made for artillery support, the plans that were developed are not shown to be inappropriate for the objective of attacking and taking Srdj. There is nothing to suggest that they were outside the scope of what was or ought to have been contemplated by the Accused in respect of the troops and artillery to be employed in the assault. So far as the evidence indicates the plan was one which, if well executed, should have enabled the successful taking of Srdj well before 1200 hours on 6 December 1991.
342. While the attack ordered by the Accused was directed at Srdj, it is apparent from the evidence, as noted elsewhere in this decision, that any such attack necessarily contemplated that JNA artillery fire would be necessary against any Croatian forces which threatened the JNA forces attacking Srdj and jeopardised the success of the attack on Srdj. As has been indicated the reality was obvious that, apart from the limited Croatian forces on Srdj itself, any such defensive action by the Croatian forces could only come from the very limited artillery and other weapons in the wider city of Dubrovnik.
343. Given these circumstances, in the finding of the Chamber, the Accused with his very considerable military knowledge and experience, was well aware that his order to attack Srdj necessarily also involved the prospect that his forces might well have need to shell any Croatian artillery and other military positions in the wider Dubrovnik which, by their defensive action, threatened the attacking JNA troops on Srdj and the success of their attack to capture Srdj. That is the inference the Chamber draws.
344. As the Chamber has found earlier, the JNA forces attacking Srdj did come under limited but determined Croatian mortar, heavy machine gun (anti-aircraft gun) and other fire directed from the wider Dubrovnik. This fire caused JNA fatalities and other casualties on Srdj. It is clear that it threatened the success of the attack. JNA artillery fire [...] was, in part, directed against a number of these Croatian defensive positions in the wider Dubrovnik. [...] On 6 December 1991, no Croatian defensive fire was directed to Srdj or to other JNA positions from the Old Town, and the JNA forces did not act under any other belief.
345. What did occur is that the JNA artillery did not confine its fire to targeting Croatian military positions, let alone Croatian positions actually firing on the JNA forces on Srdj or other JNA positions. The JNA artillery which was active that day came to fire on Dubrovnik, including the Old Town, without regard to military targets, and did so deliberately, indiscriminately and extensively over a prolonged time. In respect of the shelling of the Old Town by the JNA, it caused substantial damage to civilian property and loss of life and other casualties to civilians. It is not proved that the Accused ordered this general artillery attack on Dubrovnik, or the Old Town. The evidence indicates otherwise. His order was confined to an attack on Srdj. The implications with regard to the use of JNA artillery against Dubrovnik, of the Accused's ordered attack on Srdj, has not been shown to extend to such a general artillery attack on Dubrovnik, or the Old Town.

346. For the purposes of the Accused's individual criminal responsibility, so far as it is alleged that he ordered the attack on the Old Town on 6 December 1991, the further issue arises whether the Accused was aware of the substantial likelihood that in the course of executing his order to attack Srdj, there would be a deliberate artillery attack by his forces on the Old Town. Previous JNA shelling of Dubrovnik, during which there was unauthorised shelling of the Old Town, in the course of JNA military action in October and November 1991 in the vicinity of the city of Dubrovnik, including Srdj, would certainly have alerted the Accused that this could occur, especially as the 3/472 mtbr had been identified to him as a likely participant in the November shelling.
347. There were, however, relevant differences. The JNA operations in October and November 1991 each involved a general widespread attack and advance over several days by many JNA units over a wide front, with naval and air support. The attack on Srdj in December 1991 was a much more limited operation both in terms of the forces engaged in the attack, the ground to be gained and the time allocated to the troops in which to do so. While the Accused's order to attack Srdj necessarily had the implication of JNA artillery support against Croatian forces threatening the attacking JNA troops and the success of the attack on Srdj including, if necessary, artillery fire against specific Croatian defensive positions in Dubrovnik, that implication was of limited, specifically targeted and controlled responsive fire by the Accused's forces. The escalation of JNA artillery fire on Dubrovnik into the deliberate, indiscriminate and extensive shelling which occurred, although not dissimilar to the previous episodes, was a marked step further than was implied by the Accused's order, and occurred in circumstances sufficiently different from the previous episodes as to reduce to some degree the apparent likelihood of a repetition of the previous conduct of his forces. While the circumstances known to the Accused, at the time of his order to attack Srdj, can only have alerted him to the possibility that his forces would once again ignore orders and resort to deliberate and indiscriminate shelling, it must be established by the Prosecution that it was known to the Accused that there was a substantial likelihood of this occurring. The risk as known to the Accused was not slight or remote; it was clearly much more real and obvious. Nevertheless, the evidence falls short, in the Chamber's view, of establishing that there was a "substantial likelihood" that this would occur known to the Accused when he ordered the attack on Srdj. [...]

C. Command Responsibility

1. Law [...]

(a) *Superior-subordinate relationship*

361. In the present case, the issue is raised whether a commander may be found responsible for the crime committed by a subordinate two levels down in the chain of command.

362. It appears from the jurisprudence that the concepts of command and subordination are relatively broad. Command does not arise solely from the superior's formal or *de jure* status, but can also be "based on the existence of *de facto* powers of control". In this respect, the necessity to establish the existence of a superior-subordinate relationship does "not [...] import a requirement of direct or formal subordination". Likewise, there is no requirement that the relationship between the superior and the subordinate be permanent in nature. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination.
363. Consistently with the above reasoning, other persuasive sources seem to indicate that there is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate be immediately answerable to that superior or more remotely under his command. [...]
366. [...] As to whether the superior has the requisite level of control, the Chamber considers that this is a matter which must be determined on the basis of the evidence presented in each case.

(b) Mental element: the superior knew or had reason to know

367. A superior may be held responsible under Article 7(3) of the Statute for crimes committed by a subordinate if, *inter alia*, he knew or had reason to know that the subordinate was about to commit or had committed such crimes. [...]

(c) Necessary and reasonable measures

374. What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation. [...]

2. Findings

(a) Superior-subordinate relationship

(i) Command structure

[...]

- [...] [T]he Chamber is satisfied that on 6 December 1991 the [units carrying out the attack], were directly subordinated to the 9 VPS, which was subordinated to the 2 OG. The [units] were at the second level of subordination to the 2 OG. The Chamber is satisfied, therefore, and finds that the Accused, as the commander of the 2 OG, had *de jure* authority over the JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town.

(ii) *Effective control*

392. As discussed above, the indicators of effective control depend on the specific circumstances of the case. The Chamber turns now to consider whether the evidence in the case establishes that the Accused had the power to prevent the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991, and punish or initiate disciplinary or other adverse administrative proceedings against the perpetrators.

a. *Did the Accused have the material ability to prevent the attack on the Old Town of 6 December 1991?*

[...]

405. The Chamber is satisfied that the Accused, as the commander of the 2 OG, had the material ability to prevent the unlawful shelling of the Old Town on 6 December 1991 and to interrupt and stop that shelling at any time during which it continued.

b. *Did the Accused have the material ability to punish the perpetrators?*

[...]

414. [...] [T]he Chamber is satisfied that as the commander of the 2 OG the Accused had effective control over the perpetrators of the unlawful attack on the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to issue orders to the 3/472 mtbr, and all the other JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town, explicitly prohibiting an attack on the Old Town, as well as to take other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated. Further, the Chamber is satisfied that following the attack of 6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.

(b) *Mental element: did the Accused know or have reason to know that his subordinates were about to or had committed crimes?*

415. The factual circumstances relevant to the mental element, as established by the evidence in this case, have been reviewed in this decision. Against that factual background Article 7(3) of the Statute gives rise to a significant issue. This is whether, by virtue of the JNA artillery fire on Dubrovnik to be expected in support of the attack the Accused ordered on Srdj, he knew or had reason to know that in the course of the attack the JNA artillery would commit offences such as the acts charged. By way of general analysis the Accused knew of the recent shelling of the Old Town in October and November by his forces. Indeed, the forces in the attack on 6 December 1991 were among the forces involved at

the time of the November shelling [...]. Existing orders in December precluded shelling of the Old Town, however that had also been the position with the October and November shelling, so that general orders had not proved effective as a means of preventing his troops from shelling Dubrovnik, especially the Old Town. The Accused well knew that no adverse action had been taken against anyone by virtue of the previous acts of shelling the Old Town, so that there had been no example of adverse disciplinary or other consequences shown to those who breached the existing orders, or international law, on previous occasions.

416. In the view of the Chamber, as discussed earlier in this decision, what was known to the Accused when he ordered the attack on Srdj on 5 December 1991, and at the time of the commencement of the attack on 6 December 1991, gave the Accused reason to know that criminal acts such as those charged *might* be committed by his forces in the execution of his order to attack Srdj. Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. [...]
417. In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Srdj, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srdj, the artillery under his command *might well* get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this *would* occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srdj, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srdj, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.
418. That being so, the Chamber will therefore consider whether, in the course of the attack on Srdj on 6 December 1991, what was known to the Accused changed so as to attract the operation of Article 7(3). In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Srdj feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused

was informed by the Federal Secretary of National Defence General Kadijevic of a protest by the ECMM against the shelling of Dubrovnik. For reasons given earlier, the order of the Accused to attack Srdj necessarily involved knowledge by him that JNA artillery might need to act against Croatian defensive positions in Dubrovnik which were threatening the lives of the attacking soldiers and the success of the attack on Srdj. His knowledge, in the Chamber's finding, was that only a limited number of such Croatian defensive positions could exist and that, as the attack progressed, these positions could be subjected to controlled and limited JNA shelling targeted on these positions, or on what were believed by his forces to be such positions. While a protest such as had been made to General Kadijevic could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise), and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Srdj, was then occurring. This knowledge was of a nature, in the Chamber's view, that, when taken together with his earlier knowledge, he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijevic ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional information, i.e. for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, i.e. so as to constitute criminal conduct. [...]

(c) Measures to prevent and to punish

(i) Measures to prevent

420. [...] [T]here was, in the Accused's knowledge at the time of his decision to order the attack on Srdj and when the attack commenced, a real risk that in the heat of the attack the JNA artillery would once again repeat its then recent and already repeated conduct of unlawful shelling of Dubrovnik, in particular of the Old Town. [...] [T]he known risk was sufficiently real and the consequences of further undisciplined and illegal shelling were so potentially serious, that a cautious commander may well have thought it desirable to make it explicitly clear that the order to attack Srdj did not include authority to the supporting artillery to shell, at the least, the Old Town. Depending on the attitude of such a commander to the status of the Old Town, any such explicit clarification may have been qualified, for example, by words such as "except in the case of lethal fire from the Old Town", words which reflect the terms of one of the earlier orders. [T]he Chamber is not persuaded that a failure to make any such clarification before the attack commenced gives rise to criminal liability of the Accused, pursuant

to Article 7(3) of the Statute, for what followed. Any such clarification would have been merely by way of wise precaution. It remains relevant, however, when evaluating the events that followed, that no such precaution was taken.

421. There were of course existing orders. As described elsewhere in this decision, in some cases, their effect was to preclude shelling of Dubrovnik, others forbade the shelling of the Old Town itself. [...] The existence of such orders had not been effective to prevent the previous shellings. Further, no action had been taken to deal with those who were responsible for the previous breaches of existing orders. In these circumstances, in the Chamber's finding, the mere existence of such orders could not on 6 December 1991 be seen to be effective to prevent repetition of the past shelling of Dubrovnik, and especially the Old Town. In the Chamber's view, however, there is a relevant distinction between such existing orders which, with apparent impunity, had not been faithfully observed by the forces to whom they were given, and a further clear and specific order to the same effect, if given at the time of, and specifically for the purposes of, a fresh new attack. A new express order prohibiting the shelling of the Old Town (had that been intended by the Accused) given at the time of his order to attack Srdj, would both have served to remind his forces of the existing prohibition, and to reinforce it. Further, and importantly, it would have made it clear to those planning and commanding the attack, and those leading the various units (had it been intended by the Accused) that the order to attack Srdj was not an order which authorised shelling of the Old Town. In the absence of such an order there was a very clear prospect that those planning, commanding and leading the attack would understand the new and specific order to attack Srdj as implying at least that shelling necessary to support the attack on Srdj was authorised, notwithstanding existing orders. [...] There is nothing to support the view that the Accused took any measures to guard against this. Indeed, as the Chamber has found, the intended implication of the Accused's order to attack Srdj was that shelling, even of the Old Town, which was necessary to support the attacking infantry on Srdj, could occur. As has been made clear in this decision, however, in the Chamber's finding what did occur on 6 December was deliberate, prolonged and indiscriminate shelling of the Old Town, shelling quite outside the scope of anything impliedly ordered by the Accused. It remains relevant, however, that nothing had been done by the Accused before the attack on Srdj commenced to ensure that those planning, commanding and leading the attack, and especially those commanding and leading the supporting artillery, were reminded of the restraints on the shelling of the Old Town, or to reinforce existing prohibition orders.
422. Hence, when the Accused was informed by General Kadjevic around 0700 hours of the ECMM protest, that put the Accused directly on notice of the clear likelihood that his artillery was then already repeating its earlier illegal shelling of the Old Town. The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtbr and of its apparent role, at least as revealed by Admiral Jokic's November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srdj in regard to

the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991. This should have been starkly obvious. The evidence contains no suggestion whatever that any such order was issued by the Accused, or anyone else that day [...].

423. There was also the obvious immediate need to learn reliably what JNA shelling was in truth occurring, and why. [...]
424. Just as the Accused had the ready and immediate means to be informed of the circumstances in Dubrovnik, and the Old Town, regarding JNA shelling, and to readily send his own staff to further investigate and report, he also had the ready and immediate means throughout 6 December 1991 to communicate orders to the commander of the attacking forces, Captain Kovacevic, and to the other senior 9 VPS officers at Zarkovica, including Warship-Captain Zec. [...]
433. [...] [T]he Accused had the legal authority and the material means to have stopped the shelling of the Old Town throughout the ten and a half hours it continued, as he also had the means and authority to stop the shelling of the wider Dubrovnik. No steps that may have been taken by the Accused were effective to do so. While the forces responsible for the shelling were under the immediate command of the 9 VPS, they were under his superior command and were engaged in an offensive military operation that day pursuant to the order of the Accused to capture Srdj.
434. While the finding of the Chamber is that the Accused did not order that the attack on Srdj be stopped when he spoke to Admiral Jokic around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Srdj be stopped.

(ii) *Measures to punish*

[...]

444. The evidence establishes, in the Chamber's finding, that the Accused at all material times had full material and legal authority to act himself to investigate, or take disciplinary or other adverse action, against the officers of the 9 VPS who directly participated in, or who failed to prevent or stop, the unlawful artillery attack on the Old Town on 6 December 1991. Despite this the Accused chose to take

no action of any type. Given that one line of the Defence case is to submit that Admiral Jokic, and his staff at 9 VPS, planned, authorised and oversaw the attack on Dubrovnik on 6 December 1991, and deliberately kept word of the attack from the Accused and 2 OG, until the attack had failed, it must also be recorded, in the Chamber's finding, that at no time did the Accused institute any investigation of the conduct of Admiral Jokic or his staff, or take any disciplinary or other adverse action against them in respect of the events of 6 December 1991. [...]

3. Conclusion

446. In view of the findings made earlier in this section, the Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.

VIII. CUMULATIVE CONVICTIONS

A. Should there be cumulative convictions?

447. The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct. In this case the artillery attack against the Old Town by the JNA on 6 December 1991 underlies all the offences charged in the Indictment. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if "each statutory provision involved has a materially distinct element not contained in the other". Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision. [...]
449. The issue of cumulation arises first in relation to the offences of murder (Count 1), cruel treatment (Count 2) and attacks on civilians (Count 3). [...] [S]ince murder and cruel treatment do not contain an element in addition to the elements of

attacks on civilians and because the offence of attacks on civilians contains an additional element (i.e. an attack) it is, theoretically, the more specific provision.

450. In the present case, the essential criminal conduct was an artillery attack against the Old Town inhabited by a civilian population. In the course of that attack civilians were killed and injured. The essential criminal conduct of the perpetrators is directly and comprehensively reflected in Count 3. The offence of attacks on civilians, involved an attack directed against a civilian population, causing death, and also serious injury, with the intent of making the civilian population the object of the attack. Given these circumstances, in the present case, the offence of murder adds no materially distinct element, nor does the offence of cruel treatment the gravamen of which is fully absorbed by the circumstances in which this attack on civilians occurred. [...]
452. The issue of cumulation also arises in relation to the remaining offences charged in the Indictment. These are devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5), and destruction or wilful damage of cultural property (Count 6). The statutory basis and the elements of each of these offences have been set out earlier in this decision. The elements of each of these three offences are such that they each, on a theoretical basis, contain "materially" distinct elements from each other.
453. The offence of attacks on civilian objects requires proof of an attack, which is not required by any element of either the offence of devastation not justified by military necessity or the offence of destruction of or wilful damage to cultural property. The offence of destruction of or wilful damage to cultural property requires proof of destruction or wilful damage directed against property which constitutes the cultural or spiritual heritage of peoples, which is not required by any element of the offence of attacks on civilian objects or the offence of devastation not justified by military necessity. The offence of devastation not justified by military necessity requires proof that the destruction or damage of property (a) occurred on a large scale and that (b) was not justified by military necessity. What is required by one offence, but not required by the other offence, renders them distinct in a material fashion.
454. In the present case, however, the offences each concern damage to property caused by the JNA artillery attack against the Old Town of Dubrovnik on 6 December 1991. The entire Old Town is civilian and cultural property. There was large scale damage to it. There was no military justification for the attack. In the view of the Chamber, given these particular circumstances, the essential criminal conduct is directly and comprehensively reflected in Count 6, destruction or wilful damage to cultural property. Counts 4 and 5 really add no materially distinct element, given the particular circumstances in which these offences were committed. The criminal conduct of the Accused in respect of these three Counts, is fully, and most appropriately reflected in Count 6 [...].
455. For these reasons, in the particular circumstances in which these offences were committed, the Chamber will enter convictions against the Accused only

in respect of Count 3, attacks on civilians, and Count 6, destruction and willful damage of cultural property.

[...]

DISPOSITION

1. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:
2. The Chamber finds the Accused **guilty** pursuant to Article 7(3) of the Statute of the following two counts:

Count 3: Attacks on civilians, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 6: Destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

3. While the Chamber is satisfied that the elements of the following four counts have been established pursuant to Article 7(3) of the Statute, for reasons given earlier the Chamber does **not** record a finding of guilty against the Accused in respect of:

Count 1: Murder, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 2: Cruel Treatment, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 4: Devastation not justified by military necessity, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 5: Unlawful Attacks on Civilian Objects, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

4. The Chamber does **not** find the Accused guilty pursuant to Article 7(1) of the Statute in respect of any of the six Counts.
5. The Chamber hereby sentences the Accused to a single sentence of eight years of imprisonment.
6. The Accused has been in custody for 457 days. Pursuant to Rule 101(c) of the Rules, he is entitled to credit for time spent in detention so far.
7. Pursuant to Rule 103 of the Rules, the Accused shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

C. Appeals Chamber, Judgement

[Source: *Prosecutor v. Pavle Strugar*, IT-01-42-A (Appeals Chamber Judgement) 17 July 2008; footnotes omitted.]

**IN THE APPEALS CHAMBER
JUDGEMENT
17 July 2008
PROSECUTOR
v.
PAVLE STRUGAR**

[...]

IV. ALLEGED ERRORS OF FACT (STRUGAR'S FIRST AND THIRD GROUNDS OF APPEAL

[...]

D. Alleged Errors Regarding the Events of 6 December 1991 [...]

9. Alleged Errors Regarding the Status of Valjalo and Ivo Vlašica

164. The Trial Chamber found that Valjalo was injured while on his way to work and that there was nothing in the evidence to suggest that, in his capacity as a driver for the Dubrovnik Municipal Crisis Staff, he was taking an active part in the hostilities. It therefore held that Valjalo was the victim of cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute. Strugar submits that the Trial Chamber erred in so holding.

[...]

(i) *Applicable Legal Standard*

172. In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond a reasonable doubt that the victim of the alleged offence was a person taking no active part in the hostilities.

173. In *Kordić* and *Čerkez*, the Appeals Chamber defined the notion of direct participation in hostilities set out in Article 51(3) of Additional Protocol I as encompassing acts of war, which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy's armed forces. The Appeals Chamber considers the concepts of "active participation" under Common Article 3 and "direct participation" under Additional Protocol I to be synonymous for the present purposes. Nevertheless, as the present case requires that the definition of this concept be addressed in more detail and in different circumstances, which was not necessary in the *Kordić* and *Čerkez* case, the Appeals Chamber will expand below upon its previous reasoning.

174. The notion of participation in hostilities is of fundamental importance to international humanitarian law and is closely related to the principle of distinction between combatants and civilians. [See Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] Pursuant to Additional Protocol I, combatants have the right to participate directly in hostilities and civilians enjoy general protection against dangers arising from military operations unless and for such time as they take a direct part in hostilities. As a result, a number of provisions of international humanitarian law conventions refer to the concept of participation in hostilities.
175. While neither treaty law, nor customary law expressly define the notion of active or direct participation in hostilities beyond what has been stated above, references to this notion in international humanitarian law conventions do provide guidance as to its meaning. Common Article 3 itself provides examples of persons other than civilians taking no active part in the hostilities, namely “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. Article 41(2) of *Additional Protocol I* states that a person will be *hors de combat* if he “is in the power of an adverse Party”, “clearly expresses an intention to surrender” or “has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself” provided that “he abstains from any hostile act and does not attempt to escape”. *A contrario*, the notion of active participation in hostilities encompasses armed participation in combat activities.
176. Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such. Indeed, Article 67(1)(e) of Additional Protocol I draws a distinction between direct participation in hostilities and the commission of “acts harmful to the adverse party” while Article 3(1) of the *Mercenaries Convention* distinguishes between direct participation in hostilities and participation “in a concerted act of violence”. The notion of direct participation in hostilities must therefore refer to something different than involvement in violent or harmful acts against the adverse party. At the same time, direct participation in hostilities cannot be held to embrace all activities in support of one party’s military operations or war effort. This is made clear by Article 15 of Geneva Convention IV, which draws a distinction between taking part in hostilities and performing “work of a military character”. Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless.
177. The Appeals Chamber also takes note of examples of direct and indirect forms of participation in hostilities included in military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols. Examples of active or direct participation in hostilities include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for

the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces. Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.

178. On the basis of the foregoing, the Appeals Chamber holds that in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party. If a reasonable doubt subsists as to the existence of such a nexus, then a Trial Chamber cannot convict an accused for an offence committed against such a victim under Article 3 of the Statute.
179. When dealing with crimes pursuant to Common Article 3, it may be necessary for a Trial Chamber to be satisfied beyond a reasonable doubt that the alleged offence committed against the victim was not otherwise lawful under international humanitarian law. The need for such an additional enquiry will depend on the applicability of other rules of international humanitarian law, which is assessed on the basis of the scope of application of these rules as well as the circumstances of the case. Indeed, if the victim of an offence was a combatant or if the injury or death of such a victim was the incidental result of an attack which was proportionate in relation to the anticipated concrete and direct military advantage, his injury or death would not amount to a violation of international humanitarian law even if he was not actively participating in hostilities at the time of the alleged offence.

[...]

181. The Appeals Chamber will now address Strugar's challenges to the Trial Chamber's finding that Valjalo was not actively participating in the hostilities at the time of the offence.

182. At the outset, the Appeals Chamber notes that the evidence indicates that Valjalo was a driver for the Dubrovnik Municipal Crisis Staff and that he drove local and foreign officials in Dubrovnik in this capacity. The Appeals Chamber also notes that Valjalo testified that during the events of December 1991, he drove the President of the Executive Council of Dubrovnik, who also served as the President of the Dubrovnik Municipal Crisis Staff. Valjalo specified that the latter did not wear a military uniform. In addition, Valjalo stated that he was a civilian, wore civilian clothes and was unarmed. He indicated that while he was a reserve in the Croatian army, he was not mobilised during the war.

[...]

184. Exhibit D24, a Certificate of the Dubrovnik-Neretva County Prefect delivered pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, provides as follows: "During the worst attacks on Dubrovnik, Mato VALJALO drove members of the Crisis Staff and officials of the municipality and the Republic of Croatia to their war tasks". The Appeals Chamber observes that the Trial Chamber did not refer to this exhibit in the Trial Judgement. However, the Appeals Chamber finds that there is no reasonable doubt that the required nexus is lacking between Valjalo's activities at the time of the offence (he was injured near his home while on his way to work) and any possible participation of the Dubrovnik Municipal Crisis Staff, municipal officials and officials of the Republic of Croatia in acts of war which by their nature or purpose were intended to cause actual harm to the personnel or equipment of the JNA forces in the Dubrovnik region.

185. In light of the foregoing, the Appeals Chamber finds that a reasonable trier of fact could have concluded beyond a reasonable doubt that at the time of the alleged offence, Valjalo was not actively participating in the hostilities.

186. Accordingly, this sub-ground of appeal is dismissed.

V. ALLEGED ERRORS OF LAW (STRUGAR'S SECOND GROUND OF APPEAL)

[...]

B. Alleged Error in Characterization of the *Mens Rea* of the Criminal Offence

[...]

(a) Attacks on Civilians (Count 3)

270. The Appeals Chamber has previously ruled that the perpetrator of the crime of attack on civilians must undertake the attack "wilfully" and that the latter incorporates "wrongful intent, or recklessness, [but] not 'mere negligence' ". In other words, the *mens rea* requirement is met if it has been shown that the acts of violence which constitute this crime were wilfully directed against civilians, that is, either deliberately against them or through recklessness. The Appeals Chamber considers that this definition encompasses both the notions of "direct intent" and "indirect intent" mentioned by the Trial Chamber, and referred to by Strugar, as the *mens rea* element of an attack against civilians.

271. As specified by the Trial Chamber in the *Galić* case,

For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant. [See Case No. 218, ICTY, *The Prosecutor v. Galić* [Part A, para. 55]]

The intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack particular civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.

272. In the present case, the Trial Chamber found that the cause of the extensive and large-scale damage to the Old Town of Dubrovnik was the deliberate shelling of the Old Town on 6 December 1991, not only by JNA mortars, but also by other JNA weapons such as ZIS and recoilless cannons and Maljutka rockets. The Trial Chamber further concluded that the intent of the perpetrators of this attack was “to target civilians and civilian objects in the Old Town”. The Appeals Chamber is of the view that Strugar has failed to demonstrate that no reasonable trier of fact could have reached such conclusions.

[...]

VI. ALLEGED ERROR OF LAW REGARDING THE SCOPE OF STRUGAR’S DUTY TO PREVENT (PROSECUTION’S FIRST GROUND OF APPEAL)

[...]

297. Pursuant to Article 7(3) of the Statute, the knowledge required to trigger a superior’s duty to prevent is established when the superior “knew or had reason to know that [his] subordinate was about to commit [crimes]”. The Trial Chamber in *Celebici* interpreted this requirement in light of the language used in Article 86(2) of Additional Protocol I and held that, under the “had reason to know” standard, it is required to establish that the superior had “information of a nature, which at the least, would put him on notice of the risk of [...] offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates”.

[...]

304. Taking into consideration the relevant factual findings of the Trial Chamber, the Appeals Chamber finds that the Trial Chamber committed an error of law by not applying the correct legal standard regarding the *mens rea* element under Article 7(3) of the Statute. The Trial Chamber erred in finding that Strugar's knowledge of the risk that his forces might unlawfully shell the Old Town was not sufficient to meet the *mens rea* element under Article 7(3) and that only knowledge of the "substantial likelihood" or the "clear and strong risk" that his forces would do so fulfilled this requirement. In so finding, the Trial Chamber erroneously read into the *mens rea* element of Article 7(3) the requirement that the superior be on notice of a strong risk that his subordinates would commit offences. In this respect, the Appeals Chamber recalls that under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute.

[...]

306. In light of the Trial Chamber's factual findings regarding Strugar's knowledge prior to the attack against Srdj, the Appeals Chamber is satisfied beyond a reasonable doubt that Strugar had notice of sufficiently alarming information such that he was alerted of the risk that similar acts of unlawful shelling of the Old Town might be committed by his subordinates as well as of the need to undertake further enquiries with respect to this risk.

307. In the opinion of the Appeals Chamber, the only reasonable conclusion available on the facts as found by the Trial Chamber was that Strugar, despite being alerted of a risk justifying further enquiries, failed to undertake such enquiries to assess whether his subordinates properly understood and were inclined to obey the order to attack Srdj and existing preventative orders precluding the shelling of the Old Town.

308. Consequently, the Appeals Chamber is satisfied beyond a reasonable doubt that as of 12:00 a.m. on 6 December 1991, Strugar possessed sufficiently alarming information to meet the "had reason to know" standard under Article 7(3) of the Statute.

[...]

IX. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER,**

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

[...]

DISMISSES all grounds of appeal submitted by Strugar (...);

ALLOWS the Prosecution's first ground of appeal regarding the scope of Strugar's duty to prevent the shelling of the Old Town;

[...]

REPLACES the sentence of eight years of imprisonment imposed by the Trial Chamber by a sentence of seven and a half years, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS that, in accordance with Rules 103(C) and Rule 107 of the Rules, Strugar is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

DISCUSSION

I. Qualification of the conflict

1. Does the Trial Chamber qualify the conflict? Why/why not? How would you qualify it? On what would a correct qualification depend? Does the qualification of a conflict as international or non-international have an impact on the legal analysis of the shelling of Dubrovnik? Does the nature of the conflict have an impact on whether the shelling of civilians or civilian objects is criminalized? (GC I-IV, Art. 2; P I, Arts 51 and 52; P II, Art. 13)
2. (*Trial Chamber, paras 224-228*) Why does the Tribunal refer to the consideration whether Art. 52 of Protocol I is also covered by Protocol II? Why does it assess whether the Hague Regulations have customary law status in non-international armed conflicts as well? (P I, Arts 51 and 52; P II, Art. 13)

II. Attacks on civilians

3. a. (*Trial Chamber, para. 282*) What is the Trial Chamber's definition of a civilian? Do you agree that combatants become civilians once they lay down their arms or are sick or wounded? Does the Trial Chamber give a definition of "taking an active part in the hostilities"? (GC I-IV, Art. 3; P I, Arts 50 and 51(3))
- b. (*Appeals Chamber, paras 176-177*) Do you agree with the Appeals Chamber that "direct participation in hostilities must (...) refer to something different than involvement in violent or harmful acts against the adverse party"? Why/Why not? Does the Appeals Chamber make clear whether or not a person indirectly participating in hostilities loses the protection of civilian status? In your opinion, is that the case? (P I, Art. 51(3); P II, Art. 13(3))
- c. (*Appeals Chamber, para. 178*) What are the elements of the definition of direct participation in hostilities proposed by the Appeals Chamber? What are the differences from and similarities to the ICRC's study on direct participation in hostilities? Is the definition of the Appeals Chamber relevant? Does it create a legal reference with regard to direct participation in hostilities? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))
- d. (*Appeals Chamber, para. 178*) Do you agree with the Appeals Chamber that "in order to establish the existence of a violation of common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which [...] are intended to cause actual harm to [...] the enemy's

- armed forces.”? Does not this conception jeopardize the presumption of civilian status in case of doubt? Or does criminal evidence require greater certainty than IHL?
- e. According to the Appeals Chamber, Valjalo was not actively participating in hostilities. Did the Appeals Chamber come to this conclusion because driving Crisis Staff officials did not constitute a direct participation in hostilities or because Valjalo was not driving Crisis Staff officials when he was attacked? Would he have been considered as directly participating in hostilities if he had been injured while driving Crisis Staff officials? (P I, Art. 51(3); P II, Art. 13(3))
 - f. Does the Appeals Chamber reject the idea appearing in the ICRC’s Interpretive Guidance document that someone with a continuous fighting function in an armed group is not a civilian? Does it accept the revolving-door phenomenon, i.e. that a person who regularly takes direct part in hostilities regains protection against attacks each time he or she does not so participate? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))
4. What are the differences and what are the similarities between the Appeals Chamber’s approach to direct participation in hostilities and that reflected in the ICRC’s Interpretive Guidance document? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))
 5. (*Trial Chamber, para. 287*) Does the Tribunal accept the claim of Lieutenant-Colonel Jovanovic that because he heard air-raid sirens, he could safely assume that all civilians were indoors and that therefore anyone in sight was a combatant? Does hearing an air-raid siren absolve attackers of the obligation to take precautions in an attack and to verify whether a person is a civilian or a combatant? (P I, Arts 57 and 58)
 6.
 - a. Does the Trial Chamber distinguish between whether the attack was indiscriminate or whether it was a deliberate attack on civilians? Does it matter under IHL whether the shelling of civilians was deliberate or indiscriminate? (P I, Art. 51; P II, Art. 13)
 - b. (*Appeals Chamber, paras 270-272*) For criminal responsibility to arise, can a relevant distinction be made between whether the attack was indiscriminate or deliberate? What is the input of the Appeals Chamber in that regard? Does the notion of direct or indirect intent matter under IHL?
 7. What are the elements of the offence of attacks on a civilian population and the offence of attacks on civilian objects? Is there a distinction between the two?

III. Attacks on the Old Town of Dubrovnik

8.
 - a. How does the Trial Chamber classify the Old Town of Dubrovnik? Can an entire section of a city be a “civilian object”? Even if there are military personnel stationed there? Even if there are rockets and other weapons located there? Does the classification of the Old Town of Dubrovnik as a World Heritage Site mean that it can never be a military objective? (1954 Hague Convention on Cultural Property, Art. 4) [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]
 - b. How can cultural property become a military objective? Do you agree with the Trial Chamber that the use and not the location of such property must be determinative (*Trial Chamber, para. 310*)? What does the 1954 Hague Convention on Cultural Property suggest? [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]
 - c. Is “imperative military necessity”, as the standard for when cultural property may be legitimately attacked, a higher standard than the qualification as “military objective”, which is the standard for other objects? Does the Tribunal address this question? Why or why not?

What is the relationship between the protection of cultural objects in Protocols I and II and in the 1954 Hague Convention? Who determines whether the military necessity is “imperative”? (P I, Art. 53; P II, Art. 16; 1954 Hague Convention on Cultural Property, Art. 4) [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]

- d. Why does the Tribunal discuss the nature of the Crisis Staff whose offices are situated in the Old Town (*Trial Chamber, para. 284*)? In your opinion, would the Crisis Staff headquarters have been a legitimate military objective if the staff had been providing information to Croatian forces? Would this activity correspond to the requirement of “imperative military necessity” for when cultural property may be targeted? (P I, Art. 52; 1954 Hague Convention on Cultural Property, Art. 4) [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]
 - e. (*Trial Chamber, para. 285*) In this case, the Old Town of Dubrovnik is a registered World Heritage Site. Which other factors may determine whether a civilian object amounts to “cultural property”? Does the Tribunal list other factors? Why? Is there any significance to the fact that many women and children had left the Old Town due to the ongoing naval blockade?
 - f. (*Trial Chamber, para. 329*) What is the significance of the fact that there were “protective UNESCO emblems” marking the Old Town? Do UNESCO emblems have the same protective function as the red cross or red crescent? (GC I, Arts 39-43; P I, Art. 18; 1954 Hague Convention on Cultural Property, Arts 4 and 17) [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]
9. (*Trial Chamber, paras 195 and 295*) Is the Trial Chamber correct in holding that the question of proportionality does not arise on the facts of this case? Why/why not? Does the Trial Chamber indicate what its findings might have been with a proportionality assessment, if there had been military objectives in the Old Town?
 10. How does the Tribunal determine that destruction of cultural property entails individual criminal responsibility? Is a treaty provision obliging States to criminalize certain behaviour sufficient to determine that individual criminal responsibility attaches to that behaviour under international law?
 11. (*Trial Chamber, para. 308*) Does every violation of IHL in terms of unlawful attacks entail criminal liability? What additional elements are required for criminal responsibility to attach to acts of hostility directed against cultural property?

IV. Strugar’s criminal responsibility

12. (*Trial Chamber, paras 347 and 415-417; Appeals Chamber, paras 297-308*) Is a superior responsible for crimes committed by subordinates as soon as he or she knows of any risk that those subordinates might commit such crimes (and does not do everything feasible to prevent or repress them? Did the Trial Chamber find that Strugar knew or should have known that Dubrovnik more generally would be attacked when he ordered the attack on Srdj? What level of certainty that troops might engage in unlawful shelling of Dubrovnik is necessary in order to hold a superior criminally responsible for ordering an attack on a legitimate military objective? Is less certainty required under the doctrine of command responsibility?
13. (*Trial Chamber, para. 343*) Why does the Tribunal note that Croatian fire was sufficiently serious to threaten the success of the JNA attack on Srdj?
14. Does the Tribunal hold that Strugar was under an obligation to order that the attack on Srdj be stopped once he was aware that supporting fire for that attack was being directed at the city of Dubrovnik and the Old Town (*Trial Chamber, para. 433*)? In such circumstances, does IHL require

- a commander to stop an attack? Which rules of IHL could be used to support such a holding? (P I, Arts 51(4) and 57)
15. (*Trial Chamber, paras 433-434*) Under the doctrine of command responsibility, is the obligation to prevent and punish an obligation of result or of means? In the view of the Tribunal? In your view, which should it be?
 16. (*Trial Chamber, para. 420*) Regarding the preventive measures under command responsibility, does IHL require a commander to be “cautious” in giving orders? Does the failure to issue an explicit order not to attack the Old Town give rise to criminal liability? Would issuing an order specifying that the Old Town should not be attacked during the attack on Srdj be part of the precautionary measures a commander must take? Is there a distinction between precautionary measures required by IHL and preventive measures required by command responsibility when it comes to planning attacks? (P I, Art. 57)
 17. Why does the relationship between Lieutenant-General Strugar and Captain Kovacevic matter with respect to command responsibility?
 18. Why could Strugar not be convicted of murder even though all the elements of the crime were established? According to the doctrine of cumulative convictions as applied by the Tribunal, can there ever be a situation in which a superior is guilty of murder for deaths caused during an unlawful attack? What distinct elements may exist?

Case No. 220, ICTY, The Prosecutor v. Boškoski

[See also **Case No. 211**, ICTY, The Prosecutor v. Tadić]

[**Source:** ICTY, The Prosecutor v. Ljube Boškoski and Johan Tarčulovski, IT-04-82-T, Judgement of 10 July 2008, available at www.icty.org. Footnotes partly omitted]

[**N.B.:** For reasons of clarity, the other cases discussed in this book, when relevant, are referred to in the footnotes, and not in the core of the text.]

**PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI
JUDGEMENT**

[...]

I. INTRODUCTION

1. The Indictment charges the Accused, Ljube Boškoski and Johan Tarčulovski, with crimes committed between 12 and 15 August 2001 against ethnic Albanians from Ljuboten village in the northern part of the former Yugoslav Republic of Macedonia ("FYROM"). These acts are alleged to have occurred during an armed conflict that, as alleged, began in January 2001 and continued until at least late September 2001, between the Security Forces of FYROM, i.e., the army and police, on the one hand, and the ethnic Albanian National Liberation Army ("NLA") on the other. It should be noted that this case is the only one before this Tribunal concerning allegations arising out of the situation in FYROM in 2001.

[...]

V. GENERAL REQUIREMENTS OF ARTICLE 3 OF THE STATUTE

173. The Accused are each charged with three counts of violations of the laws or customs of war pursuant to Article 3 of the Statute, namely one count of murder, one count of wanton destruction of cities, towns or villages not justified by military necessity, and one count of cruel treatment. There are several preliminary requirements which must be satisfied for the applicability of Article 3 of the Statute. In addition to being satisfied that the crimes charged fall under this provision, it must be established that there was an armed conflict, whether international or internal, at the time material to the Indictment and that the acts of the Accused are closely related to this armed conflict.

[...]

A. Armed Conflict

1. Law

175. The test for armed conflict was set out by the Appeals Chamber in the *Tadić* Jurisdiction Decision: “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.¹ This test has been consistently applied in subsequent jurisprudence. Given the circumstances of that case, the Trial Chamber in *Tadić* interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the conflict and (ii) the organisation of the parties to the conflict, as a way to distinguish an armed conflict “from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.² This approach has been followed in subsequent judgements, although care is needed not to lose sight of the requirement for protracted armed violence in the case of an internal armed conflict, when assessing the intensity of the conflict. The criteria are closely related. They are factual matters which ought to be determined in light of the particular evidence available and on a case-by-case basis.
176. [...] Trial Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case. The Chamber will examine how each of these criteria has been assessed in practice.

(a) Intensity

177. Various indicative factors have been taken into account by Trial Chambers to assess the “intensity” of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes,³ the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed.⁴ Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones;⁵ the type of weapons used,⁶ in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns;⁷ the extent of destruction⁸ and the

¹ *Tadić* Jurisdiction Decision, para. 70. [See **Case No. 211**, ICTY, The Prosecutor v. *Tadić* [Part A., para. 70]]

² *Ibid.* para. 562

³ *Haradinaj* Trial Judgement, paras 91 and 99 [See **Case No. 211**, ICTY, The Prosecutor v. *Tadić* [Part E., paras 91 and 99]]

⁴ *Ibid.* para. 49

⁵ *Ibid.* paras 49 and 97

⁶ *Ibid.* para. 49

⁷ *Ibid.* para. 96

⁸ *Ibid.* para. 49

number of casualties caused by shelling or fighting;⁹ the quantity of troops and units deployed;¹⁰ existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.

178. At a more systemic level, an indicative factor of internal armed conflict is the way that organs of the State, such as the police and military, use force against armed groups. In such cases, it may be instructive to analyse the use of force by governmental authorities, in particular, how certain human rights are interpreted, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict. As is known, in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives. [...] However, when a situation reaches the level of armed conflict, the question what constitutes an arbitrary deprivation of life is interpreted according to the standards of international humanitarian law, where a different proportionality test applies.

[...]

180. [...] [S]ome national courts have qualified [...] situations as conflicts not of an international character to which Common Article 3 of the Geneva Conventions applies. In this respect, the Chamber notes the factors that led these courts to make such a qualification. The Constitutional Court of the Russian Federation recognised in a 1995 judgement that Additional Protocol II applied to the armed conflict in the Chechen Republic. The Court observed that the use of the armed forces under the Constitution did not require a link with a declaration of a state of emergency or a state of war and that when the State Duma adopted a resolution in 1994 on the use of the armed forces, it had declared that the disarmament of the illegal regular armed units in the Republic, which were equipped with tanks, rocket installations, artillery systems and combat planes “is in principle impossible without the use of the forces of the army”.¹¹
181. In Peru, the National Criminal Chamber held that activities of the armed group Peruvian Communist Party – Shining Path, and counter-actions to these by the Government forces, which resulted in more than 69,000 deaths and severe damage to public and private infrastructure, constituted an armed conflict and that Common Article 3 applied. The Chilean Supreme Court recognised the applicability of Common Article 3 to the situation in Chile in 1973, having had regard to the Government’s decree of 12 September 1973 which qualified the

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See **Case No. 281**, Russia, Constitutionality of Decrees on Chechnya

internal situation as “a state of war” which had the effect of making certain penal provisions becoming applicable.

182. The Supreme Court of the United States held in 2006 that the United States was in a state of armed conflict with the non-State group known as Al Qaeda on the basis that Common Article 3 applies when there is resort to armed force between a State and a non-signatory to the Geneva Conventions of 1949 which is party to an armed conflict.¹² In Israel, the Supreme Court held that “[s]ince the end of September 2000, fierce fighting has been taking place in Judeaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle.” In coming to this holding, it took into account that since the end of September 2000 until 2002, more than 600 Israeli citizens had been killed and more than 4,500 injured, and that “many” Palestinians had also been killed and wounded. To counter the “terrorist” attacks, the Israeli Defence Forces had, *inter alia*, conducted special military operations since June 2002 “to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks”.¹³
183. These cases demonstrate that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists. The high number of casualties and extent of material destruction have also been important elements in their deciding whether an armed conflict existed.
184. The Boškoski and Tarčulovski Defences have argued that since international law distinguishes between armed conflict and acts of “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”,¹⁴ acts of a terrorist nature may not be taken into account in the determination of the existence of an armed conflict. The implication of this argument would seem to be that all terrorist acts should be excluded from the assessment of the intensity of violence in FYROM in 2001. Without prejudice to the question of the qualification of the acts of the NLA as terrorist in nature, the Chamber considers that this interpretation is a misreading of the jurisprudence of the Tribunal, reviewed below.
185. The Trial Chamber in *Tadić* relied on the ICRC Commentary to the Geneva Conventions of 1949 to explain that the elements of intensity and organisation of the parties may be used solely for the purpose, as a minimum, to distinguish an armed conflict from lesser forms of violence such as “terrorist activities”. The part of the Commentary relied upon noted that the Conventions’ drafters did not intend the term “armed conflict” to apply “to any and every isolated event involving the use of force and obliging the officers of the peace to have resort to their weapons”. Rather, Common Article 3 was to apply to “conflicts which are in many respects similar to an international war, but take place within the confines of a single country”, that is, where “armed forces” on either side are

12 See **Case No. 263**, United States, *Hamdam v. Rumsfeld*

13 See **Case No. 133**, Israel, *Ajuri v. IDF Commander* [paras 1-4]

14 *Tadić* Trial Judgement, para. 562 [See **Case No. 211**, ICTY, *The Prosecutor v. Tadić* [Part B., para. 562]]

engaged in “hostilities”. The essential point made by the Trial Chamber in *Tadić* is that isolated acts of violence, such as certain terrorist activities committed in peace time, would not be covered by Common Article 3. This conclusion reflected the Appeals Chamber’s determination in *Tadić* that armed conflict of a non-international character exists when there is “protracted violence between governmental authorities and organized groups or between such groups within a State”. In applying this test, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterised as terrorist in nature. This interpretation is consistent with the Appeals Chamber’s observation in *Kordić*, that “[t]he requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism.”

186. The element of “protracted” armed violence in the definition of internal armed conflict has not received much explicit attention in the jurisprudence of the Tribunal. It adds a temporal element to the definition of armed conflict. The Chamber is also conscious of Article 8(2)(d) of the Rome Statute of the International Criminal Court relating to serious violations of Common Article 3 which “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, *isolated and sporadic acts of violence* or other acts of a similar nature”.
187. The view that terrorist acts may be constitutive of protracted violence is also consistent with the logic of international humanitarian law, which prohibits “acts of terrorism” and “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” in both international and non-international armed conflicts and to which individual criminal responsibility may attach. It would be nonsensical that international humanitarian law would prohibit such acts if these were not considered to fall within the rubric of armed conflict.
188. In addition, the Chamber notes that some national courts have not excluded acts of a terrorist nature when considering the evidence of armed conflict. The National Criminal Chamber of Peru found that the threshold of Common Article 3 had been met in respect of the situation related to acts committed by the Shining Path, such as murder of civilians, acts of sabotage against embassies and public and private enterprises’ facilities, and armed ambushes against State forces and responses to these. [...] The Supreme Court of the United States did not refrain from the determination that Common Article 3 applied to the armed conflict it identified between the United States and Al Qaeda in spite of the “terrorist” acts perpetrated by Al Qaeda or the US Government’s view that the latter was a terrorist organisation.¹⁵
189. The Supreme Court of Israel has also qualified the situation between Israel and “terrorist organizations” as armed conflict in a number of judgements. In

¹⁵ See Case No. 263, United States, *Hamdam v. Rumsfeld*

a 2006 judgement, the Israeli Supreme Court recognised that a “continuous situation of armed conflict” existed between Israel and the various “Palestinian terrorist organizations” since the first *intifada*, due to the “constant, continual, and murderous wave of terrorist attacks” and the armed response to these. The Court observed that “in today’s reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law.”¹⁶ Furthermore, the UN Commission of Inquiry on Lebanon concluded that “the hostilities that took place from 12 July to 14 August [2006] constitute an international armed conflict”, but noted “its *sui generis* nature in that active hostilities took place only between Israel and Hezbollah fighters”. In its report, the Commission stated that the fact that Israel considered Hezbollah to be a terrorist organisation and its fighters terrorists did not influence its qualification of the conflict.¹⁷

190. These cases indicate that national courts and UN bodies have not discounted acts of a terrorist nature in their consideration of acts amounting to armed conflict. Nothing in the jurisprudence of the Tribunal suggests a different approach should be taken to the issue provided that terrorist acts amount to “protracted violence”. In view of the above considerations, the Chamber considers that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict.

[...]

193. In view of these considerations, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the events in FYROM in 2001. It will treat the indicative factors identified above, together with the systemic consideration of the use of force by the State authorities, as providing useful practical guidance to an evaluation of the intensity criterion in the particular factual circumstances of this case.

(b) *Organisation of the armed group*

194. The jurisprudence of the Tribunal has established that armed conflict of a non-international character may only arise when there is protracted violence between governmental authorities and organised armed groups or between such groups within a State. The required degree of organisation of such an armed group for the purpose of Common Article 3 has not been specifically defined in legal texts or in jurisprudence. Nevertheless, certain elements of this minimal level of organisation have been elaborated by the Tribunal’s jurisprudence.
195. In *Tadić*, the Appeals Chamber distinguished between the situation of individuals acting on behalf of a State without specific instructions from that of individuals

¹⁶ See Case No. 136, Israel, The Targeted Killings Case

¹⁷ See Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006

making up “an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.” The Chamber observed that “an organised group [...] normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority” and that its members do not act on their own but conform “to the standards prevailing in the group” and are “subject to the authority of the head of the group”. Thus, for an armed group to be considered organised, it would need to have some hierarchical structure and its leadership requires the capacity to exert authority over its members.

196. The issue of the degree of organisation of an armed group was considered by the Trial Chamber in *Limaj* in deciding whether the Kosovo Liberation Army (KLA) was an organised armed group. The Chamber rejected the more stringent tests for organisation submitted by the Defence based upon the “convenient criteria” of the ICRC Commentary and the submissions that an armed group must possess a method of sanctioning breaches of Common Article 3 or fulfil the conditions of Additional Protocol II, instead holding that “some degree of organisation by the parties will suffice to establish the existence of an armed conflict”. The leadership of the group must, as a minimum, have the ability to exercise some control over its members so that the basic obligations of Common Article 3 of the Geneva Conventions may be implemented. National case law is also consistent with this minimal requirement of control. For instance, a Belgian military court refused to characterize the situation prevailing in Somalia in 1993 as an armed conflict to which Common Article 3 would apply on the basis that the groups involved were irregular, anarchic armed groups with no responsible command.
197. While the jurisprudence of the Tribunal requires an armed group to have “some degree of organisation”, the warring parties do not necessarily need to be as organised as the armed forces of a State. Neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in “protracted violence” is lower than the degree of organisation required to carry out “sustained and concerted military operations”. In this respect, it is noted that during the drafting of Article 8(2)(f) of the Rome Statute of the International Criminal Court covering “other” serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of Additional Protocol II to the section, and instead accepted a proposal to include in the chapeau the test of “protracted armed conflict”, as derived from the Appeals Chamber’s decision in *Tadić*. This indicates that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II. This difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol

II conflicts, which mean that “there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol”. By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.

198. Further guidance as to the degree of organisation required for parties to armed conflicts governed by Common Article 3 may be found in *Haradinaj*, in which the Trial Chamber, after having reviewed the practice of Trial Chambers in interpreting the criterion of organisation, concluded that “an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means”. In order to ascertain whether an armed group might be sufficiently organised, the Trial Chamber examined the indicative factors taken into account by Trial Chambers, “none of which are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled”.¹⁸
199. Trial Chambers have taken into account a number of factors when assessing the organisation of an armed group. These fall into five broad groups. In the first group are those factors signalling the presence of a command structure, such as the establishment of a general staff or high command,¹⁹ which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply,²⁰ authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit’s area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units.
200. Secondly, factors indicating that the group could carry out operations in an organised manner have been considered, such as the group’s ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions.

¹⁸ *Haradinaj* Trial Judgement, para. 60 [See **Case No. 211**, ICTY, *The Prosecutor v. Tadić* [Part E., para. 60]]

¹⁹ *Ibid.* paras 60, 65-68

²⁰ *Ibid.* para. 60

201. In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organised supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units.
202. In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members.
203. A fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords.
204. The Tarčulovski Defence submitted that the “terrorist” nature of the activities of the NLA and alleged violations of international humanitarian law militated against the NLA being considered as a party to an armed conflict because they showed that the “NLA did not have [the] authority to control the forces on the ground”. The Chamber accepts that a high number of international humanitarian law violations by the members of an armed group may be indicative of poor discipline and a lack of hierarchical command in the group in some instances. It is noted that one national court has held that a pattern of violations of rules of international humanitarian law such as terrorist attacks indicates a lack of responsible command under Article 1 of Additional Protocol II, although the court nonetheless found that Common Article 3 applied. However, the Chamber also recognises that some terrorist attacks actually involve a high level of planning and a coordinated command structure for their implementation. In other words, this question is a factual determination to be made on a case-by-case basis.
205. Where members of armed groups engage in acts that are prohibited under international humanitarian law, such as “acts of terrorism”, “acts or threats the primary purpose of which is to spread fear in the civilian population”, hostage-taking, the use of human shields, feigning protected status, attacking historic or religious monuments or buildings or using such objects in support of the military effort, or serious violations of Common Article 3, they are liable to prosecution and punishment. However, so long as the armed group possesses the organisational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict. The Chamber cannot merely infer a lack of organisation of the armed group by reason of the fact that international humanitarian law was frequently violated by its members. In assessing this factor the Chamber needs to examine how the attacks were planned and carried out – that is, for example, whether they were primarily the result of a military strategy ordered by those leading the group or

whether they were perpetrated by members deciding to commit attacks of their own accord.

206. In view of the above analysis, the Chamber will apply the test laid down by the Appeals Chamber in the *Tadić* Jurisdiction Decision in its examination of the facts of the events in FYROM in 2001, using the indicative factors identified above as a practical guide to determining whether the criterion of organisation of the parties was met.

2. Findings

207. [...] The Chamber will discuss below whether the Prosecution has demonstrated that the acts of violence that occurred in FYROM in the material time reached the level of intensity required by the jurisprudence of the Tribunal and that the NLA possessed the characteristics of an organised armed group within the meaning of the *Tadić* test to establish the existence of an armed conflict.

(a) *Intensity of the conflict*

[...]

239. The Chamber received differing evidence as to the total numbers of casualties as a result of the events of 2001. Varying sources indicate that 15 to 24 police officers and 35 to 43 to 60 members of the army were killed. [...] The [Ministry of Interior's] "White Book" documents 10 civilians killed, while the "Report on the activities of the Ministry of Interior for 2001" states that 16 civilians were killed. Some 150 to 174 police officers and 119 to 211 to 270 army members were injured, while 61 to 75 to 100 civilians were injured, and 20 to 36 civilians reportedly went missing. Although none of these figures are absolutely reliable, the Chamber takes note of them as a broad indication of the numbers of casualties produced by the events of 2001, the majority of which appeared to occur in June and August.

240. In terms of the numbers of persons displaced by the conflict, by the end of August, the United Nations Refugee Agency estimated that there were around 64,000 Macedonian refugees in Kosovo or southern Serbia, and around 70,000 internally displaced persons in Macedonia, 15,000 of whom were "micro-displaced" very short distances from original residence or sleeping in a location different from day time residence. [...] FYROM sources put the number of Macedonian refugees at 80,000 and the number of internally displaced persons at over 86,000.

[...]

242. The Chamber received varying analyses of whether the NLA exercised control over territory during 2001. [...] While the NLA did not control any of the large towns or cities, the Chamber heard evidence that much of the mountainous areas with predominantly ethnic-Albanian villages were under the "control" of the NLA. The OSCE estimated that 135 to 140 villages were under NLA control, meaning that the police were unable to perform their jobs there. The degree of

control did not reach the level of the exercise of governmental control, but the Macedonian forces were unable to enter these villages for prolonged periods of time. [...]

243. While NLA armed actions had occurred at times during the first months of 2001, particularly in the more mountainous areas in the north west bordering Albania and the Kosovo region, the evidence described above attests to a significant escalation in the intensity of the events in Macedonia from May to mid-August 2001, [...] although it does not always follow from the evidence that the “terrorist groups” involved in all the events were, in fact, the NLA. There was an increase in armed clashes to the point of almost daily incidents of violence, shooting and provocations by the NLA and the standard military response to these by the army or police or both. There was also a geographical expansion of areas of fighting [...]. Other relevant factors were the distribution and use of heavy weaponry by the Macedonian forces including combat helicopters and tanks; the growing variety of weapons used by the NLA; the mobilization of the army and units of the police to combat readiness; the calling up of reserve forces; the number of orders for military offensives to “destroy terrorists”; the besieging of towns [...] and villages [...]; the use of cease fires; the appeals to and intervention of international actors to help resolve the crisis by both sides; the institution of a peace agreement to end active hostilities; and the large number of displaced persons and refugees caused by the conflict. Some other indicative factors of armed conflict were also present: these included the attention of the UN Security Council which adopted a resolution in March condemning the “terrorist activities” and a further resolution in September welcoming the signing of the Ohrid Agreement;²¹ facilitation by the ICRC for the release of detainees on both sides and to pass messages to families of detainees; the prosecution by FYROM authorities of persons for service in the aid of an enemy army and other offences only applicable during armed conflict; and the granting of a broad amnesty to all those who participated in the conflict, with the explicit exception of those accused of war crimes who would come within the jurisdiction of the ICTY.
244. The Chamber takes into account that despite this clear escalation there remained relatively few casualties on both sides and to civilians (the highest estimates put the total number of those killed during 2001 as a result of the armed clashes at 168), and material damage to property and housing was of a relatively small scale. These low figures may indicate that, despite the use of heavy weaponry by the FYROM forces, there was generally restraint in the way in which it was used, which could suggest that the operations of the police and army were more directed to law enforcement. However, another factor relevant to the low casualties is that the armed clashes that occurred usually involved small numbers of forces and tended to be localised. While, as indicated earlier, the evidence does not always fully establish whether incidents or clashes were attributable to the “NLA” or to some independently acting groups of individuals, it is noted that

21 [para.233:On 13 August, the Ohrid Framework Agreement was signed by the main ethnic Macedonian and ethnic Albanian parliamentary parties, as well as the U.S. and the European Union as guarantors. The NLA was not a party to the Agreement. This Agreement established a “general, unconditional and open-ended cease fire” based on the principle of finding “peaceful political solutions”]

in general the tactics favoured by the NLA were of a guerrilla nature in that often they involved a quick strike by a small force making full use of the terrain. Against such tactics there was limited scope for a massive military offensive which would normally produce greater casualties.

245. [...] [I]n many regards, the legal and administrative framework that the Government of FYROM applied to its actions in 2001 reflected that which would be applicable during an armed conflict. Every order of the President in this year was issued pursuant to Article 79(2) of the Constitution, meaning that the President was acting in his capacity of Commander in Chief of the armed forces. [...]
246. More significantly, under this law, combat activities cannot be engaged in by Mol [Ministry of Interior] employees unless there are "conditions of war situation" [...].
247. A degree of ambiguity in the applicable legal framework may also be found in the way that captured NLA members were treated by the FYROM authorities. Although one order of the Ministry of Defence was issued to treat "military captured persons" in accordance with "the Geneva Convention", the Chamber received no evidence that this was applied or whether it was supposed to apply to members of the NLA. The Chamber takes into account the fact that large numbers of male ethnic Albanians suspected of terrorism, including those from Ljuboten, were arrested and charged with criminal offences rather than merely detained without charge for the duration of the conflict as is the more usual practice in armed conflict. However, these persons were often charged with offences that would normally only apply during an armed conflict. Moreover, the Amnesty Law that was passed on 8 March 2002 that absolved from prosecution all those persons who had "participated in the conflict", with the exception of those who were accused of crimes within the jurisdiction of the ICTY, is an indication that the situation was one of armed conflict.
248. A significant consideration in support of a conclusion that the situation in FYROM had reached the level of an armed conflict is the extent of the civil disruption being experienced as evidenced by the extensive displacement of persons from their homes and villages, at least 64,000 of whom became refugees and 70,000 of whom were internally displaced.
249. The Chamber is satisfied that at the times material to the Indictment, the conflict in FYROM had reached the required level of intensity.

(b) Organisation of the armed group

250. The Indictment alleges that the two major warring parties in the alleged armed conflict were FYROM Security Forces (the army and police units) and the ethnic Albanian National Liberation Army ("NLA").
251. The Chamber has heard evidence and is satisfied that the forces involved in Macedonia in 2001 included substantial forces of the Macedonian Army and

the Macedonian Ministry of Internal Affairs, i.e. the police, which constitute “governmental authorities” within the meaning of the *Tadić* test.

[...]

266. [...] [To establish the level of organisation of the NLA,] the Chamber has reviewed the evidence and has been able to reach the following conclusions.
267. In June 2001 the NLA had approximately 2,000 to 2,500 fighters with some non-military support (food, lodging, transport, etc.) being provided by another 1,000. By August 2001 the NLA had four functioning, though not fully manned, Brigades – the 112th, 113th, 114th, and 115th– and two (the 111th and 116th Brigades) still in the process of becoming operational. The 112th Brigade operated in the area of Tetovo, the 113th in the Kumanovo area, the 114th in the Skopje area, and the 115th in the Raduša area.
268. Ali Ahmeti was the leader of the NLA. Although the manner in which he assumed this position was not fully verified in evidence, members of the NLA regarded him as the leader, so did members of the international community, as indicated by the fact that communications to the NLA were directed to him and that negotiations for cease fires, the withdrawal of troops, and disarmament were carried out with Mr Ahmeti. Gzim Ostreni was NLA’s Chief of Staff; he was regarded as the deputy leader of the organisation and the military director.

[...]

272. To establish a functioning organisational system the Prosecution seeks to rely on a number of the rules and regulations which are said to have been applicable to the NLA in 2001. These informal regulations and rules, *inter alia*, purport to establish a chain of command defining the duties of each level; oblige unit commanders to ensure implementation of the regulations; lay down provisions on disciplinary measures such as detention or arrest; inform the Brigade commanders of their duty to respect civilians and civilian property as well as the obligation to observe the laws of war and international conventions during any military engagements; and recognise the jurisdiction of the ICTY over any crimes committed by NLA members. [...]
274. What remains pertinent to the Chamber is whether or to what extent these rules and regulations had actually been applied in practice by the NLA Brigades. [...] Although [...] there is no direct evidence that these rules and regulations were distributed and implemented throughout the NLA units and structures, the NLA has been described in a NATO document prepared in 2001 and accepted as reliable as “a well armed, well disciplined and a highly motivated organisation” with “a highly developed basic level of organisation and discipline” which allows the group to function effectively at the tactical level. This suggests that while the full content of the purported “Rules” and “Regulations” of the NLA does not credibly reflect the degree of organisation of the NLA, there was nonetheless a basic system of discipline within the NLA that allowed it to function with some effectiveness.

[...]

276. In evidence are some organisational documents produced by the Brigades, or at the level of a battalion or a company, indicating that weapons and clothing were issued to and received by members of a squad. The Chamber accepts these documents as evidence of some lower-level organisation but not as proof of NLA-wide regulation *per se*.
277. Indicative of the level of organisation of an armed group is its ability to carry out military operations, including troop movements and logistics. As discussed earlier, the Chamber is satisfied that there was a marked increase in hostilities from May 2001, for the most part concentrated in the north-western part of the country. Most of these hostile incidents consisted of small-scale attacks on police patrols or police stations. Like other ethnic Albanian armed groups in the formative stages of an insurgency such as the KLA in Kosovo in 1998, the tactics of the NLA consisted in large part of hit and run manoeuvres as demonstrated in the number of ambushes carried out in 2001. More serious or prolonged incidents also occurred, such as the 10 day NLA "occupation" of Aračinovo in June, and heavy clashes in Tetovo and Raduša in August.

[...]

282. The NLA lacked large scale transportation means, and largely relied on tractors or transported weapons and supplies by foot or with the use of donkeys and mules over the mountainous terrain.
283. Evidence suggests that new recruits were to have an inauguration ceremony and be given a military identification card. [...]
284. NLA recruits underwent short military training. [...]
285. Further, there is some evidence that NLA members were required to wear uniforms during operations, although not all NLA members had a uniform. Some wore black clothing or other civilian clothes. There is also evidence that some NLA members would wear as a minimum the NLA Brigade insignia, but this could be impractical especially if civilian clothes were worn.
286. [W]hile initially, in January and February 2001, the NLA mainly composed individually formed and organised smaller local groups, struggling to secure appropriate weapons and armament and operating substantially on local initiative, there was progressively a development and maturing of the NLA. It grew significantly in membership, both by local recruitment and as volunteers came from abroad. The supply and distribution of weapons and armament became progressively more planned and coordinated and the quantity and variety of weaponry more extensive. Gradually and progressively, uniforms and other equipment were becoming available. A limited system of basic training was implemented.
287. [...] In the Chamber's finding the NLA was making significant progress toward the full and effective establishment and implementation of a command structure

and the organisation of its localised volunteer groups into Brigades and other more subordinate units. This substantial undertaking had not, however, been fully achieved by August 2001.

[...]

289. It is not the case that the NLA at any time was a modern, well-organised and supplied, trained and disciplined, efficient fighting force. What is established by an extensive body of evidence from FYROM governmental, army and police sources was that the NLA managed to compel the government to commit the full weight of its substantial army including reserves, and the large police force including reserves, to the fight against the NLA. The NLA was seen by the Macedonian government as presenting a most grave threat to the very survival of the country. As contemporary assessments indicate, the country was on the verge of a civil war. [...] The NLA was sufficiently organised to enter into cease fire agreements using international bodies as intermediaries, to negotiate and sign a political agreement setting out its common goals with ethnic Albanian political groups in FYROM, and to enter into and abide by an agreement with NATO to gradually disarm and disband.
290. The Chamber is persuaded that the effect produced by the NLA by August 2001, and the level of military success it had achieved against the much larger and better equipped Macedonian army and police force, together with its ability to speak with one voice, and to recruit and arm its members, are sufficient in the particular circumstances being considered, to demonstrate that the NLA had developed a level of organisation and coordination quite markedly different and more purposed from that which existed in the early months of 2001. This had enabled it to conduct military activities and to achieve a measure of military success over more than three months at a level which could not have been expected at the beginning of 2001. It is also of some relevance that it had come to be recognised and applied by the legal system of FYROM that a state of armed conflict existed at the times relevant to this Indictment. In respect of those times, and earlier, there were judicial investigations, charges, and convictions in respect of offences that depended on the existence of an armed conflict.
291. In the Chamber's finding therefore the evidence demonstrates that the NLA possessed by August 2001 sufficient of the characteristics of an organised armed group or force to satisfy the requirements in this respect of the jurisprudence of the Tribunal set out earlier in this Judgement.

3. Conclusion

292. Having regard to the law applicable and the analysis of the evidence made above, the Chamber is persuaded that in August 2001, at the times material to the Indictment, there was a state of internal armed conflict in FYROM involving FYROM security forces, both army and police, and the NLA.

[...]

DISCUSSION

I. Material Field

1. (*Para. 175*) What is the twofold test used by the Tribunal to determine the existence of an armed conflict? Are those criteria cumulative? Are those criteria also applicable to international armed conflicts? (GC I-IV, Arts 2 and 3)

II. Intensity

2. Does the required level of intensity vary between non-international armed conflicts to which common Art. 3 applies and those to which Protocol II applies? How do you assess the level of intensity for both of them? Which is the decisive criterion for the customary IHL of non-international armed conflicts, as identified by the ICRC Study on Customary International Humanitarian Law? [See **Case No. 43**, ICRC, Customary International Humanitarian Law]
3. (*Para. 178*) Does the way in which armed force is used and how persons are detained depend on whether an armed conflict exists or not? Are there indicators of whether an armed conflict exists? Or rather, does not the existence or not of an armed conflict indicate which methods may be used?
4. (*Paras 184-190*)
 - a. Are terrorist activities necessarily excluded from the scope of IHL? If not, when does IHL apply to acts of terrorism? When determining whether IHL applies to a given act, should this act be considered on its own or within the broader framework in which it occurs?
 - b. May a terrorist act be taken into account when assessing the intensity of violence? May the repeated occurrence of acts of terrorism be sufficient to conclude that there is an armed conflict? Conversely, may the existence of an armed conflict render IHL applicable to any terrorist act perpetrated on the territory where that conflict is taking place?
 - c. Is the protracted character of violence in the sense of temporal duration decisive for the qualification of a situation as a (non-international) armed conflict? Is it an indicator? Must IHL be respected from the very beginning of an armed conflict or only from the time when it turns out to be protracted? Is it foreseeable at the outset of a conflict how long the conflict will last?
5. (*Paras 244-249*) What are the Tribunal's main arguments for concluding that the necessary level of intensity was reached in FYROM? Is it sufficient that violence carries on, or even escalates, over a long period of time for the situation to be deemed to have reached the level of an armed conflict? Is it sufficient that the combat methods used, and the legal terms employed by the parties, are related to warfare rather than law enforcement?

III. Organization

6.
 - a. (*Paras 195-196 and 199-203*) What is required of an armed group for it to be considered as sufficiently organized for the purpose of common Art. 3? Is it sufficient for it to be hierarchically structured? Does it need to reach the same level of organization as that of the State? Would it be realistic to require such a level of organization from an armed group?
 - b. (*Para. 196*) What do you think of the Limaj Defence's argument that an armed group must possess a method of sanctioning breaches of common Art. 3 or fulfil the conditions of Additional Protocol II in order to qualify as a party to a non-international armed conflict?
 - c. (*Paras 199-203*) What are the categories identified by the Tribunal in order to attest to the degree of organization of an armed group? Are they all relevant? Is any of them, if taken individually, sufficient to indicate the level of organization?

7. (*Para. 197*) What is the difference, if any, between the degree of organization required for common Art. 3 to apply and that for Protocol II to apply? What might the reasoning behind this difference be? Is there a difference between “protracted violence” and “sustained and concerted military operations”?
8. (*Para. 205*) Does the fact that an armed group systematically commits violations of IHL necessarily indicate a lack of organization and/or control over its members? When assessing the level of organization of an armed group and its ability to respect IHL, what should be taken into account: theoretical ability to comply with IHL rules, or actual compliance? If the criterion were actual compliance with IHL rules, could IHL ever be violated?
9. (*Paras 267-291*)
 - a. Does the NLA seem to qualify for any of the five categories listed by the Tribunal in paragraphs 199-203? On which factors does the Tribunal base its conclusion that the NLA was sufficiently organized?
 - b. Does the Tribunal assess the possible applicability of Protocol II? According to you, could Protocol II apply to the situation in FYROM? From the information given by the Tribunal, do you think that the NLA could qualify as a party to a Protocol II armed conflict? Which elements required by P II, Art. 1, could be problematic here?

IV. Conclusion

10. (*Paras 1, 239-291*)
 - a. Do you think it was obvious, at the beginning of 2001, that violence would reach the level of an armed conflict? Was it clear that the NLA was sufficiently organized for common Art. 3 to apply? May we conclude that IHL became applicable as early as January 2001, although these two elements could not be foreseen at that time by the parties to the conflict? Or do you think that IHL only started to apply in August 2001?
 - b. In such conditions, is it realistic to expect the parties to the conflict to apply IHL as soon as violence breaks out? What are the difficulties for the parties’ forces on the ground if they do not know the legal qualification of the situation? Would it be fair to conclude that IHL started to apply in January 2001, only because it has now become clear that the situation did amount to an armed conflict?

Case No. 221, ICTY, The Prosecutor v. Mrkšić and Šljivančanin**A. Trial Chamber, Judgement**

[Source: ICTY, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, IT-95-13/1-T, Trial Chamber II, Judgement, 27 September 2007, available at www.icty.org. Footnotes omitted]

IN TRIAL CHAMBER II

[...]

Judgement of 27 September 2007

PROSECUTOR

v.

MILE MRKŠIĆ

MIROSLAV RADIĆ

VESELIN ŠLJIVANČANIN

JUDGEMENT

[...]

I. INTRODUCTION

1. The Accused, Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin, are charged in the Indictment with crimes allegedly committed on or about 18 to 21 November 1991 against Croats and other non-Serbs who were present in the Vukovar hospital after the fall of Vukovar. The Indictment, as ultimately amended, alleges that several hundred people had sought refuge at Vukovar hospital in the belief that the Vukovar hospital would be evacuated in the presence of international observers. It is alleged that [...] the JNA¹ was responsible for the evacuation of Vukovar hospital which was to be monitored by various international organisations. The Indictment alleges that in the afternoon of 19 November 1991 JNA units took control of the hospital in preparation for the evacuation and, in the morning of 20 November 1991 the JNA units removed about 400 Croats and other non-Serbs, loaded approximately 300 of them onto buses and moved them to the JNA barracks in Vukovar where for about two hours they were subjected to threats and psychological taunts, and some were beaten. It is alleged that the Croats and other non-Serbs who had been taken from Vukovar hospital to the JNA barracks, were then transferred to Ovčara farm. There Serb soldiers forced them to run between two lines of soldiers who beat them as they passed. It is alleged in the Indictment that after the initial beating, Serb forces continued to beat and assault the detainees for several hours, so seriously that at least two

All footnotes are authors' notes

¹ Yugoslav People's Army

men died from the beatings, and that at least one female detainee was sexually assaulted. It is further alleged that at least 264 named detainees were then taken to a nearby location southeast of the Ovčara farm, where they were executed. [...]

4. The Indictment charges the Accused Veselin Šljivančanin, at the material time, a JNA major and later a colonel in the JNA, with individual criminal liability under Article 7(1) of the Statute, in particular, for allegedly planning, instigating, ordering or otherwise aiding and abetting the aforementioned crimes [...]. He is alleged to have personally directed the removal and selection of about 400 non-Serbs from Vukovar hospital on 20 November 1991, knowing or having reason to know they would be murdered, to have ordered or permitted JNA soldiers under his command to deliver custody of these detainees to other Serb forces knowing or having reason to know that they would be murdered, and to have been present at Ovčara farm on 20 November 1991 when criminal acts charged in the Indictment were being committed. [...]
7. The Prosecution alleges that at the material time the Serb forces subject to the command of Mile Mrkšić in OG South² comprised primarily elements of the JNA, including gmtbr,³ but also forces of the TO⁴ of the so-called Serbian Autonomous District/Slavonia, Baranja and Western Srem, which included TO forces from the Vukovar area ("local TOs"), TO forces of the Republic of Serbia, and various volunteer and paramilitary forces. For convenience in this decision, the Chamber will often refer to "TO forces" or "TOs" as including volunteer and paramilitary forces. Further, references to "paramilitary forces" and to "paramilitaries" include other volunteers.

VI. PREPARATION FOR THE EVACUATION OF VUKOVAR HOSPITAL AND EVENTS ON 20 NOVEMBER 1991

[...]

C. 20 November 1991

1. Events in the morning at Vukovar hospital

[...]

201. [S]ometime between 0700 and 0800 hours, JNA soldiers went through the hospital and told the patients and others who were able to walk to leave. At the exit, JNA soldiers were separating the men from women and children. The women and children were told to go towards the main gate of the hospital [...], and the men were told to go towards the side or emergency entrance [...]. The wounded who were unable to walk were to remain in their beds awaiting evacuation. [...]

² Operational Group South, of which Šljivančanin was in charge.

³ Guards Motorised Brigade

⁴ Territorial Defence

207. It is important to emphasize that, in the Chamber's finding, the men taken to the buses had not been randomly selected. The men, except the elderly, had been separated from women and children. [...] All males were searched for weapons or dangerous objects. They were placed under JNA armed guard. As will be discussed in more detail later in this Judgement, the evidence reveals that at least the vast majority of them, if not all, had been involved in Croat military formations active in the fighting at Vukovar. At the time all of them were thought by the JNA to have been so involved. The Chamber finds that at least by the time they were searched to ensure they were not armed and were under the armed guard of JNA soldiers, these men became prisoners of war. They will often be referred to as prisoners of war in what follows even though it is possible that individuals among them may not have been members of the Croat forces. The circumstances also demonstrate, in the Chamber's finding, that the two Croat women included with the men were also thought by the JNA to have been involved in the Croatian forces.

[...]

3. Events at the JNA barracks in Vukovar

215. The buses carrying the main body of male evacuees from the hospital, the prisoners of war, arrived at the JNA barracks in Vukovar at around 1030 hours. [...] In the barracks compound there were some regular JNA soldiers and also what were described as reservists, that is TOs and paramilitaries. The JNA soldiers at the barracks were mostly members of the military police [...].
216. Serb TO members and paramilitaries milled around the buses and started to threaten and to verbally abuse the men on the buses. [...]

[...]

219. As the Chamber finds elsewhere in this Judgement, Veselin Šljivančanin was present at the barracks at some time around 1100-1130 hours on 20 November 1991. Šljivančanin was standing about 15 metres from the buses with the prisoners and was talking to at least two other JNA officers.

[...]

222. The five buses left the JNA barracks together. [...] [I]n the Chamber's finding it was between 1300 and 1400 hours that the buses left the JNA barracks. They followed at least one military vehicle [...] and took the road to Negoslavci. [...] Before reaching Negoslavci the buses turned left and continued to Ovčara. There they stopped in front of a hangar that was normally used as a warehouse for agricultural machinery and belonged to the Vupik pig farm. The journey from the barracks took only some half hour.

[...]

5. Events at Ovčara

234. The buses arrived at Ovčara on 20 November 1991 between 1330 and 1430 hours. They were emptied one by one. [...] The prisoners of war were then stripped of their personal valuables; their money and jewellery was taken away while their IDs and other personal belongings were thrown in a ditch. Then they had to pass between two rows of soldiers, about 10 to 15 on each side, who were beating them severely as they passed through. The soldiers beat the prisoners of war using wooden sticks, rifle-butts, poles, chains and even crutches. They were also kicking and punching the prisoners of war. The gauntlet was about eight to 10 metres long. Everyone from the buses, except for four persons, had to go through the gauntlet and was heavily beaten. It took approximately 15 to 20 minutes to unload each bus. After passing through the gauntlet some prisoners of war were further individually interrogated and mistreated.

235. Serb paramilitaries and TO members participated in the gauntlet. Individuals among them were recognised and have been identified in evidence. [...] Some regular JNA soldiers in uniform may also have participated in the gauntlet. The JNA military police of the 2MP/gmtbr,⁵ who had provided the security on the buses, stayed on the buses while the men were made to run the gauntlet. At the hangar there were also 15-20 JNA soldiers who were securing the area. A witness described the soldiers around the hangar as JNA military policemen wearing olive-drab JNA uniforms with white belts. [...] No one tried to stop those who were hitting the prisoners of war.

[...]

237. Inside the hangar the beatings continued. The atmosphere was miserable. There were about 200 people from the buses and at least 40 Serb soldiers including paramilitaries, TO members and JNA soldiers. [...] The prisoners of war had to lean against the wall with their arms up and their legs spread. Some were hit with iron rods and rifle-butts and kicked. [...]

239. No prisoner of war received medical treatment, either at the JNA barracks, or at Ovčara, despite the fact that many were severely injured and many were extremely badly beaten.

240. At a time estimated as between 1400 and 1500 hours, a soldier approached a worker at the Vupik pig farm and told him to bring an excavating machine that was parked there and to go with him. The soldier was wearing a JNA uniform, had an officer's belt and a pistol but a regular cap. [...] While this description could well indicate the soldier was a JNA soldier, indeed some elements but not all would indicate an officer, it is too general to enable the Chamber to conclude that this soldier was not a TO or paramilitary officer. They left the farm compound. The soldier told the driver to turn right, then near the woods, to turn left. [...] The soldier told the worker to look for a place where it would be possible to dig. They drove to the end of the woods. To the right there was an old hole and the

5 2nd Military Police Battalion of the Guards Motorised Brigade

soldier asked the worker to dig there. The worker dug until the soldier told him: "Enough". The worker's estimation and recollection was that the hole excavated was about 10 metres long and three metres wide. It was between one and half to two metres deep. The worker and the soldier then returned to the Vupik pig farm. It was between 1530 and 1600 hours when they reached the yard. [...]

241. In the finding of the Chamber, the location of the hole dug by the worker, in the presence of the soldier, coincides exactly with the location of the mass grave which has since been located and identified [...].

[...]

248. Apart from the small number of men who were released from the hangar at Ovčara after the personal intervention of Serb forces who knew them, the vast majority of the prisoners of war, the men taken from the hospital on the morning of 20 November 1991, remained at Ovčara that evening. In the evening, when it was already dark outside, groups of 10 or 20 people were lined up and taken out of the hangar. A soldier described as wearing an olive-grey JNA uniform with epaulets of a regular soldier, took the first group out. [...] After 10 to 15 minutes the soldier returned and took another group out. He told the men in this group that they would be transferred to another hangar. They got into a JNA military truck parked outside the hangar. It was a regular JNA freight vehicle, covered with a tarpaulin. The soldier who took the group out of the hangar joined the driver in the front cab. The truck set off in the direction of Grabovo.

[...]

250. At about 2300 hours on 20 November 1991, Colonel Vujić and his team of senior security administration officers [...] heard gunfire coming from an area he judged to be Ovčara. The shooting he heard lasted for some time. He thought this was at some time between 2200 and 2400 hours, although it is apparent he had no precise awareness of the time.
251. During the night of 20/21 November 1991, P014 heard at intervals bursts of fire coming from the direction of Grabovo. He also described hearing after midnight at intervals what he concluded was the sound of a digging machine. In this last respect the Chamber notes that the grave having been dug in the afternoon it would need to be covered again after the killing of the prisoners of war. That could explain what P014 heard even though, if so, there are unanswered questions as to who operated the machine and related matters.
252. In the Chamber's finding, in the evening and night hours of 20/21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 2100 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later. [...]

[...]

F. Role of Veselin Šljivančanin

1. Participation in the events

365. Veselin Šljivančanin was actively involved in preparations for the evacuation. On 19 November 1991, he visited Vukovar hospital and received from Vesna Bosanac a list of the people to be evacuated. [...] In the morning of 20 November 1991, shortly before 0600 hours, Veselin Šljivančanin set off for the Vukovar hospital. [...] They arrived at about 0700 hours. [...]
367. Meanwhile, the persons removed from the hospital had been taken to the JNA barracks. There is evidence of the presence of Veselin Šljivančanin at the barracks. P009 testified that on 20 November 1991, at the time of his visit to the JNA barracks, he saw a JNA officer, whom he later identified as Veselin Šljivančanin. [...] The evidence of Veselin Šljivančanin confirms that in the afternoon of 19 November 1991, he was present in front of the hospital. [...]
368. It was the evidence of P009 that on 20 November 1991 he saw the officer whom he later learned was Veselin Šljivančanin within the compound of the JNA barracks. Šljivančanin was standing about 15 metres from the buses with prisoners removed from the hospital and was talking to at least two other JNA officers. [...]
372. [...] [T]he Chamber is persuaded by the evidence of P009 that Veselin Šljivančanin was present at the barracks at some time around 1100-1130 hours on 20 November 1991. [...]
374. After his return to the hospital, Major Vukašinić⁶ reported to Veselin Šljivančanin about the conduct of the TOs at the barracks and said that further transports of prisoners to and from the barracks might be difficult in such conditions. This report provided Veselin Šljivančanin with more details of the situation at the barracks, in addition to what he could personally observe when visiting the place.
375. Veselin Šljivančanin could also see signs of mistreatment on the prisoners brought back from the barracks. [...] The Chamber finds that after his visit to the barracks and the reports from Vukašinić and Karanfilov,⁷ Veselin Šljivančanin was aware that the TOs were capable of resorting to physical abuse. He could appreciate the severity of that abuse when men with visible signs of mistreatment returned from the barracks to the hospital.
377. [...] Veselin Šljivančanin testified that he did not go to Ovčara at any point in time on 20 November 1991. However, two witnesses claimed that they saw him at Ovčara on that day. [...]
383. Having carefully weighed this evidence the Chamber accepts the evidence of P009 that he saw Veselin Šljivančanin at Ovčara on 20 November 1991. [...]

⁶ Major Ljubiša Vukašinić was Veselin Šljivančanin's deputy.

⁷ Captain Borče Karanfilov was an officer of the security organ of the Guards Motorised Brigade (gmtbr) and was subordinated to Veselin Šljivančanin.

[...]

388. After his arrival at Negoslavci, Veselin Šljivančanin received a report on the events at Ovčara from his deputy Major Vukašinović. [...] Major Vukašinović says he informed them about problems with TO members at Ovčara and that he had managed to calm them down, after which they had departed. Nevertheless, he said he had the feeling that there might be more problems in the future and suggested the strengthening of security detail. [...]

[...]

IX. RESPONSIBILITY

[...]

B. FINDINGS

[...]

4. Responsibility of Veselin Šljivančanin

[...]

(iii) *Aiding and abetting*

655. The Prosecution alleges that Veselin Šljivančanin aided and abetted the crimes charged in the Indictment by, *inter alia*, ordering the selection of prisoners of war from amongst the persons taken from the hospital, ordering their transport to the barracks and then to Ovčara, transmitting the order to withdraw the military police of 80 mtbr⁸ issued by Mile Mrkšić and failing to issue orders required to prevent the crimes. [...]

d. Failure to give orders to prevent the commission of crimes

662. The Indictment alleges that Veselin Šljivančanin is responsible under Article 7(1) for having aided and abetted in the planning, preparation or execution of the crimes charged. The Prosecution contends that Veselin Šljivančanin aided and abetted the crimes charged in the Indictment by having failed to give orders necessary for the prevention of those crimes. It is established that a person may aid and abet by omission. The Indictment alleges that Veselin Šljivančanin “permitted JNA soldiers under his command to deliver custody of ... detainees to other Serb forces who physically committed the crimes” and “was personally present at Ovčara farm on 20 November 1991 when criminal acts charged in this indictment were being committed”. [...]
663. As established earlier, Veselin Šljivančanin personally visited Ovčara. He was seen there at about 1430 or 1500 hours, at which time in the Chamber’s finding the unloading of the prisoners of war and their having to pass through the gauntlet towards the hangar were still in progress. While the evidence does not establish that he entered the hangar the violence of TOs and paramilitaries to

8 80th Motorised Brigade (Kragujevac)

the prisoners, and the freedom of the TOs and paramilitaries to enter the hangar were only too obvious. Veselin Šljivančanin was thus present at Ovčara at the time when prisoners of war were seriously mistreated by TOs and volunteers and must have witnessed the mistreatment. In the Chamber's finding he was aware that crimes were being committed. The evidence does not allow a conclusion to be reached that during his visit to Ovčara Veselin Šljivančanin observed the actual conditions in which the prisoners were detained inside the hangar and thus it is not established that he was aware that the offence of cruel treatment was being committed this way.

[...]

667. The evidence indicates that, despite having witnessed the mistreatment of prisoners of war at Ovčara and being aware of similar and worse previous acts, Veselin Šljivančanin made no effort to prevent the continuing commission of crimes at Ovčara. There is nothing to suggest that his immediate subordinates were committing the offences at the time of his visit at Ovčara. [...] However, Veselin Šljivančanin had been officially vested by Mile Mrkšić with authority of a considerable scope in respect of the removal and security of the prisoners of war from the hospital, authority which, in the Chamber's finding, continued at the time of Veselin Šljivančanin visit to Ovčara that afternoon. In particular, he had been specifically invested with command authority over OG South military police for these purposes [...]. Yet, he gave no orders to the military police or to his own immediate subordinates present, directed to the prevention of the commission of further crimes. No evidence has been adduced, and it has not been advanced, that Veselin Šljivančanin made any attempt to stop the mistreatment of prisoners of war then occurring at Ovčara, even though he was in a position to take necessary measures.
668. Veselin Šljivančanin was under a duty to protect the prisoners of war taken from the Vukovar hospital. The duty to protect prisoners of war was imposed on him by the laws and customs of war. It was also part of his remit as security organ of OG South. Further, the evidence indicates that from the time of removal of the prisoners of war from the hospital until that night when the JNA guards securing them were withdrawn, Veselin Šljivančanin was responsible for their security, a responsibility which included both their protection and prevention of their escape. This was a responsibility with which he had been entrusted by Mile Mrkšić in relation with the operation of removing war crime suspects from the hospital. [...]
669. For these reasons, the Chamber is satisfied that Veselin Šljivančanin duty to protect the prisoners of war brought to Ovčara on the afternoon of 20 November 1991 was of significance. Veselin Šljivančanin was bound by the laws and customs of war, he was also entrusted, as security organ, with the task of implementing some of those laws, as far as the security of prisoners of war in the custody of the JNA was concerned, and he was under specific orders of Mile Mrkšić for the security of the prisoners. It follows that his omission, when visiting Ovčara, or immediately after, to take necessary measures to prevent the continuing

commission of crimes against the prisoners of war protected by the laws and customs of war, amounts to a breach of his legal duty. [...]

670. The breach of the legal duty imposed on Veselin Šljivančanin resulted in the intermittent but continuing, and at times virtually unimpeded, commission of crimes by TOs and paramilitaries during the afternoon. Had he chosen to give clear direction to the military police present, and if necessary to order other military police to assist at Ovčara, he would have been able to obstruct the commission of further crimes. [...] Accordingly, the failure of Veselin Šljivančanin to act pursuant to the legal duty on him to ensure the security of the prisoners of war had a substantial effect on the commission of crimes in Ovčara, in the afternoon of 20 November 1991. As established earlier, Veselin Šljivančanin knew that the TOs and paramilitaries were mistreating the prisoners of war and thereby committing the crimes of torture and cruel treatment. In the circumstances, he must have been aware that by failing to give clear direction to the military police present or to secure other military police to assist at Ovčara he facilitated the commission of those crimes.

[...]

672. During the visit of Veselin Šljivančanin at Ovčara crimes of torture and cruel treatment were being committed. As the security of the prisoners of war was insufficient, the commission of crimes continued. As established earlier, in the evening of that day, TOs and paramilitaries who had gathered at Ovčara took the prisoners of war to the mass grave site and murdered them. It is true that Veselin Šljivančanin must have been aware, on the basis of his knowledge of the events at Velepromet on 19 November 1991, that at least some of the TOs and paramilitaries were capable of killing. However, at the time of his visit to Ovčara, the prisoners of war remained under the security and authority of the JNA. Veselin Šljivančanin could reasonably have believed in the circumstances that the TOs and paramilitaries would be unlikely to resort to killing. It was only after the final withdrawal that evening of the JNA troops from Ovčara, the military police of 80 mtbr, when the TOs and paramilitaries were able to have unrestrained access to the prisoners of war who had been left in their control, that murder became a likely occurrence. Therefore, the Chamber is unable to conclude that Veselin Šljivančanin knew at the time of his visit to Ovčara that killings would probably be committed. He can only be held responsible for the crimes that he witnessed when visiting Ovčara and for the continued commission of similar crimes during the afternoon.
673. The Chamber further observes that the acts of murder took place after the order to withdraw the military police of 80 mtbr of the JNA from Ovčara had been issued and the prisoners of war were in the custody of the TO and paramilitaries. This withdrawal had been ordered by Mile Mrkšić. It follows that the responsibility for providing security for the prisoners of war removed from the hospital, which Veselin Šljivančanin had received on the preceding day from Mile Mrkšić, was necessarily at an end with the withdrawal of the last JNA troops. For this reason, the Chamber finds that it has not been established that Veselin Šljivančanin aided

and abetted the commission of murder at Ovčara by failing to discharge a legal duty.

674. For the reasons given, the Chamber concludes that by the failure to discharge his legal duty to protect the prisoners of war held in Ovčara from acts of mistreatment, Veselin Šljivančanin aided and abetted the crimes of torture and cruel treatment; not the crime of murder.

[...]

B. Appeals Chamber, Judgement

[Source: ICTY, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, IT-95-13/1-A, Appeals Chamber, Judgement, 5 May 2009, available at www.icty.org. Footnotes omitted]

IN THE APPEALS CHAMBER

[...]

Judgement of 5 May 2009

**PROSECUTOR
V.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN
JUDGEMENT**

[...]

B. Second Ground of Appeal: Šljivančanin's Responsibility for Aiding and Abetting Murder

1. Introduction

45. The Trial Chamber found that 194 people identified in the Schedule to the Trial Judgement were taken from the Vukovar hospital to Ovčara, where Serb forces mistreated them and later executed them. It concluded that on 20 November 1991, Šljivančanin exercised command authority (conferred on him by Mrkšić) over the military police involved in the evacuation of prisoners of war from the hospital and guarding them on the buses at the JNA barracks and at Ovčara. [...] The Trial Chamber found that once all JNA military police withdrew from Ovčara pursuant to Mrkšić's order, Šljivančanin necessarily ceased to be responsible for the security of the prisoners of war. It therefore concluded that Šljivančanin was not responsible for the murders committed by TOs and paramilitary troops after the JNA military police were withdrawn from Ovčara.
46. In its second ground of appeal, the Prosecution avers that "[t]he Trial Chamber erred in fact and in law in paragraphs 674 and 715 [of the Trial Judgement] in

failing to find that Veselin Šljivančanin was responsible for aiding and abetting the murder of the 194 prisoners killed at the grave site near Ovčara on the evening and night of 20/21 November 1991". It submits that this finding was reached as a result of erroneous conclusions of law and fact [...]. It requests that the Appeals Chamber enter a conviction against Šljivančanin under Article 3 of the Statute for aiding and abetting the murder of 194 prisoners killed near Ovčara on the evening and night of 20/21 November 1991 and, in the event its first ground of appeal succeeds, to enter a conviction against Šljivančanin under Article 5 of the Statute for murder as a crime against humanity and increase his sentence to a term of 30 years to life imprisonment.

47. The Prosecution submits that Šljivančanin's acquittal is based on two errors: (a) the Trial Chamber's failure to find that Šljivančanin knew, at the time of his visit to Ovčara, that the TOs and paramilitaries would likely kill the prisoners; and (b) the Trial Chamber's erroneous finding that Šljivančanin's legal duty towards the prisoners ended upon the withdrawal of the last JNA troops from Ovčara upon Mrkšić's orders.

[...]

49. At the outset, the Appeals Chamber recalls that to enter a conviction for aiding and abetting murder by omission, at a minimum, all the basic elements of aiding and abetting must be fulfilled. In this regard, the Appeals Chamber in Orić recalled that "omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act". The *actus reus* of aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime. The Appeals Chamber recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty. Meanwhile, the required *mens rea* for aiding and abetting by omission is that "[t]he aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal". [...]

3. Šljivančanin's legal duty towards the prisoners

64. The Trial Chamber acquitted Šljivančanin of the murder of the prisoners of war on the night of 20 November 1991 at Ovčara on the basis that his responsibility for the welfare and security of the prisoners of war ended with the withdrawal of the last JNA troops from Ovčara. The Prosecution submits that the Trial Chamber erred in delineating the temporal scope of Šljivančanin legal duty. In this regard, it contends that the Trial Chamber erred in finding that Šljivančanin's legal duty toward the prisoners of war ended upon the withdrawal of the JNA troops from Ovčara; it submits that Šljivančanin had a continuing legal duty under international humanitarian law even after Mrkšić ordered the withdrawal of JNA

troops. In support of this argument, in its written submissions, the Prosecution avers that three sources of duty towards the prisoners of war were applicable to him at the relevant time: (i) his duty under the laws and customs of war; (ii) his duty in his capacity as chief of the security organ; and (iii) his duty under Mrkšić's specific delegated authority. [...]

65. Šljivančanin responds that he did not have continuing legal duties under the laws and customs of war because the duty to protect and treat prisoners of war humanely becomes a legal duty for an agent of the relevant state only when he is specifically invested with it by the Detaining Power or State pursuant to Geneva Convention III. [...]
66. In reply, the Prosecution submits that: (i) under Geneva Convention III military personnel acting as agents of the State acquire individual responsibility for violations of international humanitarian law without requiring a "specific investment" [...].
69. The Appeals Chamber notes that the Trial Chamber did not make a finding as to whether the armed conflict in the municipality of Vukovar at the material time was of an international or non-international nature. However, even in the context of an internal armed conflict, Geneva Convention III applies where the parties to the conflict have agreed that the Convention shall apply. In this respect, the Appeals Chamber recalls the ECMM⁹ instructions to its monitors on the implementation of the Zagreb Agreement which indicated that the Geneva Conventions were to be applied to the prisoners of war. [...]
71. The fundamental principle enshrined in Geneva Convention III, which is non-derogable, that prisoners of war must be treated humanely and protected from physical and mental harm, applies from the time they fall into the power of the enemy until their final release and repatriation. It thus entails the obligation of each agent in charge of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to. This obligation is so well established that it is even reflected in Article 46 of Geneva Convention III, which applies to the transfer of prisoners of war to another location by the Detaining Power, and furthermore in paragraphs 2 and 3 of Article 12 of Geneva Convention III, which applies to the transfer of prisoners of war to another High Contracting Party. [...] Thus, the military police of the 80 mtbr of the JNA should have satisfied itself of the willingness and ability of the TOs to apply the principle enshrined in Geneva Convention III, before transferring custody of the prisoners of war.
72. Although the duty to protect prisoners of war belongs in the first instance to the Detaining Power, this is not to the exclusion of individual responsibility. The first paragraph of Article 12 of Geneva Convention III places the responsibility for prisoners of war squarely on the Detaining Power; however, it also states that this is "[i]rrespective of the individual responsibilities that may exist". The ICRC Commentaries clarify that "[a]ny breach of the law is bound to be committed by

one or more individuals and it is normally they who must answer for their acts". The JNA Regulations further explicitly state that "[e]very individual – a member of the military or a civilian – shall be personally accountable for violations of the laws of war if he/she commits a violation or orders one to be committed". The Prosecution submits that "[t]hus, members of the armed forces 'acquire' these international obligations with regard to prisoners of war. There is no further requirement of 'specific investment' of authority as argued by Šljivančanin. The Appeals Chamber agrees with this submission.

73. The Appeals Chamber thus finds that Geneva Convention III invests all agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of their position as agents of that Detaining Power. No more specific investment of responsibility in an agent with regard to prisoners of war is necessary. [...]
74. The Appeals Chamber therefore considers that Šljivančanin was under a duty to protect the prisoners of war held at Ovčara and that his responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed. Mrkšić's order to withdraw the JNA troops did not relieve him of his position as an officer of the JNA. As such, Šljivančanin remained an agent of the Detaining Power and thus continued to be bound by Geneva Convention III not to transfer the prisoners of war to another agent who would not guarantee their safety.
75. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in finding that Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mrkšić's order to withdraw. Having found that Šljivančanin was under an ongoing duty to protect the prisoners of war at Ovčara and had the requisite mens rea for aiding and abetting the murder, the Appeals Chamber will consider whether Šljivančanin failed to act in a way that substantially contributed to the murder of the prisoners of war.

[...]

5. Conclusion

101. The Appeals Chamber recalls that it has found that the only reasonable inference available on the evidence is that Šljivančanin learned of the withdrawal order at his meeting with Mrkšić upon his return to Negotslavci on the night of 20 November 1991. Moreover, the Appeals Chamber concurs with the Prosecution's submission that Šljivančanin knew that TOs and paramilitaries were capable of killing, and that if no action was taken "there was a real likelihood that the violence would escalate [...] that the TOs and the paramilitaries would succeed in fully satisfying their revenge and kill the prisoners [of war]". Accordingly, Šljivančanin knew that following the withdrawal of the military police the killing of the prisoners of war was probable and that his inaction assisted the TOs and paramilitaries.

102. The Appeals Chamber further found that the Trial Chamber erred in finding that Šljivančanin's duty to protect the prisoners of war came to an end upon Mrkšić's order to withdraw the military police of the 80 mtbr from Ovčara. Finally, it found that Šljivančanin's failure to act pursuant to his duty substantially contributed to the killing of the prisoners of war.
103. For the foregoing reasons, the Appeals Chamber finds, Judge Pocar and Judge Vaz dissenting, that all the requirements for a conviction for aiding and abetting murder by omission have been met, and is satisfied beyond reasonable doubt that the Prosecution has shown that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Šljivančanin's guilt has been eliminated. As a result, the Appeals Chamber, Judge Vaz dissenting, quashes the Trial Chamber's acquittal and finds, pursuant to Articles 3 and 7(1) of the Statute, Judge Pocar and Judge Vaz dissenting, Šljivančanin guilty under Count 4 of the Indictment for aiding and abetting the murder of 194 individuals identified in the Schedule to the Trial Judgement.

[N.B.: On 8 December 2010, the Appeals Chamber revised its judgement in light of new facts brought before it by the counsel of the defence. No questions of law were revised. Šljivančanin's sentence of seventeen years of imprisonment was eventually reduced to ten years' imprisonment.]

DISCUSSION

1. a. (*Appeals Chamber, para. 69*) Do the Chambers qualify the conflict? How could the conflict in November 1991, before Croatia was recognized by any State, have been of an international character? Why does the Appeals Chamber apply GC III? Is it applicable only because of the Special Agreements on the application of the Geneva Conventions? Are they binding on the parties? [See **Case No. 204**, Former Yugoslavia, Special Agreements between the Parties to the Conflicts]
- b. If the conflict had not been of an international character, but the parties had agreed to treat captured combatants in accordance with GC III, what would Article 12(2) of GC III imply? That such combatants could not be transferred to any entity not party to such an agreement?
2. (*Trial Chamber, para. 207*) Why were the victims in this case combatants? Why were they POWs? At what point did they become POWs?
3. a. (*Appeals Chamber, paras 71-74*) Who are the provisions of the Geneva Conventions addressed to? Are they addressed only to States Parties, or also to all agents of the State?
- b. (*Appeals Chamber, para. 71*) Does Article 46 of GC III create an obligation for the State agents responsible for the transfer? Does it imply an obligation not to transfer POWs in certain circumstances? Does it imply an obligation not to leave them in the power of certain entities or people?
4. (*Trial Chamber, para. 7; Appeals Chamber, para. 71*) Does Article 12 of GC III apply to the situation, even though the forces to which the POWs have been transferred, i.e. the TOs and paramilitaries, belong to the same party to the conflict?
5. a. (*Appeals Chamber, para. 72*) Can Article 12 of GC III be understood as attributing obligations to State agents in charge of POWs? May this obligation be extended to all transfers of POWs, regardless of who the receiving power is? Do you agree with the Appeals Chamber's finding that

Šljivančanin had a legal obligation under IHL to satisfy himself of “the willingness and ability of the TOs” to treat the POWs humanely? Can it be argued that Šljivančanin violated IHL in transferring the POWs to the TOs and paramilitaries?

- b. Who is responsible, under IHL, for ensuring that the receiving power has “the willingness and the ability [...] to apply the Conventions”? Does the obligation concern every State agent? Was the obligation under IHL binding for all JNA soldiers present at Ovčara? Did all the JNA soldiers violate IHL when they withdrew from Ovčara that night?
6. a. Is there an obligation, under IHL, to disobey unlawful orders? Can it be argued that the order, given by Mrkšić, to withdraw from Ovčara was unlawful? If yes, did Šljivančanin have an obligation, under IHL, to disobey? (CIHL, Rules 154 and 155)
- b. Did Šljivančanin have an obligation, under IHL, to take action to prevent the commission of crimes against the POWs by the TOs and paramilitaries, although the latter were not under his command, but under that of Mrkšić? (GC III, Arts 12 and 13; AP I, Arts 86 and 87; CIHL, Rule 153)

Case No. 222, United States, Kadic et al. v. Karadzic

[Source: ILM, vol. 34 (6), 1995, pp. 1595-1614; footnotes partially omitted.]

S. KADIC, et al., Plaintiffs-Appellants

v.

RADOVAN KARADZIC, Defendant-Appellee

October 13, 1995

[...]

OPINION: JOHN O. NEWMAN, Chief Judge:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. at 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action [...].

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadzic, President of the self-proclaimed Bosnian-Serb Republic of "Srpska". [...] For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background. The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadzic, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska", which claims

to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadzic possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command. The complaints allege that Karadzic acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia. [...]

Without notice or a hearing, the District Court by-passed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. [...]

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that “acts committed by non-state actors do not violate the law of nations” [...].

The District Judge also found that the apparent absence of state action barred plaintiffs’ claims under the Torture Victim Act, which expressly requires that an individual defendant act “under actual or apparent authority, or color of law, of any foreign nation”, Torture Victim Act at 2(a). [...]

Discussion. Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadzic urges us to affirm on any one of these three grounds. We consider each in turn.

I. SUBJECT-MATTER JURISDICTION

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court – the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants’ Claims

[...]

Judge Leisure accepted Karadzic’s contention that “acts committed by non-state actors do not violate the law of nations,” [...]

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. [...]

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that “evolving standards of international law govern who is within the [Alien Tort Act’s] jurisdictional grant.” *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants’ claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

(a) *Genocide* [...]

Appellants’ allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

(b) *War crimes*

Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. [See *Case No. 101*, *United States, In re Yamashita*]. Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities.

After the Second World War, the law of war was codified in the four Geneva Conventions, [...] which have been ratified by more than 180 nations, including the United States [...]. Common article 3, which is substantially identical in each of the four Conventions, applies to “armed conflicts not of an international character” and binds “each Party to the conflict ... to apply, as a minimum, the following provisions”: [here parts of Article 3 common are quoted] Thus, under the law of war as codified in the Geneva Conventions, all “parties” to a conflict – which includes insurgent military groups – are obliged to adhere to these most fundamental requirements of the law of war.

[Footnote No. 8 reads: Appellants also maintain that the forces under Karadzic’s command are bound by [...] Protocol II [...], which has been signed but not ratified by the United States [...]. Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” [...] [Protocol II] art. 1. In addition, plaintiffs argue that the forces under Karadzic’s command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, see Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of “belligerents,” and to whom the rules governing international wars therefore apply.]

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs]

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nüremberg after World War II [...]. The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

(c) Torture and summary execution

[...] It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadzic to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadzic does not meet the definition of a state. [...] Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

(a) Definition of a state in international law

[...] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. [...] It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime – sometimes due to human rights abuses – had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) Acting in concert with a foreign state

Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The “color of law” jurisprudence of 42 U.S.C. at 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. [...] A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. [...] The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid. [...]

Conclusion

The judgment of the District Court dismissing appellants’ complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

DISCUSSION

1. a. Who can violate IHL? Only a State? Also a non-State party to a non-international armed conflict? Also an individual acting for a State or for a non-State party to a non-international armed conflict? Also an individual acting in a non-international armed conflict, but not for a State or non-State party to that conflict? (Hague Convention IV, Art.3; GC I-IV, Art. 3; GC I-IV, Arts 51/52/131/148 and Arts 49/50/129/146 respectively; P I, Arts 1(1), 75(2), 86 and 91; P II, Arts 4-6)
- b. Does the Court consider that “Srpska” is a State? Does it need to prove this to affirm that “Srpska” has obligations (and rights) under IHL?
2. How does the Court qualify the conflict in Bosnia and Herzegovina? Is Protocol II only applicable if its “requirements (...) have ripened into universally accepted norms of international law” (fn. 8) or is it sufficient that the former Yugoslavia and Bosnia and Herzegovina were party to Protocol II?
3. Is a violation of Art. 3 common to the Conventions a violation of the law of nations under the Alien Tort Act? Is it a war crime?
4. a. Has each State Party an obligation under IHL to adopt legislation offering a civil cause of action to a victim against the individual who violated that provision? Even if the violation has no connection with that State Party? Does such legislation conform to IHL? (Hague Convention IV, Art. 3; GC I-IV, Arts 51/52/131/148 respectively; P I, Art. 91)
- b. Has each State Party an obligation under IHL to adopt legislation giving its penal courts jurisdiction over the individual who violated IHL, if that violation is qualified as a grave breach by IHL? Even if the violation has no connection with that State Party? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1))

Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.

[Source: Divisional Court Martial I, Hearing of 14 to 18 April 1997; original in French, unofficial translation.]

DIVISIONAL COURT MARTIAL I
Hearing of April 14 to 18, 1997

[...]
JUDGMENT
[...]

PROCEEDINGS HAVE BEEN BROUGHT AGAINST G.

born on ... in ..., Bosnia-Herzegovina, [...], married, a driver, temporarily resident at the Registration Centre for Asylum Seekers in ..., presently remanded in custody at ... prison

who is charged with

a breach of the laws and customs of war (Article 109 of the CPM [Code pénal militaire – Military Penal Code, see **Case No. 63**, Switzerland, Military Penal Code]),

that is to say:

- a) a breach of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 13, 14, 129 and 130),
- b) a breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Article 3(1)(a) and (c) and Articles 16, 27, 31, 32, 146 and 147),
- c) a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Articles 4, 5 and 13),
- d) a breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International [sic] Armed Conflicts (Protocol I) (Articles 10, 11, 75, 76, 77 and 85).
 - for having, in July 1992, in the company of three other persons unknown, probably soldiers, struck with his truncheon (beat) at least six prisoners detained at the Omarska camps, including at least one woman and a young adult male, and thus at least having caused injury to two of them;
 - for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, participated at least in two rounds of beatings of several prisoners, including A., and thus having caused violence to their physical and mental well-being;
 - for having, between May 30, and August 15, 1992, in the Keraterm prison camp, in the company of at least two other persons in uniform, committed outrages upon the personal dignity of several prisoners, including A., by

forcing one of them to lick the boots of a uniformed person in that group, [...]

The Court rules as follows:

THE FACTS

Overall situation with regard to the conflict in the former Yugoslavia

The facts of the case fall within the context of the conflict in the Former Yugoslavia. As far as the overall situation with regard to that conflict is concerned, the Court examined various public sources, in particular the Decision in the *Tadic* case by the Appeals Chamber of the International Criminal Tribunal in The Hague and the report compiled by [...] the Federal Office for Refugees which relates, in particular, to the Omarska and Keraterm camps.

The armed conflict in the former Yugoslavia broke out between the armed forces of the Federal Republic of Yugoslavia and those of Slovenia and Croatia shortly after the declaration of independence by Slovenia and Croatia on June 25, 1991.

Within the framework of that overall conflict various internal armed conflicts broke out, including the conflict between Bosnian, when the Bosnian Serb army attempted to implement the objective of the Federal Republic of Yugoslavia to create a new Yugoslav State from areas of Croatia and Bosnia-Herzegovina.

In the spring of 1992 the Bosnian Serb army, backed by Serb militias, launched military attacks throughout the territory of Bosnia-Herzegovina.

Therefore, the Government of Bosnia-Herzegovina, which considered itself to be the target of aggression on the part of the Republic of Serbia in particular, officially declared a state of war in the country on June 20, 1992.

From the beginning of the conflict it was possible to observe a deliberate policy of expelling and destroying the civilian Croat and Muslim population over the entire territory of Bosnia-Herzegovina (ethnic cleansing).

Particular situation in the Prijedor region

In that region Serb troops and militias conducted surprise attacks against towns in the north-west of Bosnia-Herzegovina, in particular Banja Luka, Kozarac and Prijedor.

During those attacks many civilians, principally Muslims, were arrested, rounded up and held prisoner. In addition to the ill-treatment inflicted on those people, a large number of summary executions were carried out.

The Omarska and Keraterm camps

A large proportion of the civilian population, which was considered hostile by the Serb forces, were deported to camps, with men and women often being separated. No distinction was made between civilian and military prisoners.

The Serb troops set up the camps after occupying the town of Prijedor, that is to say as of May 25, 1992, in the buildings of the Omarska mine situated some twenty kilometres from the town, and at Keraterm in an abandoned ceramics factory on the outskirts of the town of Prijedor.

It is apparent both from various reports which have been compiled and many witness testimonies, in particular those made during the hearing of this case, that the conditions under which people were held at the Omarska and Keraterm camps were catastrophic. The basic infrastructure failed to provide the prisoners with sufficient hygiene, food or water supplies, minimum medical care, or even sufficient space in which to sleep.

The organisation of camps such as the one in Omarska was in the hands of the civilian authorities. In addition to the prison conditions, the prisoners were also subject to the arbitrary will of the guards and those authorised to enter the camps. Thus, they were subjected daily to harassment and abuse, blows, brutality and acts of torture which most frequently resulted in death. Summary executions were a frequent occurrence.

In particular, many witnesses have described two small huts in Omarska camp situated away from the main buildings and particularly feared by the prisoners, i.e., the red house which, it is claimed, no prisoner left alive, and the white house where the guards had set up a torture chamber. There the prisoners were beaten, some of them to death. Many testimonies describe how the most frequent reason given for the beatings and executions was the simple desire of the guards to strike out indiscriminately.

The camp guards and the gangs of torturers

The Omarska and Keraterm camps were guarded by permanent uniformed guards armed with automatic weapons and subject to the camps civilian authorities.

In general they were from the region and knew one other. Many testimonies describe them as insulting and brutal to the prisoners, in particular the guards Bosko Baltic, Zivko Grahovac – known as Zika – and Zelko Karlica – known as Zak – who served at Keraterm.

In addition to the permanent guards, many testimonies state that entry to the camps was also open to groups of people from outside who were not part of the camp organisation. They held no formal position and only remained in the camps for a short time. According to the testimonies of former prisoners, access to the camps was open to such people because they were known to the guards and the officials of the camp authorities.

Many testimonies concur with regard to the fact that the guards avoided being seen by the prisoners by making them remain face down on the ground and forcing them to keep their heads down while standing. Moreover, they avoided calling each other by their names and used nicknames instead.

Those groups have often been described as particularly brutal and cruel and sometimes persisted in beating their victims to death. They were generally uniformed soldiers, although not members of the organised armed forces. One of the most feared teams was that led by Dusko Tadic and one other led by Dusan Knejevic – known as Duca –

accompanied by Zoran Zigiv, as has been confirmed in particular by the witness Dr. who was heard during the trial.

B., Ki., Ka., A. and J. in particular, who were also heard in their capacity as witnesses during the hearing, have confirmed the barbaric acts committed against civilian prisoners at the aforementioned camps, in particular the beatings and the torture carried out by the guards.

Personal situation of the accused

G. was born on ... in Prijedor, Bosnia-Herzegovina. [...] His father, who is now retired, was a policeman by profession.

The accused had average school results which led him to receive training as a locksmith. From September 1986 to September 1987 he performed his military service as a driver in Slovenia where he subsequently worked for a time.

On his return to Prijedor he worked as a taxi driver until 1989. In 1990 and 1991 the accused, who lived with his parents, was unemployed apart from a short period in 1991 when he worked as a lorry driver for a bakery.

On a personal level, the accused went out with a young woman, Mi., with whom he had a child., Al., who was born in mid-1992. However, it would appear that he no longer has any contact with his girlfriend or his son.

Dr D. Vlatkovic, the senior physician at the Bellelay psychiatric clinic, produced a psychiatric report on the accused dated March 27, 1997 from which it is evident, in particular, that he has never suffered from any mental illness which might diminish his criminal responsibility. At present he is suffering from depression which, in the opinion of the expert, is the result of his imprisonment. The accused finds his imprisonment an injustice and is consequently finding it difficult to endure, so much so that he claims it may cause him to attempt to commit suicide. Furthermore, the expert suggests that the accused is of average intelligence. He is someone who submits but without losing his critical sense. The accused has little inclination towards the military and, on the contrary, displays a certain fear and anguish with respect to the tragic events threatening Bosnia. In response to that anguish the accused made plans to go abroad for reasons which remain unclear.

In general the accused's violent nature is evident from the file, in particular the statement made during the hearing of the judgment [by] Ka., former chief of police in Prijedor, who stated that at secondary school the accused had used a knife on a schoolmate. It is also clear from the file that the accused was allegedly convicted in Yugoslavia for carrying thieves in his taxi, that he entered Austria illegally and that he was convicted of car theft there.

Alleged acts

All the witnesses refer to the accused as Goran Karlica, brother of Zoran, the Chetnik commander killed on May 31, 1992 during the seizure of Prijedor.

When questioned by the Geneva police the accused gave his name as G. and categorically denied being Goran Karlica, having been in Omarska or Keraterm camps or having struck anyone. He claims that during the period during which the acts imputed to him were committed he was in Austria and Germany.

It is also evident from the case file that at some point in February 1992 the accused left Bosnia for Wels near Linz in Austria where he found a job at the firm of D. The latter sent him to work on a building site in Germany accompanied by another employee, R.

It is also apparent from the file that in May 1992 the accused and R. witnessed the murder of one of their colleagues, known as S., which was committed by a certain Bo. The next day the accused and R. returned to Austria to report that fact to their employer. Finally, on May 16, 1992 the accused and R. went to the police in Linz to report Bo's crime. The Austrian police then took the two men to Germany to hand them over to the German police authorities.

The exhibits produced (exhibits 147 ff) show that the accused G. was in Germany until May 12 or 13, 1992, then in Austria at Gasthof Bayerischer Hof until May 20, 1992, then at the Wohnheim Voest-Alpine in Linz, and subsequently at the Gasthof Steyermühl in Steyermühl.

Furthermore, it is also clear from the file that the accused submitted a request for a visa in Austria and took certain steps by twice appearing in person before the competent authority on June 12, 1992 and subsequently on July 3, 1992.

During his witness testimony A. stated that the accused, accompanied by Zoran Zigic and a certain Dusan, had struck him during that period at the Keraterm camp. At a later stage the accused is claimed to have beaten the witness and other prisoners again at the same camp. On that occasion Zigic is claimed to have forced the witness to lick his shoe and the accused was allegedly present at that scene.

During his witness testimony Mu. also maintained that the accused was in Prijedor during May and July 1992. He stated that he had seen him wearing a speckled uniform. However, Mu. had never seen the accused beat or kill anyone.

Witness Bs. was held at the Omarska camp from May 27, to August 6, 1992. Around June 30, 1992 the witness saw a black car with four or five occupants arrive at the camp. A fellow prisoner then allegedly pointed out that G. was among them even though in his statement to the examining judge he stated that he had seen G. and Goran Karlica, who were two different people, at the camp.

In Geneva on April 24, 1995 witness Mu. thought that he recognised the accused as a torturer from the Trnopolje camp. On April 26, 1995 witness Ki. thought that he recognised him as a torturer from the Omarska and Keraterm camps. Witness B. considered him to be a guard at the Keraterm camp. As for witness Ki., he stated on April 28, 1995 that he considered him to be a torturer from the Omarska camp who violently struck six people, including his former physics teacher, Md., and his wife and his son of around twenty years of age.

Witness Ki. also thought that he had seen the accused present at, and perhaps even participate in, the killing of Md., his former physics teacher, in the White House at the Omarska camp. That sad event is said to have taken place at the end of June or the beginning of July 1992. However, it is established in the file that it was Duca who killed Md.

Witness Kl. claims to have seen the accused on May 27, 1992 on a tank in Kozarac while she was a prisoner and was passing in a column with other prisoners in front of that tank. She also states that she saw the accused again in mid-June 1992 in front of the Balkans Hotel attending a memorial ceremony for Zoran Karlica. She herself had been released from Trnopolje camp on June 10, 1992. Witness Kl. lost her husband, a Muslim and a policeman in Prijedor, and was arrested, according to her, by the Zoran Karlica unit in May 1992. He has not reappeared and in all likelihood is dead.

Witness Ka. stated that he saw the accused in a Serb uniform in Prijedor up until April 1992 and that he knows that he fought by the side of Zoran Karlica in Croatia in 1991. He says that he saw G. in Prijedor prior to May 24, 1992. The witness was vilely tortured by his former subordinates and lost a large number of his family members, including his father, his brother and the five sons of the latter.

THE LAW

Jurisdiction

The Court is of the opinion that the conflict in the former Yugoslavia must be approached in a comprehensive manner and classified as an international conflict.

The armed conflict in the former Yugoslavia broke out between the armed forces of the Federal Republic of Yugoslavia and those of Slovenia and Croatia shortly after the declaration of independence by Slovenia and Croatia on June 25, 1991. That armed conflict must be classified as internal on account of the fact that the declarations of independence were suspended for three months at the request of the European Community. At the end of that period, on October 7, 1991, Slovenia declared its independence with effect from that date and Croatia followed with effect from October 8, 1991. Thus, the armed conflict in the former Yugoslavia should be classified as international as of October 8, 1991 since those two States were then independent. All those States have acceded to the Geneva Conventions.

Switzerland has ratified in particular the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, and Protocols I and II Additional thereto.

Furthermore, the scope of Articles 109 ff of the CPM applies to all armed conflicts and Article 108(2) of the CPM specifically stipulates that violations of international agreements shall be punishable where such agreements provide for a more extensive scope than declared wars or other armed conflicts.

Thus, since the acts imputed to the accused, if they were in fact committed, constitute breaches of the laws of war within the meaning of Article 109 of the CPM, the Court has jurisdiction over this case.

Assessment of the evidence

[...] the Court assesses the evidence freely in accordance with the opinion that it formed in the course of the proceedings.

It is evident from the file that the accused had a room at the Wohnheim Voest-Alpine from May 15 to August 1, 1992. Furthermore, the accused was in Germany and Austria until May 20, 1992 and in Austria between 6 June and 3 July to carry out certain formalities in connection with his visa application. Witness D., who did not make a great impression, nevertheless made it appear likely that the accused was in Linz at the end of June and the beginning of July 1992. However, it has been impossible to establish for certain whether the accused always stayed in Linz or Steyeremühl as he claims.

The Court is of the opinion that although the accuseds [*sic*] identity as G. is beyond doubt, the witnesses are confusing, albeit in good faith, the accused with someone else by the name of Karlica, a person hated in the region whom they believe they recognise as the accused. That is because all the witnesses have personally suffered physically and psychologically from atrocities committed by the guards at the Omarska or Keraterm camp and the visitors to those camps. They have lost everything and are now refugees in Switzerland. Their testimonies are disturbing and moving, but contain contradictions with regard to places, dates and identities of whom the [*sic*] are accusing.

The contradictory evidence before the Court fails to convince it that the accused was in Prijedor, Kozarac, Omarska and Keraterm between May 27, and the end of July 1992. As the presence of the accused has not been proven it is doubtful whether he committed the acts imputed to him.

[...]

Despite the minimal amount of credibility that can be generally accorded to what the accused has said, it must be acknowledged that he has never deviated in his statements concerning his absence from Prijedor and his stays in Germany and Austria. Any doubt must be to the benefit of the accused and therefore he shall be acquitted on all counts.

Compensation and non-pecuniary injury

G. was remanded in custody on May 8, 1995. Although he protested his imprisonment to Col Bieler, who was then president of the Court, he never asked to be released pending trial. Moreover, he never lodged an appeal with the Appeal Court against the decisions to extend his imprisonment.

As a refugee [...] G. would have been able to find work after being in Switzerland for six months. [...] Having regard to those facts, it appears fair to grant him damages of Fr. 30,000 as compensation for the injury resulting from his time remanded in custody.

On the other hand, the accusation that he was a war criminal, which was not proven beyond reasonable doubt, has caused him serious injury, but within the framework of the conflict in the former Yugoslavia it does not have the same magnitude as it might have had elsewhere. The fact that he was accused and then acquitted should in no

way diminish the esteem which he may enjoy in the Serb part of Bosnia. Moreover, G. demonstrates in his correspondence in particular that he does not have high regard for the opinions and esteem of the Bosnian Muslims.

He has indeed suffered from his prolonged imprisonment and has had to be treated, in particular psychologically, by prison doctors.

Having regard to all those facts, it appears just to grant him the sum of Fr. 70,000 as compensation for non-pecuniary injury.

[...]

ON THOSE GROUNDS

Divisional Court Martial I [...]

HEREBY RULES THAT

G.

is acquitted,

[...]

and furthermore, he shall be awarded the sum of Fr. 30,000 as damages and the sum of Fr. 70,000 as non-pecuniary damages to be paid by the Federal Government,

and consequently the president of the Court orders the immediate release of G. [...]

DISCUSSION

1. Why were the Swiss Courts competent to try G.? Was it because IHL prescribes universal jurisdiction over crimes such as those of which G. was accused? Does jurisdiction under Swiss law go beyond the jurisdiction prescribed by IHL? Would the Swiss courts have been competent under Swiss law even if the acts of which G. was accused did not violate IHL? (GC I-IV, Art. 2, and Arts 49/50/129/146 respectively; P I, Art. 85) [See **Case No. 63**, Switzerland, Military Penal Code]
2.
 - a. Does the Court qualify the conflicts in the former Yugoslavia? Was such qualification necessary to have jurisdiction over G.? Under IHL? Under Swiss law? (GC I-IV, Art. 2, and Arts 49/50/129/146 respectively; P I, Art. 85) [See **Case No. 63**, Switzerland, Military Penal Code]
 - b. When was the conflict between the Yugoslav Peoples' Army and Slovenia and Croatia an international armed conflict according to the Court? Since the latter's declaration of independence? Since the entry into force of the declaration of independence? Since its recognition by some other States? Did the Court use the proper standard to assess the status of the conflict? Do you think the Court would have applied the law of international armed conflicts to a hypothetical armed conflict between a Swiss Canton declaring its independence and the rest of Switzerland?
 - c. When the conflict between Croatia and Slovenia on one side and Yugoslavia on the other became classified as an international conflict, did that necessarily imply that the conflict in Bosnia and Herzegovina also had to be considered as an international armed conflict? Would

you consider that the acts allegedly perpetrated by G. came within the ambit of the IHL of international armed conflicts? What is the opinion of the Court in that regard?

3. a. Were the acts of which G. was accused violations of IHL? Even if the conflict was a non-international one? (GC III, Arts 3, 13 and 14; GC IV, Arts 3, 27, 31 and 32; P I, Arts 75 and 76; P II, Arts 4 and 5)
- b. If the conflict was an international one, were the acts of which G. was accused considered as grave breaches of IHL? Could the victims be considered as “protected persons”? (GC I-IV, Arts 50/51/130/147 respectively; P I, 85)
- c. Is the Court’s qualification of the conflict in the Prijedor region the same as the one made by the ICTY in the Tadic case? [See **Case No. 211**, ICTY, The Prosecutor v. Tadic [Part A., paras 72-73 and Part B., paras 584-608]]
4. Which particular problems may arise in assessing the credibility of witnesses in an inter-ethnic conflict? And in establishing the responsibility of a party for violations of IHL?
5. Does the case show particular problems in establishing universal jurisdiction over violations of IHL in countries not involved in a given conflict? Is such jurisdiction realistic? Are there alternatives? How could it become more effective?
6. Is the acquittal of G. satisfactory? Should he at least have been denied compensation for his pre-trial detention?
7. Did this case add to the credibility of IHL or instead diminish it? Should the prosecutor preferably not have charged G.?

Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others

[Source: Split Country Court, Record, May 26, 1997, K-15/95; not the final version, unofficial translation.]

RECORD**[Arguments of the defence]**

[O]n the continuation of the main hearing in the criminal procedure against the accused Rajko Radulovic and others, due to the criminal act pursuant the Article 121 and 122, Basic Criminal Law of the Republic of Croatia, held on 21.05.1997. [...]

The defence attorney of the accused Miroslav Vincic, [...] Ivan Matesic, in his final presentation pointed out that the court procedure had lasted six months and all the cases had been presented on the professional level. The goal of the whole procedure was to establish the truth. The statements of witnesses, accused, and all the other material evidence helped to make a case. However has the truth concerning the accused been established? All the accused were questioned initially at the police station and all the levels of the police investigation method had been used, later on[,] in the investigation procedure[,] the accused gave their statements complying to the methods of the main hearing. [...]

All the accused behaved during the whole procedure in the manner which had to be taken in consideration while bringing the final verdict. In his speech [...] Matesic said that all the accused were common people simply forced by the outside circumstances, out of their control, to participate in the war skirmishes, and than [sic] they had to face charges for the serious crimes against humanity and violation of the international law. True, they had taken active part in the war but they had equally been the victims. [...]

All the witnesses had recalled the events, however[,] nobody had mentioned the names of the present accused persons. An enormous amount of witnesses had given all kinds of statements, however not enough to bring charges against the accused. The court expert had ruled out the possibility that the accused actually performed the demolition of the Peruca dam. [...]

According to him the international bodies showed particular interest in that and similar cases so due to the reports in the mass media the citizens considered the accused guilty even before the court actually had proclaimed them guilty. It was necessary to establish the personal guilt of each one of the accused. [...]

[...]

Not one of the witnesses mentioned Miroslav Vincic in connection with the action of expelling the civilians from the area of Dabar, Vucipolje, Zasiok and Donji Jukici. He took an active part in the military action in Gradina. He never participated in setting fire and demolishing the houses on the right bank of the Pruca lake, and never opened fire from Opsenjak to Dabar, Vucipolje and Zasiok. Numerous army units came to and went away from the post so it would really be difficult to make a list with names of those who opened fire on civilian settlements from that particular post.

Vincic never took part in the action of delivering the explosive to the Peruca dam on 27/28.01.1993. As established from the evidence he had been on the dam in December 1991 [...]. The police from Vrlika under all kind of threats forced him to fill the ranks on the Peruca dam, it was a kind of forced labour activity. He was unloading lorries and knew nothing of the content of the parcels [...]. As the member of the territorial defence he was not informed on the actual content of the parcels in the lorry. There could only be a presumption that the lorry was loaded with explosive for demolishing the dam. And anyway upon the arrival of the Kenya [sic] UN battalion all the explosive had been removed from the dam. There is no evidence whatsoever the explosive Vincic allegedly unloaded from the truck had been used for [the] actual demolishing of the dam. There is no evidence to accuse Vincic of anything.

The defence claims there is not enough evidence for bringing charges against the accused. Neither the hard evidence nor the statements of the witnesses has [sic] been relevant enough to accuse Vincic for any kind of criminal activity.

Miroslav Vincic gave himself voluntarily up to the Croat authority, without any fear, he voluntarily surrendered. It is expected from this Court to acquit the suspect. [...]

THE MAIN HEARING TERMINATED

The Council withdraws for counselling and voting.

The clients are informed on the date and time of proclaiming the verdict,
26.05.1997 at 09,00 a.m.
Terminated at 10,15 a.m.
President of the Council
Recording Secretary

The Council brought the following decision on 26.05.1997, at 09.00 a.m. and the President of the Council announces and explains in detail the following:

VERDICT

IN THE NAME OF THE REPUBLIC OF CROATIA

ACCUSED:

1. RAJKO RADULOVIC
[...]
38. MIROSLAV VINCIC
39. PETAR PEOVIC

Found guilty

The accused from the 3rd till 39th [...] acted as the members of the so-called border police Snits, members of the Republic Srpska Army from 30.05.1992, and in the armed clashes against the Croatian police units[,] performed violation of the Articles 3, 27, 32, 33, 39, 53 of the Geneva Convention on the Protection of Civilians in the war of

12.08.1949 and Articles 51, 52, 53, 56, 57 Additional Protocol – Protocol I and Articles 4, 13, 14, 15, 16, 17 and Additional Protocol – Protocol II of 1977 along with the Geneva Convention. [T]heir only goal was the ethnic cleansing, looting and demolishing, private property of civilians on the territory conquered by force [...] according to the [...] prepared plan. [...]

The 1st accused Rajko Radulovic and his deputy 2nd accused [...] opened fire from tanks [...] as well as co-ordinated gun and infantry fire on the populated area and on civilians, hitting houses, factories, churches, schools, Peruca dam, not one object was even close to resembling the army object and triggered the mass exodus of the population. [T]hey entered the [UN] [...] protected areas and confiscated and looted everything they could lay their hands on from the deserted homes. [T]hose who remained at home were mistreated and terrorised, and numerous explosive devices were set in the deserted houses and factories causing indescribable damage, all the private property on the conquered territory has either been demolished or looted, the remaining civilians were placed under house arrest, and numerous were killed.

- [T]he accused from 3 to 5 [...] decided to expel by forced [*sic*] the civilians and [...] loot[ed] and destroy[ed] their material property. [...] They beforehand made a plan of terrorising and mistreating the civilians and planned in advance some terrorist actions. [...]
- [F]rom 16.09.1991 till the end of May 1992 the accused from 1 till 5, [...] were introduced to all the plans in relation to the conquest of the territory[:] [...] expelling [...] civilians along with demolishing [...] their property in the settlements on the right and left bank of the Peruca lake[.] [...]

[...]

[The] 14th accused Stevan Cetnik opened fire and other accused opened fire from machine guns and [the] so-called Cetina territorial defence unit was under the command of the 14th accused and the [the] territorial defence Otisic was under the command of the 3rd accused soldiers [...][,] opened fire at random against the civilian population and villages [...][] [A]t the same time on the left bank of the Peruca lake the accused from 27 till 39 under the command of the 1st accused and under the direct orders of the direction commander [...] opened machine gun fire at random also in the direction of the aforementioned villages and Potravlje and Satric. The civilians from the mentioned places were forced to exodus. The aforementioned armed units entered defenceless villages on the left and right bank of the Peruca lake and continued targeting houses and farms, planting explosives and setting fires. [...]

Small number of those [the remaining civilians] who did not depart at the beginning, [were] unprotected and totally helpless, [and were] undefended against the aggression, looting [...] and unable to defend their material property [...] [O]n the other side those in command were obliged to [...] behave differently and comply to the Geneva Convention rules, but instead organised so-called “cleansing of the area”, with the only goal to mistreat and expel those who stayed behind in the area[.] [...]. [The] 35th accused and 36th accused personally looted and did nothing to prevent the other groups from the territorial defence, JNA and Martić militia from looting the

property from the deserted houses and farms, and in an organised way confiscated the property from the deserted houses and farms and planted mines in the empty houses[.] [...]

[The] 1st accused ordered the civilian Mile Buljan to enter the combat carrier [with] [...] his son Ivica Buljan and drove them along the demolished and burnt villages firing from the machine gun, ordering the house arrests, and after throwing them out from the combat carrier ordered to his soldiers to beat them up. Ivica Buljan after [...] a violent biting [*sic*] died the next day.

[The] 9th accused, 11th accused, 14th accused, 17th accused, 18th accused, 21st accused and 23rd accused[,] apart from firing on several occasions [...] seriously damaged [...] churches and on several occasions planted [...] enormous quantities of explosive devices [...]. [T]he 7th accused personally demolished the interior of the church and the fortress Prozor in Vrljika, the accused rang the church bells, wore the priests clothes and forbid the church goers [*sic*] to attend the mass, with about 10 members of the so-called SAO Krajina Maric militia mistreated civilians. [...]

[The] 1st accused searched the homes of civilian population looking for money and valuable things, so in the home of Ivan Vucemilovic-Vranic they found the Croatian flag, went to the town found the owner of the flag on the street and mistreated him violently with the wooden part stander [*sic*] of the flag beat him up head to toe, forced him to swallow the flag along with some beans, consequently he choked [...] to death. [...]

- [The] 3rd accused [...] and 11th accused in the police station premises [...] finished with questioning Bozo Coric – [a] civilian and accus[ed] him for the alleged cooperation with Ustashas [and] threatened him with firing squad and forced him to give information on the movements of the Croat police and army forces. [The 3rd accused] gave order to Krunic to put the accused Coric in the firing squad and faked [an] execution. [T]he accused was taken away to the place called Busic and threatened to be shot dead in five minutes, demanding from him information on the names of his collaborators [...]. He was ordered to stand by one stone and the accused prepared everything for his execution, the armed men prepared their guns and again he was ordered to shout at the top of his voice "I'm a Serb".
- On 20.09.1991 until 28.01.1993 [the] 3rd accused [and the accused] from 5 till 26 carried the orders of their commanders with the goal to terrorise and threaten[ed] [to] demolish [...] the Peruca dam and drowning of 30.000 people and their material belonging downstream. [...]

Under the command of [the] 6th accused, 7th accused, 16th accused, 17th accused and with their cooperation and supervision [during the] [...] cease fire[,] brought extensive quantity of explosives [...]. [T]he 5th accused, 11th accused, 18th accused, 22nd accused, 26th accused and some other members of the so-called Republik Srpska Krajina militia unit, us[ed] [...] fire arms on the left and right bank of the Peruca dam on the UNPROFOR check points [and] attacked and disarmed the members of the UNPROFOR battalion from Kenya [and] expelled them [...], [The] Kenyan battalion was stationed along the

Peruca dam as a security measure. The aforementioned accused persons captured the UNPROFOR soldiers and posted themselves instead in [*sic*] [of] the former Kenya [*sic*] battalion positions and in this way [brought] in the explosives to [...] demolish [...] the dam [...]. All those who participated in planting the explosive retreated [...] and an unidentified person switched on the device on 28.01.1993 at 10.00 a.m. and activated the detonating cord. [T]he dam collapsed and the so-called “gallery”, tower of the bridge and the unit for water level regulation had been heavily damaged, the water entered the administration building, covered water turbines, and the dam completely collapsed[.] [T]he high tide water wave had been created and the innocent civilians and their material belonging downstream [...] had been placed in danger. However the employees of the “Croatian Electric Power Industry”, sealed off the openings and opened the dam and in that way [...] slowed down the outpour of the water from the storage lake.

By violating the International Law during the armed conflict and occupation the aforementioned persons ordered and carried out [...] attacks on the civilian population[s] and settlements, without selecting the targets, and the result of it was [the] death of numerous persons, inhuman treatment of civilians, expelling of people, terrorising, intimidating, looting, destructing [*sic*] property, unjustified from the military point of view, and above all the attacks were performed on the buildings and dam and water power plant objects with enormous and dangerous power. [...]

DISCUSSION

1. How can the Court apply the law of international armed conflict to the soldiers belonging to the army of the so-called “Republic of Serb Krajina”? Does it thereby recognize that “Republic” as a State? Does the Court consider those soldiers as fighting for the Federal Republic of Yugoslavia? Taking into account the events described in **Case No. 203**, Case Study, Armed Conflicts in the Former Yugoslavia, Sections 2, 6, and 31, when could the conflict be qualified as international?
2. Is “ethnic cleansing” prohibited by IHL? In international armed conflicts? In non-international armed conflicts? Does the qualification of the conflict matter for determining whether any of the acts mentioned in the verdict are prohibited? Is the forced movement of civilians, independently of the means used, prohibited in international armed conflicts? Within and outside occupied territories? In non-international armed conflicts? (GC I-IV, Art. 2; GC IV, Arts 27, 31-33, 35-39, 49 and 53; P I, Arts 51-53, 56 and 57; P II, Arts 1-17)
3. Was the destruction of the Peruca dam a violation of IHL? Even if the IHL of non-international armed conflict had been applicable? Was the destruction an “attack” and thus prohibited by Art. 56 of Protocol I? Could such an attack under the circumstances described in the verdict have possibly been justified under Art. 56 of Protocol I? Is the destruction of the dam a grave breach of IHL? (Hague Convention IV, Art. 23 (g); GC IV, Arts 53 and 147; P I, Arts 49, 52 and 85(3)(a); P II, Art. 15)
4. Was the attack against the Kenyan UNPROFOR soldiers a violation of IHL?
5. If the argument of the Defence is assumed to be accurate, how could Miroslav Vincic be sentenced? Does the verdict mention any individual responsibility? To sentence him, is it sufficient that he belonged to a unit which violated IHL? Is the fact that he unloaded explosives at the Peruca dam also sufficient to make him responsible for its destruction? At least if he knew that those explosives were to be used to destroy the dam?

Case No. 225, The Netherlands, Responsibility of International Organizations

[The authors would like to thank Ms Lindsey Cameron, LL.M., doctoral candidate and research assistant at the University of Geneva, for having drafted this case and its discussion.]

[Source: Nuhanovic v. The Netherlands, District Court in The Hague, Judgement, 10 September 2008, available at http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BF0181&u_ljn=BF0181 (English translation; footnotes omitted)]

[...]

[Official Headnote]

[...] In this case the claimant is H. N. He was employed by the United Nations as an interpreter and also worked for Dutchbat. His parents and younger brother had sought refuge in the compound. They [...] were killed after their departure from the compound. H. N. was part of the local staff who were allowed to stay with Dutchbat. The claimants in both cases¹ argue that Dutchbat and 'The Hague' committed wrongful acts by offering insufficient protection to the victims and exposing them to the enemy. According to the claimants, the State of the Netherlands is liable for this. The State's defence is essentially that the actions of Dutchbat should be attributed exclusively not to the State of the Netherlands but to the United Nations, as this organization exercised operational command and control over the Dutch battalion. [...]

[...]

[H. N.],

living in [...], Bosnia-Herzegovina,
claimant, [...]
versus

The State of the Netherlands
(Ministry of Defence and Ministry of Foreign Affairs),

established in The Hague,
respondent [...]

[...]

2. The facts

2.1 On March 3, 1992 the Republic of Bosnia-Herzegovina declared its independence from the Socialist Federal Republic of Yugoslavia, following the Republics of Slovenia and Croatia. Subsequently, on March 27, 1992 the Bosnian-Serb leaders declared the independence of territories within Bosnia-Herzegovina previously declared autonomous by them under the name of Republika Srpska (Serbian Republic). Round the same time hostilities broke out between the Yugoslav People's Army (JNA) and Serb militias on the one hand, and Croatian and Muslim militias on the other hand.

¹ This case was heard with another case involving an electrician, Riza Mustafic, who was employed as a temporary worker (note of the authors)

On April 7, 1992 Bosnia-Herzegovina was recognized by, among others, the member states of the European Union and the United States of America. On July 5, 1992 the official army of Bosnia-Herzegovina was founded.

2.2 Srebrenica is a city in eastern Bosnia. After Bosnia-Herzegovina had been declared independent eastern Bosnia became the scene of combat, first between Muslim fighters and Serbian militias and later between the army of Bosnia-Herzegovina and the Bosnian-Serb army. As a result, in the course of time Muslim enclaves came into existence, including that of Srebrenica and environs.

2.3 Due to continuing armed conflict in Bosnia-Herzegovina the United Nations Security Council, in resolution 758 of June 8, 1992 extended the mandate of the United Nations Protection Force (UNPROFOR) from the war in Croatia to include that in Bosnia-Herzegovina.

2.4 On April 16, 1993 the UN Security Council, in resolution 819, called on all combatants to turn Srebrenica, besieged by the Bosnian Serbs, into a safe area ('safe area which should be free from any armed attack or any other hostile act'). In resolution 824 of May 6, 1993 this summons was repeated and the number of safe areas was extended.

2.5 On May 15, 1993 the United Nations and Bosnia-Herzegovina signed an agreement in Sarajevo about the status of UNPROFOR in Bosnia-Herzegovina ('Status of Forces Agreement', abridged to SOFA). In it, in article 6, the exclusively international nature of UNPROFOR was laid down. The SOFA provided, in articles 48 and 50, a special procedure for dealing with disputes and claims of a private-law nature in which UNPROFOR or a member would be a party and in which the courts of Bosnia-Herzegovina would have no jurisdiction on the basis of any provision in SOFA.

2.6 In resolution 836 of June 4, 1993 the UN Security Council extended the UNPROFOR mandate on the basis of chapter VII of the Charter ('action with respect to threats to the peace, breaches of the peace, and acts of aggression') in order to enable UNPROFOR to counter attacks on the safe areas by deterrence.

In execution of the mandate UNPROFOR was given the authority to take measures necessary for self-defence, including the use of violence. Member states and regional organizations (what was meant was: NATO) were given permission to support UNPROFOR in the implementation of its task to deploy air power, under the command of the Security Council and in close co-operation with the Secretary-General of the United Nations and UNPROFOR. Afterwards, this mandate was described as follows by the Secretary-General:

"to protect the civilian populations of the designated safe areas against armed attacks and other hostile acts, through the presence of its troops and, if necessary, through the application of air power, in accordance with agreed procedures."

2.7 On November 12, 1993 the Dutch government, on the request of the Secretary-General of the United Nations, complied with the proposal to send a battalion of the Airborne Brigade of the Royal Netherlands Army to Bosnia-Herzegovina.

2.8 The main force of the Dutch battalion ('Dutchbat') was stationed in the enclave Srebrenica. Dutchbat relieved the Canadian detachment deployed there on March 3,

1994. With the exception of an infantry company quartered in town, the Dutchbat units were stationed approximately 5 kilometres outside town, on an abandoned factory site in Potocari (the 'compound') along the road to Bratunac.

2.9 On July 11, 1995, Srebrenica was taken by force of arms by the Bosnian-Serb army under the command of general Ratko Mladic (hereafter: Mladic). The Dutchbat troops stationed in town at the time then retreated to Potocari.

2.10 During the fall of Srebrenica lieutenant-colonel Th.J.P. Karremans (hereafter: Karremans) was in charge of Dutchbat as its commander, and major R.A. Franken (hereafter: Franken) as his deputy. The French general H. Gobillard (hereafter: Gobillard) was then in charge of the 'Bosnia-Herzegovina Command' of UNPROFOR in Sarajevo as deputy commander. Chief of staff there was the Dutch brigadier C.H. Nicolai (hereafter: Nicolai), who in those days also acted as liaison officer for the Dutch government.

2.11 After the fall of Srebrenica a stream of refugees got going from the city to Potocari. Amongst them were comparatively few men, and even fewer of fighting age. Of the refugees over 5,000 were admitted into the compound according to later counts. A far larger number of refugees had to stay outside the compound.

2.12 On July 11, 1995 Gobillard in effect instructed Karremans in view of the new situation, amongst other things, to take measures to protect refugees and civilians ("Take all reasonable measures to protect refugees and civilians in your care").

2.13 Amongst the refugees who were admitted into the compound were [N.]'s parents. [N.] was employed as an interpreter by the United Nations and working for the mission of military observers for the United Nations ('United Nations Military Observers', abridged to 'UNMOs'), later also for Dutchbat. When it became evident that the enclave would fall into the hands of the Bosnian Serbs [N.] accommodated his younger brother, [M. N.], in the compound. Later also his father, [I. N.], and his mother, [N. N.-M.], found refuge there. [I.N.] was part of the committee of three refugees representing the Muslim population in negotiations with Mladic. In the compound [N.]'s family stayed in the temporary UNMO office set up there in the preambles to the fall of the enclave.

2.14 On July 12 and 13, 1995 the refugees who were inside the compound were taken away by the Bosnian Serbs, during which operation the able-bodied men were almost immediately separated from the rest. Women, children and senior men were taken to safety by coach or truck. A few individuals with a special status or special protection were allowed to stay in the compound. The individuals staying behind included local staff of Dutchbat or of the mission of military observers of the UNMOs who were employed by the United Nations and had a UN identity card (the interpreters and the hairdresser).

2.15 [N.]'s mother and brother left the compound under compulsion on July 13, 1995, together with [N.]'s father. They were amongst the very last refugees still staying within the compound. At the very last minute Franken had offered [I. N.] to remain behind in the compound, because he enjoyed special protection as a representative of the refugees. [I. N.] chose not to take up this offer but stay with his wife and his son [M.].

2.16 Dutchbat and the United Nations military observers were evacuated from the compound to Croatia, together with the others remaining behind including [N.], on July 21, 1995.

2.17 Nothing has ever been heard of [N.]’s mother and brother since. In 2007 [N.] learned that [I. N.]’s mortal remains were found in a mass grave.

2.18 By letter of February 14, 2003 the State declared it is not prepared to acknowledge any wrongfulness or liability towards [N.] or his deceased relatives.

[...]

3. The dispute

[...]

3.2.1 [N.] bases his claim on the assertion that the Dutch troops and those in charge in the Netherlands (those in charge within the armed forces and members of National Government) acted wrongfully toward [M. N.] and/or [I. N.] and/or [N. N.-M.] and/or [N.] himself according to written and unwritten standards of national and international law by not including [M. N.] in a list of local staff and/or by sending [M.] and [I. N.] off the compound and/or by failing to intervene when [M.] and [I. N.] were separated from their mother and wife by the Bosnian Serbs and deported and/or by failing to report in time and completely about the separation, probable abuse and imminent execution of [M.] and [I. N.].

The State is liable for this pursuant to national and international law. Any liability of the United Nations under international law does not detract from the State’s own liability. Because of the State’s wrongful acts and omissions [N.] suffered material and immaterial damages, the exact scope of which has yet to be assessed. [...]

3.2.2 The names of the local staff had been recorded on a list of originally 29 persons whom Dutchbat could evacuate together with its own troops. On [N.]’s request De Haan asked Franken to include [M. N.]’s name on the list. After a while Franken denied this request on incorrect grounds. On all levels Dutchbat was aware of the imminent threat to the men. Nevertheless, on July 13, 1995 [M. N.] was sent off the compound, where he was safe. The same was true for [I. N.], who under the circumstances had no realistic choice. When [M.] and [I. N.] were separated outside the gate from their mother and wife, Dutch troops did not intervene. Even after the last Muslim refugees had left the compound on July 13, 1995, the United Nations were not reported on the separation of the Muslim men and the violation of human rights that had either been observed personally by soldiers of the Dutch battalion or that they had learned about from others.

[...]

3.2.4 [...] The State’s actions [...] constitute a violation of international humanitarian law, of which the obligation to protect the civilian population is a key principle. A large number of provisions of the fourth Geneva Convention of 1949, including article 3, and of the supplementary protocols of 1977 concern this subject. Also of importance are articles 12 and 13 of the third Geneva Convention of 1949, on the treatment of prisoners of war.

For the UNPROFOR mission the standards of international humanitarian law and human rights are detailed in UN Security Council resolution 836 of June 4, 1993, extending the mandate to include deterrence of attacks on the safe areas, by 'Standing Operating Procedures' nos. 206 ('Protection of persons seeking urgent assistance') and 208 ('Human rights and war crimes') and by Standing Orders in the Dutch language to the battalion, which include, amongst other things, the provision that after the provision of aid no persons may be sent away if this results in physical threat. Even the specific instruction that Karremans received on July 11, 1995 after the fall of the enclave from Gobillard was aimed at protecting the Muslim refugees.

In his reply [N.] extended the basis of his claim with the assertion that the State violated the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: the Genocide Convention) of 1948 by making insufficient efforts to prevent genocide.

The violation of international rules constitutes a wrongful act according to Bosnian and/or Netherlands law as well as international law.

[...]

3.2.6 [...] The Dutch troops in Srebrenica were employed by the State. The State exercised control over them, both formally and effectively. The 'full command' (the ultimate power of command) over the acts and omissions of one's own troops always rests with the State, who according to article 97, subsection 2 of the Constitution has the supreme authority over the armed forces. The 'operational command and control' of the Dutch battalion were not transferred to the United Nations. In any case, such a transfer of command does not affect in any way personnel matters such as the withdrawal of a battalion. Moreover, the United Nations in those critical days in July 1995 did not function properly any longer and the State took charge again. Lack of clarity about the division of powers between the State and the United Nations should not be for the account of [N.].

Under international law, too, which is applicable either directly or by corresponding interpretation of the national law, the State is liable for the acts and omissions of its troops in Srebrenica in 1995. In this context [N.] asserts primarily that any liability of the United Nations does not detract from the State's liability towards them. Pursuant to article 34 of the Vienna Convention on Treaties² the agreement that the Netherlands entered into with the United Nations cannot have any legal consequences for the citizens of Bosnia-Herzegovina. Any transfer of operational powers by the State to the United Nations cannot set aside the conventions on human rights and international humanitarian law to which the State is a party. Alternatively, [N.] asserts that the State remains liable for violations of the standards committed in the execution of the powers transferred by the State to the United Nations, as the protection of human rights offered by the United Nations is not on a par with the protection under the ECHR (European Convention on Human Rights). Both on an abstract level as in this particular case the protection by the United Nations does not come up to the mark of that by the State

2 1969 Vienna Convention on the Law of Treaties. Article 34 reads: *General rule regarding third States* – A treaty does not create either obligations or rights for a third State without its consent.

which is subject to the jurisdiction of the European Court of Human Rights. As a second alternative [N.] asserts that the State remains responsible for its own acts due to gross negligence, insufficient monitoring of the compliance with fundamental standards and interference in (cutting across) the command structure of the United Nations.

[...]

4. The assessment

[...]

4.3 The issue of these proceedings is the State's responsibility, if any, for the death of [N.]'s brother and parents. [N.] sues the State for wrongful act, having in mind that the Dutchbat troops and those in charge in the Netherlands (those in charge in the armed forces and members of National Government) offered deficient protection.

4.4 [...] For the claim that those in charge in the armed forces and members of National Government acted wrongfully toward [N.]'s brother and parents or toward [N.] himself the court all in all expected further substantiation, but this was not provided. This claim is therefore dismissed.

4.5 The court will now address whether the State can be held liable for a wrongful act committed by Dutchbat. The State's first defence was the claim that the actions by Dutchbat must be attributed exclusively to the United Nations, and therefore not (also) to the State. If this defence is successful, the State's further defences do not need to be addressed.

4.6 The State's primary defence must be assessed according to standards of international public law, for the parties agree that the Dutch troops in Srebrenica were charged with the implementation of an order by the UN Security Council. The Dutchbat mandate was based on a Security Council resolution ensuing from chapter VII of the UN Charter. [...] [N.] reproaches Dutchbat that it failed to fulfil its primary public duty of protecting the civilian population. Therefore, not just national law is applicable. Always, it will have to be assessed first according to the standards of international law which actor is / or actors are liable on an international level: the United Nations or the State.

4.7 The court will now address whether the State is liable for the actions of Dutchbat pursuant to the standards of international public law. [...]

4.8 If a public body of state A or (another) person or entity with public status (according to the law of state A) is made available to state B in order to implement aspects of the authoritative power of state B, then the actions of that body, person or entity are considered as actions of state B. This rule, considered international common law, is part of the articles accepted by the International Law Commission (ILC) under the auspices of the United Nations concerning the liability of states. According to this rule the attribution should concern acting with the consent, on the authority and 'under direction and control' of the other state and for its purposes.

This rule of attribution also applies to the armed forces deployed by a state in order to assist another state, provided that they are placed under the 'command and control'

of that other state. In accordance with the existing international practice and the 'draft articles' of the ILC concerning the liability of international organizations, the court applies this rule by means of analogy to the attribution of the actions of armed forces made available by states to the United Nations. The court therefore considers incorrect [N.]'s assertion that the making available of Dutchbat to the United Nations can have no legal consequences under international law for the citizens of Bosnia-Herzegovina.

4.9 In view of the exclusive responsibility of the UN Security Council for maintaining international peace and security, participation in a UN peacekeeping operation on the basis of chapter VII of the Charter implies that the 'operational command and control' over the troops made available is transferred to the UN. This transfer does not include, or at least not necessarily, the personnel matters of the troops and the material logistics of the deployed detachment, nor the decision about whether or not to retreat [...]. If transfer is subject to further restrictions then express reservations must be made. [N.] has not submitted anything in this respect.

On the other hand, he does invoke the 'Standing Operating Procedures' applying to UNPROFOR and the specific instruction given by Gobillard on July 11, 1995, which could only have pertained to Dutchbat if this battalion ranked within the UN command structure. His challenge, that the Netherlands did not transfer 'operational command and control' in the context of the UN mission in Bosnia-Herzegovina, will therefore not be addressed.

4.10 [M.] and [I. N.] were not employed by Dutchbat. The reproach that Dutchbat offered inadequate protection to them has no bearing on personnel matters reserved to the Netherlands or on the power reserved to the Netherlands to decide whether to withdraw Dutchbat from the authority of the United Nations. Moreover, the Netherlands' ultimate right to withdraw Dutchbat from Bosnia-Herzegovina should be distinguished from the right at issue here to decide about the evacuation of UNPROFOR units from Srebrenica, which was up to the United Nations. All this means that the acts or omissions Dutchbat is reproached for should be assessed as actions of a contingent of troops made available to the United Nations for the benefit of the UNPROFOR mission.

4.11 To the conclusion that the reprehended acts of Dutchbat should be assessed as those of an UNPROFOR contingent the court attaches the conclusion [...] that these acts and omissions should be attributed strictly, as a matter of principle, to the United Nations. [N.] argued that this principle in their case does not prejudice attribution to the State. [...]

4.12.1 The claimants' assertion, phrased as a general rule, that in the event of violations of standards committed in the execution of powers of control and command transferred to the United Nations, it should still be tested whether the State fulfilled its obligations under the ECHR, the ICCPR, the Genocide Convention and conventions pertaining to international humanitarian law to which the Netherlands is a party, does not hold. When in the execution of powers that are no longer the State's standards are violated then the point of departure must be that those violations cannot be attributed to the State. The same is true when fundamental standards are involved. The question whether obligations from the aforesaid conventions should prevail over the obligations that

the State is subject to pursuant to the UN Charter, including the obligation of article 25 concerning the acceptance and implementation of binding decisions by the Security Council is not an issue here, for the making available of troops to the United Nations for a particular mission, as is the case here, is a nonobligatory act. The problem of possibly conflicting contractual obligations ensuing from conventions is therefore not under discussion. The ECtHR jurisprudence relating to this on the question whether an international organization to which sovereignty has been transferred offers equal protection of human rights as the ECHR is irrelevant.

4.12.2 Without detracting from the considerations under 4.12.1 the court will address [N.]’s position under the ECHR, for this convention has a special position amongst the international conventions that the Netherlands is a party to, amongst other things because of the application of the right of complaint of individuals.

[N.] argues that Dutchbat’s actions should be tested against the ECHR. On the basis of the same jurisprudence of the ECtHR the parties have arrived at opposite conclusions.

4.12.3 First and foremost it must be said that the United Nations are not a contracting party to the ECHR. If the State’s primary defence succeeds therefore the ECHR is not applicable. This opinion is supported by rulings of the ECtHR of May 31, 2007 in the cases of *A. Behrami and B. Behrami vs. France* and *Saramati vs. France*, Germany and Norway, in which actions by citizens of Kosovo were not allowed because the conduct of foreign troops present there was attributable to the United Nations (inadmissibility ‘*ratione personae*’). Without attribution to a signatory of a treaty, of course no violation of an obligation under a treaty could be established. The complaints by A. Behrami, B. Behrami and Saramati did not stand up due to article 34 of the ECHR, in which the right of complaint of individuals is linked to claimed violations by signatory states.

In deciding the ‘Behrami’ and ‘Saramati’ cases the ECtHR did not address the question whether the citizens of Kosovo, a territory of which the international-law status has been controversial since the falling apart of the former Yugoslavia, were subject to the jurisdiction of the contracting parties to the ECHR. The ECtHR did establish, however, that the international community (in this case NATO and the United Nations) had not only assumed military tasks in Kosovo, but also legislative, executive and judiciary (government) tasks. This was not so in the UNPROFOR mission.

The events regarded as violations of the ECHR by [N.] occurred in the sovereign state of Bosnia-Herzegovina. Neither the United Nations nor the State had ‘effective overall control’ over part of that state’s territory. Dutchbat was in Bosnia-Herzegovina with the agreement of the lawful government of that country. The comparison implied by [N.] to the presence of Turkey in northern Cyprus and that of Russia in Transdnjestria (Dniester Moldavian Republic) does not hold. Although the compound enjoyed diplomatic protection by the United Nations, the area was not an extraterritorial pocket.

The applicability of the ECHR in the case of [N.]’s next of kin who were killed/[N.] fails already, in the court’s opinion, on the ground of article 1 ECHR, in which the scope of the convention is limited to those who come under the jurisdiction of a high contracting party. The term jurisdiction in this article should, according to an ECtHR ruling of

December 19, 2001 in the case of *Bankovic et al. v. Belgium* and sixteen other high contracting parties, be interpreted as an essentially territorial concept. In this ruling complaints by citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) on airborne attacks in their country were disallowed because they were carried out outside the territory of those contracting parties (inadmissibility '*ratione loci*'). Later, the ECtHR adopted the same approach in the case of *Issa et al. v. Turkey*. In this case the ECtHR ruled that for the finding that the violations of the convention in the north of Iraq (that were the subject of the complaint) came under the jurisdiction of Turkey it was insufficient that large-scale Turkish military operations took place in the area at the time.

4.13 With his factual assertions [N.] wants to demonstrate that the members of Dutchbat have seriously defaulted and that there was insufficient supervision within Dutchbat on compliance with fundamental standards. On those grounds, according to [N.], the State remains liable. Contrary to [N.]'s suggestion, however, the rule of attribution explained in 4.8 is not set aside. The consequence of attribution to the United Nations is that even gross negligence or serious failure of supervision on the part of the forces made available to the UN must in principle be attributed exclusively to this organization. In the context of making available troops by member states the United Nations may, however, agree that in the event of gross negligence the state deploying the troops is liable toward the United Nations. The term gross negligence may by extension also include violations of human rights or international humanitarian law. It is also conceivable that on the UN's proposal a stipulation is agreed in which the state deploying the troops assumes third-party liability in the event of such violations.

No submissions were made on possible exceptions to this rule of exclusive attribution, however, so that the court assumes none occurred. Attribution of acts and omissions by Dutchbat to the United Nations therefore excludes attribution of the same conduct to the State.

4.14.1 The court will now address the question whether the State cut across the United Nations command structure. If Dutchbat was instructed by the Dutch authorities to ignore UN orders or to go against them, and Dutchbat behaved in accordance with this instruction from the Netherlands, this constitutes a violation of the factual basis on which the attribution to the UN rests. This then creates scope for attribution to the State. The same is true if Dutchbat to a greater or lesser extent backed out of the structure of UN command, with the agreement of those in charge in the Netherlands, and considered or shown themselves as exclusively under the command of the competent authorities of the Netherlands for that part. If, however, Dutchbat received parallel instructions from both the Dutch and UN authorities, there are insufficient grounds to deviate from the usual rule of attribution.

[...]

4.14.3 [N.] based his claim of the State's cutting across the UN command structure mainly on Nicolai's double role. In this context he argues as follows.

Because in these knife-edge days in July 1995 the United Nations did not function (properly) anymore, the State took over again. Dutch policy and UN policy became

separate matters. At the time Nicolai also received instructions from the Netherlands, which he carried out. Karremans had omitted to inform Nicolai about the number of men in the compound. On the basis of this deficient information Nicolai gave orders to co-operate with the Bosnian Serbs on the deportation of the Muslim refugees. No permission was given for this by a higher-ranking UN commander; understandably so, because within the UN organization the evacuation of refugees is a matter for the 'United Nations High Commissioner for Refugees' (UNHCR). In his first meeting with Mladic on July 11, 1995 Karremans said he spoke on behalf of Nicolai and the Dutch authorities. The next morning Karremans on behalf of the Dutch Ministry of Defence offered Mladic assistance by his troops in the evacuation, which can be construed, still according to [N.], as facilitating deportation.

4.14.4 The State argued with regard to this that Nicolai's duty as a liaison officer just entailed passing information on to the Dutch Government. It occurs more often that the UN in peacekeeping operations places militaries of the same nationality as the executive detachments in the command structure in order to leave intact lines of communication as much as possible. Dutchbat's departure from Srebrenica balances between the powers transferred to the UN and those retained by the State, for the State remained responsible for logistic matters in connection with the mission. The assertion that the United Nations were not involved in the evacuation of the refugees is wholly incorrect, according to the State.

4.14.5 There are insufficient grounds for the point of view that Dutchbat by assisting in the evacuation of the citizens of Srebrenica obeyed an order given by the State which should be considered as an infringement of the UN command structure, for even if Nicolai ordered the evacuation of the civilians this does not mean that he did so strictly or for the most part on the authority of the Netherlands. What Nicolai stated as a witness to this court, i.e. that Voorhoeve on July 11, 1995 in a telephone conversation "agreed" that the citizens of Srebrenica who had fled would be evacuated, rather indicates that the UN structure of command was respected. At most, parallel instructions were issued. This does not detract from the fact that, according to the same statement given by Nicolai, Voorhoeve, contrary to UN policies, thus provided political cover for assisting ethnic cleansing, for Nicolai also stated that the basic decision to evacuate came from Sarajevo, so from Gobillard. Nicolai made the same statement to the Parliamentary Committee of Inquiry on Srebrenica.

Moreover, Voorhoeve's approval put forward by Nicolai strictly referred to the basic resolution to evacuate, and not to the conditions under which this should take place. Karremans was aware of this approval, considering what he said to Mladic. There is no evidence whatsoever that the State gave any instructions as to the manner of evacuation. On the contrary, Nicolai stated during his provisional examination as a witness that as soon as it became clear the Serbs intended to take charge of the evacuation of the refugees themselves – and the evacuation was not going to be organized and implemented by the United Nations as was assumed originally – "The Hague" worried about the men's fate and was on the phone to say that care should be taken to see to it that the men were under no circumstances treated as a separate group [...].

On the basis of all this the court establishes that there can be no matter of any actions taken in contravention of UN policies initiated or approved by the State. In view of the criteria formulated in 4.14.1 for the assessment of the asserted cutting across the UN structure of command, the court concludes that during the evacuation of the Muslim population the factual basis for attribution of Dutchbat actions to the United Nations was fully in place.

4.14.6 It should be recognized that the circumstances in the compound, due to lack of food and medical facilities and with high temperatures were desperate at the time. Nevertheless, the court considers, needless to say, that there are good arguments in support of the claim that the passive attitude of Dutchbat toward the separate deportation on July 12 and 13, 1995 of the able-bodied men by the Bosnian Serbs was not in keeping with the specific instruction to protect civilians and refugees in the altered circumstances to the utmost, an instruction Karremans received from Gobillard – so from the UN structure of command – on July 11, 1995. This is of no avail to [N.], however, because the acts and omissions of Dutchbat during the evacuation should be considered as those of the United Nations.

4.15 From the considerations presented in 4.6 through 4.14 it must be concluded that the reprehended Dutchbat actions must be attributed exclusively to the United Nations, so that the State's primary defence succeeds. This means that the State cannot be held responsible for any breach of contract or wrongful act committed by Dutchbat. As follows from 4.4 of this ruling, neither is the State liable for wrongful action taken by those in charge of the armed forces or members of National Government. This means that [N.]'s claim must be denied.

[...]

5. The ruling

The court:

- denies the claim;

[...]

This judgment was [...] delivered in public on September 10, 2008.

[N.B.: In another case on the events in Srebrenica heard the same week as the hearings in *Nuhanovic*, the same Court held that the UN has absolute immunity before Courts in the Netherlands. According to the decision, Dutch Courts have no jurisdiction to hear complaints brought against UN peacekeeping missions. See *Mothers of Srebrenica et al. v. The State of the Netherlands and the United Nations* Case number 295247/ HA ZA 07-2973, Judgement in the incidental proceedings, July 10, 2008, online: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BD6796&u_ljn=BD6796]

DISCUSSION

1. How would you qualify the conflict in Bosnia-Herzegovina in July 1995?
2. Was UNPROFOR a party to the conflict? Was the Netherlands? Was Dutchbat?

3. Do the Geneva Conventions apply to Dutchbat? To UNPROFOR? If not, which provisions or rules of IHL applied to UNPROFOR in 1995? Different than those that would apply in 2009? [See **Case No. 57**, UN, Guidelines for UN Forces [Part B.]]
4.
 - a. If the conduct of Dutchbat had been attributed to the Netherlands, which rules of IHL would the Netherlands have violated in this case?
 - b. (*Para. 3.2.4*) Are Convention III or Convention IV or both relevant and applicable to this situation? Do the Additional Protocols apply?
5. Are the Safe Areas created by the UN Security Council in the Srebrenica region equivalent to the safety zone provided for in GC IV, Art. 15? In Protocol I, Art. 59 or 60?
6.
 - a. (*Para. 4.9*) Because to maintain and restore “peace and security” is the exclusive responsibility of the UN Security Council, does it follow that whenever a UN peace operation is established under Chapter VII of the Charter, the UN has operational command and control over that operation, as the Court suggests? Can one generalize about command and control, or must on the contrary the specific facts of each operation be considered?
 - b. (*Para. 4.9*) Does the fact that Dutchbat generally was within the command structure of the UN provide a conclusive and comprehensive answer to whether the Netherlands retained any operational control over its forces?
7.
 - a. (*Para. 4.13*) Does the lack of a formal agreement between the UN and the government of the Netherlands on third party liability in the event of gross negligence mean that such conduct can never be attributed to the State?
 - b. (*Para. 4.13*) Is attribution to either a State or an international organization necessarily exclusive? [See **Case No. 53**, International Law Commission, Articles on State Responsibility]
 - c. (*Paras 4.14(1)-(6) on the extent to which Dutchbat “cut across the UN command structure”*) If officers liaising between the UN command and national government and command structures do not have clear orders from the UN and “parallel” commands are issued, should conduct remain exclusively attributed to the UN?
8. If the conduct is exclusively attributable to the UN, how can N obtain reparation from the UN?
9. Is it reasonable for the Court to order N to pay costs, as the losing party in this case?

Case No. 226, Federal Republic of Yugoslavia, NATO Intervention

[See also, **Case No. 227**, ECHR, *Bankovic and Others v. Belgium and 16 Other States*]

A. Amnesty International, NATO Intervention in Yugoslavia, “Collateral Damage” or Unlawful Killings?

[Source: Amnesty International, Eur 70/018/2000 6 June 2000, *NATO/Federal Republic of Yugoslavia, “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, London June; footnotes partially reproduced, paragraph numbers added by us; available on <http://www.amnesty.org>]

AI INDEX: EUR 70/018/2000

London 6 June 2000

Public Document

**NATO/FEDERAL REPUBLIC OF YUGOSLAVIA
“COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS?
Violations of the Laws of War by NATO
during Operation Allied Force [...]**

5.1 Attack on Grdelica railroad bridge, hitting passenger train: 12 April

- [1] On 12 April, a civilian passenger train crossing a bridge in Grdelica, southern Serbia, was hit by two bombs. The attack took place in the middle of the day. At least 12 civilians reportedly died. NATO admitted that its aircraft had bombed the bridge and hit the train, but said that the target had been the bridge itself and that the train had been hit accidentally. At a press conference on 13 April, General Clark, Supreme Allied Commander, Europe (SACEUR), explained that the pilot’s mission had been to destroy the railroad bridge. He launched the weapon from a distance of several miles unaware that the train was heading towards the bridge:

“All of a sudden at the very last instant with less than a second to go he caught a flash of movement that came into the screen and it was the train coming in. Unfortunately he couldn’t dump the bomb at that point, it was locked, it was going into the target and it was an unfortunate incident which he, and the crew, and all of us very much regret.”

- [2] General Clark then gave the following account of how the pilot returned to drop another bomb on the bridge, striking the train again, even though he had realized that he had hit the train instead of the bridge in the first attack.

“The mission was to take out the bridge.... He believed he still had to accomplish his mission. He put his aim point on the other end of the bridge from where the train had come, by the time the bomb got close the bridge was covered with smoke and clouds and at the last minute again in an uncanny accident, the train had slid forward from the original impact and parts of the train had

moved across the bridge, and so that by striking the other end of the bridge he actually caused additional damage to the train.”

- [3] The video of the cockpit view of both attacks was shown at the press conference on 13 April. Several months later it was reported in Germany’s *Frankfurter Rundschau* newspaper that this video was shown at three times speed, giving the impression to viewers that the civilian train was moving extremely fast. [...] Jamie Shea, NATO spokesperson, told Amnesty International in Brussels that, due to the volume of videotape that analysts had to review each day during the campaign, the tapes were speeded up to facilitate viewing. [...]
- [4] NATO’s explanation of the bombing – particularly General Clark’s account of the pilot’s rationale for continuing the attack after he had hit the train – suggests that the pilot had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties. This would violate the rules of distinction and proportionality.
- [5] Also, NATO does not appear to have taken sufficient precautionary measures to ensure that there was no civilian traffic in the vicinity of the bridge before launching the first attack. The attacking aircraft – or another aircraft – could have overflown the area to ascertain that no trains were approaching the bridge. Had it done so, it might have been able to wait until the train had crossed before launching the attack.
- [6] Yet, even if the pilot was, for some reason, unable to ascertain that no train was travelling towards the bridge at the time of the first attack, he was fully aware that the train was on the bridge when he dropped the second bomb, whether smoke obscured its exact whereabouts or not. This decision to proceed with the second attack appears to have violated Article 57 of Protocol I which requires an attack to “be cancelled or suspended if it becomes clear that the objective is a not a military one ... or that the attack may be expected to cause incidental loss of civilian life... which would be excessive in relation to the concrete and direct military advantage anticipated.” Unless NATO is justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack – an argument that NATO has not made – the attack should have been stopped.
- [7] Further questions about this attack were raised in the *New York Times* on 14 April, which reported that while NATO officials had refused to name the type of weapon or aircraft involved, officials in Washington had said that the plane had been an American F-15E, firing an AGM-130 bomb. General Clark had only referred to the aircraft pilot as being involved, but the F-15E carries a crew of two: the pilot and a weapons officer who controls the bombs. According to this report, the AGM-130 is at first guided by satellite, but as it nears its target, the pilot or weapons officer can guide it, using a video image. [...]

5.3 Serbian state television and radio: 23 April

- [8] In the early morning of 23 April, NATO aircraft bombed the headquarters and studios of Serbian state television and radio (*Radio Televizija Srbije* – RTS) in central Belgrade. There was no doubt that NATO had hit its intended target. The building was occupied by working technicians and other production staff at the time of the bombing. There were estimated to be at least 120 civilians working in the building at the time of the attack. At least 16 civilians were killed and a further 16 were wounded. A news broadcast was blacked out as a result. RTS broadcasting resumed about three hours after the bombing.
- [9] At the press conference later that day, NATO's Colonel Konrad Freytag placed this attack in the context of NATO's policy to "disrupt the national command network and to degrade the Federal Republic of Yugoslavia's propaganda apparatus." He explained: "Our forces struck at the regime leadership's ability to transmit their version of the news and to transmit their instruction to the troops in the field." In addition to housing Belgrade's main television and radio studios, NATO said the building "also housed a large multi-purpose communications satellite antenna dish."
- [10] On the day of the attack Amnesty International publicly expressed grave concern, saying that it could not see how the attack could be justified based on the information available which stressed the propaganda role of the station. The organization wrote to NATO Secretary General Javier Solana requesting "an urgent explanation of the reasons for carrying out such an attack." In a reply dated 17 May, NATO said that it made "every possible effort to avoid civilian casualties and collateral damage by exclusively and carefully targeting the military infrastructure of President Milosevic." It added that RTS facilities "are being used as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represented legitimate military targets."
- [11] At the Brussels meeting with Amnesty International, NATO officials clarified that this reference to relay stations and transmitters was to other attacks on RTS infrastructure and not this particular attack on the RTS headquarters. They insisted that the attack was carried out because RTS was a propaganda organ and that propaganda is direct support for military action. The fact that NATO explains its decision to attack RTS solely on the basis that it was a source of propaganda is repeated in the US Defence Department's review of the air campaign, which justifies the bombing by characterizing the RTS studios as "a facility used for propaganda purposes." No mention is made of any relay station.
- [12] In an interview for a BBC television documentary, UK Prime Minister Tony Blair reflected on the bombing of RTS and appeared to be hinting that one of the reasons the station was targeted was because its video footage of the human toll of NATO mistakes, such as the bombing of the civilian convoy at Djakovica, was being re-broadcast by Western media outlets and was thereby undermining support for the war within the alliance. "This is one of the problems about waging a conflict in a modern communications and news world... We were aware that those pictures would come back and there would be an instinctive sympathy for the victims of the campaign."

[13] The definition of military objective in Article 52(2) of Protocol I, accepted by NATO, specifies that

“military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a *definite military advantage*.” [emphasis added by Amnesty International]

[14] Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of “effective contribution to military action” and “definite military advantage” beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the RTS headquarters cannot be considered a military objective. As such, the attack on the RTS headquarters violated the prohibition to attack civilian objects contained in Article 52 (I) and therefore constitutes a war crime.

[15] The authoritative ICRC Commentary on the *Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* interprets the expression “definite military advantage anticipated” by stating that “it is not legitimate to launch an attack which only offers potential or indeterminate advantages.” More recently the commentary on the German Military Manual states, “If weakening the enemy population’s resolve to fight were considered a legitimate objective of armed forces, there would be no limit to war.” And, further on, it says that “attacks having purely political objectives, such as demonstrating military power or intimidating the political leaders of the adversary” are prohibited. British Defence doctrine adopts a similar approach: “the morale of an enemy’s civilian population is not a legitimate target.”

[16] It is also worth recalling in this context the judgment of the International Military Tribunal in Nuremberg in 1946 in the case of Hans Fritzsche, who served as a senior official in the Propaganda Ministry of the Third Reich, including as head of its Radio Division from November 1942. The prosecution asserted that he had “incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities.” The Tribunal acknowledged that Fritzsche had shown in his speeches “definite anti-Semitism” and that he had “sometimes spread false news”, but nevertheless found him not guilty. The Tribunal concluded its judgment in this case as follows:

“It appears that Fritzsche [*sic*] sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. *His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.*” [See American Journal of International Law, vol. 41 (1947), p.328.] [emphasis added by Amnesty International]

[17] On the issue of the legitimacy of attacking a television station in general, reference has been made to a list of categories of military objectives included in a working

document produced by the ICRC in 1956, the Draft Rules for the Limitations of Dangers incurred by the Civilian Population in Time of War. [Note 53: this list is mentioned in the ICRC Commentary on the Additional Protocols, paragraph 2002, note 3; available on <http://icrc.org/ihl>] In paragraph (7) the list included "The installations of broadcasting and television stations." However, the French text of the Draft Rules made clear that such installations must be of "fundamental military importance." Also, Article 7 of the Draft Rules stated that even the listed objects cannot be considered military objectives if attacking them "offers no military advantage."

- [18] Whatever the merit of the Draft Rules, it is doubtful that they would have supported the legitimacy of the attack on the RTS headquarters. In any case the Draft Rules were discussed at the 1957 International Conference of the Red Cross, for which they had been prepared, but in the following years the approach of drawing up lists of military objectives was abandoned in favour of the approach eventually adopted by Protocol I in Article 52.
- [19] The attack on the RTS headquarters may well have violated international humanitarian law even if the building could have been properly considered a military objective. Specifically, that attack would have violated the rule of proportionality under Article 51(5)(b) of Protocol I and may have also violated the obligations to provide effective warning under Article 57(2)(c) of the same Protocol.
- [20] Article 51(5)(b) prohibits attacks "which may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated." The ICRC Commentary specified that "the expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." NATO must have clearly anticipated that civilians in the RTS building would have been killed. In addition, it appears that NATO realized that attacking the RTS building would only interrupt broadcasting for a brief period. SACEUR General Wesley Clark has stated: "We knew when we struck that there would be alternate means of getting the Serb Television. There's no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us." In other words, NATO deliberately attacked a civilian object, killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.
- [21] Article 57(2)(c) of Protocol I requires that "Effective warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." Official statements, issued prior to the RTS bombing, on whether NATO was targeting the media were contradictory. On 8 April, Air Commodore Wilby stated that NATO considered RTS as a "legitimate target in this campaign" because of its use as "an instrument of propaganda and repression." He added that radio and television would only become "an acceptable instrument of public information" if President Milosevic provided equal time for uncensored Western news broadcasts for two periods of three hours a day. And on the same day, General Jean Pierre

Kelche, French armed forces chief, said at a press conference, "We are going to bust their transmitters and their relay stations because these are instruments of propaganda of the Milosevic regime which are contributing to the war effort."

[22] But [...] Jamie Shea [...] wrote to the Brussels-based International Federation of Journalists on 12 April that "Allied Force targets military targets only and television and radio towers are only struck if they are integrated into military facilities...There is no policy to strike television and radio transmitters as such."

[23] It appears that the statements by Wilby and Shea came after some members of the media had been alerted to the fact that an attack on the television station had already been planned. According to Eason Jordan, the President of CNN International, in early April he received a telephone call from a NATO official who told him that an attack on RTS in Belgrade was under way and that he should tell CNN's people to get out of there. [...]

[24] John Simpson, who was based in Belgrade for the BBC during the war, was among the foreign correspondents who received warnings from his headquarters to avoid RTS after the aborted attack. [...]

[25] UK Prime Minister Tony Blair blames Yugoslav officials for not evacuating the building. "They could have moved those people out of the building. They knew it was a target and they didn't. And I don't know, it was probably for, you know, very clear propaganda reasons ... There's no point – I mean there's no way of waging war in a pretty way. It's ugly. It's an ugly business."

[26] Amnesty International does not consider the statement against official Serbian media made by Air Commodore Wilby two weeks before the attack to be an effective warning to civilians, especially in light of other, contradictory statements by NATO officials and alliance members. As noted above, Western journalists have reported that they were warned by their employers to stay away from the television station before the attack, and it would also appear that some Yugoslav officials may have expected that the building was about to be attacked. However, there was no warning from NATO that a specific attack on RTS headquarters was imminent. NATO officials in Brussels told Amnesty International that they did not give a specific warning as it would have endangered the pilots.

[27] Some accounts in the press have suggested that the decision to bomb RTS was made by the US government over the objections of other NATO members. According to the writer Michael Ignatieff, "within NATO command allies were at loggerheads: with British lawyers arguing that the Geneva Conventions prohibit the targeting of journalists and television stations, and the US side arguing that the supposed 'hate speech' broadcast by the station foreclosed its legal immunity under the conventions." [...]

[28] [...] However, if in fact the UK or other countries did object and abstain from participating in this attack, they may not be absolved of their responsibility under international law as members of an alliance that deliberately launched a direct attack on a civilian object. [...]

B. ICTY, Prosecutor's Report on the NATO Bombing Campaign

[Source: ICTY Prosecutor's office, *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, The Hague, 13 June 2000; available on <http://www.icty.org/sid/10052#IVA6>]

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia [...]

IV. Assessment

[...]

vi General Assessment of the Bombing Campaign

54. During the bombing campaign, NATO aircraft flew 38,400 sorties, including 10,484 strike sorties. During these sorties, 23,614 air munitions were released (figures from NATO). As indicated in the preceding paragraph, it appears that approximately 500 civilians were killed during the campaign. These figures do not indicate that NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally.
55. [...] All targets must meet the criteria for military objectives [...]. If they do not do so, they are unlawful. [...] The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective. As a general statement, in the particular incidents reviewed by the committee, it is the view of the committee that NATO was attempting to attack objects it perceived to be legitimate military objectives.
56. The committee agrees there is nothing inherently unlawful about flying above the height which can be reached by enemy air defences. However, NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians or civilian objectives. The 15,000 feet minimum altitude adopted for part of the campaign may have meant the target could not be verified with the naked eye. However, it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases during the bombing campaign.

B. Specific Incidents [...]

i) *The Attack on a Civilian Passenger Train at the Grdelica Gorge on 12/4/99*

58. On 12 April 1999, a NATO aircraft launched two laser guided bombs at the Leskovac railway bridge over the Grdelica gorge and Juzna Morava river, in [south-] eastern Serbia. A 5-carriage passenger train, travelling from Belgrade to Ristovac on the Macedonian border, was crossing the bridge at the time, and was struck by both missiles. [...] At least ten people were killed in this incident and at least 15 individuals were injured. The designated target was the railway bridge, which was claimed to be part of a re-supply route being used for Serb forces in Kosovo. After launching the first bomb, the person controlling the weapon, at the last instant before impact, sighted movement on the bridge. The controller was unable to dump the bomb at that stage and it hit the train, the impact of the bomb cutting the second of the passenger coaches in half. Realising the bridge was still intact, the controller picked a second aim point on the bridge at the opposite end from where the train had come and launched the second bomb. In the meantime the train had slid forward as a result of the original impact and parts of the train were also hit by the second bomb.

59. It does not appear that the train was targeted deliberately. [...] The substantive part of the explanation, both for the failure to detect the approach of the passenger train and for firing a second missile once it had been hit by the first, was given by General Wesley Clark, NATO's Supreme Allied Commander for Europe and is here reprinted in full:

[See *supra* Part A., [1] and [2]]

[...]

General Clark then showed the cockpit video of the plane which fired on the bridge:

"The pilot in the aircraft is looking at about a 5-inch screen, he is seeing about this much and in here you can see this is the railroad bridge which is a much better view than he actually had, you can see the tracks running this way.

Look very intently at the aim point, concentrate right there and you can see how, if you were focused right on your job as a pilot, suddenly that train appeared. It was really unfortunate.

Here, he came back around to try to strike a different point on the bridge because he was trying to do a job to take the bridge down. Look at this aim point – you can see smoke and other obscuration there – he couldn't tell what this was exactly.

Focus intently right at the centre of the cross. He is bringing these two crosses together and suddenly he recognises at the very last instant that the train that was struck here has moved on across the bridge and so the engine apparently was struck by the second bomb." (Press Conference, NATO HQ, Brussels, 13 April).

60. Some doubt has since been cast on this version of events by a comprehensive technical report submitted by a German national, Mr Ekkehard Wenz, which queries the actual speed at which the events took place in relation to that suggested by the video footage of the incident released by NATO. The effect of this report is to suggest that the reaction time available to the person controlling the bombs was in fact considerably greater than that alleged by NATO. Mr. Wenz also suggests the aircraft involved was an F15E Strike Eagle with a crew of two and with the weapons being controlled by a Weapons Systems Officer (WSO) not the pilot.
61. The committee has reviewed both the material provided by NATO and the report of Mr. Wenz with considerable care. It is the opinion of the committee that it is irrelevant whether the person controlling the bomb was the pilot or the WSO. Either person would have been travelling in a high speed aircraft and likely performing several tasks simultaneously, including endeavouring to keep the aircraft in the air and safe from surrounding threats in a combat environment. If the committee accepts Mr. Wenz's estimate of the reaction time available, the person controlling the bombs still had a very short period of time, less than 7 or 8 seconds in all probability, to react. Although Mr Wenz is of the view that the WSO intentionally targeted the train, the committee's review of the frames used in the report indicates another interpretation is equally available. The cross hairs remain fixed on the bridge throughout, and it is clear from this footage that the train can be seen moving toward the bridge only as the bomb is in flight: it is only in the course of the bomb's trajectory that the image of the train becomes visible. At a point where the bomb is within a few seconds of impact, a very slight change to the bomb aiming point can be observed, in that it drops a couple of feet. This sequence regarding the bomb sights indicates that it is unlikely that the WSO was targeting the train, but instead suggests that the target was a point on the span of the bridge before the train appeared.
62. It is the opinion of the committee that the bridge was a legitimate military objective. The passenger train was not deliberately targeted. The person controlling the bombs, pilot or WSO, targeted the bridge and, over a very short period of time, failed to recognize the arrival of the train while the first bomb was in flight. The train was on the bridge when the bridge was targeted a second time and the bridge length has been estimated at 50 meters. [...] It is the opinion of the committee that the information in relation to the attack with the first bomb does not provide a sufficient basis to initiate an investigation. The committee has divided views concerning the attack with the second bomb in relation to whether there was an element of recklessness in the conduct of the pilot or WSO. Despite this, the committee is in agreement that, based on the criteria for initiating an investigation [...], this incident should not be investigated. In relation to whether there is information warranting consideration of command responsibility, the committee is of the view that there is no information from which to conclude that an investigation is necessary into the criminal responsibility of persons higher in the chain of command. Based on the information available to it, it is the opinion of the committee that the attack on the train at Grdelica Gorge should not be investigated by the OTP. [...]

iii) *The Bombing of the RTS (Serbian TV and Radio Station) in Belgrade on 23/4/99*

71. On 23 April 1999, at 0220, NATO intentionally bombed the central studio of the RTS [...] the centre of Belgrade. [...] While there is some doubt over exact casualty figures, between 10 and 17 people are estimated to have been killed.
72. The bombing of the TV studio was part of a planned attack aimed at disrupting and degrading the C3 (Command, Control and Communications) network. In co-ordinated attacks, on the same night, radio relay buildings and towers were hit along with electrical power transformer stations. At a press conference on 27 April 1999, NATO officials justified this attack in terms of the dual military and civilian use to which the FRY communication system was routinely put [...].
73. At a [...] press conference on 23 April 1999, NATO officials reported that the TV building also housed a large multi-purpose communications satellite antenna dish, and that "radio relay control buildings and towers were targeted in the ongoing campaign to degrade the FRY's command, control and communications network". In a communication of 17 April 1999 to Amnesty International, NATO claimed that the RTS facilities were being used "as radio relay stations and transmitters to support the activities of the FRY military and special police forces, and therefore they represent legitimate military targets" (Amnesty International Report, [...] [See *supra* Part A, [10]].)
74. Of the electrical power transformer stations targeted, one transformer station supplied power to the air defence co-ordination network while the other supplied power to the northern-sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system. In this regard, NATO indicated that

"we are not targeting the Serb people as we repeatedly have stated nor do we target President Milosevic personally, we are attacking the control system that is used to manipulate the military and security forces."

More controversially, however, the bombing was also justified on the basis of the propaganda purpose to which it was employed:

"[We need to] directly strike at the very central nerve system of Milosevic's regime. This of course are those assets which are used to plan and direct and to create the political environment of tolerance in Yugoslavia in which these brutalities can not only be accepted but even condoned. [...] Strikes against TV transmitters and broadcast facilities are part of our campaign to dismantle the FRY propaganda machinery which is a vital part of President Milosevic's control mechanism."

In a similar statement, British Prime Minister Tony Blair was reported as saying in *The Times* that the media "is the apparatus that keeps him [Milosevic] in power and we are entirely justified as NATO allies in damaging and taking on those targets" (24 April, 1999). In a statement of 8 April 1999, NATO also indicated that the TV studios would be targeted unless they broadcast 6 hours per day of Western media reports: "If President Milosevic would provide equal time for

Western news broadcasts in its programmes without censorship 3 hours a day between noon and 1800 and 3 hours a day between 1800 and midnight, then his TV could be an acceptable instrument of public information.”

75. NATO intentionally bombed the Radio and TV station and the persons killed or injured were civilians. The questions are: was the station a legitimate military objective and; if it was, were the civilian casualties disproportionate to the military advantage gained by the attack? For the station to be a military objective within the definition in Article 52 of Protocol I: a) its nature, purpose or use must make an effective contribution to military action and b) its total or partial destruction must offer a definite military advantage in the circumstances ruling at the time. The 1956 ICRC list of military objectives, drafted before the Additional Protocols, included the installations of broadcasting and television stations of fundamental military importance as military objectives [...]. The list prepared by Major General Rogers included broadcasting and television stations if they meet the military objective criteria [...]. As indicated in paras 72 and 73 above, the attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milosevic in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.
76. If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the “effective contribution to military action” and “definite military advantage” criteria required by the Additional Protocols [...]. The ICRC Commentary on the Additional Protocols interprets the expression “definite military advantage anticipated” to exclude “an attack which only offers potential or indeterminate advantages” and interprets the expression “concrete and direct” as intended to show that the advantage concerned should be substantial and relatively close rather than hardly perceptible and likely to appear only in the long term (ICRC Commentary on the Additional Protocols of 8 June 1977, para. 2209 [Available on <http://icrc.org>]). While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government’s political support, it is unlikely that either of these purposes would offer the “concrete and direct” military advantage necessary to make them a legitimate military objective. NATO believed that Yugoslav broadcast facilities were “used entirely to incite hatred and propaganda” and alleged that the Yugoslav government had put all private TV and radio stations in Serbia under military control (NATO press conferences of 28 and 30 April 1999). However, it was not claimed that they were being used to incite violence akin to Radio Mille Collines during the Rwandan genocide, which might have justified their destruction [...]. At worst, the Yugoslav government was using the broadcasting networks to issue propaganda supportive of its war effort: a circumstance which does not, in and of itself, amount to a war crime (see in this regard the judgment of the International Military Tribunal in Nuremberg in 1946

in the case of Hans Fritzsche, who served as a senior official in the Propaganda ministry alleged to have incited and encouraged the commission of crimes. The IMT held that although Fritzsche clearly made strong statements of a propagandistic nature, it was nevertheless not prepared to find that they were intended to incite the commission of atrocities, but rather, were aimed at arousing popular sentiment in support of Hitler and the German war effort [...]. [See *supra* Part A., [16]]. The committee finds that if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law. It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power. In a press conference of 9 April 1999, NATO declared that TV transmitters were not targeted directly but that "in Yugoslavia military radio relay stations are often combined with TV transmitters [so] we attack the military target. If there is damage to the TV transmitters, it is a secondary effect but it is not [our] primary intention to do that." A NATO spokesperson, Jamie Shea, also wrote to the Brussels-based International Federation of Journalists on 12 April claiming that Operation Allied Force "target[ed] military targets only and television and radio towers are only struck if they [were] integrated into military facilities ... There is no policy to strike television and radio transmitters as such" [...]. [See *supra* Part A., [22]].

77. Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate.

Although NATO alleged that it made "every possible effort to avoid civilian casualties and collateral damage" (Amnesty International Report, [See *supra* Part A., [10]]), some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted "effective warning of attacks which may affect the civilian population, unless circumstances do not permit" as required by Article 57(2) of Additional Protocol I. [...]

On the other hand, foreign media representatives were apparently forewarned of the attack (Amnesty International Report, [See *supra* Part A., [23] and [24]]). As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck. Consequently, UK Prime Minister Tony Blair blamed Yugoslav officials for not evacuating the building, claiming that "[t]hey could have moved those people out of the building. They knew it was a target and they didn't ... [I]t was probably for ... very clear propaganda reasons." [See *supra* Part A., [25]]. Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.

78. Assuming the RTS building to be a legitimate military target, it appeared that NATO realised that attacking the RTS building would only interrupt broadcasting for a brief period. Indeed, broadcasting allegedly recommenced within hours of the strike, thus raising the issue of the importance of the military advantage gained by the attack vis-à-vis the civilian casualties incurred. The FRY command and control network was alleged by NATO to comprise a complex web and that could thus not be disabled in one strike. As noted by General Wesley Clark, NATO "knew when we struck that there would be alternate means of getting the Serb Television. There's no single switch to turn off everything but we thought it was a good move to strike it and the political leadership agreed with us" [See *supra* Part A, [20]] [...] The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident. [...] With regard to these goals, the strategic target of these attacks was the Yugoslav command and control network. The attack on the RTS building must therefore be seen as forming part of an integrated attack against numerous objects, including transmission towers and control buildings of the Yugoslav radio relay network which were "essential to Milosevic's ability to direct and control the repressive activities of his army and special police forces in Kosovo" (NATO press release, 1 May 1999) and which comprised "a key element in the Yugoslav air-defence network" (*ibid.* 1 May 1999). Attacks were also aimed at electricity grids that fed the command and control structures of the Yugoslav Army (*ibid.* 3 May 1999). Other strategic targets included additional command and control assets such as the radio and TV relay sites at Novi Pazar, Kosovaka and Krusevac (*ibid.*) and command posts (*ibid.* 30 April). Of the electrical power transformer stations targeted, one transformer station supplied power to the air-defence coordination network while the other supplied power to the northern sector operations centre. Both these facilities were key control elements in the FRY integrated air-defence system (*ibid.* 23 April 1999). [...] Not only were these targets central to the Federal Republic of Yugoslavia's governing apparatus, but formed, from a military point of view, an integral part of the strategic communications network which enabled both the military and national command authorities to direct the repression and atrocities taking place in Kosovo (*ibid.* 21 April 1999).
79. On the basis of the above analysis and on the information currently available to it, the committee recommends that the OTP not commence an investigation related to the bombing of the Serbian TV and Radio Station. [...]

V. Recommendations

90. The committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents. The committee has not spoken to those involved in directing or carrying out the

bombing campaign. The committee has also assigned substantial weight to the factual assertions made by Human Rights Watch as its investigators did spend a limited amount of time on the ground in the FRY. Further, the committee has noted that Human Rights Watch found the two volume compilation of the FRY Ministry of Foreign Affairs entitled *NATO Crimes in Yugoslavia* generally reliable and the committee has tended to rely on the casualty figures for specific incidents in this compilation. If one accepts the figures in this compilation of approximately 495 civilians killed and 820 civilians wounded in documented instances, there is simply no evidence of the necessary crime base for charges of genocide or crimes against humanity. Further, in the particular incidents reviewed by the committee with particular care [...] the committee has not assessed any particular incidents as justifying the commencement of an investigation by the OTP. NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences. [...]

DISCUSSION

I. Qualification of the conflict and applicable law

1. a. How would you qualify the conflict between the Kosovo Liberation Army (UCK) and the forces of the Federal Republic of Yugoslavia (FRY)? Was it an international or a non-international armed conflict? A case of internal violence? A war of national liberation? What about the conflict between NATO and the FRY? (GC I-IV, Art. 2; P I, Art. 1; P II, Art. 1)
- b. If the conflict between the UCK and the FRY was a non-international armed conflict, did NATO's intervention against the FRY internationalize it? If yes, why? Does this change the nature of the relations between the FRY and the UCK?
- c. Would the conflict have become international if NATO had intervened against the UCK? Why? Does this mean that the applicable law varies according to whether a third State intervenes alongside a State or against a State?
- d. Since NATO is not a party to the Geneva Conventions and their Additional Protocols, is it nevertheless bound by IHL? If yes, why? Since NATO members are not all bound by the same IHL instruments, how is it possible to determine which instruments are applicable to NATO? Is NATO only bound by IHL rules applicable to all its members? Or is NATO, as an international organization, only bound by customary IHL?
2. Does the lawful or unlawful nature of NATO's intervention in regard to *jus ad bellum* influence what rules of IHL are applicable? Are all acts committed during an unlawful operation automatically unlawful under IHL? Or are *jus ad bellum* and IHL two separate sets of rules? (P I, Preamble, para. 5)

II. Attack against the bridge

3. a. In regard to IHL, what do you make of NATO's use of high-altitude aerial attacks during its intervention in the FRY? Are such attacks prohibited? Do they allow for respect for the fundamental principles of IHL such as proportionality and the distinction between civilian objects and military objectives? Is it sufficient, as stated in the ICTY Prosecutor's Report, that "the obligation to distinguish was effectively carried out *in the vast majority of cases*" (Our emphasis, See Part B., para. 56)? (P I, Arts 51(4)(b)-(c) and 57(2)(a)(ii); CIHL, Rules 11-12 and 17)
- b. Can a bridge be a military objective? Under what conditions? How would you define the notion of military objective? Does the Prosecutor's Report seem to accept that the bridge was a military objective? What criteria did he or she use to reach a decision? Are NATO's declarations alone sufficient to establish the legitimacy of a military target under IHL? (P I, Art. 52(2); CIHL, Rule 8)
- c. If a civilian train is hit during an attack in which it "was not deliberately targeted" (See Part B., para. 62), does this constitute a violation of IHL? A war crime? "Collateral damage"? How would you define collateral damage? Is it damage caused to civilians or civilian property during an attack that otherwise respects the principle of proportionality? Is the latter respected when the military objective destroyed is a bridge and the "collateral damage" is civilians? Even if the damage is due to "an uncanny accident" (See Part A., para. 2)? (P I, Art. 57; CIHL, Rules 15-21)
- d. In the light of the information available to you, do you believe that the attack on Grdelica bridge was in accordance with IHL? Only the first attack, if the attackers were unaware that a train was arriving on the bridge? Did NATO respect the principle of precaution? What other precautions could NATO have taken? Had it been able to take more measures, under IHL should it have? Is your reply different for the first and second attack? What do you think of the Committee's conclusion on this event (See Part B., para. 62 *in fine*)? (P I, Arts 51(5)(b) and 57(2)(b); CIHL, Rules 14 and 19)

III. Attacks against the Serbian State radio and television buildings

4. a. According to IHL, did the RTS (Serbian radio-television buildings) in Belgrade constitute a military objective? Would it constitute a military objective if it was not "an acceptable instrument of public information", meaning that it does not allow "equal time for uncensored Western news broadcasts for two periods of three hours a day" (See Part A., para. 21)? If we accept this position, does it mean that the FRY forces could have considered a television station from a NATO member State as a military objective and destroyed its buildings for the same reasons? (P I, Art. 52; CIHL, Rules 7-10)
- b. Were the RTS facilities a military objective if they were used "as radio relay stations and transmitters to support the activities of the FRY military [...] forces" (See Part B., para. 73)? If they were used for propaganda? As an instrument to instigate hatred and violence, like Radio Mille Collines in Rwanda? (P I, Art. 52; CIHL, Rules 7-10) [See **Case No. 238**, France, Radio Mille Collines]
- c. The Prosecutor's Report estimates that the number of victims "does not appear to be clearly disproportionate" to the "concrete and direct military advantage" obtained by the bombing. On what criteria do you think this balance should be judged? What responsibility do military commanders have in this regard? (P I, Arts 51(5)(b) and 52; CIHL, Rule 14)
- d. Did the NATO forces respect the principle of precaution when they bombed the RTS? (P I, Art. 57(2)(c); CIHL, Rule 20) Is the warning that NATO supposedly gave sufficient under P I, Art. 57? Even if it was given only to foreign journalists?

5. Do journalists benefit from special status in IHL? Do they have the status of protected persons? Is this status relevant in this case? Even if they contribute to the war effort by broadcasting “hate speech” (See Part A., para. 27)? [See **Case No. 37**, Protection of Journalists]

IV. Conclusions of the Report

6.
 - a. What do you think of the Report’s conclusion (See Part B., para. 90)? Where is the law “not sufficiently clear”? In relation to which specific incidents? Is it not the role of a tribunal such as the ICTY to clarify the law? Indicate, for all the incidents in the case, whether it was the law, the facts or both which were not clear enough. Why would investigations probably not produce sufficient results?
 - b. Would the ICTY have had jurisdiction to judge the alleged perpetrators of war crimes committed by NATO forces? Why did it not do so? Is the choice made by the ICTY to concentrate on the worst criminals justified? [See **Case No. 210**, UN, Statute of the ICTY [Part C., Art. 1]]

Case No. 227, ECHR, Bankovic and Others v. Belgium and 16 Other States

[Source: European Court of Human Rights, Grand Chamber Decision as to the admissibility of Application no. 52207/99, 12 December 2001, available on <http://hudoc.echr.coe.int>]

The European Court of Human Rights, Grand Chamber

**Decision as to the admissibility of Application no. 52207/99
by Vlastimir and Borka BANKOVIC, Zivana STOJANOVIC,
Mirjana STOIMENOVSKI, Dragana JOKSIMOVIC and Dragana SUKOVIC**

against

**Belgium, the Czech Republic, Denmark, France, Germany, Greece,
Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway,
Poland, Portugal, Spain, Turkey and the United Kingdom [...]**

THE FACTS [...]

A. The circumstances of the case [...]

2. The bombing of Radio Televizije Srbije ("RTS")

9. Three television channels and four radio stations operated from the RTS facilities in Belgrade. The main production facilities were housed in three buildings at Takovska Street. The master control room was housed on the first floor of one of the buildings and was staffed mainly by technical staff.
10. On 23 April 1999, just after 2.00 am approximately, one of the RTS buildings at Takovska Street was hit by a missile launched from a NATO forces' aircraft. Two of the four floors of the building collapsed and the master control room was destroyed.
11. The daughter of the first and second applicants, the sons of the third and fourth applicants and the husband of the fifth applicant were killed and the sixth applicant was injured. Sixteen persons were killed and another sixteen were seriously injured in the bombing of the RTS. Twenty-four targets were hit in the [the Federal Republic of Yugoslavia] FRY that night, including three in Belgrade. [...]

COMPLAINTS

28. The applicants complain about the bombing of the RTS building on 23 April 1999 by NATO forces and they invoke the following provisions of the Convention: Article 2 (the right to life), Article 10 (freedom of expression) and Article 13 (the right to an effective remedy).

THE LAW [...]

30. As to the admissibility of the case, the applicants submit that the application is compatible *ratione loci* with the provisions of the Convention because the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States. They also suggest that the respondent States are severally liable for the strike despite its having been carried out by NATO forces, and that they had no effective remedies to exhaust.
31. The Governments dispute the admissibility of the case. They mainly contend that the application is incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States within the meaning of Article 1 of the Convention. [...]
32. The French Government further argue that the bombardment was not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States. The Turkish Government made certain submissions as regards their view of the position in northern Cyprus. [...]

A. Whether the applicants and their deceased relatives came within the “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention

34. This is the principal basis upon which the Governments contest the admissibility of the application and the Court will consider first this question. Article 1 of the Convention reads as follows:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.” [...]

1. The submissions of the respondent Governments [...]

37. They maintain that they are supported in this respect by the jurisprudence of the Court which has applied this notion of jurisdiction to confirm that certain individuals affected by acts of a respondent State outside of its territory can be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the relevant State over them. The arrest and detention of the applicants outside of the territory of the respondent State in the *Issa and Öcalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, unreported and *Öcalan v. Turkey*, (dec.), no. 46221/99, 14 December 2000, unreported) constituted, according to the Governments, a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil. Jurisdiction in the *Xhavara* case which concerned the alleged deliberate striking of an Albanian ship by an Italian naval vessel 35 nautical miles off the coast of Italy (*Xhavara and Others v. Italy and Albania*, (dec.), no. 39473/98, 11 January 2001, unreported) was shared by written agreement between the respondent States. [...]

38. The Governments conclude that it is clear that the conduct of which the applicants complain could not be described as the exercise of such legal authority or competence. [...]

2. The submissions of the applicants [...]

52. Alternatively, the applicants argue that, given the size of the air operation and the relatively few air casualties, NATO's control over the airspace was nearly as complete as Turkey's control over the territory of northern Cyprus. While it was a control limited in scope (airspace only), the Article 1 positive obligation could be similarly limited. They consider that the concepts of "effective control" and "jurisdiction" must be flexible enough to take account of the availability and use of modern precision weapons which allow extra-territorial action of great precision and impact without the need for ground troops. Given such modern advances, reliance on the difference between air attacks and ground troops has become unrealistic. [...]

3. The Court's assessment [...]

(d) Were the present applicants therefore capable of coming within the "jurisdiction" of the respondent States?

74. The applicants maintain that the bombing of RTS by the respondent States constitutes yet a further example of an extra-territorial act which can be accommodated by the notion of "jurisdiction" in Article 1 of the Convention, and are thereby proposing a further specification of the ordinary meaning of the term "jurisdiction" in Article 1 of the Convention. The Court must be satisfied that equally exceptional circumstances exist in the present case which could amount to the extra-territorial exercise of jurisdiction by a Contracting State.
75. In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction". Admittedly, the applicants accept that jurisdiction, and any consequent State Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion

that the positive obligation in Article 1 to secure “the rights and freedoms defined in Section I of this Convention” can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants’ approach does not explain the application of the words “within their jurisdiction” in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 of the four Geneva Conventions of 1949 [...].

4. The Court’s conclusion

82. The Court is not therefore persuaded that there was any jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it is not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question. [...]

For these reasons, the Court unanimously

Declares the application inadmissible.

Paul MAHONEY, Registrar

Luzius WILDHABER, President

DISCUSSION

[N.B.: The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) is available on <http://conventions.coe.int>]

1. a. Did the Court declare the application inadmissible because the applicants could not assert their human rights vis-à-vis the respondent States, or because it simply did not have jurisdiction to take cognizance of any violation of these rights?
- b. Did the respondent States have human rights obligations vis-à-vis the applicants? Did they have IHL obligations vis-à-vis the applicants?
2. a. Who is protected *ratione personae* by the ECHR against a State Party?
- b. Who is protected *ratione personae* by IHL against a State party to the IHL treaties? (GC III, Art. 4; GC IV, Art. 4; P I, Arts 49(2), 50 and 51)
- c. Do Art. 1 common to the Conventions and Art.1(1) of Protocol I deal with the scope of IHL? Do they influence the scope of protection *ratione personae*?
3. a. Is France’s argument that the bombing attacks were attributable to NATO, not the member States (which carried them out), tenable as regards human rights? As regards IHL?
- b. If Belgrade had been occupied in the course of the war, would the conduct of the occupation troops have been attributable to all NATO member States? Only to those that sent occupation troops? Only to the State that sent the troops whose conduct was at issue? Only to NATO itself?
- c. Is NATO bound by IHL?

4. a. Would the application have been admissible if the respondent States had carried out the bombing attacks within their own territories? If the FRY had been party to the ECHR? In that case, could the application have been lodged against the FRY?
- b. If the application had been admissible, would the Court have applied IHL? On what grounds? Is it competent to do so? (Art. 2 of the ECHR guarantees the right to life and Art. 15 provides that:
“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 [protecting the right to life], except in respect of deaths resulting from lawful acts of war [...], shall be made under this provision. [...]”)
- c. Is it likely that the Court would have found a violation of the ECHR if it had found the application admissible? By reason only of the fact that civilians were killed? Owing to the fact that the principle of proportionality was not respected? Or that precautionary measures were not taken? Or that the target of the attack was not a military objective? Can a radio station be a military objective? If it incites the population and the armed forces to war? If it incites to genocide? If it is used for military communications? (P I, Arts 49(2), 50, 51, 52 (2) and 57) [See **Case No. 226**, Federal Republic of Yugoslavia, NATO Intervention]
- d. Could the Court have jurisdiction to rule on the lawfulness of air strikes in time of armed conflict? How could it have established the necessary facts in order to issue a ruling? Is the ECHR the appropriate instrument for such a ruling? Is a Court ruling a possible and appropriate means for protecting victims of bombing attacks in time of armed conflict? What other courts might offer recourse to the victims?

Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region (1994-2005)

[N.B.: This case study was prepared by Thomas de Saint Maurice for the French edition of this book. It is based exclusively on public documents and it partially uses the Case study prepared by Lina Milner published in the first edition of this book.]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

STRUCTURE OF THE CASE STUDY

I. Genocide in Rwanda

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- 2) ICRC, press release of 21 April 1994

B. The United Nations Assistance Mission for Rwanda (UNAMIR)

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- 1) Security Council resolution 929 (1994)
- 2) ICRC, June 1994 memorandum

D. UN, 1997 Report on the issue of refugees

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- 2) UN, Report on the situation of human rights in the Democratic Republic of the Congo

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C. Violations of international humanitarian law

- 1) UN, Report on human rights in the Democratic Republic of the Congo
- 2) The Kisangani massacre of May 2002
- 3) UN, press release of 18 June 2002

D. The United Nations Mission in the Democratic Republic of the Congo (MONUC)

- 1) The mandate
- 2) Security Council resolution 1592 (2005)

Abbreviations

Rwanda

- FAR: Forces armées rwandaises (Rwandese Armed Forces, i.e., armed forces of the former Hutu-led government)
- FPR: Front patriotique rwandais (Rwandese Patriotic Front)
- MRBD: Mouvement révolutionnaire national pour le développement (National Revolutionary Movement for Development)
- UNAMIR: United Nations Assistance Mission for Rwanda.

Burundi

- CNDD: Conseil national pour la défense de la démocratie (National Council for the Defence of Democracy)
- FDD: Forces pour la défense de la Démocratie (Forces for the Defence of Democracy)
- FROLINA: Front pour la libération nationale (Front for National Liberation)
- PALIPHEUTU: Parti pour la libération du peuple hutu (Party for the Liberation of the Hutu People)

Democratic Republic of the Congo

- DRC: Democratic Republic of the Congo
- FAC: Forces armées congolaises (Congolese Armed Forces)
- RCD: Rassemblement congolais pour le démocratie (Congolese Rally for Democracy)
- SADC: South African Development Conference

Angola

- UNITA: National Union for the Total Independence of Angola

I. Genocide in Rwanda

[See also **Case No. 234**, ICTR, *The Prosecutor v. Jean-Paul Akayesu*; **Case No. 241**, Switzerland, *The Niyonteze Case*, and **Case No. 235**, ICTR, *The Media Case*]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. The genocide

[**N.B.:** For a description of the acts of genocide, refer to DES FORGES Alison and HRW-FIDH, *Aucun témoin ne doit survivre*, Paris, Karthala, 1999, 911 pp; PRUNIER Gerard, *The Rwanda Crisis, 1959-1994: history of a Genocide*, London, Hurst, 389 pp. See also the facts reported in the ICTR cases, available on <http://www.ictor.org>]

1) The genesis of the genocide

[**Source:** "Hearing of Jean-Pierre CHRÉTIEN," in *Fact-finding mission on Rwanda. Minutes of the hearings from 24 March 1998 to 5 May 1998*, French National Assembly, Paris, <http://www.assemblee-nationale.fr/dossiers/rwanda.asp>. Original in French, unofficial translation.]

Hearing of Mr Jean-Pierre CHRÉTIEN Director of Research at the CNRS

(Session held on 7 April 1998)

Chaired by Mr Paul Quilès, Chairman of the Defence Committee

The Chairman, Mr Paul Quilès, welcomed the historian Mr Jean-Pierre Chrétien, who is Director of Research at the CNRS. [...] He added that Mr Jean-Pierre Chrétien adhered to the school of thought which holds to the view that the rift between Hutu and Tutsi is essentially a post-colonial creation. He therefore suggested that Jean-Pierre Chrétien explain the mission to gather information about the conflicts between that school of thought and other views. [...]

Mr Jean-Pierre Chrétien began by showing the specific nature of the ethnic problem in Rwanda, pointing out that the Hutu-Tutsi issue in the region of the Great Lakes represented a particular kind of ethnic problem as the Hutus and the Tutsis are not heterogeneous peoples gathered within artificial borders. A clear distinction therefore needed to be made between historical periods: the waves of migration which populated Rwanda some thousand years ago, the political history of the kingdoms dating back four or five centuries, and the complex social history characterized by various conflicts between regions and clans and by the distinction made between the Hutu, Tutsi and Twa ethnic groups, a distinction which, far from always having existed, progressively gained strength, especially since the eighteenth century with the ascent of the centralized monarchical governments.

These ethnic categories were not therefore invented by the colonizers; they existed before the latter arrived on the scene. It is consequently appropriate to analyse the evolution over time of relations between the Tutsis and the Hutus. Taking up the myth of the great Tutsi invasion, the colonial era saw an increase in the strength of a Gobineau-type mythology, according to which everything can be explained by the age-old clash between the Bantu and Hamitic racial groups. It gave rise to an ideological scenario with scientific pretensions. Mr Jean-Pierre Chrétien insisted on the omnipresent obsession with race under colonial rule: it suited the whites and fascinated the first generation of literate blacks, swelling the pride of the Tutsis, who were treated as if they were black Europeans, and annoying the Hutus, who were treated as if they were Bantu Negroes. To support his thesis, Mr Jean-Pierre Chrétien cited, in particular, the German Count von Goetzen who, in 1895, talked about *"large invasions from Abyssinia"* [...] and the *Journal of former pupils of Astrida (Bulletin des anciens élèves d'Astrida)* which claimed in 1948 that *"being of Caucasian origin like the Semites and Indo-Europeans, the Hamitic peoples originally had nothing in common with Negroes. The preponderance of the Caucasian type has remained clearly evident among the Batutsi ... their height – rarely less than 1.80 m – ... their fine facial features imbued with an intelligent expression, everything helps to justify the title bestowed on them by the explorers: aristocratic Negroes"*. Mr Jean-Pierre Chrétien thus showed that, far from pursuing a simple policy of "divide and rule", colonial rule was social management based on an ideology of racial inequality which pitted the Tutsis, who were treated as virtual aristocrats, against the Hutus, who were considered victims of a kind of scientifically legitimized human erosion. The colonizers therefore introduced racial discrimination into the heart of Rwandan society, in which social categories already existed. [...]

Turning next to the study of post-colonial Rwanda until 1990, Mr Jean-Pierre Chrétien stressed the specific nature of the Rwandan "democratic" project, which was based on a methodological mix of the numerical dominance of the Hutu masses, who were perceived as a homogeneous community, and the indigenous nature of its members, defined as the only "true Rwandans". When, with the coming of independence, the so-called "social" revolution erupted between 1959 and 1961, it thus targeted the whole Tutsi contingent, designating it collectively as being synonymous with a "feudal" system backed by the colonizing power. A model was then introduced into both the reality and the thinking of the day; backed and endorsed by the Belgian Christian democracy and the missionary Church, it referred to democracy and defined the Tutsi minority

as both feudal and foreign from one generation to another. It was 1789 in reverse, with the hereditary orders not being suppressed but simply changed. A large number of quotations reveal this line of thought: for example, Grégoire Kayibanda, leader of that revolution, said in 1959 that the country had to be "*restored to its proprietors, the Bahutu*"; in 1960 Parmehutu declared that "*Rwanda [was] the country of the Bahutu (Bantu) and of all those, black or white, of Tutsi, European or other origins, who will shake off feudal-colonialist objectives*" and invited the Tutsis who did not share that way of seeing things to "*return to Abyssinia*"; [...] Behind the democratic language, the priority of ethnic identity, officially shown on identity cards, was imposed willy-nilly: democracy was a doctrine of ethnic majority in disguise. The propaganda disseminated by Parmehutu, the sole political party which became the MRND [National Revolutionary Movement for Development] in 1973, did not change. In July 1972, "*Ingingo z'ingenzi mu mateka y'Urwanda*", the Parmehutu creed, affirmed, "*Tutsi domination is the source of all the ills suffered by the Hutus since the world began*." [...] That official discrimination – "*respectable racism*", as Marie-France Cros of the *La Libre Belgique* called it – was steeped in a sense of having a clear conscience and was endorsed both by social and democratic language and by the Church. Instead of redressing the balance, the regime in power between 1959 and 1994 only accentuated the marginalization or exclusion of the minority and tended to reflect the desire to marginalize if not exclude it. The problem cannot be tackled as if it were a regional matter with federal repercussions, nor as if it were a genuine social issue, since there were rich and poor people in both categories. Under those conditions, the binary nature of the relation makes it particularly explosive.

[...] Since prophecies of victimization can be said to justify preventive self-defence, fear was frequently exploited and, against the aforementioned background, played a key role in the crises in the region of the Great Lakes. From 1959 onwards, it was the essential tactical force driving popular mobilization during the massacres. Hence, at Christmas 1963, following an attack by Tutsi refugees, four soldiers were killed. By way of reprisal the Government sent ministers to organize "*popular self-defence*" in the prefectures. In September 1964, 10,000 Tutsis were massacred in the Gikongoro prefecture.

The cloud of genocide weighs heavily on Rwanda and that swiftly covered-up crisis foreshadowed by 30 years the programme of massacres and the genocide that occurred in 1994. The phenomenon recurred before that, in 1973, these crises thus constituting a legacy of experience and memories, fears and suspicions.

Mr Jean-Pierre Chrétien then turned to the end of the Habyarimana regime. In the late 1980s, the unchanging political regime was faced with economic and social difficulties that were both structural and cyclical in nature – economic deadlock, structural adjustment, a sense of hopelessness among young people, the rise of the opposition, aspirations to pluralism of expression – to which was added the invasion by the Rwandan Patriotic Front (FPR) on 1 October 1990, followed by a simulated attack on Kigali on 4 and 5 October. The response to those events was twofold and contradictory: an opening-up to democracy and ethnic mobilization. Between 1990 and 1994, a race against the clock was truly on – the opponents being the logic of democratization and peace and the logic of war and racism.

Under pressure from the domestic opposition and from foreign powers, the logic of democratization led to greater willingness on the part of the government to consider the issue of public liberties and to the acceptance of political pluralism in June 1991. From 1992 onwards, the shape of Rwandan political strategy was determined by three poles: the Habyarimana sphere of influence, supposedly represented by Akazu (the “household” from the north-west, headed, in particular, by the family of “Mrs President”, Ms Habyarimana); the domestic opposition, which was primarily Hutu; and finally, the armed opposition of the FPR, which was primarily Tutsi. Following meetings between the FPR and the Rwandan authorities, the signature of a cease-fire in July 1992 appeared to be a sign that things were moving beyond ethnic antagonism, which was a far too simplified a view.

Mr Jean-Pierre Chrétien emphasized how his meetings with the Hutu opposition had helped him to appreciate the situation before going on to stress that the resumption of anti-Tutsi killings had in no way been inevitable. He pointed out that the extremist reaction which embodied the logic of genocide had simultaneously assumed a violent form based on the racist propaganda and a more subtle form aimed at disrupting the opposition within the country. [...]

It was against that background that, in May 1990, the newspaper *Kangura* was founded with the help of Akazu finances, its task being to spread the racist “gospel”, and that, in April-July 1993, the “free” radio station “Radio-Télévision Libre des Mille Collines” (RTLNC), was launched under the leadership of Ferdinand Nahimana, an extremist who had been dismissed from his position as director of the Rwandan National Information Office (ORINFOR) by the opposition for having incited the pogroms in Bugesera. [...] [See Case No. 235, ICTR, The Media Case]

This is how a climate of violence developed that was denounced by various players both in Rwanda and abroad [...]. Mr Jean-Pierre Chrétien pointed out that in March 1993 he himself had referred to “a tragic slide into genocide”.

Hence, a far-reaching political debate was then going on in Rwanda, setting the government’s ethnically oriented line against the democratic line adopted by the opposition. Moreover, those debates are mentioned in a whole series of texts, which no one could be unaware of. Those same texts provide evidence of the emergence, at the end of 1992, of a current close to the government and prepared for anything. [...] [Jean-Pierre Chrétien] recalled what had been said by President Habyarimana, who, in November 1992, referred to the Arusha agreement as a “piece of trash”, and by Professor Mugesera, an influential member of the MRND, who called for the Tutsis to be eliminated. [...]

Tackling the course taken by the genocide itself, Mr Jean-Pierre Chrétien drew attention to the great many inquiries and testimonies providing evidence of the reality and the “normality” of the genocide. The propaganda employed in the press and on the radio during the events was part of an ongoing political culture that went back for more than thirty years and which revolved around three major topics: the priority of ethnic Hutu or Tutsi origins; the legitimization of a genuine racial conflict which condemned some while taking a totalitarian approach to defining the power of the others; and finally,

the normalization of a culture of violence. It would admittedly have been difficult to conceive of the scale and the atrocity of the genocide in advance, but it was surprising that the international community took so long to notice it and to condemn it. [...]

2) ICRC, press release of 21 April 1994

[Source: ICRC Press Release, no. 1772, 21 April 1994]

Human tragedy in Rwanda

Geneva (ICRC) – Tens, maybe hundreds of thousands killed: the exact number of victims of the massacres that have swept Rwanda over the last two weeks will never be known. Terrified inhabitants have been fleeing the centre of the country and several hundred thousand displaced people are massed in the south and the north. The human tragedy in Rwanda is on a scale that the International Committee of the Red Cross (ICRC) has rarely witnessed.

In the hospitals in the capital, Kigali, surgeons have managed to save hundreds of lives. However, the wounded can no longer be taken to medical centres for fear that they will be killed before they arrive, and those that have been saved cannot leave hospital because to do so would mean certain death.

The need for humanitarian aid is also immense in outlying areas of the country, where hundreds of thousands of people, some of them wounded, have sought refuge. The displaced, who lack food and medical care, will be assisted by Rwandese medical staff as soon as security conditions allow. In addition, sanitation systems must be installed to minimize the risk of epidemics.

Since the start of the violence, about 30 ICRC delegates, the French team of *Médecins sans Frontières* and Rwandese Red Cross volunteers have risked their lives to preserve a measure of humanity in the midst of the carnage. What they have done is vital, but is no more than a drop in the ocean.

ICRC delegates on the spot are in constant contact with all parties concerned and are broadcasting messages on local radio stations, calling for an end to the atrocities and demanding that civilians, the wounded and any people taken prisoner be spared.

B. The United Nations Assistance Mission for Rwanda (UNAMIR)

[Source: United Nations, Letter dated 15 December 1999 from the Secretary-General addressed to the President of the Security Council, S/1999/1257, 16 December 1999, "Enclosure: Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda"; available on <http://www.un.org>]

Enclosure Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda 15 December 1999

I. INTRODUCTION

Approximately 800,000 people were killed during the 1994 genocide in Rwanda. The systematic slaughter of men, women and children which took place over the course of about 100 days between April and July of 1994 will forever be remembered as one of the most abhorrent events of the twentieth century. Rwandans killed Rwandans, brutally decimating the Tutsi population of the country, but also targeting moderate Hutus. Appalling atrocities were committed, by militia and the armed forces, but also by civilians against other civilians.

The international community did not prevent the genocide, nor did it stop the killing once the genocide had begun. This failure has left deep wounds with Rwandan Society, and in the relationship between Rwanda and the international community, in particular the United Nations. These are wounds which need to be healed, for the sake of the people of Rwanda and for the sake of the United Nations. Establishing the truth is necessary for Rwanda, for the United Nations and also for all those, wherever they may live, who are at risk of becoming victims of genocide in the future.

[...] The Inquiry has analysed the role of the various actors and organs of the United Nations system. Each part of that system, in particular the Secretary-General, the Secretariat, the Security Council and the Member States of the organisation, must assume and acknowledge their respective parts of the responsibility for the failure of the international community in Rwanda. Acknowledgement of responsibility must also be accompanied by a will for change: a commitment to ensure that catastrophes such as the genocide in Rwanda never occur anywhere in the future.

The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole. The fundamental failure was the lack of resources and political commitment devoted to developments in Rwanda and to the United Nations presence there. There was a persistent lack of political will by Member States to act, or to act with enough assertiveness. This lack of political will affected the response by the Secretariat and decision-making by the Security Council, but was also evident in the recurrent difficulties to get the necessary troops for the United Nations Assistance Mission for Rwanda (UNAMIR). Finally, although UNAMIR suffered from a chronic lack of resources and political priority, it must also be said that serious mistakes were made with those resources which were at the disposal of the United Nations. [...]

II. DESCRIPTION OF KEY EVENTS

Arusha Peace Agreement [...]

Only a week after the signing of the Agreement, the United Nations published a report which gave an ominously serious picture of the human rights situation in Rwanda. The report described the visit to Rwanda by the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions. Mr Waly Bacre Ndiaye, from 8 to 17 April 1993. Ndiaye determined that massacres and a plethora of other serious human rights violations were taking place in Rwanda. The targeting of the Tutsi population led Ndiaye to discuss whether the term genocide might be applicable. He stated that he could not pass judgment at that stage, but citing the Genocide Convention, went on to say that the cases of intercommunal violence brought to his attention indicated "very clearly that the victims of the attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership of a certain ethnic group and for no other objective reason." Although Ndiaye – in addition to pointing out the serious risk of genocide in Rwanda – recommended a series of steps to prevent further massacres and other abuses, his report seems to have been largely ignored by the key actors within the United Nations system.

In order to follow up on the Arusha Agreement, the Secretary-General dispatched a reconnaissance mission to the region from 19 to 31 August 1993. [...] The mission was led by Brigadier-General Romeo A. Dallaire, Canada, at the time Chief Military Observer of the United Nations Observer Mission Uganda-Rwanda (UNOMUR). [...]

On 15 September, a joint Government-RPF delegation met with the Secretary-General in New York. The delegation argued in favour of the rapid deployment of the international force and the rapid establishment of the transitional institutions. Warning that any delay might lead to the collapse of the peace process, the delegation expressed the wish for a force numbering 4,260. The Secretary-General gave the delegation a sobering message: that even if the Council were to approve a force of that size, it would take at least 2-3 months for it to be deployed. The United Nations might be able to deploy some further observers in addition the 72 already sent, but even this would take weeks. Therefore the Rwandan people needed to be told that they had to rely on themselves during the interim period. The Government and the RPF had to make an effort to respect the cease-fire, the Secretary-General said, because it would be even more difficult to get troops if fighting were to resume. He also mentioned the enormous demands being made of the United Nations for troops, in particular in Somalia and Bosnia, and that the United Nations was going through a financial crisis.

The establishment of UNAMIR

On 24 September 1993, [...] the Secretary-General presented a report to the Security Council on the establishment of a peacekeeping operation in Rwanda (S/26488), based on the report from the reconnaissance mission. The report set out a deployment plan for a peacekeeping force of 2,548 military personnel. With operations divided into four phases, the Secretary-General proposed the immediate deployment of an advance party of about 25 military and 18 civilian personnel, and 3 civilian police. The first phase was

to last 3 months, until the establishment of the Broad-based Transitional Government (BBTG), during which the operation would prepare the establishment of a secure area in Kigali and monitor the cease-fire. By the end of phase 1, the report of the Secretary-General stated that the operation was to number 1,428 military personnel. [...]

On 5 October, the Council unanimously adopted resolution 872 (1993), which established UNAMIR. The Council did not approve all the elements of the mandate recommended by the Secretary-General, but instead decided on a more limited mandate. [...]

Dallaire was appointed Force Commander of the new mission. He arrived in Kigali on 22 October. He was joined by an advance party of 21 military personnel on 27 October. The Secretary-General subsequently appointed a former Foreign Minister of Cameroon, Mr Jacques-Roger Booh Booh, as his Special Representative in Rwanda. Booh Booh arrived in Kigali on 23 November 1993.

On 23 November 1993, Dallaire sent Headquarters a draft set of Rules of Engagement (ROE) for UNAMIR, asking for the approval of the Secretariat. The draft included in paragraph 17 a rule specifically allowing the mission to act, and even to use force, in response to crimes against humanity and other abuses ("There may also be ethnically or politically motivated criminal acts committed during this mandate which will morally and legally require UNAMIR to use all available means to halt them. Examples are executions, attacks on displaced persons or refugees"). Headquarter never responded formally to the Force Commander's request for approval. [...]

The 11 January Cable

On 11 January 1994, Dallaire sent the Military Adviser to the Secretary-General, Major-General Maurice Baril, a telegram entitled "Request for Protection for Informant", which has come to figure prominently in the discussions about what knowledge was available to the United Nations about the risk of genocide. The telegram stated that Dallaire had been put into contact with an informant who was a top level trainer in the Interahamwe militia. The contact had been set up by a "very very important government politician" (who in later correspondence was identified as the Prime Minister Designate, Mr Faustin Twagiramungu). The cable contained a number of key pieces of information.

The first related to a strategy to provoke the killing of Belgian soldiers and the Belgian battalion's withdrawal. [...]

Secondly, the informant said that the Interahamwe had trained 1,700 men in the camps of the RGF, scattered in groups of 40 throughout Kigali. He had been ordered to register all Tutsi in Kigali, and suspected it was for their extermination. He said that his personnel was able to kill up to 1,000 Tutsi in 20 minutes.

Thirdly, the informant had told of a major weapons cache with at least 135 weapons (G3 and AK47). He was prepared to show UNAMIR the location if his family was given protection.

Having described the information received from the informant, Dallaire went on to inform the Secretariat that it was UNAMIR's intention to take action within the next 36 hours. He recommended that the informant be given protection and be evacuated,

and – on this particular point, but not on the previous one – requested guidance from the Secretariat as to how to proceed. Finally, Dallaire admitted to having certain reservations about the reliability of the informant and said that the possibility of a trap was not fully excluded. As has often been quoted, the telegram nonetheless ended with a call for action: “Peux ce que veux. Allons-y.” [...]

The first response from Headquarters to UNAMIR [...] ended “No reconnaissance or other action, including response to request for protection, should be taken by UNAMIR until clear guidance is received from Headquarters.”

Booh Booh replied to Annan in a cable also dated 11 January. The Special Representative described a meeting which Dallaire and Booh Booh’s political adviser, Dr Abdul Kabia, had had with the Prime Minister Designate, who expressed “total, repeat total, confidence in the veracity and true ambitions of the informant.” Booh Booh emphasized that the informant only had 24 to 48 hours before he had to distribute the arms, and requested guidance on how to handle the situation, including the request for protection for the informant. The final paragraph of the telegram, para. 7, stated that Dallaire was “prepared to pursue the operation in accordance with military doctrine with reconnaissance, rehearsal and implementation using overwhelming force.” [...]

Later the same day, Headquarters replied. Again, the cable was from Annan, signed by Riza, addressed this time to both Booh Booh and Dallaire. Headquarters stated that they could not agree to the operation contemplated in para. 7 of the cable from Booh Booh, as it in their view clearly went beyond the mandate entrusted to UNAMIR under resolution 872 (1993). Provided UNAMIR felt the informant was absolutely reliable, Booh Booh and Dallaire instead were instructed to request an urgent meeting with President Habyarimana and inform him that they had received apparently reliable information concerning the activities of the Interahamwe which represented a clear threat to the peace process. [...] If any violence occurred in Kigali, the information on the militia would have to be brought to the attention of the Security Council, investigate responsibility and make recommendations to the Council. [...]

The cable from Headquarters ended with the pointed statement that “the overriding consideration is the need to avoid entering into a course of action that might lead to the use of force and unanticipated repercussions.” [...]

Political deadlock and a worsening of the security situation [...]

The conclusion drawn was that determined and selective deterrent operations were necessary, targeting confirmed arms caches and individuals known to have illegal weapons in their possession. [...] UNAMIR sought the guidance and approval of Headquarters to commence deterrent operations. [...]

On 14 February, [...] the Belgian Foreign Minister, Mr Willy Claes, wrote a letter to the Secretary-General, arguing in favour of a stronger mandate for UNAMIR. Unfortunately, this proposal does not appear to have been given serious attention within the Secretariat or among other interested countries.

Dallaire continued to press for permission to take a more active role in deterrent operations against arms caches in the KWSA. The Secretariat, however, maintained

the interpretation of the mandate which was evident in their replies to Dallaire's cable, insisting that UNAMIR could only support the efforts of the gendarmerie. [...] Annan emphasized that public security was the responsibility of the authorities and must remain so. "As you know, resolution 792 [sic] (1993) only authorized UNAMIR to 'contribute to the security of the city of Kigali, i.e., within a weapons secure area established by repeat by the parties?'" [...]

In a report on 23 February, Dallaire wrote that information regarding weapons distribution, death squad target lists, planning of civil unrest and demonstrations abounded. "Time does seem to be running out for political discussions, as any spark on the security side could have catastrophic consequences." [...]

The crash of the Presidential plane; genocide begins

On 6 April 1994, President Habyarimana and the President of Burundi, Cyprien Ntaryamira, flew back from a subregional summit. [...]

According to UNAMIR's report to Headquarters, at approximately 20.30, the plane was shot down as it was coming in to land in Kigali. The plane exploded and everyone on board was killed. By 21.18, the Presidential Guard had set up the first of many roadblocks. Within hours, further road-blocks were set up by the Presidential Guards, the Interahamwe, sometimes members of the Rwandan Army, and the gendarmerie. UNAMIR was placed on red alert at about 21.30. [...]

After the crash, UNAMIR received a number of calls from ministers and other politicians asking for UNAMIR's protection. [...]

The tragic killing of the Belgian peacekeepers took place against a backdrop of an escalated confrontation with Rwandan soldiers outside the Prime Minister's house. [...] [I]n Camp Kigali, the United Nations peacekeepers were badly beaten, and later, after the Ghanaian peacekeepers and the Togolese had been led away, the Belgian soldiers were brutally killed. [...]

Describing the shortcomings and lack of resources of UNAMIR, Dallaire did not believe he had forces capable of conducting an intervention in favour of the Belgians: "The UNAMIR mission was a peacekeeping operation. It was not equipped, trained or staffed to conduct intervention operations." [...]

About 2,000 people had sought refuge at ETO [École Technique Officielle], believing that the UNAMIR troops would be able to protect them. There were members of the Interahamwe and Rwandan soldiers outside the school complex. On 11 April, after the expatriates in ETO had been evacuated by French troops, the Belgian contingent at ETO left the school, leaving behind men, women and children, many of whom were massacred by the waiting soldiers and militia. [...]

Within a couple of days of the crash of the Presidential plane, national evacuation operations were mounted by Belgium, France, Italy and the United States. The operations were undertaken with the aim of evacuating expatriates. The Force Commander informed Headquarters of the arrival of the first three French aircraft during the early hours of the morning of 8 April. In a cable dated 9 April from Annan

(Riza), Dallaire was requested to “cooperate with both the French and Belgian commanders to facilitate the evacuation of their nationals, and other foreign nationals requesting evacuation. [...] This should not, repeat not, extend to participating in possible combat, except in self-defence.”

Withdrawal of the Belgian contingent

The Secretary-General met the Foreign Minister of Belgium, Mr Willy Claes, in Bonn on 12 April. In the minutes of the United Nations from the conversation, Claes’ message to the United Nations was described as follows: “The requirements to pursue a peacekeeping operation in Rwanda were no longer met, the Arusha peace plan was dead, and there were not means for a dialogue between the parties; consequently, the UN should suspend UNAMIR. [...]”

The Secretary-General informed the Security Council about the Belgian position in a letter on 13 April. The letter stated that it would be extremely difficult for UNAMIR to carry out its tasks effectively. The continued discharge by UNAMIR of its mandate would “become untenable” unless the Belgian contingent was replaced by an equally well-equipped contingent or unless Belgium reconsidered its decision. [...] The Permanent Representative argued that since the implementation of the Arusha Peace Agreement was seriously jeopardized, the entire UNAMIR operation should be suspended. It is the understanding of the Inquiry that in addition to this and subsequent letters to the Council, the Belgian Government conducted a campaign of high level démarches with Council members in order to get the Council to withdraw UNAMIR.

The continued role of UNAMIR [...]

In a [...] cable on 14 April, Dallaire made clear the dire consequences of the Belgian withdrawal, which he described as a “terrible blow to the mission”.

On 13 April, Nigeria had presented a draft resolution in the Security Council on behalf of the Non-Aligned Caucus advocating a strengthening of UNAMIR. [...]

[...] [T]he United States initially stated that if a decision were to be taken then, it would only accept a withdrawal of UNAMIR, as it believed there was no useful role for a peacekeeping operation in Rwanda under the prevailing circumstances”. [...]

DPKO [the UN Department of Peacekeeping Operations] argued that since there did not seem to be any real prospects of a cease-fire in the coming days, it was their intention to report to the Council that a total withdrawal of UNAMIR needed to be envisaged. [...]

Dallaire responded on 19 April arguing in favour of keeping a force of 250 as a minimum presence, and against a total withdrawal: “a wholesale withdrawal of UNAMIR would most certainly be interpreted as leaving the scene if not even deserting the sinking ship.” He also pointed to the risk of dangerous reactions against UNAMIR in the case of a withdrawal. [...]

On 21 April, the Council voted unanimously to reduce UNAMIR to about 270 and to change the mission’s mandate. [...]

New proposals on the mandate of UNAMIR

By the end of April, however, the disastrous situation in Rwanda made the Secretary-General recommend a reversal of the decision to reduce the force level. Boutros-Ghali's letter to the Security Council of 29 April (S/1994/518) provided an important shift in emphasis – from viewing the role of the United Nations as that of neutral mediator in a civil war to recognising the need to bring to an end the massacres against civilians, which had by then been going on for three weeks and were estimated to have killed some 200,000 people. [...]

On 13 May, the Secretary-General formalized his recommendations in a report to the Security Council, which outlined the phased deployment of UNAMIR II up to a strength of 5,500, emphasizing the need for haste in getting the troops into the field. The United States proposals contained i.a. an explicit reference to the need for the parties' consent, the postponement of later phases of deployment pending further decisions in the Council and requirement that the Secretary-General return to the Council with a refined concept of operations, including among other elements the consent of the parties and available resources. [...]

UNAMIR II established

The Council adopted resolution 918 (1994) on 17 May 1994. The resolution included a decision to increase the number of troops in UNAMIR, and imposed an arms embargo on Rwanda. [...]

A few African countries signalled some willingness to contribute, provided they received financial and logistical assistance in order to do so. By 25 July, over two months after resolution 918 (1994) was adopted, UNAMIR still only had 550 troops, a tenth of the authorized strength. Thus the lack of political will to react firmly against the genocide when it began was compounded by a lack of commitment by the broader membership of the United Nations to provide the necessary troops in order to permit the United Nations to try to stop the killing. [...]

In order to follow-up resolution 918 (1994), the Secretary-General also sent Riza and Baril to Rwanda, among other things to try to move the parties towards a cease-fire and to discuss the implementation of resolution 918 (1994). The special mission to the region took place between 22 and 27 May. In a report to the Security Council dated 31 May, the Secretary-General presented his conclusions based on that mission. The report includes a vivid description of the horrors of the weeks since the beginning of the genocide, referring to a "frenzy of massacres" and an estimate that between 250,000 and 500,000 had been killed. Significantly, the report stated that the massacres and killings had been systematic, and that there was "little doubt" that what had happened constituted genocide. [...]

III. CONCLUSIONS

The Independent Inquiry finds that the response of the United Nations before and during the 1994 genocide in Rwanda failed in a number of fundamental respects. The responsibility for the failings of the United Nations to prevent and stop the genocide in Rwanda lies with a

number of different actors, in particular the Secretary-General, the Secretariat, the Security Council, UNAMIR and the broader membership of the United Nations. This international responsibility is one which warrants a clear apology by the Organization and by Member States concerned to the Rwandese people. As to the responsibility of those Rwandans who planned, incited and carried out the genocide against their countrymen, continued efforts must be made to bring them to justice – at the International Criminal Tribunal for Rwanda and nationally in Rwanda. [...]

1. The overriding failure

The overriding failure in the response of the United Nations before and during the genocide in Rwanda can be summarized as a lack of resources and a lack of will to take on the commitment which would have been necessary to prevent or to stop the genocide. UNAMIR, the main component of the United Nations presence in Rwanda, was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role in dealing with a peace process in serious trouble. The mission was smaller than the original recommendations from the field suggested. It lacked well-trained troops and functioning material. The mission's mandate was based on an analysis of the peace process which proved erroneous, and which was never corrected despite the significant warning signs that the original mandate had become inadequate. By the time the genocide started, the mission was not functioning as a cohesive whole: in the real hours and days of deepest crisis, consistent testimony points to a lack of political leadership, lack of military capacity, severe problems of command and control and lack of coordination and discipline. [...]

2. The inadequacy of UNAMIR's mandate [...]

The responsibility for the limitations of the original mandate given to UNAMIR lies firstly with the United Nations Secretariat, the Secretary-General and responsible officials within the DPKO for the mistaken analysis which underpinned the recommendations to the Council, and for recommending that the mission be composed of fewer troops than the field mission had considered necessary. The Member States which exercised pressure upon the Secretariat to limit the proposed number of troops also bear part of the responsibility. Not least, the Security Council itself bears the responsibility for the hesitance to support new peacekeeping operations in the aftermath of Somalia, and specifically in this instance for having decided to limit the mandate of the mission in respect to the weapons secure areas. [...]

10. The lack of political will of Member States [...]

In sum, while criticisms can be levelled at the mistakes and limitations of the capacity of UNAMIR's troops, one should not forget the responsibility of the great majority of United Nations Member States, which were not prepared to send any troops or material at all to Rwanda. [...]

It has been stated repeatedly during the course of the interviews conducted by the Inquiry that the fact that Rwanda was not of strategic interest to third countries and that the international community exercised double standards when faced with the risk of a catastrophe there compared to action taken elsewhere. [...]

C. “Operation Turquoise”

1) Security Council resolution 929 (1994)

[Source: United Nations, S/RES/929, 22 June 1994; available on <http://www.un.org/documents/>]

Resolution 929 (1994) Adopted by the Security Council at its 3392nd session 22 June 1994

The Security Council:

Reaffirming all its previous resolutions on the situation in Rwanda, in particular its resolutions 912 (1994) of 21 April 1994, 918 (1994) of 17 May 1994 and 925 (1994) of 8 June 1994, which set out the mandate and force level of the United Nations Assistance Mission for Rwanda (UNAMIR),

Determined to contribute to the resumption of the process of political settlement under the Arusha Peace Agreement and encouraging the Secretary-General and his Special Representative for Rwanda to continue and redouble their efforts at the national, regional and international levels to promote these objectives, [...]

Noting the offer by Member States to cooperate with the Secretary-General towards the fulfilment of the objectives of the United Nations in Rwanda (S/1994/734), and stressing the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties, [...]

Deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda, [...]

Recognizing that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community,

Determining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region,

1. *Welcomes* the Secretary-General's letter dated 19 June 1994 (S/1994/728) and agrees that a multinational operation may be set up for humanitarian purposes in Rwanda until UNAMIR is brought up to the necessary strength;
2. *Welcomes* also the offer by Member States (S/1994/734) to cooperate with the Secretary-General in order to achieve the objectives of the United Nations in Rwanda through the establishment of a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, on the understanding that the costs of implementing the offer will be borne by the Member States concerned;
3. *Acting* under Chapter VII of the Charter of the United Nations, authorizes the Member States cooperating with the Secretary-General to conduct the operation

referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994); [...]

[N.B.: These subparagraphs read as follows:

- "(a) Contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and
- (b) Provide security and support for the distribution of relief supplies and humanitarian relief operations;"]

9. *Demands* that all parties to the conflict and others concerned immediately bring to an end all killings of civilian populations in areas under their control and allow Member States cooperating with the Secretary-General to implement fully the mission set forth in paragraph 3 above; [...]

2) ICRC, memorandum of June 1994

[Source: *Mémoire sur le respect du droit international humanitaire*, ICRC, Geneva, 23 June 1994. Original in French, unofficial translation.]

Since the events of 6 April 1994, Rwanda has experienced an unleashing of violence and a humanitarian disaster that are without precedent in recent history and that are characterized by the systematic extermination of a large portion of the population. At the same time, the conflict between government forces and the Rwanda Patriotic Front (RPF) has resumed and has not ceased to escalate, also taking its toll in terms of victims, suffering and destruction.

In accordance with the terms of United Nations Security Council Resolution 929, member States were authorized to send armed troops to Rwanda with the option, in certain circumstances, of using force.

As the promoter and guardian of international humanitarian law, the International Committee of the Red Cross (ICRC) would like to draw attention to the following points. Any armed hostilities between foreign troops and armed forces or groups opposing them and the direct consequences thereof are governed by the principles and rules of international humanitarian law as contained, in particular, in the four Geneva Conventions of 1949 and in customary law relative to the conduct of military operations, reaffirmed in Articles 35 to 42 and 48 to 58 of Protocol I of 1977 additional to the Geneva Conventions.

All parties concerned must take the necessary steps to respect and ensure respect for international humanitarian law, especially:

I. PROTECTION OF PERSONS NOT – OR NO LONGER – TAKING PART IN THE HOSTILITIES

Persons who are not, or no longer, taking part in the hostilities, such as the wounded, the sick, prisoners and civilians, must be protected and spared in all circumstances:

- All the wounded and sick must be collected and cared for, without any distinction, in accordance with the basic provisions of the First and Fourth Geneva Conventions;

- Civilians who refrain from acts of hostility must be spared and treated humanely; in particular, attacks on their life, their physical integrity or their personal dignity, hostage-taking and the passing of sentences without a fair trial are prohibited;
- Combatants and other persons taken captive and those who have laid down their arms are entitled to the same protection; they must be handed over to the immediately superior military officer and, in particular, must not be killed or ill-treated;
- Combatants and civilians who have been captured must also be treated humanely and in accordance with the provisions of the Third and Fourth Geneva Conventions respectively:
 - In particular, they must be detained in places where their security is ensured and which offer satisfactory material conditions with regard to hygiene, food and shelter:
 - Any form of torture or ill-treatment is strictly prohibited;
 - The right to receive ICRC visits must be respected and upheld.

II. CONDUCT OF MILITARY OPERATIONS

The armed forces do not have an unlimited right as to the choice of methods and means of warfare; a clear distinction must be made, in all circumstances, between, on the one hand, civilian objects and civilians who are not taking part in the hostilities and who refrain from acts of violence and, on the other, combatants and military objectives:

- Attacks against civilian persons or objects are prohibited;
- All feasible precautions must be taken to avoid injury to civilians, loss of civilian life and damage to civilian objects; in particular, civilians must be kept out of danger resulting from military operations and their evacuation must be organized or facilitated when security conditions so require and permit;
- Attacks that strike military objectives and civilians without distinction are prohibited, as are those that may be expected to cause incidental loss of life among the civilian population or damage to civilian property which would be excessive in relation to the concrete and direct military advantage anticipated;
- It is prohibited to use weapons or methods of warfare that cause unnecessary suffering to persons placed *hors de combat* or that render their death inevitable; it is prohibited to give orders to leave no survivors;
- Goods indispensable to the survival of the civilian population, such as food, crops, cattle and drinking water installations and supplies, must not be attacked, destroyed or put out of operation.

III. RESPECT FOR THE EMBLEM OF THE RED CROSS AND MEDICAL ACTIVITIES

Medical or religious staff, ambulances, hospitals and other medical units and means of medical transport must be protected and respected; the emblem of the red cross, which is the symbol of that protection, must be respected in all circumstances:

- The freedom of movement needed by all Red Cross staff and medical staff called upon to assist the civilian population and persons who are *hors de combat* must be ensured and the safety of that personnel guaranteed;
- Any misuse of the emblem of the red cross is prohibited and will be punished.

IV. RELIEF OPERATIONS

Relief operations for the civilian population that are solely humanitarian, impartial and non-discriminatory in nature must be facilitated and respected. The staff, vehicles and premises of relief agencies must be protected.

V. DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW

The parties concerned must ensure that all military and paramilitary forces and other militias acting under their responsibility know their obligations under international humanitarian law. It is essential that appropriate instructions to ensure respect for those obligations be issued repeatedly.

VI. ROLE OF THE ICRC

The ICRC, whose principal mandate is to protect and assist the victims of armed conflicts, stresses its desire to help ensure, in agreement with the parties concerned and insofar as its means allow, respect for the humanitarian rules and to carry out the tasks conferred upon it by international humanitarian law.

Geneva, 23 June 1994

D. UN 1997 Report on the issue of refugees

[Source: United Nations, E/CN.4/1997/61, 20 January 1997; available on <http://www.ohchr.org>]

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

**Report on the situation of human rights in Rwanda
submitted by Mr. René Degni-Ségui,**

**Special Rapporteur of the Commission on Human Rights,
under paragraph 20 of resolution S-3/1 of 25 May 1994**

[...]

III. THE PROBLEM OF THE RETURN OF REFUGEES

133. A durable solution to the problem of the return of Rwandan refugees, an ongoing concern of the international community, has eluded UNHCR, the OAU and the States of the Great Lakes region, despite the considerable efforts that they have made. The Rwandan refugee crisis has become increasingly more complicated and has degenerated into an armed conflict that threatens the security and stability of the Great Lakes region and involves the risk of causing an “implosion”.
134. The truth is that the continued presence of Rwandan refugees in neighbouring countries has put all of UNHCR’s strategies to the test and has created what is called the “eastern Zaire crisis”. [...]

B. Failure of the strategies of the Office of the United Nations High Commissioner for Refugees

150. After the failure of two diplomatic attempts to settle the Rwandan refugee crisis at the Cairo (29-30 November 1995) and Tunis (18-19 March 1996) Conferences, organized under the auspices of the Carter Center in Atlanta, UNHCR adopted two sets of strategies. The first, which was to be selective, ended in failure and the second, which was new and was based on a comprehensive approach, also did not survive the crisis in Zaire.

1. The “selective” strategies

151. In order to deal with the obstruction of the Rwandan refugees’ return, which was caused primarily by acts of intimidation in the camps, UNHCR adopted measures at the end of 1995, in cooperation with the host countries concerned, that turned out to be inadequate. Some were aimed directly at the intimidators, while others were designed to promote repatriation.

(a) *Measures aimed at the intimidators*

152. These measures were designed to separate the intimidators from the other refugees in order to enable the latter to decide freely whether or not they wanted to return to Rwanda.
153. Intimidators are refugees in the camps who spread propaganda for the non-return of refugees and/or exert physical or psychological pressure on them to force them to give up the idea of returning to Rwanda. The intimidators come mainly from the ranks of former FAR and militia members and persons linked to the former regime. According to an Amnesty International report (AFR/ EFAI/2 January 1996), the intimidators operate mainly by means of tracts. One tract, distributed in the Mugunga camp in September 1995 and translated from Kinyarwanda, stated:

“Of all those that UNHCR repatriated, not one is still alive ... The Tutsi have taken over the Hutus’ belongings and those who dare speak out

are massacred mercilessly ... UNHCR wants to repatriate the refugees as it usually does, illegally, knowing full well that they will be killed. Dear brother, we know you have problems, but suicide is no solution. Candidates for death can go home. They have been warned."

154. At the Regional Conference on Assistance to Refugees, Returnees and Displaced Persons in the Great Lakes Region held in Nairobi on 7 January 1995, it was decided that persons suspected of genocide and intimidators should be separated from genuine refugees. That strategy was integrated into the Plan of Action adopted by the Bujumbura Regional Conference on Refugees and Displaced Persons in the Great Lakes Region, held in February 1995. On the spot, however, it turned out to be difficult, if not impossible, to identify the persons covered by these categories. Moreover, even if it had been possible to identify them, their separation or removal from the camps would have been dangerous. Thus, when the Zairian authorities arrested 12 refugees regarded as intimidators in the Mugunga camp on the basis of a list drawn up and provided by UNHCR, the refugees in the camp became aggressive towards UNHCR officials, going as far as to threaten them during the attempted census they had wanted to conduct.
155. The planned measures against the intimidators generally did not yield the expected results. Only a few dozen intimidators were arrested out of the tens of thousands operating in the camps. From mid-December 1995, when the implementation of these measures began in Zaire, until May 1996, UNHCR reported the arrests of 34 intimidators. The number was hardly more than 41 in September 1996, according to the latest report of the Special Rapporteur for Zaire (E/CN.4/1997/6/Add.1 [available on <http://www.ohchr.org>]). The failure of the strategy of removing the intimidators from the camps forced UNHCR to consider other measures to encourage the repatriation of Rwandan refugees.

(b) Measure to encourage repatriation

156. These measures, which relate mainly to information campaigns for repatriation, are either incentives or deterrents.

(i) Incentives

157. As part of its policy to encourage the voluntary repatriation of Rwandan refugees, UNHCR set up video information centres in March 1996 containing information on possibilities of assistance for returning to Rwanda. A document prepared by the UNHCR Public Information Section goes into considerable detail about the possibilities available to the refugees: "Five centres – named Ogata, Mandela, Nyerere, Martin Luther King and Gandhi – were inaugurated at Kibumba camp in the Goma region. Each of the centres – tarpaulin over wooden frames built for 300-400 people – is equipped with televideos, radios and public address systems. The project involves plans for 16 such centres in the Goma camps and others in the Bukavu and Uvira regions. On the whole, the films shown about life in several prefectures in Rwanda have been well received by the refugees, who come from these prefectures".

158. It must, however, be recognized that the strategy of visits organized by UNHCR in and to the camps has not yielded the expected results. Mistakes have sometimes been made that have not made UNHCR's task any easier. For example, one of the two refugees taken to Rwanda by UNHCR to check out the situation was arrested in May 1996, as soon as he arrived in his home commune, on charges of having taken part in the genocide. Such an incident could only have had a negative impact on the programme of incentives to return. Following this new failure, UNHCR undertook to implement deterrent measures.

(ii) *Deterrent measures*

159. These measures are intended to set up obstacles to the ongoing presence of refugees in the camps. As is known, most of the refugees have set up survival structures which are both commercial (restaurants, shops, transport, etc.) and social (schools, dispensaries, etc.). Some of these activities offer obvious advantages, if only because they reduce food and financial dependence and eliminate idleness, which leads to crime. However, as these activities prosper, they encourage the refugees to stay in the camps instead of returning to Rwanda. In order to remedy this situation, UNHCR undertook to dismantle these structures and decided to close the schools and shops operating in the camps. It also decided to reduce the daily food ration given to each refugee, lowering it from 2,000 to 1,500 calories.

160. These measures were not well received by the refugees and by a number of humanitarian organizations. The former denounced them, particularly through the *Rassemblement pour le retour des réfugiés et la démocratie au Rwanda* (Union for the Return of Refugees and Democracy to Rwanda) (RDR), calling them "disguised forced repatriation". The latter considered that these measures were serious violations of some fundamental human rights, particularly the right of children, including refugee children, to education. [...]

2. The comprehensive strategy

161. The new strategy, intended to be both comprehensive and integrated, was adopted at a meeting of the UNHCR Executive Committee on 11 October 1996. It proposes four sets of measures: concerted measures aimed at dealing with the present situation; measures applicable to each individual country; measures to be taken jointly with the International Tribunal for Rwanda; and measures to be applied by the international community.

(a) *Measures to be applied in an integrated manner*

162. These measures comprise four main elements:

- (a) UNHCR encourages the selective and progressive closure of the camps for the Rwandan refugees and active assistance in their repatriation. These measures must be implemented in conjunction with the exclusion clause applicable to intimidators and other leaders in the camps;

- (b) UNHCR is to assist the Governments of the host States in determining on a case-by-case basis the status of persons not wishing to return to Rwanda. In doing so, they will automatically exclude asylum for persons sought by the International Tribunal against whom there is sufficient evidence of participation in the genocide. Such persons will have to be transferred to other locations for interrogation;
- (c) Those persons losing their refugee status will cease to enjoy the international protection of UNHCR;
- (d) In accordance with the Bujumbura Integrated Plan of Action, the above measures should be applied through close cooperation between the country of origin, the host countries and the international community.

(b) Measures to be applied in each of the countries concerned

163. These measures concern the country of origin, Rwanda, and the two host countries, the United Republic of Tanzania and Zaire.

(i) Rwanda

164. The Rwandan Government is to: (a) continue to promote the repatriation and resettlement of the refugees, in particular through an appropriate information campaign and the implementation of measures to reassure the refugees, in conformity with the Arusha Accord; (b) ensure the prosecution of persons suspected of genocide, under the Genocide Act, in order to break with the tradition of impunity; and (c) continue to cooperate with the Human Rights Operation in Rwanda, whose presence must be reinforced.

165. For the large-scale return of the refugees, food stocks will have to be constituted with UNHCR assistance. Furthermore, UNHCR will have to: (a) draw the attention of the authorities to real-estate and land ownership disputes; and (b) in agreement with the donor community, give emphasis to aid for the returnees, including specific projects for vulnerable groups. This will apply particularly to women, for whom a comprehensive programme entitled "Initiative for Rwandan women" is due to start in 1997. This programme aims at promoting the economic power of women, strengthening social structures in the post-genocide society and facilitating the process of national reconciliation within the country.

(ii) United Republic of Tanzania

166. The Tanzanian Government is requested to: (a) initiate, with UNHCR assistance, the process of case-by-case consideration of requests from candidates for asylum, excluding those persons against whom there is sufficient evidence of participation in genocide. A recently created separation camp will be available for this purpose; (b) tighten security around the camps because of the risks involved in such an exercise; and (c) afford protection to innocent persons with good reasons for not returning to Rwanda, not with a view to their integration, but for their eventual repatriation.

167. UNHCR, for its part, is committed to acting in concert with the international community to assist the United Republic of Tanzania in the rehabilitation of the environment and infrastructure destroyed by the presence of refugees in the part of its territory concerned.

(iii) *Zaire*

168. The Government of Zaire and UNHCR are requested to:

- (a) Proceed with the selective and gradual closure of the camps. Those persons wishing to return to Rwanda will be given logistical support for their return and reintegration; the others will have to be separated from them by a screening process, after which those eligible for international protection will continue to be protected by the Government, without this in any way entailing their local integration;
- (b) Considering the dangers involved in implementing this strategy, provision has been made for a number of accompanying measures: the Government of Zaire is to increase and strengthen the Zairian contingent, initially set at a maximum of 2,500 soldiers, for security in the camps. International aid will be provided to expand the contingent and ensure its training and supervision. There will have to be a proportional number of international security advisers, with specific commitments from the Governments concerned;
- (c) Interested Governments – with UNHCR assistance – should agree with the Zairian authorities on specific measures to deal with cases of the manipulation of the refugees by intimidators (for example, violent sabotage of census operations) and to ensure that aid is not diverted to former FAR members still militarily active in North Kivu and South Kivu. With the assistance of the international community, the Government of Zaire must be called upon to dissolve the so-called “banana plantation” headquarters of the former FAR members and dismantle its military facilities. Zaire will cooperate fully with the International Tribunal;
- (d) UNHCR must immediately inform the refugees in the camps located in Zaire that violent sabotage of its recent attempt to count the refugee population is an intolerable affront to its mandate, confirming the bad faith of the camp leaders. A broad information campaign will have to be directed towards making the refugees aware of the fact that the blockage created by those leaders had led to a situation where food aid would be strictly controlled and reduced, especially to prevent it from being diverted. This measure will be linked stepwise to the gradual closure of the camps. UNHCR, with strong support from Governments, must seek the full cooperation of the Zairian Government in this regard;
- (e) In order to respect the fundamental right of all children to education and to solve the problem of repatriation, the Government of Zaire will have to reopen primary schools for the refugee children and provide the means to protect them against manipulation and delinquency.

169. The Tripartite Commission (Rwanda/Zaire/UNHCR) will have to ensure greater coordination in the operation to close the camps. Lastly, in cooperation with donors and partners, UNHCR must endeavour to increase the assistance now being provided for the rehabilitation of the environment and infrastructure destroyed by the presence of the refugees in Zaire.

(c) *Measures to be applied in cooperation with the International Tribunal*

170. Together with the procedures to identify persons subject to the exclusion clause, every effort will have to be made to secure full support for reinforcing the activities of the International Tribunal to investigate and search for suspects.
171. In agreement with the Tribunal, UNHCR will determine the modalities for strengthening their cooperation. Governments have a central role to play in implementing the procedures aimed at separating and excluding persons suspected of genocide from international protection and bringing them before the Tribunal.

(d) *Measures to be taken by the international community*

172. The close link between the refugee crisis and peace in the Great Lakes region means that its problems have to be solved through the adoption of an integrated strategy encompassing the security, judicial, political and humanitarian dimensions. UNHCR intends to continue its close cooperation with the United Nations and the Organization of African Unity in this area. In addition to the financial aid expected from them, Governments must be requested to increase their assistance to Rwanda with a view to creating conditions of security there (for example, assistance in the administration of justice) and to provide incentives for the refugees to return. Governments will have to maintain a balance between the aid granted to refugees and assistance for the survivors of the genocide. They will have to bear in mind the major objective of national reconciliation.
173. Governments will also have to be requested to extend their full support to Rwanda, the United Republic of Tanzania and Zaire in the implementation of the measures described above and to take all necessary steps to deal with present tensions. They are invited to take care of the damage caused by the refugees to the environment and infrastructures in those three countries.
174. UNHCR had not yet begun implementing that ambitious programme when the crisis erupted in eastern Zaire. [...]

E. International repression: the ICTR

[See **Case No. 230**, UN, Statute of the ICTR; **Case No. 234**, ICTR, *The Prosecutor v. Jean-Paul Akayesu*; **Case No. 235**, ICTR, *The Media Case*. See also generally the ICTR website, www.ictr.org]

[**Source:** International Crisis Group, *Rwanda Tribunal: The Countdown*, Press Release, Nairobi-Brussels, 1 August 2002; available on <http://www.crisisweb.org>]

Rwanda Tribunal: The Countdown Delays and Rwandan obstruction threaten ICTR independence and credibility

Nairobi/Brussels, 1 August 2002: The International Criminal Tribunal for Rwanda (ICTR) is about half way through its mandate, but at the current rate it has no chance of completing its work by the finishing date of 2008.

A new ICG report, *The International Criminal Tribunal for Rwanda: The Countdown*, [available on <http://www.crisisweb.org>] says that there are two main factors affecting the ability of the court to complete its work: the overly ambitious prosecution schedule and the lack of effective efforts to reform the Tribunal's processes and speed up hearings.

Five cases of utmost importance are still waiting to be heard – one dealing with the media, two involving the military including an alleged mastermind of the genocide, Theoneste Bagosora, and two involving former ministers and political party leaders. These trials are crucial to revealing important truths about the preparation, launch and execution of the Rwandan genocide in 1994. The media case is the only one that is actually underway. [See **Case No. 235**, ICTR, *The Media Case*]

ICG Africa Program Co-Director Fabienne Hara said: "It is vital that the Tribunal rationalises the number of cases before it, concentrates on its core mandate, and implements reforms to speed up hearings. Without this, confusion and obstruction threaten the Tribunal's mission and will reduce its impact on the political reconstruction of Rwanda and the region to zero".

A crisis has also developed between the Tribunal and the government of Rwanda over investigations into crimes allegedly committed by members of the Rwandan Patriotic Army (RPA) in 1994. Authorities in Kigali have blocked all assistance to the ICTR in breach of their international obligations and have demanded the investigations be dropped. This tension is only likely to get worse and it is vital that the UN Security Council gives strong and unambiguous support to ensure the ICTR's credibility and independence. The Tribunal must not be seen as an instrument of victors' justice.

ICG Central Africa Program Director Francois Grignon said: "In this context it is unfortunate that the Security Council delegation did not visit the Tribunal in its annual trips to Central Africa in 2001 and 2002. This sends a dangerous signal of disinterest to Rwanda about the mission of the UN Tribunal and its role in ending the crises in Congo and in Burundi".

In the Congo war, the Rwandan government has long demanded the arrest of génocidaires on Congolese territory, so it is paradoxical that just as the DRC government agreed to open an office to assist ICTR investigations in Kinshasa, the Rwandan government is paralysing the work of the Tribunal. Both Kinshasa and Kigali

have toyed with international justice. The only way to end this is to ensure that the Tribunal is reformed and credible – and to demand that both states respect their international obligations towards it.

F. National repression in Rwanda

1) Gacaca: gambling with justice

[Source: Amnesty International, *Rwanda: Gacaca – gambling with justice*, Press Release 103/02, AI Index: AFR 47/003/2002, 19 June 2002; available on <http://www.amnesty.org>]

Rwanda: Gacaca – gambling with justice
Press Release 103/02
AI Index: AFR 47/003/2002- 19 June 2002

"The gacaca system of community tribunals may represent an opportunity for genocide survivors, defendants and witnesses to present their cases in an open and participatory environment. This could be an important step towards national reconciliation and resolving Rwanda's prison crisis," Amnesty International said today, in reaction to Rwanda's inauguration of a new community-based tribunal system designed to address the backlog of cases from the 1994 genocide.

"However, the extrajudicial nature of gacaca and the inadequate preparation for its start, coupled with the present government's intolerance of dissent and unwillingness to address its own poor human rights record, risk subverting the new system," the organization added. "It is therefore imperative that both the Rwandese government and the international community take steps to ensure that gacaca complies with minimum international standards of fair trial."

The huge number of detainees charged with genocide-related offences has proved an impossible task for the country's formal judicial system. The new system, loosely based on a traditional mode of settling disagreements within local communities, will try tens of thousands of detainees accused of offences in categories 2, 3 and 4 of Rwanda's genocide legislation.

While Amnesty International sees the pressing need to bring to justice people accused of participation in the genocide, the organization fears that if key shortcomings in *gacaca* are not promptly addressed, the new system will fail to provide the justice, truth or reconciliation promised by the Rwandese government. "*Gacaca* may become a vehicle for summary and arbitrary justice that fails defendants and genocide survivors alike," it added.

Rwandese government leaders readily admit that *gacaca* is flawed but argue that there is no alternative. The international donor community, which is funding *gacaca*, has largely concurred with this assessment.

Amnesty International is principally concerned with the extrajudicial nature of the *gacaca* tribunals. The *gacaca* legislation does not incorporate international standards of fair trial. Defendants appearing before the tribunals are not afforded applicable

judicial guarantees so as to ensure that the proceedings are fair, even though some could face maximum sentences of life imprisonment.

For the most part, those who will serve as *gacaca* magistrates have no legal or human rights background. The abbreviated training they have received is grossly inadequate to the task at hand, given the complex nature and context of the crimes committed during the genocide.

Amnesty International also questions whether there will be an open and free flow of information during the hearings, whether all parties will be heard impartially, and whether the presumption of innocence until proven guilty will be respected. Pre-*gacaca* trial sessions observed by Amnesty International delegates in 2001 were marked by intimidation and haranguing by officials of defendants, defence witnesses and local populations.

The recent human rights record of the Rwandese government is characterized by the denial of freedom of expression and association, arbitrary arrests, illegal detentions and other violations of human rights. "The Rwandese government's unwillingness to curb ongoing human rights violations, or investigate past abuses by its own state agents undermines the credibility of its pronouncements on the need for accountability, truth-telling and justice in relation to *gacaca*."

Implementing *gacaca* also entails huge logistical problems. Tens of thousands of detainees will have to be transferred from central prisons to their home communities for the *gacaca* hearings. The Rwandese government has not clarified how and in what conditions the detainees will be transported, accommodated, fed and treated at the local level. The government's failure to address these issues could deepen the cruel and inhumane conditions faced by Rwanda's prison population.

Recommendations

There is room for the Rwandese government and the international community to improve *gacaca* and establish accountability for all past and ongoing human rights abuses in Rwanda. For this to be achieved, the Rwandese government must:

- ensure that *gacaca* complies with internationally recognized fair trial standards, including the presumption of innocence and the right to adequate time and facilities to prepare a defence;
- ensure that *gacaca* defendants, especially those facing long terms of imprisonment, have the right to appeal to the formal court system;
- ensure that defendants are present when the *gacaca* magistrates categorize their offences;
- put in place an independent and effective program of monitoring the *gacaca* hearings, with the findings made public;
- provide adequate protection to magistrates, defendants and witnesses and promptly investigate any allegations of intimidation;

- provide assurances that conditions of detention will respect international minimum standards, including the right to human conditions of detention and freedom from torture; and
- open investigations into human rights violations committed by their own forces before and since coming to power.

Amnesty International is also calling on the international community to support the Rwandese government in establishing a monitoring program for *gacaca*, ensuring that it is independent, effective and transparent; to ensure that the Rwandese authorities take prompt action to address violations of fair trial standards arising during *gacaca*; and to provide all necessary support to enable the Rwandese government to meet its obligations under international standards regarding conditions of detention.

Background

As many as one million Rwandese were brutally killed by their fellow Rwandese during the 1994 genocide and its aftermath. These killings were accompanied by numerous acts of torture, including rape.

The *gacaca* system will try detainees accused of offences in categories 2 through 4 of Rwanda's genocide legislation. Category 2 includes alleged perpetrators or accomplices to intentional homicides or serious assaults that led to death. Category 2 defendants who do not confess face maximum terms of imprisonment of between 25 years and life if convicted. Category 3 contains persons accused of other serious assaults against individuals. Category 4 covers persons who committed property crimes. Category 1 relates to the most serious genocide offences and includes individuals who allegedly organized, instigated, led or took a particularly zealous role in the violence. Category 1 defendants will continue to be tried by the formal court system.

The burdens faced by the post-genocide judicial system in Rwanda have proved insurmountable. Rwanda's special genocide chambers have tried less than six percent of those detained for suspected genocide offences. There are now approximately 110,000 Rwandese in the country's detention facilities, the vast majority of them still awaiting trial. Many were arbitrarily arrested and have been unlawfully held for years with minimal or no investigation of the accusations lodged against them. The overcrowding and unsanitary conditions within detention facilities amount to cruel, inhuman and degrading treatment with deaths resulting from preventable diseases, malnutrition and the debilitating effects of overcrowding.

Legislation establishing the *gacaca* tribunals was enacted in early 2001. In late 2001, 260,000 adults of "integrity, honesty and good conduct" were selected by local communities to serve as magistrates on the more than 10,000 *gacaca* tribunals. These magistrates received limited training in early 2002.

2) The issues of detention

[Source: ICRC, ICRC News 01/13, 5 April 2001, available on <http://www.icrc.org/eng/>]

Rwanda: Emergency aid in Rilima Prison

Over the last few days, the ICRC has stepped up its aid to Rilima prison, situated in the region of Bugesera, south-east Rwanda. The majority of the 7,400 inmates are being held awaiting trial, but deteriorating hygiene has killed dozens over the last few months. Poor detention conditions and lack of food are accentuating the effects of malaria (endemic in the region), typhus (diagnosis still to be confirmed) and diarrhoea.

A week ago, the ICRC initiated measures to increase the amount of water available at the prison, repairing a pump and installing additional storage tanks. The organization is currently arranging treatment for dozens of the most severely ill detainees, having already supplied the necessary medicines. The ICRC is also ready to assist the Rwandan authorities in fully disinfecting the prison, for which the materials required will be available in a few days. The health and interior ministries have been briefed on the seriousness of the situation in this prison.

The ICRC lacks the means to take over from the Rwandan authorities, and nor does it wish to do so; it is the authorities who are responsible for detainee health and prison hygiene in their country. The ICRC is encouraging the bodies responsible to devote the attention and resources to this problem that it requires, while fully aware that the Rwandan population at large does not necessarily live under hygienic conditions or have access to health care.

The ICRC delegation is maintaining contact with the Rwandan authorities, both locally and at the highest level, in an effort to improve the functioning of the bodies responsible for Rilima prison and all other places of detention in Rwanda. The aim is that preventive measures taken by the government should prevent any recurrence of a similar emergency in the coming months.

The ICRC makes regular visits to places of detention in Rwanda, meeting over half the food requirements of 92,000 detainees spread over 19 central prisons.

Rwanda is currently trying to deal with the problem of holding 115,000 detainees, most of them accused of involvement in the genocide of April to July 1994. Some 20,000 are being held in village lockups, of which three-quarters are in the provinces of Gitarama and Butare.

DISCUSSION

1. What distinguishes genocide from other crimes? What is the difference between an act of genocide and a serious violation of IHL? Between genocide and a crime against humanity? Do massacres carried out for political reasons come under the term genocide? [See also **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part B., paras 618-654 and Part C., paras 238-249 and 271-304]; **Case No. 234**, ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part A., paras 492-523]]

2. How does IHL address acts of genocide? Are the provisions dealing with genocide applicable no matter what the context? In law? In practice? Is IHL applicable in situations that are not armed conflicts? In what ways does it fall short when confronted with situations of genocide? (*See* for example GC I, Arts 12(2) and 50; GC II, Arts 12(2) and 51; GC III, Arts 13 and 130; GC IV, Arts 32 and 147; P I, Art. 85(2))
3. Who can be held internationally responsible for the genocide? The Rwandan State? Even if today, the Rwandan authorities are for the most part Tutsis? The whole international community? The United Nations? Specific third States (France, Belgium, the United States)? Can the leaders of these States and of the United Nations be prosecuted for their inaction before the genocide, as they were aware of its preparation? For their inaction during the genocide? [*See Case No. 23*, The International Criminal Court [Part A., Arts 6 and 30]]
4.
 - a. In what case is the UN obliged to intervene in a non-international armed conflict?
 - b. Does Art. 1 common to the Geneva Conventions and Protocol I oblige States Parties to intervene militarily in a conflict in order to “ensure respect for IHL”? Can they authorize such interventions? Do they oblige States Parties to obtain the mandate to intervene from the Security Council?
5. How do you balance reacting to serious violations of human rights against respect for State sovereignty?
6. How is IHL applicable to UN forces? To foreign forces intervening in accordance with a Security Council resolution? [*See Document No. 57*, UN, Guidelines for UN Forces, and **Case No. 198**, Belgium, Belgian Soldiers in Somalia]
7. Could the intervention of these forces be seen as a means of implementing IHL?
8. Is it possible to make a clear distinction between the role these forces can play in resolving a conflict, on the one hand, and in protecting humanitarian assistance, on the other?
9.
 - a. How do the Conventions and their Additional Protocols protect refugees present in an area where hostilities erupt? Are the provisions the same in the context of international armed conflict and non-international armed conflict? What are the consequences of and reasons for the lack of reference to refugees in IHL relating to non-international armed conflicts? (GC I-IV, Art. 3; GC IV, Art. 70(2); P I, Art. 73; *See also* the 1951 Convention Relating to the Status of Refugees, available on <http://www.unhcr.org>, and **Document No. 25**, Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa)
 - b. Putting aside the qualification of the conflict, what is the status of a refugee in an area where hostilities break out between the State from which he is fleeing and the State in which he has taken refuge? (P I, Art. 73)
10.
 - a. Do the measures of forced repatriation taken by UNHCR with respect to the Rwandan refugees contravene Art. 45 of Convention IV?
 - b. Moreover, should the repatriation of refugees be accompanied simultaneously by guarantees of adequate security and genuine reception facilities in their country of origin? Does the international community have an important role to play at that level?
11.
 - a. Can an armed combatant enjoy refugee status? And the protection of IHL? Can an unarmed member of the former Rwandan Armed Forces who took part in the genocide of the Tutsis enjoy refugee status? And the protection of IHL? (GC IV, Arts 3, 4 and 5; 1951 Convention Relating to the Status of Refugees, Art. 1.F(a) and Art. 32(1), available on <http://www.unhcr.org>)
 - b. Is it incumbent on UNHCR to separate armed individuals from unarmed refugees? On the international community? On the country of origin? On the country of refuge? On the ICRC? On what grounds?

- c. On what grounds can armed refugees be prosecuted for offences committed inside the camps themselves?
- d. Does the principle of non-refoulement also apply to armed refugees? And to those presumed to have committed the genocide in Rwanda in 1994? (1951 Convention Relating to the Status of Refugees, Art. 33(1), available on <http://www.unhcr.org>)
12. a. With respect to refugees suspected of having committed war crimes during the genocide in Rwanda, should a distinction be made between those who have supposedly laid down their arms and those who have not? Between those who are said to have committed war crimes, crimes against humanity or ordinary law crimes, and those who are simply former combatants?
- b. In accordance with your reply, when is a refugee considered to have committed crimes? Does it suffice that he belonged to the armed forces which committed the crime? Or that he still belongs to those armed forces?
13. Should a humanitarian organization also feed those guilty of genocide? Even if they have not laid down their arms? Will it lose its status as a humanitarian organization if it feeds those guilty of genocide? What if that is the only way to feed innocent refugees?
14. What rules of international law are contravened by a State which supplies arms to armed refugees? In particular if the recipients belong to an armed group which has committed the crime of genocide?
15. Does Rwanda have an obligation to prosecute the perpetrators of the genocide which occurred in its territory? According to the 1948 Convention on Genocide? According to the Geneva Conventions and their Protocols? (Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, available on <http://www.ohchr.org>; GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1))
16. Why does P II contain no provisions criminalizing actions in the context of non-international armed conflicts? Does it, on the contrary, impel the authorities in power to grant the perpetrators impunity when it calls on them “to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict”? (P II, Art. 6(5))
17. Does universal jurisdiction extend to those responsible for genocide? Can it be exercised within the context of both international and non-international armed conflicts? In regard to the perpetrators of genocide, is the 1948 Convention on Genocide explicit on this point?
18. a. Are the prison conditions described above compatible with IHL? Can those who have committed serious breaches of IHL invoke the guarantees relating to treatment contained in IHL? (GC IV, Art. 146(4); P I, Art. 75; P II, Arts 2(2), 4 and 5)
- b. Does the *gacaca* system appear to respect minimum guarantees relating to the institution of independent and impartial criminal proceedings? How can the lack of judicial guarantees in the Rwandan legal system be redressed while simultaneously accelerating the completion of criminal proceedings?
- c. How could the international community mobilize to put an end to this situation?
19. Could the ICTR take charge of the criminal proceedings of some of the 110,000 accused in Rwandan prisons? How? Why does international justice only consider the cases of individuals who planned and prepared or perpetrated genocide? Is the ICTR only charged with judging perpetrators of genocide? Does it also have jurisdiction to judge crimes committed during the armed conflict between the former government of Rwanda and the FPR?

II. Civil war in Burundi



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. The “villagisation” phenomenon in Burundi

[Source: United Nations, E/CN.4/1997/12, 10 February 1997; available on <http://www.ohchr.org>]

**Second report on the human rights situation in Burundi
submitted by the Special Rapporteur, Mr. Paulo Sérgio Pinheiro,
in accordance with Commission resolution 1996/1 [...]**

II. OBSERVATIONS ON THE HUMAN RIGHTS SITUATION [...]

C. Obstacles to the right to freedom of movement and freedom to choose one’s residence [...]

56. [...] [A]larming is the policy of forcibly herding people into camps; this is being done by the *de facto* Government in several provinces with the self-confessed aim of keeping tighter control over the population groups and cutting the rebels off from their supply and recruitment bases. During December 1996, a large number of *collines* in the provinces of Karuzi, Bubanza, Cibitoke and Ruyigi have reportedly been emptied of their inhabitants. It is reported that persons refusing to submit to this policy find themselves rapidly accused of complicity with the rebels and treated as enemies. Yet, agreeing to go to the camps set up for

them would mean losing the confidence of the rebels and their supporters. The situation in Karuzi province during the second half of December was particularly difficult, since the population groups that the authorities are said to have tried to force into the camps came precisely from communes in which the rebels apparently had numerous supporters. The Burundi authorities are reportedly considering further initiatives of this type in other provinces, so as to protect civilians from the machinations of the rebels and identify the latter.

57. Between late November and early December 1996, the number of displaced persons in Burundi increased suddenly and sharply, mainly because of the authorities' policy of moving certain population groups from the *collines* into camps and because of the intensification of the fighting in which civilians reportedly found themselves caught in the crossfire between the rebels and the army. Some sources suggest that up to 200,000 Burundians of Hutu origin, or even more, may have already been forced into these makeshift camps. In addition, people flee from the fighting and hide in the environs of their homes. In Rural Bujumbura, it is reported that dozens of people in a state of advanced malnutrition have little by little emerged from the forest where they had been hiding for months in very precarious conditions. Several NGOs have suggested that large numbers of Burundians may have made for Rwanda to escape the violence sweeping Cibitoke province. [...]

B. The armed conflict

[Source: Amnesty International, *Burundi Insurgency and Counter-Insurgency Perpetuate Human Rights Abuses*, AI Index: AFR 16/034/1998, 19 November 1998; available on <http://www.amnesty.org>]

I. INTRODUCTION

Between December 1997 and September 1998 hundreds of people – many of them unarmed civilians – were killed in Burundi. Thousands more have been forced to leave their homes and are internally displaced or have fled to neighbouring countries, joining the hundreds of thousands of others who are already in exile or are displaced inside Burundi. Soldiers of the Burundian army have deliberately and arbitrarily killed hundreds of civilians – virtually all of them Hutu. Scores of other killings of unarmed civilians have been committed by members of the various armed opposition groups and other militia active in Burundi. Few of those responsible have been arrested and brought to justice. [...]

II. THE CONTEXT OF ARMED CONFLICT

Since late 1994, the *Forces pour la défense de la démocratie* (FDD), Forces for the Defence of Democracy, the armed wing of the Hutu-dominated *Conseil National pour la défense de la démocratie* (CNDD), National Council for the Defence of Democracy, have been leading an insurgency against the Tutsi-dominated government forces. The armed wings of other Hutu opposition parties, the *Parti pour la libération du peuple hutu* (PALIPEHUTU), Party for the Liberation of the Hutu People, and the *Front pour la libération nationale* (FROLINA), Front for National Liberation, are also engaged in

insurgency against the government. The armed conflict and other political violence have claimed at least 150,000 lives since late 1993, most of them civilian.

The Hutu civilian population has been caught in the middle of the conflict: viewed as supportive of the insurgency by the armed forces, and frequently the victim of reprisals by the armed forces, as well as increasingly the victim of attacks by armed opposition groups. Since the conflict started, civilians have also been the victims of fighting between different armed opposition groups. For example in Bubanza province in July 1997 up to 500 mainly Hutu civilians were reportedly killed by PALIPEHUTU because of their perceived support for the CNDD. Many civilians have had their property looted by both the army and armed opposition groups. The Tutsi civilian population has also been attacked by armed opposition groups, and those in camps for the internally displaced have been particularly vulnerable to abuses. [...]

In addition to the increased conscription, the government has initiated a self-defence program for all civilians. The government claims that the program is to encourage civic responsibility, including training the civilian population to support civil and military authorities in fighting the insurgency through surveillance. While recognizing the right of the government to take steps to protect civilians, Amnesty International is concerned that the self-defence program in itself may lead to further human rights abuses. Although government officials have on several occasions denied that the program involves providing the population with arms, at least in certain areas, including Bujumbura and Bururi Province, the Tutsi civilian population has been trained and armed by the government. In April 1998, the Governor of Rural Bujumbura province admitted that some of the local population had been given guns and grenades. [...]

In addition to the internal armed conflict, the Burundian army and armed opposition groups are also reported to be involved in the armed conflict in the neighbouring Democratic Republic of Congo (DRC) which broke out in August 1998. Although the government of Burundi has repeatedly denied involvement in the conflict, numerous sources in Burundi and in the DRC have reported that Burundian troops participated in the capture of Uvira, Kalemie and other towns in eastern DRC, assisting the Congolese armed opposition group, the *Rassemblement congolais pour la démocratie* (RCD), Congolese Rally for Democracy. The Burundian government is also reported to have lent other support to Rwandese and Ugandan troops, who also support the RCD, including by allowing troops and equipment to transit through Burundi. Amnesty International has received detailed information on hundreds of killings of unarmed civilians, mainly women and children, since the start of the conflict in DRC including by the RCD, the Rwandese security forces and allied groups. [...] The government of Burundi has alleged that Burundian armed opposition groups are involved in the conflict in the DRC, in return for the promise of support by President Laurent Désiré Kabila. [...]

III. HUMAN RIGHTS VIOLATIONS COMMITTED BY THE SECURITY FORCES

Extrajudicial executions and deliberate killings

Large scale killings of unarmed civilians, primarily by government forces, have continued throughout 1998 in violation of international humanitarian law and obligations of the

Burundi government under international treaties it has ratified. The killing of persons taking no active part in the conflict in Burundi is in violation of common Article 3 of the 1949 Geneva Conventions which clearly prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” of all non-combatants. By ratifying Protocol II Additional to the Geneva Conventions, the Burundi government has undertaken obligations to respect and protect certain fundamental guarantees during non-international armed conflicts. These guarantees include the right of all persons not taking a direct part or who have ceased to take part in the hostilities to be treated humanely. Protocol II prohibits violence to life, torture and other human rights violations against such persons. In addition, the killings of unarmed civilians is in violation of the guarantee to the right to life enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (African Charter), treaties which Burundi voluntarily ratified.

Amnesty International has received numerous reports of killings from the southern provinces of Makamba and Bururi, and from the province of Rural Bujumbura. The majority of killings have taken place in areas of armed conflict, making access to and verification of information particularly difficult. However, several clear patterns emerge.

Most killings by government soldiers of Hutu civilians, appear to take place in reprisal for insurgent activity or killings of soldiers or Tutsi civilians by Hutu-dominated armed opposition groups.

Unarmed civilians have been targeted and killed on the pretext that they were believed to be armed combatants. Scores of unarmed civilians have also been killed because members of the security forces have failed to isolate combatants from civilians. In the majority of cases reported to Amnesty International, it appears that little, if any, attempt is made to make the distinction. They include young children, who were killed individually in circumstances where it was clear that they posed no threat to the lives of soldiers or other civilians.

Scores of other civilians have been killed by government soldiers accusing them of failing to provide information on armed opposition groups, or having in some way protected or colluded with them. In some instances, it appears that soldiers were alerted by the local population to the presence of armed opposition groups but were unable or unwilling to engage in direct combat and resorted instead to reprisal attacks on civilians after the combatants had left.

Other civilians have been extrajudicially executed or have “disappeared” and are presumed to have been killed shortly after their arrest by members of the armed forces.

In the majority of cases, members of the security forces who have committed such killings remain unpunished. (See the document *Burundi: Justice on Trial* (index AFR 16/013/1998) [available on <http://www.amnesty.org>])

Scores of civilians have also been killed or maimed because of the use of indiscriminate weapons such as anti-personnel mines. Government soldiers and combatants of armed opposition groups have also been killed and injured. All parties to the conflict are reported to have used anti-personnel and/or anti-tank mines. [...] The border

between Tanzania and Burundi is now heavily mined apparently by the government to prevent incursions by the armed opposition groups it claims are using Tanzania as a base. The presence of mines in the border area also has the effect of preventing some people from fleeing the country and seeking asylum elsewhere. [...]

DISCUSSION

1. Assuming that the situation in Burundi can be classified as a non-international armed conflict, does the Government have sufficient grounds to justify the forced displacement of the Hutu civilian population to assembly camps?
2. Are the authorities wrong to justify actions on the grounds of imperative military reasons and protection of the civilian population? Are they in breach of the prohibition of the use of forced displacement as a method of warfare? (GC I-IV, Art. 3; P II, Art. 17)
3. If the authorities are right to justify their actions on those grounds, are they in violation of Arts 4, 5-17 and 18 of Protocol II?
4. Do the policy of assembling the Hutu civilian population and the consequences for both the rebel groups and the civilian population contravene the prohibition to use starvation as a method of combat and the requirement to preserve objects indispensable to the survival of the civilian population? (P II, Art. 14)
5. Is IHL applicable to civilian self-defence militias? Are the members of such militias still “civilians” even though they carry weapons? (GC I-IV, Art. 3; P II, Art. 13(3))
6. Are reprisals prohibited by the IHL of non-international armed conflicts? By customary IHL? Is the concept of reprisals conceivable in a non-international armed conflict? Are attacks on villages where armed rebels are said to be hiding lawful under the IHL of non-international armed conflicts? Under what conditions? Do the principles of proportionality and distinction apply to non-international armed conflicts?

III. Armed conflicts in the Democratic Republic of the Congo

[N.B.: See also ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (*Democratic Republic of the Congo v. Rwanda*) available on <http://www.icj-cij.org>, and **Case No. 236**, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo*]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

A. The qualification of the conflicts on the territory of the Democratic Republic of the Congo: multiple actors

1) Africa's First World War

[Source: BRAECKMAN Colette, "La première guerre mondiale africaine," in *Le Soir*, Brussels, 20 January 2001; Original in French, unofficial translation.]

Africa's First World War

The Democratic Republic of Congo (DRC) is the scene of "Africa's First World War", the first conflict involving the armies of six different countries on the "dark continent". As President Kabila is now dead, what is driving the different forces and what are they each aiming to achieve?

1. *Rwanda*. To justify the presence of its army in Congo, Kigali has consistently referred to its security needs, the necessity of tracking down the Hutu perpetrators of genocide and other “negative forces”. In fact, it is being driven by other compulsions: its desire to exploit the resources in eastern Congo, a dream of territorial expansion and, in any case, the desire to install a friendly if not submissive government in Kinshasa. It is to that end that the Rwandans are supporting the “Rally for Congolese Democracy” (RCD) that they would like to put in power in Kinshasa – by force or by negotiation. Moreover, having fought for Kabila, the Rwandans feel betrayed by their former ally; they are angry at him for having allowed Tutsis to be hounded in August 1998, with many of them being killed in Kinshasa, Lubumbashi and elsewhere. [...]
2. *Uganda*. Like Kagame, President Museveni feels that he was betrayed by his ally Kabila, whom he had helped to put in power. In fact, Kabila had opposed the Ugandan army’s systematic exploitation of the resources in the north-east of the country and did not intend to submit to the advice about political governance forced upon him by Museveni, who was behaving like the self-proclaimed patron of the region. Allied to Rwanda as much to put Kabila in power as to attempt to depose him, Uganda has distanced itself, however, from Kigali for two basic reasons: the first has to do with competition to exploit the mineral wealth in the east (illustrated by the three Kisangani wars); the second is political. In fact, while the Rwandans dream of pulling the strings of those who govern Congo, the Ugandans, whose security constraints are less strong, would like to put an autonomous, competent Congolese power in place and, to that end, they are supporting Jean-Pierre Bemba and train his army.
3. *Burundi*. The Burundian army admits to its presence in the DRC but it restricts its activities – which have to do with security – to the shores of Lake Tanganyika, on the South Kivu border: it operates on the other side of the border to track down Hutu rebels who are part of Kabila’s military machine. [...]
4. *Zimbabwe*. Zimbabwe is the most visible of Kabila’s allies, maintaining a force of 12,000 men in Congo, but it is not the most determinative element. Weakened by internal disputes and by the economic crisis resulting from poor management as well as from the fact that the international creditors are penalizing his country because of its involvement in Congo, President Mugabe is trying to pull out [...]. However, having entered the DRC in order to uphold the Kabila regime and, even more importantly, Congo’s territorial integrity and the sovereignty of Kinshasa, Zimbabwe cannot simply let go of a country in which it has invested a great deal; it is committed to continuing its assistance.
5. *Namibia*. Namibia maintains 2,500 men in Congo as part of its involvement in DRC under the SADC (South African Development Conference) agreements. Its objective is more to show its solidarity with Angola and Zimbabwe than to support the Kabila regime itself [...].
6. *Angola*. Rich and equipped with a seasoned army, Angola has given assistance to Kinshasa for straightforward reasons: to implement the solidarity agreements

between the SADC countries and, in particular, to prevent UNITA from establishing a rearguard base in the DRC. [...] With a watchful eye on their security and their borders, the Angolans would not be willing to tolerate RCD rebels and Rwandans pushing forward to Lubumbashi or Mbuji Mayi because, in their view, this could restore the opposition Angolan army headed by Jonas Savimbi to power. In fact, they suspect Kigali of having served as a centre for deliveries of weapons and of having collaborated with UNITA in military matters.

The toughest protagonists are Kigali and Luanda. On the other hand, only an agreement between these two capitals would be capable of securing lasting peace. Angola, which is currently ensuring security in Kinshasa and is supporting the Katangans in government, is being put in the position – whether it likes it or not – of being the real backer of the post-Kabila government.

2) **UN, Report on the situation of human rights in the Democratic Republic of the Congo**

[Source: United Nations, E/CN.4/2000/42, 18 January 2000, available on <http://www.ohchr.org/english/>]

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD

Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission on Human Rights resolution 1999/56 [...]

II. THE ARMED CONFLICT

13. On 2 August 1998, war broke out in the Democratic Republic of the Congo, six days after President Kabila's expulsion of his former ally, the Rwandan Patriotic Army (APR), from the country. An unknown party, later known as the Congolese Rally for Democracy (RCD), attacked the Democratic Republic of the Congo with the support of Rwanda, Uganda and Burundi. Rwanda and Uganda have openly acknowledged their support, while Burundi continues to deny its involvement. In November 1998, another armed group, the Congolese Liberation Movement (Mouvement pour la libération du Congo – MLC), began to operate. By 31 August 1999, these groups had occupied 60 per cent of the territory. RCD split into two factions, one based in Goma (RCD/Goma) and the other in Kisangani, though it later moved to Bunia and changed its name to Congolese Rally for Democracy/Liberation Movement (RCD/ML), better known as RCD/Bunia. Both factions signed the Lusaka Peace Agreement, despite strong internal disagreements, on 31 August. [...] A new rebel group, the Congolese Liberation Front (Front de libération du Congo – FLC) emerged in Bandundu, and is apparently supported by the National Union for the Total Independence of Angola (UNITA).

14. Invoking the inherent right of individual or collective self-defence, as set out in Article 51 of the Charter of the United Nations, and as recalled in Security Council resolution 1234 (1999) of 9 April 1999, troops from Angola, Namibia, the Sudan, Chad and Zimbabwe intervened in the conflict in support of the Congolese Armed Forces (FAC). In addition to the nine national armies, there are at least 16 irregular armed groups.
15. Throughout the country, both within and outside the occupied zone, the war is perceived as foreign aggression intended to lead to the secession of part of the country or its annexation by Rwanda. [...]
16. The violence has been extreme, especially in the east. The activities of the foreign-backed rebels have been countered by the terrorism of the Mai-Mai nationalist guerrilla fighters, who are supported by the population, with the commendable exception of human rights advocates who continue to oppose violence of any kind. [...]

Categorization of the conflict

20. In paragraph 41 of his report (E/CN.4/1999/31) [available on <http://www.ohchr.org/english/>], the Special Rapporteur categorized the conflict in the Democratic Republic of the Congo as an internal conflict with the participation of foreign armed forces. Various facts make it necessary to reconsider this viewpoint. Foreign armies, including those who responded to the appeal by President Kabila to intervene in accordance with Article 51 of the Charter of the United Nations and those described by the Security Council as “uninvited” countries, have exchanged prisoners in accordance with the provisions of the Third Geneva Convention of 1949; prisoners have been visited and exchanged in territories of the “uninvited” countries; there have been clashes typical of any war between foreign national forces in Congolese territory; and “uninvited” States have signed the Lusaka Ceasefire Agreement, which specifically refers to prisoners of war and the mixed nature of the conflict. The Special Rapporteur therefore believes that there is in fact a combination of internal conflicts (RCD against the Kinshasa Government and MLC against Kinshasa) and international conflicts, such as the conflict between Rwanda and Uganda in Congolese territory, clashes between the Rwandan and Ugandan armies and FAC. In the international conflicts, respect for the four Geneva Conventions is required, while, in the internal conflicts, the provisions of article 3 common to the four Conventions are applicable. [...]

B. The Lusaka cease-fire agreement of 1999

[Source: United Nations, Letter Dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council, S/1999/815, (Annex: Cease-fire Agreement); available on <http://www.un.org>]

Letter dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations Addressed to the President of the Security Council [...]

Annex Cease-fire Agreement

Preamble

We the Parties to this Agreement; [...]

Determined to ensure the respect, by all Parties signatory to this Agreement, for the Geneva Conventions of 1949 and the Additional Protocols of 1977, and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, as reiterated at the Entebbe regional Summit of 25 March, 1998:

Determined further to put to an immediate halt to any assistance, collaboration or giving of sanctuary to negative forces bent on destabilising neighbouring countries;

Emphasising the need to ensure that the principles of good neighbourliness and non-interference in the internal affairs of other countries are respected;

Concerned about the conflict in the Democratic Republic of Congo and its negative impact on the country and other countries in the Great Lakes region; [...]

Recognising that the conflict in the DRC has both internal and external dimensions that require intra-Congolese political negotiations and commitment of the Parties to the implementation of this Agreement to resolve;

Taking note of the commitment of the Congolese Government, the RCD, the MLC and all other Congolese political and civil organisations to hold an all inclusive National Dialogue aimed at realising national reconciliation and a new political dispensation in the DRC;

Hereby agree as follows:

Article I: The Cease-fire

1. The Parties agree to a cease-fire among all their forces in the DRC. [...]

Article III: Principles of the agreement [...]

7. On the coming into force of the Agreement, the Parties shall release persons detained or taken hostage and shall give them the latitude to relocate to any provinces within the RDC or country where their security will be guaranteed.

8. The Parties to the Agreement commit themselves to exchange prisoners of war and release any other persons detained as a result of the war.
9. The Parties shall allow immediate and unhindered access to the International Committee of the Red Cross (ICRC) and Red Crescent for the purpose of arranging the release of prisoners of war and other persons detained as a result of the war as well as the recovery of the dead and the treatment of the wounded.
10. The Parties shall facilitate humanitarian assistance through the opening up of humanitarian corridors and creation of conditions conducive to the provision of urgent humanitarian assistance to displaced persons, refugees and other affected persons.
11. a. The United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the OAU, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement, and taking into account the peculiar situation of the DRC, mandate the peacekeeping force to track down all armed groups in the DRC. In this respect, the UN Security Council shall provide the requisite mandate for the peace-keeping force. [...]
13. The laying of mines of whatever type shall be prohibited. [...]
22. There shall be a mechanism for disarming militias and armed groups, including the genocidal forces. In this context, all Parties commit themselves to the process of locating, identifying, disarming and assembling all members of armed groups in the DRC. Countries of origin of members of the armed groups, commit themselves to taking all necessary measures to facilitate their repatriation. Such measures may include the granting of amnesty in countries where such a measure has been deemed beneficial. It shall, however, not apply in the case of suspects of the crime of genocide. The Parties assume full responsibility of ensuring that armed groups operating alongside their troops or on the territory under their control, comply with the processes leading to the dismantling of those groups in particular. [...]

Representatives of the Parties have signed the Agreement [...]

For the Republic of Angola

For the Democratic Republic of Congo

For the Republic of Namibia

For the Republic of Rwanda

For the Republic of Uganda

For the Republic of Zimbabwe.

As witnesses

For the Republic of Zambia

For the Organisation of African Unity

For the United Nations

For the Southern African Development Community.

**Annex 'A' to the Cease-fire Agreement
Modalities for the Implementation of the Cease-fire Agreement
the Democratic Republic of Congo [...]**

Chapter 9: Disarmament of Armed Groups

- 9.1 The JMC [Joint Military Commission] with the assistance of the UN/OAU shall work out mechanisms for the tracking, disarming, cantoning and documenting of all the armed groups in the DCR, including ex-FAR, ADF, LRA, UNRFH, Interahamwe, FUNA, FDD, WNBF, UNITA and put in place measures for:
- a. handing over to the UN International Tribunal and national courts, mass killers and perpetrators of crimes against humanity; and
 - b. handling of other war criminals. [...]

C. Violations of international humanitarian law

1) UN, Report on human rights in the Democratic Republic of the Congo

[Source: United Nations, E/CN.4/2000/42, 18 January 2000; available on <http://www.ohchr.org>]

**QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND
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Commission on Human Rights resolution 1999/56 [...]**

V. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

A. By the Kinshasa Government

108. The principal violations of the law on armed conflicts by the forces of the Kinshasa regime and their allies were as follows:

Attacks on the civilian population

109. Especially the bombing of Kisangani and pillaging in the city in January (17 dead); the bombing of Zongo (120), Libenge (200), Goma (between 30 and 65 dead) and Uvira (3) in May; and the atrocities perpetrated by Chadian soldiers in Bunga and Gemena. In addition, the Zimbabwean army's bombing of rebel-occupied towns claimed many victims.

Murders in the north-east

110. In Mobe, some 300 civilians were killed, apparently during an unsuccessful search for rebels (second week of January 1999).

Sexual violence against women

111. While many general charges have been made, the most specific information relates to the flight of FAC soldiers from Equateur at the beginning of the year, when, in addition to committing robberies, they raped women.

B. By RCD and MLC forces

Attacks on the civilian population

112. The cruellest and most violent actions, committed without heed for the laws of war, were attacks on the civilian population, as reprisals for acts committed by Mai-Mai [...] Many of these massacres were carried out using machetes, knives or guns, and houses were usually set on fire at the same time. RCD claims that these incidents were provoked by the Interahamwe or the Mai-Mai, but these groups have no reason to commit massacres against the Congolese population or Hutu refugees, who account for most of the victims. These incidents [...] were denied by RCD, before finally being acknowledged as unfortunate mistakes. [...] A feature common to all these incidents is the attempt to cover up all traces immediately. Ugandan troops carried out similar massacres in Beni on 14 November, with an unconfirmed death toll of 60 civilians. [...]

Arson and destruction

114. In incidents mostly, though not always, unconnected to the massacres, RCD forces have set fire to and destroyed many villages.

Deportations

115. Mai-Mai and other persons have been arrested during military operations and transported to Rwanda and Uganda, where they usually disappear without a trace.

Mutilation

116. The Special Rapporteur received many reports of mutilation [...]. During his mission in February, he met an 18-year-old man, arrested along with another young man by Rwandan soldiers in a village in South Kivu on suspicion of collaborating with the Mai-Mai. The first man's genitals were cut off completely and he was abandoned in the jungle, from where he was later rescued, although he was left with irreparable physical damage. His comrade died when his heart was torn out.

Rape of women as a means of warfare

117. The Special Rapporteur received reports of rapes of women in Kabamba, Katana, Lwege, Karinsimbi and Kalehe. There were also reports of women being raped by Ugandan soldiers in towns in Orientale province. [...]

2) The Kisangani massacre of May 2002

[Source: ZAJTMAN Arnaud, "Massacre in Kisangani", in *Libération*, Paris, 30 May 2002; unofficial translation.]

Massacre in Kisangani

[...] Incident or premeditated crime? One thing is sure: at least 200 Congolese were massacred in cold blood on 14 and 15 May, some of them in appalling circumstances, at Kisangani in the eastern part of Congo-Kinshasa. For the last four years, the country's third-largest town has been in the hands of the rebel *Rassemblement congolais pour la démocratie* (RCD-Goma), an unpopular Rwandan-controlled organization. They are the ones who exercise *de facto* control over the region, [...] not President Joseph Kabila back in Kinshasa.

It all started at dawn on 14 May, when a group of mutineers hostile to the Rwandan occupation seized control of the local radio station. "If you're a Congolese soldier, grab a weapon. If you're a civilian, grab a stone. If you're a boxer, a wrestler or a karate expert, a wizard or a fetish-man, bring your knowledge, your power. The hour has come to throw out the Rwandans," announced the station, listing the names of buildings where Rwandans were living.

The 800,000 inhabitants of Kisangani were ready and waiting for a chance to rise up against the Rwandans and their Congolese supporters. Hopes of a quick return to normality had been dashed by the failure of the peace negotiations that ended last month in South Africa. The radio announcement fell on willing ears. Gradually, thousands of people congregated in the centre of the town, which lies between the Congo and the Tshopo rivers.

Jean-Paul is a foreigner of mixed race. He stayed indoors, terrified. "They were going to kill the Rwandans. Who'd be next? The genocide in Rwanda all started with the radio." The crowd responded to the broadcast. Five Rwandans were killed, including three civilians. Shot, stoned or burned alive.

[...] Suddenly, a group of "loyal rebel" soldiers took over the radio station. They stormed into the building, ordered the mutineers to leave and told the population to go home. They fired into the air in the streets of the town. The crowd broke up and it could all have ended there. But towards the end of the morning a group of "Zulus" arrived by plane from Goma, the headquarters of the RCD and of the Rwandan forces stationed in Congo-Kinshasa, in the extreme east of the country. The 120-strong unit of unknown origin was commanded by Rwandans. One group of "Zulus" plundered an alcohol warehouse, another drank beer near a church, a third was seen with the RCD's Kisangani commander of military operations, Laurent Kunda, who offered them whisky. Calm had returned, but these men had their orders, and they intended to carry them out.

A Belgian priest Guy Verhaegen heard the first shots. Shortly after, he saw the "Zulus" moving through the area. He stayed in his church compound and hid behind a wall, from which he could see some of what happened. "There were about fifteen of them on the back of a pickup. They were firing bursts from automatic weapons. I didn't hear anyone firing back. From time to time the vehicle stopped and the soldiers went into

the houses. I don't know what they did there." Tenda Tangwa lives in the same area. He does know what the soldiers did. "They burst into the house and one of them went to the room of my 21-year-old son. He begged him not to shoot. The soldier replied: "It's God you need to pray to, not me," and executed him." The soldiers left the area in the middle of the afternoon. According to Father Verhaegen, 40 to 50 people were killed.

No mandate. The UN has a contingent of over 500 soldiers in Kisangani – Uruguayans and Moroccans. They are there to observe the "ceasefire". They did nothing. The Blue Helmets of the United Nations Observer Mission in the Democratic Republic of the Congo (MONUC) were armed ... but had no mandate to intervene. Kisangani is supposed to have been demilitarized two years ago under a Security Council resolution that has never been applied.

Meanwhile, the massacre continued. A large number of soldiers and policemen, affiliated with the RCD rebels but whose loyalty was less than certain in the eyes of the Rwandans, were arrested in various parts of town. In particular, these included policemen about to start training organized by the UN, the symbol of waning rebel power in the town. At least four were tied up and taken away to an unknown destination. There is still no news of them. At the end of the day a number of vehicles commandeered by the "Zulus" arrived at high speed, stopping on the iron bridge over the Tshopo. They sealed off an area between the bridge, suspended above a hydro-electric dam, and a beach, a few hundred metres downstream.

Hands tied. "They were Rwandan soldiers. It was easy to recognize them. They had radios and they were speaking their language [Kinyarwanda, Ed.]," reported one local inhabitant. Local people heard shots coming from the beach all that afternoon and evening. Next day, the dam staff went back to work. The sluices had been closed the day before on account of the incident. Now they opened them, allowing the river to flow again. Which was when the truth emerged. "The fishermen were the first to see the corpses. They told us straight away. Dozens of bodies were appearing," reports one inhabitant, under condition of anonymity. "The bodies had been mutilated. Their stomachs had been cut open and stones had been put inside." "Some of them had been decapitated," adds another. Most of the victims had their hands tied together and were wearing military uniforms. The International Committee of the Red Cross was able to organize the recovery of the bodies. According to humanitarian personnel, between 50 and 150 corpses were fished out of the river. "If those soldiers had known Kisangani, they would never have committed their crime here. Everyone knows there's a counter-current," explained one local. Despite the large numbers already killed, executions continued in the bush around Kisangani.

A MONUC employee claims to have witnessed the execution of around 60 people at Kisangani airport on the afternoon of 15 May. Most of them were policemen or soldiers. "They were buried in a mass grave at the end of the runway," said the man, who wished to remain anonymous. The people of Kisangani are angry with the Rwandans and the rebels, of course, but also with the Blue Helmets: "These aren't peace-keeping observers. They're observers of Congolese corpses," fumes one woman. "We are in darkness." The heart of darkness.

3) UN, press release of 18 June 2002

[Source: United Nations, Press Release, GG/SM/8277, 18 June 2002; available on <http://www.un.org>]

SECRETARY-GENERAL STRONGLY CONDEMNS ACTS OF INTIMIDATION AGAINST UN MISSION IN DEMOCRATIC REPUBLIC OF THE CONGO

The following statement on the Democratic Republic of the Congo was issued today by the Spokesman for Secretary-General Kofi Annan:

Yesterday, a Rally for Congolese Democracy-Goma (RCD-Goma) commander, accompanied by a team of armed elements, forcibly entered the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) facilities at the Onatra port in Kisangani. They manhandled the MONUC guard on duty, and abducted two MONUC staff members, who were taken to an RCD facility at the far end of the compound. They were released after about 20 minutes during which they were assaulted and sustained injuries to the face. This incident was followed by two subsequent forcible entries into MONUC facilities by RCD-Goma, later yesterday afternoon and again this morning.

The Secretary-General strongly condemns these acts of intimidation against MONUC. The Secretary-General reminds the RCD-Goma leadership that MONUC is deployed in the Democratic Republic of the Congo to assist in the peace process. It can only do so with the full cooperation of the parties, who are responsible for ensuring the security of United Nations staff. The Secretary-General wishes to remind the RCD-Goma of its obligations in this regard, and calls on it to comply with relevant Security Council resolutions.

D. The United Nations Mission in the Democratic Republic of the Congo (MONUC)

1) The mandate

[Source: *Democratic Republic of the Congo – MONUC – Mandate*, available on the MONUC official site, <http://monusco.unmissions.org>]

According to Security Council Resolution 1291 (2000) of 24 February 2000:

MONUC had an authorized strength of up to 5,537 military personnel, including up to 500 observers, or more, provided that the Secretary General determined that there was a need and that it could be accommodated within the overall force size and structure, and appropriate civilian support staff in the areas, *inter alia*, of human rights, humanitarian affairs, public information, child protection, political affairs, medical and administrative support. MONUC, in cooperation with the joint Military Commission (JMC), had the following mandate

- To monitor the implementation of the Ceasefire Agreement and investigate violations of the ceasefire;

- To establish and maintain continuous liaison with the headquarters of all the parties' military forces;
- To develop, within 45 days of adoption of resolution 1291, an action plan for the overall implementation of the Ceasefire Agreement by all concerned with particular emphasis on the following key objectives: the collection and verification of military information on the parties' forces, the maintenance of the cessation of hostilities and the disengagement and redeployment of the parties' forces, the comprehensive disarmament, demobilization, resettlement and reintegration of all members of all armed groups referred to in Annex A, Chapter 9.1 of the Ceasefire Agreement, and the orderly withdrawal of all foreign forces;
- To work with the parties to obtain the release of all prisoners of war, military captives and remains in cooperation with international humanitarian agencies;
- To supervise and verify the disengagement and redeployment of the parties' forces.
- Within its capabilities and areas of deployment, to monitor compliance with the provision of the Ceasefire Agreement on the supply of ammunition, weaponry and other war-related materiel to the field, including to all armed groups referred to in Annex A, Chapter 9.1;
- To facilitate humanitarian assistance and human rights monitoring, with particular attention to vulnerable groups including women, children and demobilized child soldiers, as MONUC deems within its capabilities and under acceptable security conditions, in close cooperation with other United Nations agencies, related organizations and non-governmental organizations;
- To cooperate closely with the Facilitator of the National Dialogue, provide support and technical assistance to him, and coordinate other United Nations agencies' activities to this effect;
- To deploy mine action experts to assess the scope of the mine and unexploded ordnance problems, coordinate the initiation of the mine action activities, develop a mine action plan, and carry out emergency mine action activities as required in support of its mandate.

Acting under chapter VII of the Charter of the United Nations, the Security Council also decided that MONUC may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located JMC personnel, facilities, installations and equipment, ensure the security and freedom of movement of its personnel, and protect civilians under imminent threat of physical violence.

Further by its resolution 1565 (2004) of 1 October 2004,

the Security Council revised the mandate of MONUC and authorized the increase of MONUC's strength by 5,900 personnel*, including up to 341 civilian police personnel, as well as the deployment of appropriate civilian personnel, appropriate and proportionate air mobility assets and other force enablers, and expresses its determination to keep MONUC's strength and structure under regular review, taking into account the evolution of the situation on the ground.

The Council decided that MONUC will have the following mandate

- to deploy and maintain a presence in the key areas of potential volatility in order to promote the re-establishment of confidence, to discourage violence, in particular by deterring the use of force to threaten the political process, and to allow United Nations personnel to operate freely, particularly in the Eastern part of the Democratic Republic of the Congo,
- to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence,
- to ensure the protection of United Nations personnel, facilities, installations and equipment,
- to ensure the security and freedom of movement of its personnel,
- to establish the necessary operational links with the United Nations Operation in Burundi (ONUB), and with the Governments of the Democratic Republic of the Congo and Burundi, in order to coordinate efforts towards monitoring and discouraging cross-border movements of combatants between the two countries, [...]
- without notice, the cargo of aircraft and of any transport vehicle using the ports, airports, airfields, military bases and border crossings in North and South Kivu and in Ituri,
- to seize or collect, as appropriate, arms and any related materiel whose presence in the territory of the Democratic Republic of the Congo violates the measures imposed by paragraph 20 of resolution 1493, and dispose of such arms and related materiel as appropriate,
- to observe and report in a timely manner, on the position of armed movements and groups, and the presence of foreign military forces in the key areas of volatility, especially by monitoring the use of landing strips and the borders, in particular on the lakes.

The Council decided that MONUC will also have the following mandate, in support of the Government of National Unity and Transition

- to contribute to arrangements taken for the security of the institutions and the protection of officials of the Transition in Kinshasa until the integrated police unit for Kinshasa is ready to take on this responsibility and assist the Congolese authorities in the maintenance of order in other strategic areas, as recommended in paragraph 103 (c) of the Secretary-General's third special report,
- to contribute to the improvement of the security conditions in which humanitarian assistance is provided, and assist in the voluntary return of refugees and internally displaced persons,

* As of 1 October 2004, the total authorized strength of uniformed personnel stood at 17,175. This number included earlier increases of the Mission's strength to 8,700 and 10,800 by Security Council resolutions S/RES/1445 of 4 December 2002 and S/RES/1493 of 28 July 2003 respectively.

- to support operations to disarm foreign combatants led by the Armed Forces of the Democratic Republic of the Congo, including by undertaking the steps listed in paragraph 75, subparagraphs (b), (c), (d) and (e) of the Secretary-General's third special report,
- to facilitate the demobilization and voluntary repatriation of the disarmed foreign combatants and their dependants,
- to contribute to the disarmament portion of the national programme of disarmament, demobilization and reintegration (DDR) of Congolese combatants and their dependants, in monitoring the process and providing as appropriate security in some sensitive locations,
- to contribute to the successful completion of the electoral process stipulated in the Global and All Inclusive Agreement, by assisting in the establishment of a secure environment for free, transparent and peaceful elections to take place,
- to assist in the promotion and protection of human rights, with particular attention to women, children and vulnerable persons, investigate human rights violations to put an end to impunity, and continue to cooperate with efforts to ensure that those responsible for serious violations of human rights and international humanitarian law are brought to justice, while working closely with the relevant agencies of the United Nations.

The Council authorized MONUC to use all necessary means, within its capacity and in the areas where its armed units are deployed, to carry out the above tasks

The Council further decided that MONUC will also have the mandate, within its capacity and without prejudice to carrying out the above tasks, to provide advice and assistance to the transitional government and authorities, in accordance with the commitments of the Global and All Inclusive Agreement, including by supporting the three joint commissions outlined in paragraph 62 of the Secretary-General's third special report, in order to contribute to their efforts, with a view to take forward

- Essential legislation, including the future constitution,
- Security sector reform, including the integration of national defence and internal security forces together with disarmament, demobilization and reintegration and, in particular, the training and monitoring of the police, while ensuring that they are democratic and fully respect human rights and fundamental freedoms,
- The electoral process.

2) Security Council resolution 1592 (2005)

[Source: United Nations, S/RES/1592 (2005), 30 March 2005, available on <http://www.un.org>]

Resolution 1592 (2005) Adopted by the Security Council at its 5155th meeting, on 30 March 2005

The Security Council,

[...]

Reaffirming its commitment to respect the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo as well as of all States

in the region, and its support for the process of the Global and All-Inclusive Agreement on the Transition in the Democratic Republic of the Congo, signed in Pretoria on 17 December 2002, and calling on all the Congolese parties to honour their commitments in this regard, in particular so that free, fair and peaceful elections can take place,

Reiterating its serious concern regarding the continuation of hostilities by armed groups and militias in the eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and in the Ituri district, and by the grave violations of human rights and of international humanitarian law that accompany them, calling on the Government of National Unity and Transition to bring the perpetrators to justice without delay, and *recognizing* that the continuing presence of *ex-Forces armées rwandaises* and Interahamwe elements remains a threat for the local civilian population and an impediment to good-neighbourly relations between the Democratic Republic of the Congo and Rwanda,

Welcoming in this regard the African Union's support for efforts to further peace in the eastern part of the Democratic Republic of the Congo, and calling on the African Union to work closely with MONUC in defining its role in the region,

Recalling its condemnation of the attack by one of these militias against members of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), on 25 February 2005, and welcoming the first steps taken to date to bring them to justice, in particular the arrests of militia leaders suspected of bearing responsibility for human rights abuses,

Reiterating its call on the Congolese parties, when selecting individuals for key posts in the Government of National Unity and Transition, including the Armed Forces and National Police, to take into account the record and commitment of those individuals with regard to respect for international humanitarian law and human rights,

Recalling that all the parties bear responsibility for ensuring security with respect to civilian populations, in particular women, children and other vulnerable persons, and *expressing concern* at the continuing levels of sexual violence,

[...]

Recalling the link between the illicit exploitation and trade of natural resources in certain regions and the fuelling of armed conflicts, *condemning categorically* the illegal exploitation of natural resources and other sources of wealth of the Democratic Republic of the Congo, and *urging* all States, especially those in the region including the Democratic Republic of the Congo itself, to take appropriate steps in order to end these illegal activities,

[...]

Noting that the situation in the Democratic Republic of the Congo continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to extend the mandate of MONUC, as contained in resolution 1565, until 1 October 2005, with the intention to renew it for further periods;

2. *Reaffirms its demand* that all parties cooperate fully with the operations of MONUC and that they ensure the safety of, as well as unhindered and immediate access for, United Nations and associated personnel in carrying out their mandate, throughout the territory of the Democratic Republic of the Congo, and in particular that all parties provide full access to MONUC military observers, including to all ports, airports, airfields, military bases and border crossings, and *requests* the Secretary-General to report without delay any failure to comply with these demands;
3. *Urges* the Government of National Unity and Transition to do its utmost to ensure the security of civilians, including humanitarian personnel, by effectively extending State authority, throughout the territory of the Democratic Republic of the Congo and in particular in North and South Kivu and in Ituri;
4. *Calls on* the Government of National Unity and Transition to carry out reform of the security sector, through the expeditious integration of the Armed Forces and of the National Police of the Democratic Republic of the Congo and in particular by ensuring adequate payment and logistical support for their personnel, and *stresses the need* in this regard to implement without delay the national disarmament, demobilization and reinsertion programme for Congolese combatants;
5. *Further calls on* the Government of National Unity and Transition to develop with MONUC a joint concept of operations for the disarmament of foreign combatants by the Armed Forces of the Democratic Republic of the Congo, with the assistance of MONUC, within its mandate and capabilities;
6. *Calls on* the donor community, as a matter of urgency, to continue to engage firmly in the provision of assistance needed for the integration, training and equipping of the Armed Forces and of the National Police of the Democratic Republic of the Congo, and urges the Government of National Unity and Transition to promote all possible means to facilitate and expedite cooperation to this end;
7. *Emphasizing* that MONUC is authorized to use all necessary means, within its capabilities and in the areas where its armed units are deployed, to deter any attempt at the use of force to threaten the political process and to ensure the protection of civilians under imminent threat of physical violence, from any armed group, foreign or Congolese, in particular the ex-FAR and Interahamwe, encourages MONUC in this regard to continue to make full use of its mandate under resolution 1565 in the eastern part of the Democratic Republic of the Congo, and stresses that, in accordance with its mandate, MONUC may use cordon and search tactics to prevent attacks on civilians and disrupt the military capability of illegal armed groups that continue to use violence in those areas;
8. *Calls on* all the parties to the Transition in the Democratic Republic of the Congo to make concrete progress towards the holding of elections, as provided for by the Global and All-Inclusive Agreement, in particular in furthering the early adoption of the constitution and of the electoral law, as well as the registration of voters;

9. *Demands* that the Governments of Uganda, Rwanda, as well as the Democratic Republic of the Congo put a stop to the use of their respective territories in support of violations of the arms embargo imposed by resolution 1493 of 28 July 2003 or of activities of armed groups operating in the region;
10. *Further urges* all States neighbouring the Democratic Republic of the Congo to impede any kind of support to the illegal exploitation of Congolese natural resources, particularly by preventing the flow of such resources through their respective territories;
11. *Reaffirms its concern* regarding acts of sexual exploitation and abuse committed by United Nations personnel against the local population, and requests the Secretary-General to ensure compliance with the zero tolerance policy he has defined and with the measures put in place to prevent and investigate all forms of misconduct, discipline those found responsible and provide support to the victims, and to pursue active training and awareness-raising of all MONUC personnel, and further requests the Secretary-General to keep the Council regularly informed of the measures implemented and their effectiveness;
12. *Urges* troop-contributing countries carefully to review the Secretary-General's letter of 24 March 2005 (A/59/710) and to take appropriate action to prevent sexual exploitation and abuse by their personnel in MONUC, including the conduct of pre-deployment awareness-training, and to take disciplinary action and other action to ensure full accountability in cases of such misconduct involving their personnel;
13. *Decides* to remain actively seized of the matter.

DISCUSSION

1. a. Is the conflict in the Democratic Republic of the Congo (DRC) international or non-international in nature? In order to determine the legal nature of the conflict, is it necessary to distinguish between the fighting taking place between government and rebel forces and the fighting in which foreign powers are involved? (GC I-IV, Arts 2 and 3)
- b. What is the nature of the conflict between the governmental *Forces armées congolaises* (FAC) and the forces of the *Congolese Rally for Democracy* (RCD), for example? Between the governmental *Rwandan Patriotic Front* (FPR) and the (Rwandan rebel) *Interahamwe* militias, on Congolese territory?
- c. Does foreign intervention automatically internationalize a conflict? Is a conflict classified the same way when Zimbabwean forces (together with the FAC) fight against the RCD, and when the (Rwandan governmental) FPR battles the FAC or other non-State armed groups allied to the Congolese Government?
- d. Can a conflict situation be divided into as many bilateral relationships as there are internal and external parties to the conflict, so that the scope of applicable IHL varies according to the parties confronting each other? For example, is the scope of applicable IHL narrower in the conflict between the FAC and the RCD than in that between the FAC and the FPR? Even if the RCD is supported by the FPR?

- e. What provisions are applicable in the case of non-international armed conflicts? As the DRC was not, at the time, party to Protocol II, was only Art. 3 common to the Geneva Conventions applicable? Were the conditions met for applying Protocol II? Is IHL enforceable against non-State armed groups? What about the application of IHL between the parties to a non-international armed conflict if they are “[d]etermined to ensure the respect [...] for the Geneva Conventions of 1949 and the Additional Protocols of 1977” (Preamble to the Lusaka Agreement)? Isn’t this provision of the preamble valid only between States party to the agreement? Is this a recognition of the applicability of Protocol II even to States that have not ratified it?
2. a. According to IHL, when is a territory considered occupied? (HR, Art. 42) Are Congolese territories controlled by Rwanda or Uganda occupied territories within the meaning of IHL? What are the obligations of an occupying power under IHL?
- b. Are occupying powers entitled to exploit the natural resources of the territories they occupy? To what extent? Which provisions of IHL govern these questions? Does exploitation of this kind amount to requisition? If so, do the requisitions comply with IHL? What difference is there between seizing and requisitioning property? What is an occupier allowed to seize? What is an occupier allowed to requisition? Does IHL contain rules that are detailed enough to regulate both activities? Under what conditions does seizure comply with Art. 53 of the Hague Regulations? Are these conditions stipulated explicitly or implicitly in the provision? Is an occupying power responsible for private companies exploiting mineral resources? (GC IV, Art. 33(2); HR, Arts 23(g), 46(2), 47, 52 and 53) [See **Case No. 105**, Singapore, Bataafsche Petroleum v. The War Damage Commission; **Case No. 127**, Israel, Ayub v. Minister of Defence, and **Case No. 129**, Israel, Al Nawar v. Minister of Defence]
- c. Are the authorities of an occupying power obliged to comply with the rules of the Fourth Geneva Convention applicable to occupied territories? As regards the Congolese? As regards Rwandan nationals, in occupied territory for example? (GC IV, Arts 4, 13, 25, 26, 29, 45, 47 and 70; P I, Art. 73) [See **Case No. 211**, ICTY, The Prosecutor v. Tadic [Part C., paras 163-169]] Are they entitled to arrest Congolese nationals in Congolese territory and transfer them to their own territory? (GC IV, Art. 49) Can Rwandan or Ugandan authorities arrest rebel Rwandan nationals in Congolese territory and transfer them to Rwanda or Uganda, respectively? (GC IV, Arts 4, 49 and 70(2); P I, Art. 73) [See **Case No. 211**, ICTY, The Prosecutor v. Tadic [Part C., paras 163-169]] Is the practice of forced disappearances prohibited by IHL? Does IHL take up the issue of missing persons? (GC IV, Arts 26 and 137; P I, Arts 32 and 33; ICC Statute, Arts 7(1)(i) and 7(2)(i)) [See **Case No. 23**, The International Criminal Court]
- d. Are Congolese territories allegedly controlled by States allied to the Congolese authorities (Angola and Zimbabwe in particular) occupied territories? Even if they are controlled with the consent of the “host” State? Even if control takes the form of mine concessions? And if the allied States have been authorized to pursue a rebel movement on Congolese territory (the Angolan army against UNITA, for example)?
3. Can the ICRC deal with “the recovery of the dead and the treatment of the wounded” (Art. 9 of the Lusaka Agreement) or “organize the recovery of the bodies” (Document 3.C.2)? On what conditions? Must it identify the bodies before burying them? Is this the ICRC’s mandate? Are the parties obliged to accept the ICRC’s services? (GC I, Arts 9, 17 and 18; GC IV, Arts 10 and 140; P I, Art. 33)
4. a. What is the role of the UN forces in the DRC? Are they authorized to use force to prevent massacres? Could the UN be held responsible if they do not do so? Or the UN member States? Should the UN base its actions on the investigation report on UNAMIR so as not to repeat in the DRC the mistakes made in Rwanda? Are the situations comparable?

- b. Does IHL prohibit attacks against UN forces? Are non-State groups bound by this prohibition? (ICC Statute, Arts 8.2(b)(iii) and 8.2(e)(iii)) [See **Case No. 23**, The International Criminal Court; See also **Case No. 22**, Convention on the Safety of UN Personnel, Art. 9]
 - c. Since the DRC is party to the ICC Statute, does the Court have jurisdiction over those responsible for such attacks? Over those responsible for other violations of IHL? Does the ICTR have jurisdiction over the perpetrators of violations of IHL in the context of the conflict in the DRC? At least for the aspects of the conflict that are extensions of the Rwandan conflict in Congolese territory (for example, the fighting in the DRC between the Rwandan Patriotic Army and the Interahamwe militias)? [See **Case No. 23**, The International Criminal Court, and **Case No. 230**, UN, Statute of the ICTR]
5. How do the Conventions and the Protocols guarantee the right of the victims to assistance and protection? Are the guarantees identical in the framework of international and non-international armed conflicts? Are the provisions of Protocol II on access to humanitarian aid more restrictive than those of the IHL of international armed conflict? (GC I-IV, Arts 9/9/9/10 respectively; GC IV, Arts 23, 30, 55, 59-62 and 148; P I, Arts 68-71; P II, Arts 5 and 18)
6. Are UN personnel bound by IHL? Should they be? Assuming that they are, how should the sexual exploitation and abuses committed by some of them be considered? Who would have the responsibility to prosecute these crimes?

Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus

[N.B.: See also Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part 3]]

I. Context

[Source: Human Rights Watch, “You Will Be Punished” – Attacks on Civilians in Eastern Congo, Report, 2009, available at www.hrw.org. Footnotes omitted]

**“You Will Be Punished”
Attacks on Civilians in Eastern Congo**

[...]

**Maps
North and South Kivu**

KEY PLAYERS

The Congolese Armed Forces (Forces armées de la République démocratique du Congo, FARDC): The Congolese national army, FARDC, created in 2003 has an estimated strength of 120,000 soldiers, many from former rebel groups who were incorporated following various peace deals. About half of the Congolese army is deployed in eastern Congo. Since 2006, the government has twice attempted to integrate the 6,000 strong rebel CNDP, but failed each time. In early 2009 a third attempt was made to incorporate the CNDP as well as other remaining rebel groups, a process known as “fast track accelerated integration.” Many who agreed to integrate, however, remained loyal to their former rebel commanders, raising serious doubts about the sustainability of the process.

National Congress for the Defense of the People (Congrès national pour la défense du peuple, CNDP): The CNDP is a Rwandan-backed rebel group launched in July 2006 by the renegade Tutsi general, Laurent Nkunda, to defend, protect, and ensure political representation for the several hundred thousand Congolese Tutsi living in eastern Congo, and some 44,000 Congolese refugees, most of them Tutsi, living in Rwanda. It is estimated to have some 6,000 combatants, including a significant number recruited in Rwanda; many of its officers are Tutsi. On January 5, 2009, Nkunda was ousted as leader by his military chief of staff, Bosco Ntaganda, and subsequently detained in Rwanda. Ntaganda, wanted on an arrest warrant from the International Criminal Court, abandoned the three-year insurgency and integrated the CNDP's troops into the government army. On April 26, 2009, the CNDP established itself as a political party.

Democratic Forces for the Liberation of Rwanda (Les Forces démocratiques de libération du Rwanda, FDLR): The FDLR is a Hutu militia group based in eastern Congo, some of whose leaders participated in the genocide in Rwanda in 1994. It seeks to overthrow the government of Rwanda and promote greater political representation of Hutu. In late 2008, the FDLR was estimated to have at least 6,000 combatants, controlling large areas of North and South Kivu, including many key mining areas. The FDLR's president and supreme commander is Ignace Murwanashyaka, based in Germany. He was arrested on November 17, 2009, on charges of war crimes and crimes against humanity. The group's military commander in eastern Congo is Gen. Sylvester Mudacumura. The Congolese government has often supported and shown general tolerance for the FDLR, until early 2009 when its policy changed and the government launched military operations against the group.

Rally for Unity and Democracy (RUD)-Urunana: RUD-Urunana is a splinter group of the FDLR estimated at some 400 combatants based in North Kivu, made up largely of dissident FDLR combatants. It was created in 2004 by the United States-based former FDLR 1st vice-president, Jean-Marie Vianney Higiyo. Other political leaders are in Europe and North America. Since the start of military operations against RUD and the FDLR in January 2009, the two groups have reunited militarily.

Mai Mai militia: The Mai Mai militia groups are local defense groups often organized on an ethnic basis who have traditionally fought alongside the government army against “foreign invaders,” including the CNDP and other Rwandan-backed rebel groups. In

2009 there were over 22 Mai Mai groups, ranging greatly in size and effectiveness, in both North and South Kivu. Some joined the Congolese army as part of the rapid integration process, while others refused, angry at the perceived preferential treatment given to the CNDP and unwilling to join the army unless they were able to stay in their communities. The various Mai Mai groups are estimated to have some 8,000 to 12,000 combatants.

Coalition of Congolese Patriotic Resistance (Coalition des patriotes résistants congolais, PARECO): PARECO is the largest of the Mai Mai groups, created in March 2007 by joining various other ethnic-based Mai Mai militias including from the Congolese Hutu, Hunde, and Nande ethnic groups. Throughout 2007 and 2008, PARECO collaborated closely with the FDLR and received substantial support from the Congolese army, especially in their battles against the CNDP. In 2009, many PARECO combatants, particularly the Hutu, joined the Congolese army and its military commander, Mugabu Baguma, was made a colonel. The Hunde and Nande commanders were not offered equivalent command positions and remained outside the integration process, along with the majority of the Hunde and Nande combatants

Patriotic Alliance for a Free and Sovereign Congo (Alliance des patriotes pour un Congo libre et souverain, APCLS): The APCLS is a breakaway faction of PARECO. Created in April 2008, it is largely made up of ethnic Hunde and is led by General Janvier Buingo Karairi. It is based in the area to the north of Nyabiondo, in western Masisi, with its headquarters in Lukweti village and has an estimated 500 to 800 combatants. The APCLS is allied with the FDLR and refuses to integrate into the Congolese army without guarantees that they will be deployed in their home region and that the newly integrated CNDP soldiers will leave.

[Source: Amnesty International, "No End to War on Women and Children, North Kivu, Democratic Republic of the Congo", Report 2008, available at www.amnesty.org]

In August 2007 armed conflict erupted in the province of North Kivu. The renewed fighting, the worst since the official end of the DRC conflict in 2003, pitted the regular Congolese army (FARDC) against the CNDP armed political group, under the command of renegade general Laurent Nkunda. Also involved were mayi-mayi ethnic militia opposed to the CNDP, and the Rwandan FDLR, a mainly Rwandan Hutu armed insurgent group which contains remnants of forces allegedly responsible for the 1994 Rwandan genocide. The United Nations (UN) peacekeeping force in the DRC, MONUC, was unable to contain the fighting and at its height could only assure the security of major population centres.

[...]

The immediate cause of the August 2007 fighting was a breakdown in attempts to integrate CNDP forces into the FARDC. Laurent Nkunda claims his CNDP forces are fighting to protect eastern DRC's ethnic Tutsi population from attacks by the FDLR, which the CNDP accuses the government and FARDC of supporting militarily. The government, for its part, asserts it launched military operations against the CNDP to restore the authority of the state. Also ranged against the CNDP are mayi-mayi militias, many of which are grouped in an armed political coalition called PARECO.

The mayi-mayi are drawn from a number of ethnic groups and purport to protect their communities from opposing forces, primarily the CNDP, which they accuse the Rwandan government of supporting.

Civilians bore the brunt of the violence, which was marked by serious violations of international human rights and humanitarian law by both the armed groups and government armed forces and which triggered a desperate humanitarian crisis. By the end of 2007, more than 500,000 people had fled their homes and sought shelter with host families or in camps for the internally displaced that sprang up across the province. The humanitarian and security situation in many sites, many of which are located close to military positions, is extremely poor.

The escalating violence in North Kivu, which again threatened regional stability, led to concerted international efforts to resolve the crisis. In November 2007, the governments of the DRC and Rwanda agreed, in the "Nairobi communiqué", to take joint measures to dismantle the FDLR. The measures agreed included the launch of DRC government military operations against the FDLR. The two governments also undertook to prevent support to other armed groups operating in eastern DRC. [...]

In January 2008, after the failure of a government military offensive against the CNDP, a Conference on Peace, Security and Development for the Kivus was organized in Goma, the capital of North Kivu. The conference [...] brought together representatives of the DRC government, the CNDP, PARECO and other Congolese armed groups (the FDLR was not invited to the conference) and Kivu civil society. The negotiations led to an "Act of Engagement" signed on 23 January by Congolese armed groups in the Kivus, including the CNDP and PARECO, in which they committed to an immediate cease-fire, to the progressive demobilisation of their forces, and to an immediate halt to violations of international humanitarian law [...]. In return, the government undertook to end the threat posed by the FDLR and to grant an amnesty to members of the Congolese armed groups who signed the Act of Engagement for "acts of war" not including crimes against humanity, war crimes or genocide, a definition that limits the amnesty to participation in armed conflict but not to acts that constitute serious human rights violations.

[...]

Since the signing of the Act of Engagement, the cease-fire has been broken on hundreds of occasions, thousands of women and girls have been raped, hundreds of children recruited into the armed groups, often through abduction, and scores of civilians unlawfully killed. Hundreds of thousands of people living as IDPs remain too fearful to return to their homes and fields. Congolese and foreign armed groups remain in control of large parts of the province and the majority of the FDLR continues to resist the disarmament and repatriation to Rwanda of its forces. [...]

II. 2008 Crisis in North Kivu

[Source: Human Rights Watch, "Killings in Kiwanja. The UN's Inability to Protect Civilians," Report, 2008, available at www.hrw.org. Footnotes omitted]

[...]

II. Context

Peace process fails

In late August 2008, heavy fighting resumed in North Kivu between the Congolese army and Nkunda's CNDP rebels, as well as other armed groups, breaking a fragile ceasefire that had been in place since the Goma peace agreement was signed on January 23. [...]

The Congolese army launched an offensive against the CNDP on August 28 but quickly lost ground, despite their superior numbers. The better organized CNDP rebels captured huge swathes of territory in the heavily populated and fertile areas of Masisi and Rutshuru, sometimes temporarily halting or reversing their advance for strategic reasons or in response to pressure from the international community. On October 26, the rebels captured Rumangabo military camp, one of the most important military bases in eastern Congo, for the second time since October 8. After seizing a large stock of weapons and ammunition, the CNDP forces then moved simultaneously north towards Rutshuru and south towards Goma. From October 26 to 28, the rebels gained control of a strategic stretch of road between Goma and Rutshuru and won another battle at Kibumba, just 27 kilometers north of Goma.

When CNDP forces took Kiwanja and Rutshuru on October 29, other CNDP forces were threatening Goma. While the Congolese government feared a possible CNDP capture of Goma, its soldiers fled the city both north and south, pillaging and looting along the way. The CNDP did not attempt to enter Goma, and declared a unilateral ceasefire.

The government did not respond to the ceasefire and its forces continued skirmishes with the CNDP forces. The CNDP also engaged in occasional combat with pro-government militias, including the Coalition of Congolese Patriotic Resistance (PARECO) and other Mai Mai groups, as well as with a Rwandan armed group, the Democratic Forces for the Liberation of Rwanda (FDLR), some of whose leaders participated in the 1994 genocide. The ongoing fighting allowed the CNDP to take further territory; by the end of November, it controlled nearly twice the area under its command at the end of August.

[...]

[Source: United Nations Security Council, "Final Report of the Group of Experts on the Democratic Republic of the Congo," 12 December 2008, S/2008/773, available at www.un.org]

[...]

G. Support to CNDP by the Government of Rwanda

61. The Group has investigated allegations that the Government of Rwanda is providing support to CNDP. It has found evidence that the Rwandan authorities have been complicit in the recruitment of soldiers, including children, have facilitated the supply of military equipment, and have sent officers and units from the Rwandan Defence Force (RDF) to the Democratic Republic of the Congo in support of CNDP.

[...]

63. CNDP operates recruitment networks in Rwanda. In some cases, there has reportedly been complicity by Rwandan officials in this recruitment. At the very least, it is clear that the Rwandan Government could do more to shut down these recruitment activities. [...]

64. [...] [N]umerous former CNDP combatants, both Congolese and Rwandan, have testified that RDF officers and units provide support to CNDP on Congolese territory:

- (a) The Group has received numerous reports of RDF presence within CNDP and RDF units deployed in support of CNDP. Eight former CNDP combatants have testified to the Group that there were active RDF officers or units supporting CNDP. [...]
- (d) According to MONUC reports and local sources interviewed by the Group, an RDF battalion based on the other side of the border from Kibumba (Rutshuru territory) has made several targeted strikes into territory of the Democratic Republic of the Congo against FDLR positions close to the border. On 1 May 2008, around 10 RDF soldiers crossed the border to Ruhunda market and abducted an FDLR officer, Captain Kasereka, after killing the FARDC soldier Issa Molimo from the 83rd brigade. The Group received confirmation regarding this incident from MONUC and the local population. The second incident took place in August 2008, when a group of RDF soldiers injured an FDLR commander and the woman he was staying with.

[...]

66. The Group has evidence that indicates that RDF provided support to CNDP during their recent offensive of 26 to 30 October 2008:

- (a) According to four separate interviews with eyewitnesses from Gasizi and Ruhunda, Congolese villages located along the Rwandan border directly to the east of Kibumba, at least two Rwandan tanks were deployed to the Kabuhanga border crossing on 25 or 26 October 2008. [...]
- (b) The same local sources consistently reported that on 25 and 26 October 2008, they saw troops crossing from Rwanda through Kikeri and Mashahi forest area

in support of CNDP advance. The Group was unable to ascertain whether these were RDF or CNDP troops, but the sources were certain they came from Rwandan territory;

[...]

68. Rwanda has also been a rear base for CNDP in other ways:

- (a) [...] [B]ank accounts that CNDP uses for financing are located in Rwanda;
- (b) CNDP officials have houses and families in Rwanda, whom they visit. CNDP delegates meet regularly with embassies there, despite the Nairobi communiqué, in which the Government of Rwanda pledged to prevent the entry into and exit from its territory of members of CNDP;
- (c) The Group was informed, including by CNDP operatives and local businessmen, of fund-raising meetings held in Gisenyi on a regular basis, especially during the offensive on Goma in late October 2008;
- (d) The CNDP leadership uses a series of around 30 consecutive MTN Rwandacell telephone numbers for much of their communication. Until September 2008, when the transmission towers were disabled, Rwandacell phones could operate on their Supercell sister network that operated in Masisi and Rutshuru (Democratic Republic of the Congo). CNDP regularly buys or is sent credit for these telephones through representatives in Rwanda. According to documents that the Group has obtained, one of the satellite telephones CNDP uses was issued to an individual, Lambert Amahoro, based in Kigali;
- (e) As explained above, some of the trucks that supply CNDP with fuel and goods are registered in Rwanda;

[...].

III. 2009 Conflict in the Kivus

[Source: Human Rights Watch, “You Will Be Punished” – Attacks on Civilians in Eastern Congo,” Report, 2009, available at www.hrw.org. Footnotes omitted]

“You Will Be Punished” Attacks on Civilians in Eastern Congo

[...]

II. Lead-Up to Military Operations

Crisis Point

[See *supra*, Part II, “2008 Conflict in North Kivu”]

- [1] In August 2008, the Congolese army launched a military offensive against the CNDP. Despite their superior numbers, the government forces quickly lost ground. [...] On October 8, 2008, the rebels unexpectedly attacked and captured Rumangabo

military camp, one of the most important military bases in eastern Congo, and seized a large stock of weapons and ammunition. Then, on October 26, the CNDP launched a major military offensive, rapidly overrunning Congolese army positions in quick succession. Military support from UN peacekeepers to the Congolese army was not enough to halt the advance and on October 29, 2008, Nkunda's rebels approached Goma, causing widespread panic. The Congolese army disintegrated, its soldiers looting, raping, and killing as they fled. UN peacekeepers remained as the only credible military force to protect Goma and its 500,000 inhabitants.

[...]

Rwanda-Congo Deal

- [2] Rwanda too faced difficulties following the CNDP's advance on Goma. Rwandan President Paul Kagame had started to feel the political costs associated with his support for Nkunda's CNDP. The December 12, 2008 publication of the UN Group of Experts report, which had been made available to governments a month earlier, detailed evidence of Rwanda's support for the CNDP [...] [See *supra* Part II]. In addition, officials in Rwanda had found it difficult to control the increasingly headstrong Nkunda. The CNDP's announcement that its goals were national and included the removal of Kabila was not well received in Kigali.
- [3] On December 5, 2008, the Congolese minister of foreign affairs, Alexis Thambwe Mwamba, and his Rwandan counterpart, Rosemary Museminali, announced the upcoming joint military operation against the FDLR, named *Umoja Wetu*. For several weeks, bilateral talks continued in secret. [...]
- [4] In January 2009 the plan was put into operation. On January 5, Bosco Ntaganda, Nkunda's military chief of staff, announced he was removing Nkunda as leader of the CNDP for hindering peace in eastern Congo. Ntaganda was being sought on an arrest warrant from the International Criminal Court for war crimes committed in Ituri, northeastern Congo, between 2002 and 2004. According to CNDP insiders interviewed by Human Rights Watch, Ntaganda had had many rifts with Nkunda since he joined the CNDP movement in 2006, which may, in part, explain his decision to head the "putsch" against Nkunda. He was also likely urged on by Rwandan officials who knew Ntaganda well (he had served in the Rwandan army) and who sought to exploit the divisions between the two men for their own purposes.
- [5] Shortly after announcing Nkunda's removal, [...] [t]en senior CNDP officers [...] joined Ntaganda's putsch and signed a declaration of the cessation of hostilities on January 16, which stated that the CNDP would integrate into the Congolese army to disarm the FDLR through joint Rwandan and Congolese military operations. [...] Seeing support ebbing away, Nkunda responded to a request [...] to come to Gisenyi, Rwanda, for consultations. On his arrival the next day, Rwandan authorities promptly detained Nkunda and placed him under house arrest. Ntaganda was made a general in the Congolese army.

- [6] Later on March 23, a new CNDP negotiating delegation signed a political agreement with the Congolese government, which provided its troops with amnesty for acts of war and insurgency (but not for war crimes, crimes against humanity or genocide), release of political prisoners, and political participation in Congo's government.

Joint Military Operations

Umoja Wetu

- [7] On January 20, at least 4,000 Rwandan troops, and possibly many more, crossed the border into eastern Congo to fight the FDLR in a joint Rwandan-Congolese offensive named operation *Umoja Wetu* ("Our Unity" in Swahili). Although a joint offensive in name, many Congolese troops were distracted by the complicated integration of former combatants from the CNDP, and other armed groups into their ranks and were largely absent from the operation. Concerned about negative public opinion from having concluded a deal in which Rwandan troops were invited into Congo, Kabila's government at first maintained that the Rwandan soldiers present in Congo were only military advisors to the joint operations and would not stay long. Then in a televised statement on January 31, President Kabila extended the invitation declaring that the joint operation would be finished by the end of February 2009, without making any mention of the extent of Rwanda's military involvement.
- [8] Rwandan troops quickly forged ahead, sometimes together with former CNDP troops, attacking one of the main FDLR bases [...] and other FDLR positions (North Kivu). [...]
- [9] After 35 days of military operations in North Kivu, and in what was likely an agreed timeframe between Presidents Kabila and Kagame, the Rwandan army withdrew from Congo on February 25. [...]

Kimia II

- [10] Government representatives from both Rwanda and Congo emphasized that the mission was not complete and pressed MONUC to join forces with the Congolese army to finish off the FDLR problem in North and South Kivu. [...]
- [11] On March 2, the Congolese army jointly with MONUC peacekeepers launched the second phase of military operations against the FDLR, known as operation *Kimia II* ("quiet" in Swahili). [...] Former CNDP officers received important command positions. Bosco Ntaganda, a newly made general in the Congolese army, was in effect deputy commander of operation *Kimia II*. Aware that Ntaganda was wanted on an arrest warrant from the ICC, and that the Congolese government, as a state party to the ICC, had a legal obligation to arrest him, Congolese government officials kept Ntaganda's name out of the official organizational structure of operation *Kimia II*. On May 29, the Congolese minister of defense wrote to Alan Doss, the head of MONUC, to say that Ntaganda was not playing a role in *Kimia II*. The assurances, however, were false. According to at least five Congolese army officers interviewed by Human

Rights Watch, and internal Congolese army documents, Ntaganda was the *de facto* deputy commander of operations for *Kimia II* and was in charge of integrating CNDP soldiers into the Congolese army. His regular presence in Goma and his repeated visits to troops on the frontlines all demonstrated he played an important role.

[...]

III. Human Rights Abuses by FDLR and Allies

[...]

A Strategy of Deliberately Targeting Civilians

[12] Before January 2009 and the launch of operations *Umoja Wetu* and *Kimia II*, FDLR members lived in numerous towns and villages spread across North and South Kivu, intermixed with Congolese civilians. Their relationships with local communities varied. In some locations, the FDLR lived in relative harmony, while in others the relationship was more violent. One constant was the FDLR's ruthless economic exploitation of local populations. In many of the areas controlled by the FDLR, Congolese state authorities and administrative services were non-existent. FDLR commanders often acted as local authorities and imposed a system of forced cohabitation, administration, and exploitation on Congolese civilians who had no choice but to live side-by-side with FDLR combatants.

[13] When the Congolese army launched military operations against the FDLR in mid-January 2009, the relationship between the FDLR and local Congolese communities suddenly changed. Almost overnight the FDLR brutally turned on their Congolese neighbors. The FDLR responded to the dramatic shift in the Congolese government's policy toward them and the launch of joint Congo-Rwanda military operations by carrying out a strategy of unlawful retaliatory attacks against the civilian population. FDLR combatants deliberately targeted Congolese civilians with what they considered punishment for their government's policy and for what the FDLR perceived as the population's "betrayal."

[14] The scale and ferocity of the attacks depended on the nature of the military operations against the FDLR. In some areas, FDLR combatants attacked civilians before the Congolese army and their allies had arrived, sometimes deliberately taking the civilians into their military positions as hostages, perhaps to be used as human shields. In other areas, the FDLR retreated, waited for the Rwandan or the Congolese army soldiers to come and go, and then returned to punish the civilian population for "welcoming" or "collaborating" with their enemies.

[15] Between late January and September 2009, FDLR forces deliberately killed at least 701 civilians. Many were chopped to death by machete or hoe. Some were shot. Others were burned to death in their homes. More than half of the victims were women and children. The FDLR also targeted and killed village chiefs and other influential community leaders, a tactic especially effective at spreading fear throughout entire communities.

- [16] The widespread killing of civilians was accompanied by rape. In the first six months of 2009, the cases of sexual violence registered at health facilities near the areas of conflict in North and South Kivu doubled or tripled. FDLR combatants were responsible for nearly half of all the rapes documented by Human Rights Watch. In over 30 cases documented by Human Rights Watch, victims told us that their FDLR attackers said that they were being raped to “punish” them. Most of the victims were gang-raped, some so viciously that they later bled to death as a result of their injuries. Some of the victims were killed when they were shot in the vagina. The killing and rape was accompanied by widespread and wanton burning of homes, schools, health centers and other civilian structures. In dozens of places across North and South Kivu, entire villages were burned to the ground and the population’s goods were looted, leaving families utterly destitute.
- [17] The widespread and systematic nature of the attacks on civilians across North and South Kivu in areas sometimes hundreds of kilometers apart, the similarity of the messages from the FDLR to local communities – including in public meetings, warning letters and direct verbal threats – as well as the similarity of methods used during attacks, strongly indicate that the retaliatory attacks were ordered from the FDLR’s central command. Dozens of former FDLR combatants interviewed by Human Rights Watch and others confirmed that no significant military operations could be carried out without clear orders from the military leadership. A senior FDLR commander who deserted in April 2009 told a European diplomat in a transcribed interview that the FDLR leadership had ordered “punitive action” against those who collaborated with the Congolese military operations. The UN Group of Experts also collected information from FDLR “signalers” who pass on commands from the FDLR military command to individual units, some of whom later deserted, that they communicated orders to attack population centers, to carry out “reprisal” attacks against the Congolese population and to treat all collaborators of the Congolese army as their “enemies.”
- [18] Some local authorities and health workers who had lived near FDLR positions for many years and knew the group well told Human Rights Watch they believed the FDLR’s strategy of attacking civilians may have been aimed at causing a humanitarian disaster with a high human cost so that the Congolese government would be forced to call off the military operations. A number of FDLR combatants who left the group since January 2009 and entered the UN’s DDRRR program told UN officials that they had been given orders to create a humanitarian catastrophe with the intention of pressing the international community to call off its support for the military operations against them.
- [19] Whatever the FDLR’s aims, under international law, deliberate attacks on civilians are war crimes, and serious offenses committed against civilians as part of a widespread or systematic attack against any civilian population are crimes against humanity.

Explicit Threats to “Punish” Civilians

[20] The FDLR strategy of retaliatory attacks against civilians was clearly evident in threatening letters the FDLR wrote to local authorities, written announcements left on roads, public meetings FDLR commanders held with civilian populations, and in oral threats FDLR combatants gave to civilians. In dozens of such verbal messages collected by Human Rights Watch across towns and villages in North and South Kivu, the FDLR explicitly said that the civilian population would be “punished” for the Congolese army’s military operations.

Warning letters

[21] The FDLR and its RUD-Urunana ally deposited letters and other notes for civilian populations before, during, and after attacks in which they explicitly warned people that they would be targeted or that further attacks would follow. [...]

[22] In one such letter from during the *Umoja Wetu* operation, [...] an FDLR commander warned that anyone who collaborated with the Rwandan army would be considered a “mortal enemy.” The letter added that if the population collaborated with Rwandan soldiers, they would be considered as a “belligerent party” with all “imaginable consequences.”

[...]

Public meetings

[23] During the course of its research, Human Rights Watch interviewed individuals who were present at 11 separate public meetings held by FDLR or RUD commanders in North and South Kivu. In each of these meetings the message was the same: if you are not with us, you are against us and will be punished. In some meetings FDLR or RUD combatants warned that if local populations did not take action to stop the Congolese army’s operations, they would be punished, indicating that some of the attacks on civilians may have been carried out in an attempt to influence government officials to halt operations. [...]

Killings in Ufumandu area

[24] The Rwandan army crossed the border into eastern Congo on January 20, just as many FDLR commanders had gathered at their base in and around Kibua for the annual meeting of the high command. [...]

[25] As the Rwandan and Congolese coalition forces engaged in operation *Umoja Wetu* advanced toward Kibua around January 25, the FDLR barricaded roads and blocked civilians from fleeing the area. According to witnesses interviewed by Human Rights Watch, when some civilians tried to flee, the FDLR attacked them, killing dozens with gunfire, rocket-propelled grenades, and machetes. [...]

[26] The FDLR also abducted as hostages at least 46 local residents and took them to their military camp, apparently intending to use them as “human shields” against

the impending attack. Witnesses said that when coalition forces attacked Kibua on January 27, the trapped civilians tried to flee, but the FDLR hacked many to death while others died in the crossfire. [...]

Targeting local chiefs

[27] Since the start of military operations in January 2009, the FDLR has summarily executed at least eight local chiefs whom they accused of having welcomed the Congolese and Rwandan armies, failing to stop the military operations against the FDLR, or providing information to the coalition forces about their whereabouts. Family members and those who worked with local authorities have also been targeted. In some instances, local chiefs were executed publicly in a clear attempt to terrorize the population.

[...]

Burning and Pillage

[28] The FDLR's strategy of retaliatory attacks against Congolese civilians to "punish" them also included the widespread and wanton burning of thousands of homes, schools, health centers, churches and other structures throughout North and South Kivu. In some villages, not a single structure was left standing. According to information collected by Human Rights Watch in missions across North and South Kivu, the FDLR burned or otherwise destroyed at least 7,051 homes and other structures between January and September 2009. The destruction was often accompanied by the pillaging of goods, leaving civilian populations utterly destitute. [...]

V. Abuses by the Congolese Army and Other Forces

[29] Congolese civilians desperately seeking protection from the brutal FDLR attacks were cruelly let down. The Congolese army, the FARDC, in joint operations with the Rwanda Defence Forces (RDF), in operation *Umoja Wetu*, and later with the support of MONUC peacekeepers in operation *Kimia II*, also targeted and committed horrific abuses against civilians. [...]

[...]

Massacres and Killing of Civilians during Operation *Umoja Wetu*

[30] Rwandan army soldiers entered Congo in late January 2009 and joined Congolese army units in operation *Umoja Wetu* against the FDLR. The five-week operation was jointly commanded by Rwandan and Congolese army officers based in Goma, North Kivu, and the neighboring border town of Gisenyi, Rwanda. In some locations coalition soldiers were well-behaved. Congolese civilians reported that Rwandan troops, in particular, paid for the food they bought from local people while on operations and made a deliberate effort to maintain good relations. But such good behavior was not repeated everywhere. In a number of areas, coalition forces were responsible for the targeted killing of civilians, rape, arbitrary arrests,

and the destruction of homes. According to Human Rights Watch research, at least 201 civilians were killed by coalition forces during operation *Umoja Wetu*.

[...]

[31] Victims and witnesses interviewed by Human Rights Watch found it difficult, if not impossible, to distinguish Rwandan army soldiers from former CNDP combatants recently integrated into the Congolese army who played an important role in the operation. The soldiers of both armies often wore identical camouflage uniforms, many were Tutsi, and spoke Kinyarwanda (the main language of Rwanda). Rwandan army soldiers did have a small Rwandan flag on the upper sleeve of their uniforms, but this was not always easy to spot. In some cases former CNDP combatants had the same army uniforms though they usually removed the Rwandan flag. A significant number of CNDP combatants were in fact former Rwandan army soldiers or were Rwandan citizens who had been recruited into the CNDP in 2007 and 2008. In most cases witnesses simply identified their attackers as “Tutsi soldiers” in camouflage uniforms.

[...]

Ndorumu massacre

[32] In late February, Rwandan and Congolese soldiers arrived in Ndorumu, Masisi territory, a remote village nestled among the forested hills largely made up of ethnic Hunde, with a small minority of Hutu. The coalition soldiers set up a military position at the local primary school and told the population not to be frightened since they were government soldiers who had come to bring peace. The APCLS militia, an ally of the FDLR, had a military position in Lukweti, a few kilometers from Ndorumu, but according to witnesses interviewed by Human Rights Watch, there were no APCLS or FDLR combatants present in Ndorumu the day the coalition forces arrived.

[33] Within just two hours of their arrival, the coalition forces called a meeting at the local school, but as people gathered they began to shoot and kill civilians. There was no military combat in the village, nor did the FDLR or APCLS militia attack the coalition forces. Instead the coalition forces randomly and without warning began to attack local civilians who they accused of collaborating with the FDLR. [...]

[34] During a two-day killing spree, coalition soldiers killed some 90 civilians in and around Ndorumu village, sending a stark warning that civilians would be punished for their perceived support of the FDLR and its allies. The victims included 30 women, four children and eight elderly men.

[...]

Other Abuses during Operation *Umoja Wetu*

Sexual violence

[35] The attacks on civilians by the coalition soldiers during operation *Umoja Wetu* often included sexual violence against women and girls, and also in at least one case,

against a man. Human Rights Watch documented 42 cases of rape by coalition soldiers who were deployed against the FDLR in January and February 2009.

[...]

- [36] There appears to have been an increase in cases of male rape since the launch of military operations against the FDLR. However, there are almost no statistics due to the shame and fear associated with male rape in Congo. [...]

Unlawful destruction of homes and other structures

- [37] Coalition soldiers also engaged in wide-scale and wanton destruction of homes and villages. During operation *Umoja Wetu*, coalition forces burned at least 1,357 homes in 14 different villages in [...] territories of North Kivu. In most cases, soldiers blamed civilians for having lived with the FDLR or their allies and punished them by burning their homes, sometimes in apparent frustration after they were unable to find the FDLR. The widespread destruction of homes and other civilian structures without a militarily justified reason is a form of collective punishment against the civilian population.

[...]

Arbitrary arrests, torture and illegal transfers to Rwanda

- [38] Human Rights Watch documented the arbitrary arrest in Goma of at least two Congolese Hutu civilians during operation *Umoja Wetu*, who were taken across the border to Rwanda, where they were held illegally for days or weeks. The detainees were tortured by Rwandan military authorities to force them to confess to being FDLR combatants or sympathizers. Human Rights Watch received credible reports of 23 similar cases.

- [39] In interviews with Human Rights Watch, two of these civilians detained at different times and locations described similar practices used. They were initially arrested in Goma by soldiers in Congolese army or police uniforms who later changed into Rwandan army uniforms before transferring the detainees to Rwanda. The change of uniforms and the subsequent detention in Rwanda strongly indicates that those carrying out the arrests were Rwandan officials. In both cases, the detainees were tortured, including by being badly beaten, and reported that other detainees with whom they were held were also beaten.

[...]

- [40] Of the 25 cases of arbitrary arrest by the coalition forces involving the illegal transfer of Congolese civilians to Rwanda reported to Human Rights Watch, none of the detainees was ever charged with any offense.

- [41] On February 25, 2009, Rwandan soldiers began to withdraw from eastern Congo and in the following days ended the joint Rwandan-Congolese military operation *Umoja Wetu*. The Rwandan government praised the operation and said it had

“seriously weakened” the FDLR and urged the Congolese government to continue its military operations against the FDLR.

Massacres and Killings during Kimia II

[42] On March 2, the Congolese army launched its next phase of operations against the FDLR, called *Kimia II*, this time with substantial logistical, tactical, and other support from MONUC peacekeepers [...]. Despite MONUC’s mandate under UN Security Council Resolution 1856 to help protect civilians and the insistence of UN officials that their support of the operations would help to decrease any harm to civilians, this phase of military operations was even more deadly to civilians than operation *Umoja Wetu*.

[43] Human Rights Watch has documented the deliberate killing by Congolese army soldiers of 505 civilians in North and South Kivu since the start of operation *Kimia II* from March through to September 2009. [...]

Massacres in Nyabiondo-Pinga area

[44] As during the *Umoja Wetu* operation, the area between Nyabiondo and Pinga was the target of military operations during the *Kimia II* operations, demonstrating that the FDLR had not been pushed out of this area during operation *Umoja Wetu*, as had been claimed. As before, civilians paid the price. Although this zone had been attacked by coalition forces in February, FDLR forces and their APCLS militia allies had not been defeated and had simply fled or retreated to the surrounding forests and returned to the villages soon after the coalition forces departed. In March, Congolese army forces, largely drawn from CNDP soldiers newly integrated into the Congolese army, some of whom may have participated in the earlier *Umoja Wetu* operation, returned to the edges of the area to continue their offensive. The soldiers established military positions surrounding the zone from where they launched dozens of attacks. As before, FDLR and APCLS combatants retreated or fled in the face of the offensive. When Congolese army soldiers arrived into the villages where the combatants had previously been based, they often found only civilians, whom they accused of supporting the FDLR and its allies.

[45] According to dozens of victims and witnesses interviewed by Human Rights Watch, Congolese army forces deliberately killed at least 270 civilians in this area alone between March 5 and September 29. Victims and witnesses repeatedly identified the perpetrators of these attacks as “Tutsi soldiers” in camouflage uniforms, indicating that they may have been former CNDP soldiers newly integrated into the Congolese army.

[...]

Motivation for attacks in Nyabiondo-Pinga area

[46] Several local authorities, Congolese army commanders and others told Human Rights Watch that they believed the motivation for the attacks on civilians by former

CNDP soldiers integrated into the Congolese army in the Nyabiondo-Pinga area is about control over land and the return of Congolese Tutsi refugees from Rwanda. One former CNDP officer now integrated into the Congolese army told Human Rights Watch that the operations in the Nyabiondo-Pinga area were intended to “kill civilians and terrorize the Hunde and Hutu population” so that the land would be cleared for the return of Congolese Tutsi coming back from Rwanda.

- [47] Several thousand Tutsi civilians lived in the mountainous area between Nyabiondo and Pinga including many Tutsi who came to Congo from Rwanda following ethnic pogroms there in 1959. In 1992-93, ethnic clashes erupted between Hutu, Hunde and Tutsi ethnic groups who lived in this area and in other towns and villages in Masisi. The clashes, which were largely about control over land, left thousands dead. Many Tutsi fled the area to seek refuge in other parts of Congo and eventually fled to Rwanda following the arrival into Congo of a large number of Hutu refugees and those responsible for the genocide in Rwanda.
- [48] One of the CNDP’s main political objectives is the return of the Congolese Tutsi refugees from Rwanda back to Congo. There are an estimated 44,000 Congolese refugees in official refugee camps in Rwanda, in addition to other unregistered Congolese Tutsi who live in host families or who bought their own land in Rwanda. Some acquired Rwandan citizenship. Many harbored the desire to return to Congo one day.
- [49] UNHRC [sic] [UNHCR] has not yet officially begun the process of returning Congolese Tutsi refugees from Rwanda back to Congo, deeming the situation too insecure. Yet between April and November 2009, several thousand refugees and possibly other Rwandan citizens crossed the border to Congo, the majority since August. [...]
- [50] It is unclear what has sparked this seemingly sudden population movement. Those interviewed by Human Rights Watch in Kibumba and Kitchanga cited hunger in Rwanda, educational opportunities in Congo, possibilities of accessing their land in Congo, and news of peace and security in eastern Congo as the reasons why they decided to leave Rwanda this year. Yet given that most are still living in camps once they arrive in Congo, it is possible they may have been encouraged to return or they believe there are new opportunities.
- [...]

Other Abuses during *Kimia II*

[...]

Forced labor

- [51] Since the start of military operations against the FDLR, Congolese army forces have pressed hundreds of civilians into forced labor to carry their supplies, ammunition, and other equipment to the frontlines. The journeys are long and difficult, and the loads often very heavy. At least two men died after collapsing under loads that

were too heavy for them to carry and at least ten others were killed when they refused or were physically unable to lift the load assigned to them. [...]

- [52] Civilians have also been abducted to serve as “guides” and show the FARDC soldiers the paths usually taken by the FDLR or their military positions. These civilians risked being punished and beaten either for not knowing where the FDLR may be hiding, or, if they did seem to know where to go, sometimes they have been accused of being an FDLR member or collaborator. Civilians traveling with soldiers as porters or guides also risked falling into ambushes by the FDLR or being targeted later by FDLR combatants who accused them of having “collaborated with” or supported the enemy forces.

[...]

- [53] In many areas, Congolese army soldiers also forced civilians to carry out services for them such as collecting firewood and water, or constructing their temporary huts. In some locations the use of civilians for this work led local authorities to bitterly complain that their populations were being used as “slaves.”

[...]

VII. Congolese Government and Army’s Failure to Protect Civilians

- [54] The protection of civilians in Congo is primarily the responsibility of the Congolese government and its security forces. Yet Congolese government officials have failed to take adequate or effective steps to protect civilians in eastern Congo. Congolese army troops have committed widespread violations of international humanitarian and human rights law, but few have been held to account.

- [55] During military operations in *Umoja Wetu* and *Kimia II*, the Congolese armed forces made little if any planning for civilian protection, integrated highly abusive militias into its forces, and failed to seriously address the deeply entrenched problem of impunity. In some cases, the Congolese army launched attacks in areas where they knew civilians and humanitarian workers would be put at particular risk.

Inadequate Civilian Protection Planning

- [56] Before the Congolese government embarked on the military operations *Umoja Wetu* and *Kimia II*, little or no provision for civilian protection in conflict areas was put into place. Once operations were underway and FDLR retaliatory attacks against civilians were launched, the government and army officials made few, if any, adjustments to military operations to account for the increased risk to civilians.

- [57] [...] When asked by Human Rights Watch researchers what measures were being taken to protect civilians during the ongoing military operations, some senior army commanders responded that civilian protection was the responsibility of MONUC.

- [58] The government should have foreseen and taken into account that its military operations would be placing civilians at greatly heightened risk of abuses from FDLR combatants and its own forces. Previous military operations in North Kivu in

2007 and 2008, including a short-lived joint operation in 2007 when CNDP troops temporarily “mixed” with Congolese army soldiers to fight the FDLR, had also resulted in FDLR retaliatory attacks against civilians and abuses by government soldiers. But Congolese decision-makers appeared to focus entirely on the offensive military operations against the FDLR without giving adequate, if any, serious attention to the additional risks to civilians. Civilians suffered tremendously because the Congolese government, with the support of its international partners (discussed below), sought to achieve the twin goals of making a peace deal with the CNDP rebels and weakening the FDLR by launching military operations without adequate provision for the protection of civilians. This had horrific consequences for the people of eastern Congo.

Integration Problems Increase Risks

- [59] In a hasty “fast track accelerated integration” process that was part of the arrangement struck between Congo and Rwanda, the Congolese army welcomed an estimated 20,000 former rebels, mostly from the CNDP but also other Mai Mai groups, into its ranks. After registering their names, giving them Congolese army uniforms, and, for some, a cursory health check, the Congolese government deployed them within days on military operations against the FDLR alongside their existing soldiers. At the launch of operation *Kimia II*, there were an estimated 50,000 government soldiers deployed on military operations in North and South Kivu. The rapid integration process provided no opportunity for vetting the rebels to dismiss human rights abusers, nor were child soldiers removed from the rebel ranks before being integrated into the government army. Once former rebels became government soldiers, their conduct became the responsibility of the Congolese army.
- [60] The rapid integration process led to immediate problems. There was confusion over chain of command with newly integrated former rebels and government soldiers who were already in the army often remaining loyal to their old commanders rather than to their new officers. [...]

VIII. MONUC and Civilian Protection

- [61] [...] MONUC was first established in 1999. With nearly 20,000 peacekeepers, MONUC is currently the largest UN peacekeeping mission in the world, with a strong mandate from the UN Security Council to protect civilians “under imminent threat of physical violence” and to use force to do so. In December 2008, the Security Council specifically requested MONUC to attach “the highest priority to addressing the crisis in the Kivus, in particular the protection of civilians.”
- [62] Since 2004, MONUC’s mandate also authorized the mission to participate in and support military operations led by and jointly planned with Congolese army integrated brigades against foreign and national armed groups, including the FDLR. The Security Council emphasized that such operations must be “in accordance with international humanitarian, human rights and refugee law and should include appropriate measures to protect civilians.”

[63] MONUC has faced significant challenges in fulfilling this mandate. In March 2009 it joined forces with the Congolese armed forces to carry out the *Kimia II* military operations against the FDLR. But preparations for the operation were hurried, permitting little time for full reflection on how an international peacekeeping force could appropriately provide protection to civilians while backing a national army with a terrible human rights record. Well into *Kimia II*, the conditions around MONUC's involvement were not yet properly clarified and no concrete plan to provide protection to civilians at risk was in place. To make matters worse, MONUC lacked the necessary logistical resources and rapid response capabilities to effectively carry out its mandate to protect civilians, and it had trouble grappling with the fragmented and catastrophic conflict on the ground.

[...]

Concerns about Operation *Kimia II*

[64] On March 2, the Congolese army with direct MONUC participation launched operation *Kimia II*. MONUC's role included logistical and operations support such as intelligence and operations planning, fire support, air strikes, transportation, joint patrolling, and medical evacuations. MONUC also agreed to supply daily rations for 16,000 soldiers, plus fuel for FARDC vehicles and other transport support worth over \$6 million for the first six months of the operation.

[65] [...] A number of diplomats and MONUC officials recognized the potentially catastrophic human cost of the planned operations and were aware of the serious limitations in the Congolese army's capacity to conduct the operations effectively and in compliance with international humanitarian law. Civilian staff members in MONUC told Human Rights Watch there was little to no consultation between MONUC military and civilian staff before plans went forward with *Kimia II*, giving those wary about MONUC's support for the operation little opportunity to voice their concerns or to develop advance plans to enhance civilian protection.

[...]

[66] There is no evidence that MONUC officials pressed the Congolese government to address serious shortcomings before the launch of *Kimia II*, including completing integration of the CNDP and other armed groups in the Congolese army, resolving salary and logistical problems for the armed forces involved in the operation, and putting into place a strategy for adequate civilian protection. In an internal document in November 2009, MONUC said that conducting military operations against the FDLR was a sovereign decision by the Congolese government and insisted that if MONUC had not supported the military operations, it risked a "chain reaction" that could have unraveled the integration process, seen a re-emergence of armed groups, and a deterioration of relations between Congo and Rwanda.

[...]

Debates on conditionality

[67] MONUC officials emphasized both publicly and privately that the *Kimia II* operations should respect international humanitarian and human rights law, but no formal conditions were put in place defining MONUC's role in the operations. It was not clear how respect for international humanitarian law would be ensured – especially by Congolese army forces with a record of war crimes – or under what circumstances MONUC would withdraw its support if violations occurred. [...]

[68] On January 13, March 6, and April 2, the UN Office of Legal Affairs provided formal legal advice to MONUC. According to the confidential legal note in April, MONUC “cannot participate in any form of joint operations with FARDC units, or support an operation by those units, if there are substantial grounds for believing there to be a real risk of them violating international humanitarian law, human rights law or refugee law in the course of the operation.” The legal advice added that should such violations occur, “MONUC must immediately intercede with the FARDC at the command and operations levels, with a view to dissuading the unit concerned from continuing such violations.” If such action did not bring results and the violations were widespread and serious, MONUC was advised “to cease its participation in the operations as a whole.”

[...]

MONUC and accountability for FARDC abuses

[69] [...] MONUC did seek to act on the abuses committed by Congolese soldiers in the area between Nyabiondo and Pinga. On November 1, after eight months of support to operation *Kimia II*, Alain Le Roy, the head of the UN Department of Peacekeeping Operations announced during a visit to Congo that MONUC would suspend its support to the Congolese army's 213th Brigade. MONUC's own preliminary investigations had revealed Congolese army soldiers had killed at least 62 civilians in the Lukweti area, just north of Nyabiondo. MONUC support, however, was not suspended to any other army units despite credible information that gross human rights violations were occurring elsewhere. Following strong protests from Congolese government officials about the suspension, MONUC quickly responded that its overall support to *Kimia II* operations would continue.

[70] MONUC's withdrawal of support to the 213th Brigade consisted of halting all supplies of food rations for the soldiers for the month of November. But since there is no system in place to track whether the rations MONUC provides to Congolese army units participating in operation *Kimia II* actually make it to the troops on the ground, it is unclear what, if any, impact this suspension of support will bring. None of the commanders responsible for the abuses in the Nyabiondo or Shalio areas, nor other commanders known for previous serious human rights violations, had been removed from involvement in *Kimia II* operations at the time of writing.

[...]

DISCUSSION

I. Qualification of the conflict and applicable law

1. How would you qualify the situation in the Kivus between 2007 and 2009? Would you say that there is one single armed conflict spreading over time and territory, or, for the purpose of determining the applicable rules of IHL, that there are several armed conflicts (in 2007, 2008 and 2009)? Do the Act of Engagement of 23 January 2008 and the declaration on the cessation of hostilities of 16 January 2009 mark the end of a conflict? Do the hostilities that erupted after these peace agreements mark the beginning of new conflicts?
2. Would you say that, between 2007 and 2009, there was one single armed conflict with evolving alliances, or that there were several armed conflicts respectively starting after each redefinition of the alliances?
3.
 - a. What is the nature of the armed conflict(s)? Who are the parties to the conflict(s)? Does the same set of rules apply to all the parties? Based on the background information provided in the case, do you think that all the non-State armed groups meet the requirements for Protocol II to apply?
 - b. (*2009 Conflict in the Kivus, paras 17-19*) Does the FDLR meet the requirements for Protocol II to apply? Even though it is deliberately violating IHL? In order for Protocol II to apply, does the armed group have to respect IHL or be able to respect IHL? (P II, Art. 1)
 - c. Do the armed groups other than the FDLR meet the requirements for Protocol II to apply? If no, which groups do not seem to meet the requirements? If one armed opposition group meets the requirements of Protocol II, does the latter also apply to fighting between the government and groups which do not meet those requirements? To fighting between such groups? If at least one group fights for the government? Does Protocol II at least protect the persons affected by governmental measures in such conflicts?
 - d. If Protocol II does not apply to some of the groups, what law does apply to them? Does Protocol II still apply to the other groups that meet the requirements? (GC I-IV, Art. 3; P II, Art. 1)
 - e. Would you say that there is one single armed conflict with several bilateral confrontations, or that there are several armed conflicts, each of which represents a bilateral confrontation? Can a conflict situation be divided into as many bilateral relationships as there are parties to the conflict, potentially with a different set of rules applying to each relationship? Is it realistic to say that different rules may apply to the same party according to who it is fighting? Is it realistic to expect parties to respect this difference?
4.
 - a. Does foreign intervention automatically internationalize a conflict? Was Rwanda's support for the CNDP in 2008 sufficient to conclude that Rwanda was involved in the armed conflict? If yes, does it turn the conflict into an international one? For qualification purposes, does it matter that Rwanda's assistance and direct attacks were not directed against the Congolese army, but against a rebel group on Congolese territory, the FDLR?
 - b. Did the fact that Rwanda was involved in the conflict against the FDLR in 2009 internationalize the conflict (operation *Umoja Wetu*)? For qualification purposes, does it matter that Rwanda was invited by the Congolese Government?
5. Can peacekeeping forces be parties to an armed conflict? Did MONUC become a party to the conflict when it agreed to launch joint military operations against the FDLR (operation *Kimia II*)? Did this internationalize the conflict? Was MONUC a party to the conflict before operation *Kimia II*? Does the fact that MONUC was authorized to use all necessary means automatically mean that it was party

to the armed conflict? [See **Case No. 228**, Case Study, Armed Conflicts in the Great Lakes Region, [Part 3, D.]]

II. Conduct of hostilities

6. a. (*2009 Conflict in the Kivus, paras 17-23*) Under IHL, when may civilians be directly targeted? Does it suffice to say that someone is collaborating with the enemy for him to be considered as belonging to the enemy party and thus to be a legitimate target? (GC I-IV, Art. 3; P II, Art. 4; CIHL, Rules 1 and 6)
- b. (*2009 Conflict in the Kivus, paras 12-23 and 37*) Under IHL, can civilians be targeted in the conduct of hostilities, or killed once in the power of the enemy, in “retaliatory” attacks intended to punish them for their government’s policy? What protection does IHL offer against such situations? What can IHL do when deliberate attacks against the civilian population and civilian objects, or the killing of civilians in the power of a belligerent, are part of that belligerent’s military strategy? (HR, Art. 50; GC I-IV, Art. 3; GC IV, Art. 33; P I, Arts 20, 51(6) and 75(2)(d); P II, Art. 4(2)(b); CIHL, Rules 103 and 146-148)
7. (*2009 Conflict in the Kivus, paras 24-26*) Which rules of IHL did the FDLR violate when it prevented civilians from fleeing the place of hostilities? Which rules did it violate when it abducted local residents and took them to its military camp? What does IHL say about hostage-taking? What does it say about human shields? (GC I-IV, Art. 3; P I, Art. 51(7); P II, Art. 4(2)(c); CIHL, Rules 96 and 97)
8. (*2009 Conflict in the Kivus, para. 27*) Can local chiefs be considered as belonging to the enemy party? What about people who work with the local authorities? If they are “failing to stop the military operations against the FDLR, or providing information to the coalition forces about their whereabouts”? Can they then be considered as directly participating in hostilities? Even assuming that they may be so considered, can they be summarily executed? Can their family members be targeted? (P II, Art. 4; CIHL, Rules 1, 2 and 6)
9. (*2009 Conflict in the Kivus, paras 16 and 35-37*) What protection does IHL give against rape and other forms of sexual violence? Does IHL also protect men against sexual violence? (GC I-IV, Art. 3; GC IV, Art. 27; P I, Arts 75(2) and 76; P II, Art. 4(2)(a) and (e); CIHL, Rules 90, 91 and 93)
10. (*2009 Conflict in the Kivus, paras 31 and 39*) From the point of view of IHL, is it a problem that it was difficult to distinguish Rwandan army soldiers from former CNDP combatants recently integrated into the Congolese army (*para. 31*)? Similarly, what do you think of the fact that soldiers wearing Congolese uniforms changed into Rwandan uniforms during the transfer of detainees (*para. 39*)? Under IHL, is there an obligation for armed groups to distinguish themselves from allied armed groups? Why can this be problematic? (P I, Arts 44(3) and 48; CIHL, Rule 106)
11. (*2009 Conflict in the Kivus, paras 38-40*)
 - a. In the present case, on what basis could Congolese civilians be arrested and detained? Does the applicable IHL give any indication about when a person may be detained? If IHL is unclear on the matter, how should confinement be regulated? Can civilians be detained only when they are charged with an offence?
 - b. Can detained civilians be transferred to another State’s territory? If this other State is the Detaining Power’s ally? Does your answer vary according to the nature of the conflict? Why does Human Rights Watch say that the transfer to Rwanda was illegal (*para. 40*)? (P II, Art. 17; CIHL, Rule 129)

12. (*2009 Conflict in the Kivus, paras 51-53*)

- a. Can civilians be forced to carry out tasks for one of the parties to the conflict? Does your answer vary according to the nature of the tasks? Does your answer vary according to the nature of the conflict? Did the Congolese army violate IHL when it forced civilians to carry supplies, ammunitions and other equipment to the frontline? When it used them as guides? When it forced them to collect firewood and water, or to construct temporary huts? (GC IV, Arts 40, 51 and 95; P II, Art. 5(1)(e); CIHL, Rule 95)
- b. Can civilians who are forced to serve as guides be considered, at the time they so serve, as directly participating in hostilities and therefore be directly targeted by the FDLR? If not, how else can the FDLR prevent its military positions from being discovered? (GC I-IV, Art. 3; P II, Art. 4(1); CIHL, Rules 1 and 6) [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

III. Responsibility

13. (*2009 Conflict in the Kivus, paras 54-60*) Is the DRC responsible for the violations of IHL committed by former CNDP combatants integrated into the Congolese army? What should it have done to prevent or reduce violations committed by former CNDP combatants? (HR, Art. 3; P I, Art. 91; CIHL, Rule 149)
14. (*2009 Conflict in the Kivus, paras 54-60*) Under IHL, what were the DRC's obligations regarding the protection of the civilian population? Is there a general obligation to protect the civilian population against the enemy? Or is it only an obligation to protect the civilian population against the effects of specific military attacks? What could the Congolese army have done to better protect the civilian population? (CIHL, Rule 22)
15. (*2009 Conflict in the Kivus, para. 11*) What responsibility did the DRC incur when it integrated Bosco Ntaganda into its armed forces and appointed him deputy commander of operation *Kimia II* while he was under an ICC arrest warrant? Did the DRC violate its obligations under the ICC Statute by not surrendering Ntaganda to the ICC?
16.
 - a. (*2008 Crisis in North Kivu*) Did Rwanda engage its international responsibility for assisting the CNDP in 2008? In which cases and for what reasons did IHL violations committed by the CNDP engage the responsibility of Rwanda? Can Rwanda be held accountable for failing to prevent such violations? (CIHL, Rule 149)
 - b. (*2009 Conflict in the Kivus, paras 7, 29-53*) Can Rwanda be held accountable for violations committed during operation *Umoja Wetu*? Only for violations committed by its own forces? Or can it be held accountable for violations committed by the Congolese forces? [See **Case No. 53**, International Law Commission, Articles on State Responsibility]
 - c. Whose obligation is it to investigate and prosecute violations of IHL committed in the Kivus? Is it solely the DRC's obligation, because the violations occurred on Congolese territory? Does Rwanda also have an obligation to investigate and prosecute violations? Is Rwanda under such an obligation only for violations committed by its own forces? Does any other State have an obligation in this respect? (GC IV, Art. 146; CIHL, Rules 157 and 158)
17. Why did MONUC have an obligation to stop violations of IHL by the Congolese forces? Can it be held accountable for violations committed by the Congolese forces during operation *Kimia II*? Only if MONUC peacekeepers committed violations? If yes, who would have jurisdiction to prosecute?

Case No. 230, UN, Statute of the ICTR

A. The Statute

[Source: UN Doc. S/RES/955 (November 8, 1994)]

**Statute of the International Criminal Tribunal
for the Prosecution of Persons Responsible for Genocide
and Other Serious Violations of International Humanitarian Law
Committed in the Territory of Rwanda and Rwandan Citizens Responsible
for Genocide and Other such Violations Committed
in the Territory of Neighbouring States,
between January 1, 1994 and December 31, 1994**

The Security Council,

[...]

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of July 1, 1994 (S/1994/879 and S/1994/906), and *having taken note* of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of October 1, 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects, [...]

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;
2. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;
3. *Considers* that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute; [...]

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.

Article 3: Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

**Article 4: Violations of Article 3 common to the Geneva Conventions
and of Additional Protocol II**

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims, and of Additional Protocol II thereto of June 8, 1977. These violations shall include, but shall not be limited to:

- (a) Violence to 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;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.

Article 5: Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual criminal responsibility

1. 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 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on January 1, 1994 and ending on December 31, 1994.

Article 8: Concurrent jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9: *Non bis in idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
 - (a) The act for which he or she was tried was characterised as an ordinary crime;
or
 - (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

- (a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;
- (b) The Prosecutor; and
- (c) A Registry.

Article 11: Composition of the Chambers

[as modified by Security Council Resolution 1512 (2003)]

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 bis: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - (a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations

and non-member States maintaining permanent observer missions at United Nations Headquarters;

- (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge 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 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 *bis* of the Statute of that Tribunal;
 - (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;
 - (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
- 2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.
 - 3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter*: Election and Appointment of *Ad litem* Judges

- 1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - (a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations

and non-member States maintaining permanent observer missions at United Nations Headquarters;

- (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;
 - (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;
 - (d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;
 - (e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.
2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 quater: Status of *Ad litem* Judges

- 1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:
 - (a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;
 - (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
 - (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;
 - (d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:
 - (a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;
 - (b) Have power:
 - (i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) To review an indictment pursuant to article 18 of the present Statute;
 - (iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.
2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.
3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 *bis* of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.
4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and

appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall

assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
 - (g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by

a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

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

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International

Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) The identification and location of persons;
 - (b) The taking of testimony and the production of evidence;
 - (c) The service of documents;
 - (d) The arrest or detention of persons;
 - (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

B. Security Council Resolution 1534 (2004)

[Source: S/RES/1534 (2004), Resolution 1534 (2004), Adopted by the Security Council at its 4935th meeting, on 26 March 2004.]

The Security Council, [...]

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY's completion strategy and its resolution 1503 (2003) of 28 August 2003,

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies, [...]

Acting under Chapter VII of the Charter of the United Nations, [...]

4. *Calls* on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
5. *Calls* on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003); [...]
9. *Recalls* that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular; [...]

DISCUSSION

1.
 - a. Does the Statute qualify the situation in Rwanda in 1994?
 - b. What is the difference between a genocide and an armed conflict? Can an armed conflict be an act of genocide? Is every genocide an armed conflict to which at least Art. 3 common to the

Conventions is applicable? Why does IHL not explicitly prohibit acts of genocide? Can the same act fall under Arts 2, 3, and 4 of the Statute?

- c. Which acts enumerated in Arts 2 and 3 of the Statute are not necessarily covered by Protocol II?
2. a. Were the genocide and the armed conflict in Rwanda, though non-international, a threat to peace (justifying measures under Chapter VII of the UN Charter)? Is the establishment of a tribunal to prosecute violations of IHL a proper measure to stop that threat? Can we today say whether it contributed to the restoration of peace in Rwanda? Does that (the end result) actually matter? Does the prosecution of (former) leaders not make peace and reconciliation more difficult?
- b. Or are violations of IHL themselves threats to peace (justifying measures under Chapter VII of the UN Charter)? Even in non-international armed conflicts? Can the same be said of gross violations of human rights outside armed conflicts?
3. a. Can the UN Security Council establish a tribunal? Is such a tribunal independent? Is it a “court established by law”? Does the creation of a tribunal competent to try acts committed before it was established itself violate the prohibition (in IHL and international human rights law) of retroactive penal legislation?
- b. How else than by a Security Council resolution could the ICTR have been established? What are the advantages and disadvantages of those other methods?
4. Is the prosecution of serious violations of the IHL of non-international armed conflicts prescribed by IHL? Is it compatible with IHL?
5. Are Arts 2-4 of the Statute penal legislation or simple rules of competence of the ICTR?
6. a. Is Art. 4 retroactive penal legislation, as neither Art. 3 common to the Conventions nor Protocol II foresee any individual penal responsibility for violations of the IHL of non-international armed conflicts? Were those acts prohibited under Rwandan legislation (as Rwanda was a party to Protocol II)? Would the fact that those acts were punishable under Rwandan legislation suffice to avoid a violation of the principle *nullum crimen sine lege*? Is that principle only respected if such legislation exists? Could Art. 3 common to the Conventions and Protocol II be considered as self-executing penal legislation?
- b. Why does Art. 4 copy just Art. 4(2) and no other provision of Protocol II? Does that have any significance for the qualification of other violations of Protocol II as serious violations? Could you give some other examples of provisions of Protocol II the violation of which definitely falls under Art. 4 of the Statute? Could you give some examples of provisions of Protocol II the violation of which does not fall under Art. 4 of the Statute?
7. Is Art. 9 compatible with the IHL of non-international armed conflicts? (GC I-IV, Art. 3; P II, Art. 6)
8. a. Are those detained under the authority of the ICTR (pending trial or having been sentenced) protected by Arts 5 and 6 of Protocol II? Are any provisions of the Statute incompatible with those guarantees of IHL?
- b. Does the ICRC have the right to visit the accused?

Case No. 231, UN, A Multinational Force to Facilitate Humanitarian Aid

[Source: UN Doc. S/RES/1080 (November 15, 1996)]

The Security Council,

[...],

Gravely concerned at the continuing deteriorating situation in the Great Lakes region, in particular eastern Zaire, [...],

Stressing the need for all States to respect the sovereignty and territorial integrity of the States in the region in accordance with their obligations under the Charter of the United Nations,

Underlining the obligation of all concerned strictly to respect the relevant provisions of international humanitarian law, [...],

Recognizing that the current situation in eastern Zaire demands an urgent response by the international community,

Reiterating the urgent need for an international conference on peace, security and development in the Great Lakes region under the auspices of the United Nations and the OAU to address the problems of the region in a comprehensive way,

Determining that the present situation in eastern Zaire constitutes a threat to international peace and security in the region,

Bearing in mind the humanitarian purposes of the multinational force as specified below,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* its condemnation of all acts of violence, and its call for an immediate ceasefire and a complete cessation of all hostilities in the region;

[...]

3. *Welcomes* the offers made by Member States, in consultation with the States concerned in the region, concerning the establishment for humanitarian purposes of a temporary multinational force to facilitate the immediate return of humanitarian organizations and the effective delivery by civilian relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees and civilians at risk in eastern Zaire, and to facilitate the voluntary, orderly repatriation of refugees by the United Nations High Commissioner for Refugees as well as the voluntary return of displaced persons, and invites other interested States to offer to participate in these efforts; [...]

5. *Authorizes* the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 3 above to achieve, by using all necessary means, the humanitarian objectives set out therein;

6. *Calls upon* all concerned in the region to cooperate fully with the multinational force and humanitarian agencies and to ensure the security and freedom of movement of their personnel;
7. *Calls upon* the Member States participating in the multinational force to cooperate with the Secretary-General and to coordinate closely with the United Nations Coordinator for humanitarian assistance for eastern Zaire and the relevant humanitarian relief operations; [...]
12. *Expresses* its intention to authorize the establishment of a follow-on [*sic*] operation which would succeed the multinational force, and *requests* the Secretary-General to submit for its consideration a report, no later than 1 January 1997, containing his recommendations regarding the possible concept, mandate, structure, size and duration of such an operation, as well as its estimated costs; [...].

DISCUSSION

1.
 - a. Is the situation here of such gravity as to constitute a threat to peace justifying measures under Chapter VII of the UN Charter? Are violations of IHL themselves (specifically, the denial of access to humanitarian aid) threats to peace, thus justifying measures under Chapter VII of the UN Charter? Even in non-international armed conflicts? Could the same be said of gross violations of human rights outside armed conflicts?
 - b. Is the sending of a multinational protection force to facilitate humanitarian assistance an appropriate measure to stop this threat? Should military forces really perform this role? Can they do so? Is the UN mandate of the protection force the best solution for this situation, particularly when “all necessary means” may be used? Will it help restore law and order? Would the objective here be more accurately defined if called conflict resolution instead of humanitarian action?
 - c. How should the roles ideally be distributed between military forces and humanitarian organizations?
2.
 - a. What features distinguish humanitarian action from conflict resolution? Why should the distinction between these objectives be maintained?
 - b. How can the risk of entering the domain of “interference” in the internal affairs of a State be avoided? Where is the dividing line between humanitarian intervention and political interference?
3.
 - a. Is it possible to envisage the UN dispatch of military forces solely to enforce IHL while excluding any action related to resolving the conflict?
 - b. Which problems are faced by a State, organization or military force that wishes to intervene in terms of conflict resolution at the same place where it also wishes to enforce IHL or provide humanitarian aid?
4. Is the multinational force sent by the UN bound by IHL? Does the applicability of IHL depend on whether the troops are considered to be under each individual State’s authority? Does IHL apply to the international forces here? What do you think of the argument that IHL cannot formally apply to such operations because they are not armed conflicts between equal partners, but law enforcement actions – if not “police operations” – conducted by the international community, authorized by the Security Council and reflecting international legal norms whose aim is not to make war but to enforce “law and order”? (GC I-IV, Art. 2)

5. Have parties to international and non-international armed conflicts an obligation to accept humanitarian assistance to civilians in need? May humanitarian organizations or third States provide such assistance to civilians in need even without the agreement of the relevant party to conflict? Can a UN Security Council Resolution replace such agreement? (GC IV, Arts 1, 2, 3, 59-61; P I, Arts 69, 70, 81 and 91; P II, Art. 18)

Case No. 232, Germany, Law on Cooperation with the ICTR

[Source: "Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Rwanda," in *BGBL* (Bundesgesetzblatt) 1998 I, p. 843; original in German, unofficial translation.]

§ 1. Obligation to Cooperate

- (1) Pursuant to this Law, the Federal Republic of Germany shall fulfill its obligations to cooperate as stated in Resolution 955 (1994) adopted by the United Nations Security Council in accordance with Chapter VII of the United Nations Charter.
- (2) For the purposes of this Law, the term "Tribunal" shall refer to the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda between January 1, 1994 and December 31, 1994 and for the Prosecution of Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States during the same period, established by Resolution 955 (1994), and shall include its Chambers, its prosecuting authorities and the members of that Tribunal and the prosecuting authorities.

§ 2. Status vis-à-vis criminal proceedings in the Federal Republic of Germany

- (1) At the Tribunal's request, criminal proceedings involving offences which fall within its jurisdiction shall be transferred to the Tribunal at any stage. In the event that criminal proceedings which are so transferred have resulted in the imposition of a legally valid sentence, once the convicted party in question, pursuant to 3, paragraph 1, has been remanded to the custody of the Tribunal, the further enforcement of this sentence shall cease.
- (2) Should a request pursuant to paragraph 1, sentence 1 be submitted, no proceedings may be conducted against any person for an offence falling within the jurisdiction of the Tribunal for which they are standing or have stood trial before that Tribunal.
- (3) Insofar as the conditions stipulated in paragraph 1, sentence 1 have been satisfied, the decision to transfer proceedings to the Tribunal shall be taken by the competent court. That court shall also submit to the Tribunal the available evidence and the records of the investigations and proceedings conducted up to that point, as well as any judicial decisions that have already been handed down. [...]
- (4) Subject to the proviso that the final decision shall be taken by the public prosecutor, where the proceedings in question are not yet pending before the court, paragraph 3, sentences 1 and 2 shall apply *mutatis mutandis*. [...]
- (6) In those cases specified in paragraph 3, sentence 1, the court shall not rule on the costs of the proceedings incurred prior to their transfer to the Tribunal until

such time as the Tribunal has brought the transferred proceedings in question to a legal conclusion. In this connection, the court shall predicate its decision upon the Tribunal's ruling on the issues of guilt and punishment. Following consultation with the parties involved, a decision shall be effected by a court order. Sentences 1 to 3 shall apply *mutatis mutandis* in respect of those decisions which are to be taken in accordance with the law on compensation for criminal proceedings.

§ 3. Transfer and conveyance of individuals

- (1) For the purpose of prosecuting an offence falling within the jurisdiction of the Tribunal, or for the purpose of enforcing a punishment imposed for such an offence, at the request of the Tribunal, any persons residing within the area where this law is in effect shall be placed in confinement and committed to the custody of either the Tribunal or the country which has assumed responsibility for enforcing a sentence imposed by the Tribunal.
- (2) [...] [T]he Law on International Mutual Assistance in Criminal Matters shall apply *mutatis mutandis* to such proceedings.
- (3) For the purpose of prosecuting an offence falling within the jurisdiction of the Tribunal, or for the purpose of enforcing a sentence imposed for such an offence, at the request of the Tribunal, persons shall be conveyed through the area where this Law is in effect and held in custody for the purpose of ensuring their conveyance. [...]

§ 5. Mutual assistance by enforcement

- (1) Mutual assistance may be rendered by the enforcement of a legally valid sentence of imprisonment imposed by the Tribunal.
- (2) [...] [W]here the German enforcement authority deems the enforcement of a sentence to have been carried out, where a convicted prisoner escapes from custody prior to the conclusion of the enforcement of their sentence, where the enforcement of a sentence is no longer possible for other reasons, or in the event of the Tribunal's requesting a particular report, the competent authority, [...] shall advise and assist the Tribunal accordingly.
- (3) Where, in the opinion of the relevant competent authority, a pardon should be considered, the competent authority, pursuant to 74a of the Law on International Mutual Assistance in Criminal Matters, shall advise the Tribunal accordingly so that it may rule on the issue of granting a pardon to the convicted party in question.

§ 6. Privileges and immunities

The judges, the director of the prosecuting authority and the President of the Tribunal shall be entitled to the privileges, immunities, exemptions and facilities which are

accorded to diplomats under international law. Insofar as the efficient performance of the tasks of the Tribunal necessitates such an arrangement,

Article VI, Section 22 of the United Nations Convention on Privileges and Immunities of February 13, 1946 (Federal Law Gazette, 1980, II, p. 941) shall apply *mutatis mutandis* to other persons who, though not members of the Tribunal, are involved in proceedings conducted by that Tribunal.

§ 7. Entry into force

This Law shall enter into force on the day following its promulgation.

DISCUSSION

1. To what extent does Security Council Resolution 955 [See **Case No. 230**, UN, Statute of the ICTR] place a binding obligation on the international community to cooperate with the ICTR?
2.
 - a. Do States have to enact a law on cooperation with the International Tribunal?
 - b. Does this type of law clarify the jurisdictional scope of the ICTR?
 - c. Why is the normal legislation on mutual assistance in criminal matters not sufficient to implement Resolution 955 (1994)? Or could Resolution 955 be considered as self-executing? Which obligations under Resolution 955 go beyond normal extradition and mutual judicial assistance treaties?
3. Do you think that conflicting interest(s) may arise between the ICTR and Germany over the fate of an accused?
4. Does this legislation entitle Germany to arrest a suspect and transfer him to the competent authorities of the ICTR? Could Germany decide not to transfer a suspect and try him under its national legislation?
5. Will this type of legislation deter suspects who might otherwise decide to come to Germany to be immune from prosecution?

**Case No. 233, Luxembourg, Law on Cooperation
with the International Criminal Courts**

[Source: Luxembourg, *Loi du 18 mai 1999 introduisant certaines mesures visant à faciliter la coopération avec le TPIY et le TPIR*, available in French on <http://www.cicr.org/ihl-nat>; unofficial translation.]

**Law of 18 May 1999 introducing certain measures
intended to facilitate cooperation with: [...]**

- 2) the International Tribunal created by the United Nations Security Council in resolution 955 (8 November 1994) to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such acts or violations committed in the territory of neighbouring States, between 1 January and 31 December 1994.**

We, JEAN, by the grace of God, Grand Duke of Luxembourg, Duke of Nassau;

Our Council of State having been heard;

The Chamber of Deputies having granted its approval;

Given the Chamber of Deputies' decision of 21 April 1999 and that of the Council of State of 27 April 1999 that a second vote is unwarranted;

have ordered and do order:

Art. 1

In application [...] of United Nations Security Council resolution 955 (8 November 1994) establishing an international tribunal to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such acts or violations committed in the territory of neighbouring States between 1 January and 31 December 1994, the Grand Duchy of Luxembourg shall take part in the repression of breaches and shall cooperate with [this tribunal] in accordance with the present law.

The following provisions shall apply to any person charged with crimes or other offences under Luxembourg law that constitute, under [...] Articles 2 to 4 of the Statute of the International Tribunal created by resolution 955, grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol II, signed in Geneva on 8 June 1977, violations of the laws and customs of war, genocide or crimes against humanity.

Section I: Jurisdiction and deferral from the Luxembourg courts

Subsection 1: Jurisdiction of the Luxembourg courts

Art. 2

Without prejudice to other specific legal provisions, those accused of the above-mentioned violations may be prosecuted and judged by Luxembourg courts if the accused or their accomplices are found in Luxembourg. These provisions also apply to any attempt to commit these violations wherever such an attempt is punishable.

The international tribunal shall be informed by the chief state prosecutor of any prosecution under way involving offenses that could come under its jurisdiction. A copy of that communication shall be simultaneously sent by the chief state prosecutor to the Minister of Justice.

No prosecution may take place before a national court for offences constituting grave violations of international humanitarian law in cases where the accused has already been judged by the international tribunal for the same offences.

Subsection 2: Deferral from the Luxembourg courts

Art. 3

The originals of requests from the international tribunal for deferral of cases from Luxembourg's investigative process or its courts shall be sent, accompanied by any documentary evidence, to the Minister of Justice, whose task shall be to ensure that they are properly constituted.

Art. 4

Depending on the circumstances, either the chief state prosecutor or the state prosecutor shall instruct the investigating magistrate, if an investigation is under way, or the court already dealing with the case on the basis of committal for trial or direct summons, to defer the case to the international tribunal.

The request for deferral shall be communicated to the other parties concerned. Any observations prompted by that communication must be made within eight days. The investigating magistrate or the court dealing with the case may also decide to take oral statements from the parties, who shall be summoned for this purpose by the registrar by means of a registered letter.

Art. 5

If the investigating magistrate or the court dealing with the case finds that the offences constituting the basis of the request for deferral are covered by Article 1 of the present law and that there is no apparent error, he/she shall defer the case and refer it to the international tribunal. No appeal may be made against any decision by the investigating magistrate or the court dealing with the case to defer it.

Art. 6

Once a case has been deferred, the case file shall be sent by the Minister of Justice to the international tribunal.

Art. 7

The deferral of a case from the national judicial system shall not affect the rights of any party claiming damages to apply the provisions of Article 3 of the code governing the investigation of criminal cases.

Where a case has been deferred from a court, that court – unless otherwise stipulated by the law and without prejudice to the ability of the international tribunal to order the restoration to their rightful owners of all property and resources acquired by illegal means – shall retain its ability, at the request of a victim who sued for damages before the criminal case was deferred, to rule on the civil action after the international tribunal has issued a judgement on the criminal proceedings.

Section II: Judicial cooperation

Subsection 1: International judicial assistance

Art. 8

The originals or certified copies of requests for judicial assistance from the international tribunal or its prosecutor must be addressed to the Minister of Justice, accompanied by any documentary evidence.

These documents shall be forwarded to the state prosecutor of the district court with territorial jurisdiction, who shall take all necessary steps.

In urgent cases these documents may be sent directly and by any means to the state prosecutor of the district court with territorial jurisdiction. They must be sent simultaneously in the forms specified in the preceding paragraphs.

Art. 9

Requests for assistance shall be dealt with, according to the circumstances, either by the state prosecutor of the district court with territorial jurisdiction or by the investigating magistrate of that court, and if appropriate in the presence of the prosecutor of the international tribunal.

Any provision of information requested by the international tribunal or its prosecutor and any warrant issued by those entities for enforcement on Luxembourg territory may be implemented only in compliance with national law and, in particular, in line with the powers assigned to the national authorities and in keeping with the code governing the investigation of criminal cases. The reports drawn up in the process of dealing with these requests shall be sent by the Minister of Justice to either the international tribunal or its prosecutor, depending on the circumstances.

In urgent cases, certified copies of these reports may be sent directly and by any means to the international tribunal.

Art. 10

Any conservatory measure to be taken regarding property situated on Luxembourg territory must receive prior approval from the Minister of Justice. The investigating magistrate of the district court with territorial jurisdiction shall order the search and seizure required for this purpose.

Subsection 2: Arrest and surrender

Art. 11

The originals of any requests by the international tribunal or its prosecutor for arrest and surrender must be sent, accompanied by any documentary evidence, to the Minister of Justice who, after ensuring that they are properly constituted, shall forward them to the state prosecutor of the district court in the place of residence of the person sought or the place where he/she can be found.

The state prosecutor shall apply to the chambers of the district court to have the international tribunal's request for arrest declared enforceable.

In urgent cases these documents may be sent directly and by any means to the state prosecutor of the district court with territorial jurisdiction. They must be sent simultaneously in the forms specified in the preceding paragraphs.

Art. 12

Any person who is on Luxembourg territory and accused of one of the offences listed in Article 1 and whose arrest and surrender has been properly requested by the international tribunal shall be arrested without delay upon presentation of such a request duly declared enforceable by the chambers of the district court at the request of the state prosecutor or, in urgent cases in which that person has been indicted by the international tribunal, upon presentation of an arrest warrant issued by the state prosecutor or the investigating magistrate of the district court following application by the state prosecutor. The person sought shall be immediately informed of the accusation against him/her.

The person sought shall be brought before the investigating magistrate at the latest within 24 hours of his/her arrest. The latter shall note any information and explanation that the person consents to provide.

The person sought may at any time apply to the chambers of the district court for release. The latter shall act in accordance with the provisions of Article 116 ff. of the code governing the investigation of criminal cases. However, the surrender of the person sought may not be delayed by such an application.

Art. 13

The chambers of the appeal court shall deal immediately with the matter. The person sought shall appear before the chambers at the latest 10 days after his/her arrest. The prosecuting authorities and the person sought, possibly accompanied by his/her counsel and, if need be, in the presence of an interpreter, shall have the opportunity to make a statement.

Art. 14

If the chambers finds that the offences constituting the grounds for requesting arrest and surrender come within the field of application of Article 1 and that the request contains no apparent error, they shall order that the person be surrendered.

The chambers shall also decide whether or not there are grounds for handing over to the international tribunal, in whole or in part, the papers and other objects seized.

It shall order the return to the person sought of papers and other objects having no direct bearing on the offence of which he/she has been accused.

The chambers shall announce its decision in the form of an order issued at a public hearing within 10 days of the appearance before it of the person sought.

No appeal on points of law is possible in such cases.

Art. 15

The order issued by the chambers of the appeal court and, in certain cases, the place and date of surrender of the person sought and the length of detention awaiting surrender shall be communicated to the international tribunal by the Minister of Justice.

The person sought shall be surrendered within a month of the date on which the surrender order was issued. Failing this, the person's immediate release shall be ordered by the president of the chambers of the appeal court, unless the surrender has been delayed by circumstances beyond the authorities' control.

Release of the person sought shall preclude neither subsequent arrest nor a fresh decision to surrender him/her should the international tribunal present a new request to that end.

Art. 16

The provisions of the subsection are also applicable if the person sought is being prosecuted or has been convicted in Luxembourg on charges other than those serving as grounds for the international tribunal's request. However, in such cases the detainee is not entitled to release as provided for in Article 15.

The proceedings of the international tribunal shall have the effect, vis-à-vis the Luxembourg judicial and prison system as concerns the person sought, of suspending the time limit for bringing a prosecution and for enforcing a sentence.

**Subsection 3: Enforcement of orders for return of property
issued by the international tribunal**

Art. 17

Decisions by the international tribunal to return property in application of Article 24(3) of its Statute [ICTY, corresponding to the Art. 23(3) of the ICTR Statute] may be implemented in Luxembourg only after being declared enforceable before Luxembourg's civil courts in accordance with the ordinary procedure for enforcement set out in Article 546 of the Civil Procedure Code.

We command and order that the present law be promulgated in the Official Gazette for execution and compliance by all those concerned.

Minister of Justice, [...]

Luc Frieden

For the Grand Duke: His Lieutenant-Representative,

Henri heir to the throne of the Grand Duke

DISCUSSION

1. To what extent does Security Council Resolution 955 oblige States to cooperate with the ICTR? [See **Case No. 230**, UN, Statute of the ICTR]
2.
 - a. Must States adopt legislation regarding cooperation with the ICTR?
 - b. Does this type of legislation serve to clarify the reach of the ICTR's jurisdiction?
 - c. Why is the standard legislation on mutual cooperation in criminal matters between States not sufficient to implement Resolution 955? Could that resolution be considered self-executing? Which of the obligations contained in Resolution 955 go beyond the provisions of classic treaties on extradition and judicial cooperation?
3. Does this law oblige Luxembourg to arrest suspects and hand them over to the ICTR? Can Luxembourg decide not to hand over suspects and, instead, to try them before its own courts?
4. Does this type of legislation dissuade suspects from going to Luxembourg for fear of facing prosecution?

Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu**A. Trial Chamber**

[Source: ICTR, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998; footnotes omitted; available on <http://www.ictr.org>]

**THE PROSECUTOR
v.
JEAN-PAUL AKAYESU
Case No. ICTR-96-4-T**

JUDGEMENT [...]

1. INTRODUCTION [...]

6. [...] "The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the Tribunal, charges:

JEAN PAUL AKAYESU

with GENOCIDE, CRIMES AGAINST HUMANITY and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as set forth below:

[...]

The Accused

3. Jean Paul AKAYESU, born in 1953 in Murehe sector, Taba commune, served as *bourgmestre* of that commune from April 1993 until June 1994. Prior to his appointment as *bourgmestre*, he was a teacher and school inspector in Taba.
4. As *bourgmestre*, Jean Paul AKAYESU was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

General Allegations

5. Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda.
6. In each paragraph charging genocide, a crime recognized by Article 2 of the Statute of the Tribunal, the alleged acts or omissions were committed with intent to destroy, in whole or in part, a national, ethnic or racial group.

7. The victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group.
8. In each paragraph charging crimes against humanity, crimes recognized by Article 3 of the Tribunal Statute, the alleged acts or omissions were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.
9. At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda.
10. The victims referred to in this indictment were, at all relevant times, persons not taking an active part in the hostilities.
- 10A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.
11. The accused is individually responsible for the crimes alleged in this indictment. Under Article 6(1) of the Statute of the Tribunal, individual criminal responsibility is attributable to one who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of any of the crimes referred to in Articles 2 to 4 of the Statute of the Tribunal.

Charges

12. As *bourgmestre*, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as *bourgmestre*, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.
- 12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the *bureau communal*. The majority of these displaced civilians were Tutsi. While seeking refuge at the *bureau communal*, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the *bureau communal* premises. Displaced civilians were also murdered frequently on or near the *bureau communal* premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.
- 12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean

Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the *bureau communal* premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities. [...]

19. On or about April 19, 1994, Jean Paul AKAYESU took 8 detained men from the Taba *bureau communal* and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul AKAYESU.
20. On or about April 19, 1994, Jean Paul AKAYESU ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwizeze and her fiancé (whose name is unknown), Tharcisse Twizyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba *bureau communal*. [...]

**Counts 7-8
(Crimes Against Humanity)**

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation the murders of 8 detained men in front of the *bureau communal* as described in paragraph 19, Jean Paul AKAYESU committed:

- COUNT 7: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and
- COUNT 8: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

**Counts 9-10
(Crimes Against Humanity)**

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the murders of 5 teachers in front of the *bureau communal* as described in paragraph 20, Jean Paul AKAYESU committed:

- COUNT 9: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and
- COUNT 10: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal. [...]

**Counts 13-15
(Crimes Against Humanity)**

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the events at the *bureau communal*, as described in paragraphs 12(A) and 12(B), Jean Paul AKAYESU committed:

- COUNT 13: CRIMES AGAINST HUMANITY (rape), punishable by Article 3(g) of the Statute of the Tribunal; and
- COUNT 14: CRIMES AGAINST HUMANITY, (other inhumane acts), punishable by Article 3(i) of the Statute of the Tribunal; and
- COUNT 15: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ARTICLE 4(2)(e) OF ADDITIONAL PROTOCOL 2, as incorporated by Article 4(e)(outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal. [...]

6. THE LAW [...]

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

492. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. [...]

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

494. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"). It states:

"Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

495. The Genocide Convention is undeniably considered part of customary international law, [...].
496. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

497. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy “in whole or in part” a national, ethnical, racial or religious group.
498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.
499. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

Killing members of the group (paragraph (a)):

500. [...] It is accepted that there is murder when death has been caused with the intention to do so [...].

Causing serious bodily or mental harm to members of the group (paragraph b)

502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable. [...]
504. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.
506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion

from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.
508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Forcibly transferring children of the group to another group (paragraph e)

509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.
510. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.
511. On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.
512. [...] [T]he Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

513. An ethnic group is generally defined as a group whose members share a common language or culture.
514. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.
515. The religious group is one whose members share the same religion, denomination or mode of worship. [...]
517. As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in Article 2 (2) of the Statute, must have been “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.
518. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator. [...]
521. In concrete terms, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual. [...]
523. On the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. [...]

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute) [...]

599. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: [See Case No. 230, UN, Statute of the ICTR] [...]
600. Prior to developing the elements for the above cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment upon the applicability of common Article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

Applicability of Common Article 3 and Additional Protocol II

601. The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.
602. The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to “armed conflicts not of an international character”, whereas for a conflict to fall within the ambit of Additional Protocol II, it must “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application.
603. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the

two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria.

604. The Security Council, when delimiting the subject-matter jurisdiction of the ICTR, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

“Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.”

605. Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTY, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt* part of customary law.
606. Notwithstanding the above, a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor

for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council. Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question, so long as the conflict were covered, at the very least, by the customary norms of Common Article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in Article 4 of the Statute.

607. However, the Chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts 6, 8, 10, 12 and 15. For the first four of these, there is mention only of Common Article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count 15 makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the Chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the Chamber finds it necessary and reasonable to establish the applicability of both Common Article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.
608. It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the *Tadic* judgment that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope.

609. However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals Chamber concurred with this view inasmuch as “[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law [...]”, but not all.
610. Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

Individual Criminal Responsibility

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.
612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the *Tadic* case. In the ICTY Appeals Chamber, the problem was posed thus:

“Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal’s jurisdiction.”

613. Basing itself on rulings of the Nuremberg Tribunal, on “elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts”, as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

“All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal

armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

614. This was affirmed by the ICTY Trial Chamber when it rendered in the *Tadic* judgment.
615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.
616. It should be noted, moreover, that Article 4 of the ICTR Statute states that, “The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977” (emphasis added). The Chamber understands the phrase “serious violation” to mean “a breach of a rule protecting important values [which] must involve grave consequences for the victim”, in line with the above-mentioned Appeals Chamber Decision in *Tadic*, paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 – which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and Article 4 of Additional Protocol II, which equally outlines “Fundamental Guarantees”. The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.
617. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.

The nature of the conflict

618. As aforesaid, it will not suffice to establish that as the criteria of Common Article 3 have been met, the whole of Article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to

afford protection to victims in conflicts not of an international character. Hence, the Chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of Article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

Common Article 3

619. The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an international character'. An inherent question follows such a description, namely, what constitutes an armed conflict? The Appeals Chamber in the *Tadic* decision on Jurisdiction held "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached". Similarly, the Chamber notes that the ICRC commentary on Common Article 3 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

- That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
- That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
 - (a) That the *de jure* Government has recognized the insurgents as belligerents; or
 - (b) that it has claimed for itself the rights of a belligerent; or
 - (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
 - (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

620. The above reference criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections. The term, 'armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

621. Evidence presented in relation to paragraphs 5-11 of the Indictment, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.

Additional Protocol II

622. As stated above, Additional Protocol II applies to conflicts which “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

623. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

- (i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
- (ii) the dissident armed forces or other organized armed groups were under responsible command;
- (iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
- (iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

624. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.

625. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent

organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

626. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.
627. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

Ratione personae

628. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II – the class of victims and the class of perpetrators.

The class of victims

629. Paragraph 10 of the Indictment reads, "The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities". This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of "persons taking no active part in the hostilities" (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection

of, "all persons who do not take a direct part or who have ceased to take part in hostilities". These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are *indeed* persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

The class of perpetrators

[N.B.: The Appeals Chamber reviewed the content of these paragraphs (See Part B. of this case, paras 430-446)]

[...]

Ratione loci

635. There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied "to all persons affected by an armed conflict as defined in Article 1". The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on jurisdiction in *Tadic*, wherein it was held that "the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations"
636. Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

Conclusion

637. The applicability of Common Article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the Chamber to make its findings with regard the accused's culpability under Article 4 of the Statute. This will be dealt with in section 7 of the judgment.

7. LEGAL FINDINGS

7.1. *Counts 6, 8, 10 and 12 – Violations of Common Article 3 (murder and cruel treatment) and Count 15 – Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)*

638. Counts 6, 8, 10, and 12 of the Indictment charge Akayesu with Violations of Common Article 3 of the 1949 Geneva Conventions, and Count 15 charges Akayesu of Violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto. All these counts are covered by Article 4 of the Statute.
639. It has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment. The Chamber found the conflict to meet the requirements of Common Article 3 as well as Additional Protocol II. [...]

8. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows: [...]

- Count 7: Guilty of Crime against Humanity (Murder) [...]
- Count 9: Guilty of Crime against Humanity (Murder) [...]
- Count 13: Guilty of Crime against Humanity (Rape)
- Count 14: Guilty of Crime against Humanity (Other Inhumane Acts) [...]

B. Appeals Chamber

[Source: ICTY, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Chamber, 1 June 2001; footnotes partially reproduced; available on <http://www.ictor.org>]

[N.B.: The definition of genocide set out in paras 492-523 of the judgement of Trial Chamber I was not revised in the present Appeals Chamber judgement.]

THE PROSECUTOR v. JEAN-PAUL AKAYESU JUDGEMENT [...]

IV. PROSECUTION'S GROUNDS OF APPEAL

A. **First and Second Grounds of Appeal: Article 4 of the Statute (violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II)**

425. The Prosecution raises two grounds of appeal relating to the Trial Chamber's analysis of Article 4 of the Statute. Akayesu was charged with five counts under

Article 4 of the Statute and was acquitted on each of the said counts. The first Ground of Appeal alleges that the Trial Chamber erred in law in applying a “public agent or government representative test” in determining who can be held responsible for Serious Violations of Common Article 3 and Additional Protocol II thereto (“the public agent test”). The second Ground of Appeal is raised as an alternative ground of appeal, with the Prosecution submitting that it will only be necessary for the Appeals Chamber to consider it if it rejects the Prosecution’s first Ground of Appeal. The Prosecution’s second ground, alleges that, having applied the public agent or government representative test, the Trial Chamber erred in fact in finding that Jean Akayesu was not a public agent or government representative who could incur responsibility under Article 4 of the Statute.

426. As for the remedy sought, the Prosecution moves that with respect to the first Ground of Appeal, the Appeals Chamber set aside the Trial Chamber’s findings on this issue. With respect to the second Ground of Appeal, the Prosecution moves the Appeals Chamber to hold that the Trial Chamber erred in applying the public agent test in its factual findings in this case. [...]

2. Discussion

430. The Trial Chamber found as follows:

630. The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. *The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.*

631. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. *The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts.* The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols. [footnote 794: Trial

Judgment, paras 630 and 631 (emphasis added).]

431. Subsequently, having applied this finding to Akayesu’s circumstance to determine whether he could be held individually responsible for the crimes charged under Article 4 of the Statute, the Trial Chamber held that:

640. For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities. Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the Chamber recalls that Article 4 of the Statute also applies to civilians. [footnote 795: Trial Judgment, para. 640]
432. In the opinion of the Appeals Chamber, there is no doubt that the Trial Chamber applied the public agent test in interpreting Article 4 of the Statute, to consider subsequently the particular circumstances of Akayesu's case. While pointing out that the Geneva Conventions and the Protocols have an "overall protective and humanitarian purpose" [footnote 796: *Ibid.* para. 631] and consequently, "the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted" [footnote 797: *Ibid.* para. 631], the Trial Chamber found that the category of persons likely to be held responsible for violations of Article 4 of the Statute includes "only [...] individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts". The Trial Chamber, held that this approach would allow application of ... [sic] in a fashion which "corresponds best with the underlying protective purpose of the Conventions and the Protocols". [footnote 798: *Ibid.* para. 631 (emphasis added).]
433. The issue here is whether this interpretation is consistent with the provisions of the Statute in particular and international humanitarian law in general. To that end, it is necessary, firstly, to review the relevant provisions of the Statute as interpreted by the case-law of the Tribunals and, secondly, the object and purpose of Common Article 3 to the Geneva Conventions. [footnote 799: Article 31(1) of the Vienna Convention on the Law of Treaties (1969) provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"]
434. The Appeals Chamber shall firstly recall the provisions of Article 4 of the Statute: [See Case No. 230, UN, Statute of the ICTR] [...]
435. Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision. It provides only that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed"

in particular, serious violations of Article 3 common to the Geneva Conventions. A reading of Article 4 together with Articles 1 and 5 of the Statute respectively relating to the Tribunal's overall competence and personal jurisdiction, sheds no further light on the class of persons likely to be prosecuted under these articles, in particular under, Article 4. [See **Case No. 230**, UN, Statute of the ICTR] [...]

436. Thus, there is no explicit provision in the Statute that individual criminal responsibility is restricted to a particular class of individuals. In actuality, articles of the Statute on individual criminal responsibility simply reflect the principle of individual criminal responsibility as articulated by the Nuremberg Tribunal. An analysis of the provisions of the Statute is therefore not conclusive. As a result, the Appeals Chamber must turn to the article which serves as a basis for Article 4, to wit, Article 3 Common to the Geneva Conventions [...].
437. It must be noted that Article 3 common to the Geneva Conventions does not identify clearly the persons covered by its provisions nor does it contain any explicit reference to the perpetrator's criminal liability for violation of its provisions. The chapeau of Common Article 3 only provides that "each party to the conflict shall be bound to apply, as a minimum, the following provisions". The primary object of this provision is to highlight the "unconditional" [footnote 802: ICRC Commentary [of Convention IV] [available on <http://www.icrc.org/ihl>], p. 38] character of the duty imposed on each party to afford minimum protection to persons covered under Common Article 3. In the opinion of the Appeals Chamber, it does not follow that the perpetrator of a violation of Article 3 must of necessity have a specific link with one of the above-mentioned Parties.
438. Despite this absence of explicit reference in the common Article 3 [footnote 803: *Tadic* (Jurisdiction Decision), [See **Case No. 211**, ICTY, The Prosecutor v. *Tadic* [Part A., para. 128]] ICTY Appeals Chamber nevertheless held that authors of violation of provisions of this article incur individual criminal responsibility. Furthermore, it developed a certain number of other tests for the application of article 3 which the Appeals Chamber can summarize here as follows:
 - The offence (serious violation) must be committed within the context of an armed conflict;
 - The armed conflict can be internal or international;
 - The offence must be against persons who are not taking any active part in the hostilities;
 - There must be a nexus between the violations and the armed conflict.
439. Although ICTY Appeals Chamber has, on several occasions, addressed the issue of the interpretation of common Article 3, it should be noted that it has never found it necessary to circumscribe the category of persons who may be prosecuted under Article 3. Therefore, no clarification has to date been provided on this point in the jurisprudence of the Tribunals, except for recent holdings by an ICTY Trial Chamber. The latter indeed found that "common Article 3 may also require some relationship to exist between a perpetrator and a party to

the conflict.” [footnote 808: Kunarac Judgment, para. 407] However, the Appeals Chamber observes that this holding finds no support either in statute or in case law. In any case, the *Kunarac* Trial Chamber has not found it necessary to elaborate on this point in light of the circumstances of the case.

440. In this context, the Appeals Chamber deems it appropriate to analyze the object and purpose of common Article 3 in particular, and of the Geneva Conventions, in general, which object and purpose, in its view, are determinative in the interpretation of Article 4 of the Statute.
441. ICRC commentaries outline the principles underlying the adoption of common Article 3:

“This Article is common to all four Geneva Conventions [...]. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhoped for extension of Article 2 [...]. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle [the Red Cross] pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character”. [footnote 811: ICRC Commentary [of Convention IV], [available on <http://www.icrc.org/ihl>] p.26]

442. Thus, common Article 3 seeks to extend to non-international armed conflicts, the protection contained in the provisions which apply to international armed conflicts. Its object and purpose is to broaden the application of the international humanitarian law by defining what constitutes minimum humane treatment and the rules applicable under all circumstances. Indeed, “[i]n the words of ICRC, the purpose of common Article 3 [is] to ensure respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself. These rules may thus be considered as the quintessence of humanitarian rules found in the Geneva Conventions as a whole”. [footnote 812: *Celebici Appeal Judgment*, para. 143] *Protection of victims* is therefore the core notion of common Article 3.
443. The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.

444. In paragraph 630 of the Judgment, the Trial Chamber found that the four Conventions “were adopted primarily to protect the victims as well as potential victims of armed conflicts”. It went on to hold that “[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces”. Such a finding is *prima facie* not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close nexus between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.
445. Accordingly, the Appeals Chamber finds that the Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons, as defined by the Trial Chamber.
446. For the foregoing reasons, the Appeals Chamber entertains this ground of appeal and finds further that it is therefore not necessary to pass on the Prosecution’s alternative ground of appeal. [...]

V. DISPOSITION

For these reasons, The Appeals Chamber, [...]

Unanimously dismisses [*sic*] each of the grounds of appeal raised by Jean-Paul Akayesu,

Affirms the verdict of guilty entered against Jean-Paul Akayesu of all the counts on which he was convicted and the sentence of life imprisonment handed down, [...]

Considers the First, Third and Fourth Grounds of Appeal of the Prosecutor and **Finds** that, with respect to the points of law in issue in the Prosecution’s appeal, this Judgement sets out the relevant legal findings thereon.

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

DISCUSSION

1. (*Trial Chamber, paras 492-499*)
 - a. How would you define genocide in order to distinguish it from a crime against humanity?
 - b. Is the obligation to sanction genocide an element of customary international law? Of customary IHL? Does the ICTR have the jurisdiction to prosecute individuals who committed genocide by virtue of its Statute alone? Must the State of which the accused is a national be a party to

the Convention on Genocide? Must it have included repression of this crime in its national legislation?

- c. Is the expression “in part” attached to the extent of the crimes actually committed or to the perpetrators’ intention? Do you agree with the Chamber when it rules that a crime committed with the intention to destroy part of a specific group constitutes genocide?
 - d. What is the special intent (or *dolus specialis*) necessary for genocide to take place? How can we determine the existence of this special intent? (See also paras 517-523)
2. (Trial Chamber, paras 510-523)
- a. What do you think of the ICTR’s definition of a protected group? Is the chamber using subjective or objective criteria? Is group membership not often a matter of “self-identification” by the members of the group or “stigmatization” by the group’s enemies, and therefore would subjective criteria not be more appropriate?
 - b. What does the expression “stable group” mean? Are only national, ethnic, racial and religious groups “stable”? Would this mean that the extermination of other groups (such as handicapped people, some political groups and homosexuals by the Nazi regime) would be qualified as a crime against humanity but not as genocide? Is “cultural genocide” recognized in international law? Do you think it should be?
3. (Trial Chamber, paras 601-610, 619-627)
- a. How does the ICTR qualify the conflict in Rwanda? Is Art. 3 common to the Conventions applicable? Is Protocol II applicable?
 - b. What is the relevance of the qualification of the conflict to the case?
 - c. Is there a difference of applicability between Art. 3 common to the Conventions and Protocol II?
4. Does Art. 4 of the ICTR Statute criminalize certain acts? Or does it give the ICTR jurisdiction over acts criminalized elsewhere? If so, where are those acts criminalized? [See **Case No. 230**, UN, Statute of the ICTR]
5. (Trial Chamber, paras 601-610)
- a. What is the relevance, for the prosecution of the accused, of establishing whether the rules referred to in Art. 4 of the Statute were at the time of indictment part of customary international law?
 - b. Why did the Court find it necessary to establish that Art. 3 common to the Conventions is part of customary international law? What were the conclusions of the Court concerning Protocol II?
 - c. Was the Court correct to argue in its conclusion that at the time when Akayesu committed his crimes, Art. 4 was part of existing customary law?
 - d. Is it necessary for a rule of Art. 3 common to the Conventions or of Protocol II to be part of customary law for the ICTR to apply it under Art. 4 of its Statute? Why? Because of the principle of *nullum crimen sine lege*? Would the application of a purely treaty-based rule of Protocol II violate that principle? Even though Rwanda was, at the time of the crimes, party to Protocol II? At least for those rules which are neither incorporated into Rwandan legislation nor self-executing?
 - e. Did the Security Council not empower the ICTR through Art. 4 of its Statute to apply all rules of Protocol II? If so, does the Court consider that this would have violated the principle of *nullum crimen sine lege*?
 - f. Did the Chamber in the *Tadic* case [See **Case No. 211**, ICTY, The Prosecutor v. Tadic [Part A., paras 89, 94 and 143]] consider that the ICTY may only apply customary rules? If one accepts such an interpretation, should it also apply to the ICTR?

6. (*Trial Chamber, paras 611- 617*)

- a. Why may the ICTR only prosecute violations of Art. 3 common to the Conventions and Protocol II for which customary law foresees individual criminal responsibility? Is the same reasoning applicable as for the ICTY in the *Tadic* case? Do you agree with the statement in para. 608 of the Trial Chamber decision that most States have criminalized violations of Art. 3 common to the Conventions in their domestic penal codes? Would that be necessary to claim that customary law criminalizes violations of common Art. 3? For the ICTR to try Akayesu?
- b. Would it have sufficed for the Rwandan criminal code to foresee individual criminal responsibility for the acts Akayesu was accused of? Can we assume that the acts committed by Akayesu were prohibited under Rwandan criminal law? Had the ICTR adopted such an approach, would it have violated the principle of *nullum crimen sine lege*?

7. (*Appeals Chamber, paras 430-445*)

- a. Who are the beneficiaries of the IHL of non-international armed conflicts? Who has to respect Art. 3 common to the Conventions? Protocol II? All individuals who commit a prohibited act during an armed conflict on the territory of the State in which the conflict is taking place? Must the act be linked to the conflict? [See **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part B.]] Must the perpetrator belong to a party to the conflict? Must he be a public agent for one of the parties? Must he be part of the armed forces of one of the parties?
- b. According to the Trial Chamber (See paragraphs of the Trial Chamber Judgement reproduced in para. 430 of the Appeals Judgement), is only a person who is mandated and supposed to be helping the war effort of one of the parties obliged to respect IHL? How do you interpret Art. 3 common to the Conventions and Protocol II on this issue? Do you think that the Appeals Chamber was right to decide that the Trial Chamber had committed an error?
- c. Is the Appeals Chamber's interpretation the only one that allows for individual criminal responsibility to be applied in non-international armed conflicts that take place in a failed State?

Case No. 235, ICTR, The Media Case

[Source: ICTR, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*; footnotes omitted; available on <http://www.ictor.org>]

Judgement of: 3 December 2003**THE PROSECUTOR****V.****FERDINAND NAHIMANA****JEAN-BOSCO BARAYAGWIZA****HASSAN NGEZE****Case No. ICTR-99-52-T****JUDGEMENT AND SENTENCE [...]****GLOSSARY**

<i>Akazu:</i>	"Little house"; used to refer to group of individuals close to President Habyarimana
<i>CDR:</i>	Coalition pour la Défense de la République (Coalition for the Defence of the Republic)
<i>CRP:</i>	Le Cercle des Républicains Progressistes (Circle of Progressive Republicans)
<i>Gukora:</i>	To work; sometimes used to refer to killing Tutsi
<i>Gutsembatsemba:</i>	"Kill them" in the imperative form
<i>Icyitso/Ibyitso:</i>	Accomplice; RPF sympathizer/accomplice; sometimes used to refer to Tutsi
<i>Impuzamugambi:</i>	"Those who have the same goal"; Name of youth wing of CDR
<i>Inkotanyi:</i>	RPF soldier; sometimes used to refer to Tutsi
<i>Inkuba:</i>	"Thunder"; Name of youth wing of MDR
<i>Interahamwe:</i>	"Those who attack together"; Name of youth wing of MRND
<i>Inyenzi:</i>	Cockroach; group of refugees set up in 1959 to overthrow the new regime; sympathizer of RPF; sometimes used to refer to Tutsi
<i>Kangura:</i>	"Awaken" in the imperative form; Name of newspaper published in Kinyarwanda and French
<i>MDR:</i>	Mouvement Démocratique Républicain (Democratic Republican Movement)

<i>MRND:</i>	Mouvement Révolutionnaire National pour le Développement (National Revolutionary Movement for Development)
<i>PL:</i>	Parti Libéral (Liberal Party)
<i>PSD:</i>	Parti Social Démocrate (Social Democratic Party)
<i>RDR:</i>	Rassemblement Républicain pour la Démocratie au Rwanda (Republican Assembly for the Democracy of Rwanda)
<i>RPF:</i>	Rwandan Patriotic Front
<i>RTL:</i>	Radio Télévision Libre des Mille Collines
<i>Rubanda nyamwinshi:</i>	Majority people, Hutu majority or the democratic majority of Rwanda
<i>Tubatsembatsembe:</i>	“Let’s kill them”

CHAPTER I

INTRODUCTION [...]

2. The Accused

5. Ferdinand Nahimana [...]. In 1992, Nahimana and others founded a *comité d’initiative* to set up the company known as *Radio Télévision Libre des Mille Collines*, S.A. He was a member of the party known as Mouvement Révolutionnaire National pour le Développement (MRND).
6. Jean-Bosco Barayagwiza [...] was a member of the *comité d’initiative*, which organized the founding of the company *Radio Télévision Libre des Mille Collines*, S.A. During this time, he also held the post of Director of Political Affairs in the Ministry of Foreign Affairs. [...]

3. The Indictments

8. Ferdinand Nahimana is charged [...] with seven counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution, extermination and murder), pursuant to Articles 2 and 3 of the Statute. [...] He stands charged mainly in relation to the radio station called *Radio Télévision Libre des Mille Collines* (RTL).
9. Jean-Bosco Barayagwiza is charged [...] with nine counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity [...], and two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Articles 2, 3 and 4 of the Statute. [...] He stands charged mainly in relation to the radio station called RTL and the CDR Party. [...]

CHAPTER III

FACTUAL FINDINGS [...]

4. RTLM

4.1 RTLM Broadcasts

342. Many witnesses testified that radio played a significant role in the lives of Rwandans. Prosecution Expert Witness Alison Des Forges testified that in the 1980s, the MRND government subsidized the production of radios, which were sold at a reduced price or even given away to those in the administrative structure of the party. According to Des Forges, radio was increasingly important as a source of information as well as entertainment and a focus of social life. RTLM started broadcasting in July 1993. [...]
343. [...] Francois Xavier Nsanzuwera, who in 1994 was Prosecutor in Kigali, [...] described crossing at least four roadblocks on 10 April, finding all those manning each of the roadblocks listening to RTLM. He observed this on many occasions and described radios and weapons as the two key objects that would be found at roadblocks. Witness LAG, who manned a roadblock in Cyangugu, testified that they heard about what was happening in the country and their leaders' instructions from RTLM. [...]

4.1.1 Before 6 April 1994

345. Some RTLM broadcasts focused on ethnicity in its historical context, in an apparent effort to raise awareness of the political dynamic of Hutu-Tutsi relations. In an RTLM broadcast on 12 December 1993, for example, Barayagwiza shared his own experience as a Hutu with RTLM listeners, to illustrate the role of education and culture in the development of ethnic consciousness:

A Hutu child, ... let me take my own example, for I was born a Hutu; my father is a Hutu, my grandfather is a Hutu, my great grandfather is a Hutu and all my mother's parents are Hutus. [...] They brought me up as a Hutu, I grew up in Hutu culture. I was born before the 1959 revolution; my father did forced labor [...]. My mother used to weed in the fields of the Tutsis who were in power. My grandfather paid tribute-money. I saw all those things, and when I asked them why they go to cultivate for other people, weed for other people when our gardens were not well maintained, they would tell me: "That is how things are; we must work for the Tutsis." [...]

346. Prosecution Expert Witness Alison Des Forges described this passage as communicative of Barayagwiza's "insistence that the ethnic groups are a fundamental reality". She suggested that while there was nothing wrong with taking pride in one's ethnic origins, in the context of a time when Hutu power was being defined as an ideology in opposition to a minority group, which carried the threat of violence against that group, such statements could contribute to the heightening of ethnic tensions. [...]

348. Subsequently in the same broadcast, [...] Gaspard Gahigi, RTLM Editor-in-Chief, [...] suggested that “people want to conceal the ethnic problem so that the others do not know that they are looking for power”, then giving the floor to Barayagwiza, who agreed and elaborated on the point:

Yes! Notable among them are the RPF people who are asking everybody to admit that the ethnic groups do not exist. And when one raises the issue, they say that such a person is “unpatriotic, an enemy of peace, whose aim is to divide the country into two camps. However, it looks like right from the beginning of our discussion, we have proved that the ethnic groups do exist, that the ethnic problem does exist, but that today it is being linked to ... by the way, it is not only today, this dates back a long time ago, it is associated with the quest for power.

The RPF claim that they are representing the Tutsis, but they deny that the Tutsis are in the minority. They are 9% of the population. The Hutus make up 80%! So, their conclusion is, “If we accepted that we are Tutsis and accepted the rules of democracy, and we went to the polls, the Hutus will always have the upper hand and we shall never rule.” Look at what happened in Burundi: they also thought like that. Those who staged the coup d’Etat thought in the same way. Their mentality is like that of the *Inyenzi*, whose only target is power, yet they know very well that today it is unacceptable to attain power without going through the democratic process... They wonder: “How shall we go about acceding to power?” and they add: “The best way is to refute the existence of ethnic groups, so that when we are in power, nobody will say that it is a single ethnic group that is in power.” That is the problem we are facing now. [...]

361. In a broadcast by Kantano Habimana and Noël Hitimana, on 23 March 1994, the RTLM journalists warned listeners of a long-term plan being executed by the RPF, and their undertaking “to fight anything related to ‘Power,’ that is, to fight any Hutu, any Hutu who says: ‘Rwanda is mine, I am part of the majority. I decide first, not you.’” [...]
362. Chrétien notes with regard to this broadcast the emphasis on the fear to be felt by Hutu who have been subjugated by Tutsi. The Hutu seized power from the Tutsi in 1959, and the Tutsi were going to take it back. The historical political context was described entirely in ethnic terms, and the terms “Hutu” and “Tutsi” were used for political groups of people struggling for power. [...]
363. RTLM broadcasts engaged in ethnic stereotyping in economic terms as well as political terms. [...]
368. RTLM broadcasts also engaged in ethnic stereotyping in reference to physical characteristics. In an RTLM broadcast on 9 December 1993, Kantano Habimana discussed accusations that RTLM hated the Tutsi:

Not all Tutsis are wicked; some of them are wicked. Not all Hutus are good, some of them are wicked. Of the ethnic groups, there are some wicked Twas This shows that human nature remains the same among all the ethnic

groups in Rwanda, among all the men in Rwanda. But what type of person got it into his head that the RTLM hates the Tutsis? What have the Tutsis done to incur our hatred? A Tutsi, (he smiles) who ... and which way are the Tutsis hated? The mere fact of seeing a Tutsi strolling about forces you to say he has a beautiful nose, that he is tall and slim, and what not. And you grudge him for that? If he has a beautiful, aquiline nose, you also have your own nose that is fat and which allows you to breathe enough air to ventilate your lungs. [...]

369. The Chamber notes, despite Habimana's effort to express even-handedness, the hostility towards and resentment of Tutsi that is conveyed in this broadcast, as well as the acknowledgement that some thought that RTLM hated the Tutsi. The denial is unconvincing. In another RTLM broadcast, on 1 January 1994, Kantano Habimana again mentioned the concern expressed by others that RTLM was promoting ethnic hatred:

[...] However, in this war, in this hard turn that Hutus and Tutsis are turning together, some colliding on others, some cheating others in order to make them fall fighting ... I have to explain and say: "This and that...The cheaters are so-and-so ..." You understand ... If Tutsis want to seize back the power by tricks ... Everybody has to say: "Mass, be vigilant ... Your property is being taken away. What you fought for in '59 is being taken away." So kids, do not condemn me. I have nothing against Tutsis, or Twas, or Hutus. I am a Hutu but I have nothing against Tutsis. But in this political situation I have to explain: "Beware, Tutsis want to take things from Hutus by force or tricks." So, there is not any connection in saying that and hating the Tutsis. When a situation prevails, it is talked of.

370. Again in this broadcast, there was no reference to *Inkotanyi* or *Inyenzi*. The opposing forces were presented as Hutu and Tutsi. The Tutsi were said to want to seize power back through force or trickery, and Habimana said, again unconvincingly, "I have nothing against Tutsis", which was belied by everything else he said. [...]

371. That RTLM broadcasts intended to "heat up heads" is evidenced by broadcasts calling the public to arms. In an RTLM broadcast on 16 March 1994, Valerie Bemeriki conveyed the call to "rise up":

We know the wisdom of our armed forces. They are careful. They are prudent. What we can do is to help them whole-heartedly. A short while ago, some listeners called to confirm it to me saying: 'We shall be behind our army and, if need be, we shall take up any weapon, spears, bows. ... Traditionally, every man has one at home, however, we shall also rise up. Our thinking is that the *Inkotanyi* must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda. Let them know that it is impossible. [...]

375. Many of the RTLM broadcasts reviewed by the Chamber publicly named individuals as RPF accomplices and called on listeners to be vigilant to the security risk posed by these individuals. In an RTLM broadcast on 15 March 1994, Noël Hitimana reported:

But in Bilyogo I carried out an investigation, there are some people allied with the *Inkotanyi*, the last time, we caught Lt Eric there, I say to him that if he wants, that he comes to see where his beret is because there is even his registration, we caught him at Nyiranuma's house in Kinyambo. There are others who have become *Inkotanyi*, Marc Zuberi, good day Marc Zuberi (he laughs ironically), Marc Zuberi was a banana hauler in Kibungo. With money from the *Inkotanyi* he has just built himself a huge house there, therefore he will not be able to pretend, only several times he lies that he is *Interahamwe*; to lie that you are *Interahamwe* and when the people come to check you, they discover that you are *Inkotanyi*. This is a problem, it will be like at Ruhengeri when they (*Inkotanyi*) came down the volcanoes taking the names of the CDR as their own, the population welcomed them with joy believing that it was the CDR who had come down and they exterminated them. He also lies that he is *Interahamwe* and yet he is *Inkotanyi*, it's well-known. How does he manage when we catch his colleague *Inkotanyi* Tutsi? Let him express his grief.

Let's go to Gitega, I salute the council, let them continue to keep watch over the people because at Gitega there are many people and even *Inkotanyi*. There is even an old man who often goes to the CND, he lives very close to the people from MDR, near Mustafa, not one day passes without him going to the CND, he wears a robe, he has an eye nearly out of its socket, I do not want to say his name but the people of Gitega know him. He goes there everyday and when he comes from there he brings news to Bilyogo to his colleague's house, shall I name them? Gatarayiha Seleman's house, at the house of the man who limps "Ndayitabi".

376. The Chamber notes that the people named in this broadcast were clearly civilians. The grounds on the basis of which RTLM cast public suspicion on them were cited in the broadcast. They are vague, highly speculative, and have no apparent connection with military activity or armed insurrection.
377. In an RTLM broadcast on 14 March 1994, Gaspard Gahigi named an *Inkotanyi* and listed at the end of the broadcast the names of all his family members:

At RTLM, we have decided to remain vigilant. I urge you, people of Biryogo, who are listening to us, to remain vigilant. Be advised that a weevil has crept into your midst. Be advised that you have been infiltrated, that you must be extra vigilant in order to defend and protect yourself. You may say: "Gahigi, aren't you trying to scare us?" This is not meant to scare you. I say that people must be told the truth. That is useful, a lot better than lying to them. I would like to tell you, inhabitants of Biryogo, that one of your neighbors, named Manzi Sudi Fadi, alias Bucumi, is no longer among you. He now works as a technician for Radio Muhabura. We have seized a letter he wrote to Ismael Hitimana, alias Safari,... heads a brigade of *Inkotanyi* there the [*sic*] in Biryogo area, a brigade called *Abatiganda*. He is their coordinator. It's a brigade composed of *Inkotanyi* over there in Biryogo. [...]

As you can see, the brigade does exist in the Biryogo area. You must know that the man Manzi Sudi is no longer among you, that the brigade is headed by a man named Hitimana Ismaël, co-ordinator of the Abatiganda brigade in Biryogo. The Manzi Sud also wrote: "Be strong. I think of you a great deal. Keep your faith in the war of liberation, even though there is not much time left. Greetings to Juma, and Papa Juma. Greetings also to Espérance, Clarisse, Cintré and her younger sister, ... Umutoni."

378. Chrétien noted that this broadcast was an accusation of someone by name as being an RPF accomplice and the reading of a private letter, including the names of the family members. He testified that an ICTR investigator had been able to find Manzi Sudi Fahdi in Kigali and learned that his whole family, including the children Espérance, Clarisse, Cintré and others, were killed during the genocide. [...]

388. In a broadcast on 3 April 1994, Noël Hitimana forecast an imminent RPF attack:

They want to carry out a little something during the Easter period. In fact, they're saying: "We have the dates hammered out." They have the dates, we know them too. They should be careful, we have accomplices among the RPF. ... who provide us with information. They tell us, "On the 3rd, the 4th and the 5th, something will happen in Kigali city." As from today, Easter Sunday, tomorrow, the day after tomorrow, a little something is expected to happen in Kigali city; in fact also on the 7th and 8th. You will therefore hear gunshots or grenade explosions. Nonetheless, I hope that the Rwandan armed forces are vigilant. There are *Inzirabwoba* [fearless], yes, they are divided into several units! The *Inkotanyi* who were confronted with them know who they are... As concerns the protection of Kigali, yes, indeed, we know, we know, on the 3rd, the 4th and the 5th, a little something was supposed to happen in Kigali. And in fact, they were expected to once again take a rest on the 6th in order to carry out a little something on the 7th and the 8th ... with bullets and grenades. However, they had planned a major grenade attack and were thinking: "After wrecking havoc in the city, we shall launch a large-scale attack, then ..."

389. Chrétien suggested that this broadcast gave credibility to the "reign of rumour," on the basis of the fear shared by all at the time owing to the nullification of the Arusha Accords.

4.1.2 After 6 April 1994

390. In the days just after 6 April 1994, Noël Hitimana broadcast that Kanyarengwe and Pastor Bizimungu had died, suggesting that they, having desired and provoked misfortune, had been struck by it and asking what had prompted them, both Hutu, to sign a blood pact with those who would exterminate "us", apparently from the context a reference to the Hutu. The broadcast then asked listeners to look for *Inyenzi*:

You the people living in Rugunga, those living over there in Kanogo, those living in Kanogo, in fact, those living in Mburabuturo, look in the woods of Mburabuturo, look carefully, see whether there are no *Inyenzis* inside. Look carefully, check, see whether there are no *Inyenzis* inside ...

391. When confronted on cross-examination with the fact that this was a false report of the death of Kanyarengwe and Bizimungu, Nahimana stated that Kanyarengwe was head of the RPF and Bizimungu its spokesperson. He said he could understand that the military might ask journalists to demoralize the opponents. "When there is war, there is war, and propaganda is part of it," he said. With regard to looking for people in the forest, Nahimana expressed the view that if the people were civilians who had gone to the forest in fear, he would not accept these words. On the other hand, if military intelligence had concluded that they were armed infiltrators of the RPF, he could understand an announcement such as the one in the broadcast.
392. RTLM broadcasts continued after 6 April to define the enemy as the Tutsi, at times explicitly. In a broadcast on 15 May 1994, for example, the RTLM Editor-in-Chief Gaspard Gahigi said:

The war we are waging, especially since its early days in 1990, was said to concern people who wanted to institute "democracy" We have said time and again that it was a lie. these days, they trumpet, they say the Tutsi are being exterminated, they are being decimated by the Hutu, and other things. I would like to tell you, dear listeners of RTLM, that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi. [...]

395. In an RTLM broadcast on 30 May 1994, Kantano Habimana equated *Inkotanyi* with Tutsi, referring to the enemy several times first as *Inkotanyi* and then as Tutsi:

If everybody, if all the 90% of Rwandans, rise like one man and turn on the same thing called *Inkotanyi*, only on the thing called *Inkotanyi*, they will chase it away until it disappears and it will never dream of returning to Rwanda. If they continue killing themselves like this, they will disappear. Look, the day all these young people receive guns, in all the *communes*, everyone wants a gun, all of them are Hutu, how will the Tutsi, who make up 10% of the population, find enough young people, even if they called on the refugees, to match those who form 90% of the population.

How are the *Inkotanyi* going to carry this war through? If all the Hutu children were to stand up like one man and say we do not want any more descendents of Gatutsi in this country, what would they do? I hope they understand the advice that even foreigners are giving them. [...]

396. In an RTLM broadcast on 4 June 1994 Kantano Habimana more graphically equated *Inkotanyi* with Tutsi, describing the physical characteristics of the ethnic group as a guide to selecting targets of violence. He said:

One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the *Inkotanyi* and exterminate them, all the easier that

[Tr.] the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it. Then we will go on to Kibungo, Rusumo, Ruhengeri, Byumba, everywhere. We will rest after liberating our country. [...]

403. In an RTLM broadcast of 2 July 1994, Kantano Habimana exulted in the extermination of the *Inkotanyi*:

So, where did all the *Inkotanyi* who used to telephone me go, eh? They must have been exterminated. Let us sing: "Come, let us rejoice: the *Inkotanyi* have been exterminated! Come dear friends, let us rejoice, the Good Lord is just." The Good Lord is really just, these evildoers, these terrorists, these people with suicidal tendencies will end up being exterminated. When I remember the number of corpses that I saw lying around in Nyamirambo yesterday alone; they had come to defend their Major who had just been killed. Some *Inkotanyi* also went to lock themselves up in the house of Mathias. They stayed there and could not find a way to get out, and now they are dying of hunger and some have been burnt. However, the *Inkotanyi* are so wicked that even after one of them has been burnt and looks like a charred body, he will still try to take position behind his gun and shoot in all directions and afterwards he will treat himself, I don't know with what medicine. Many of them had been burnt, but they still managed to pull on the trigger with their feet and shoot. I do not know how they are created. I do not know. When you look at them, you wonder what kind of people they are. In any case, let us simply stand firm and exterminate them, so that our children and grandchildren do not hear that word "*Inkotanyi*" ever again. [...]

408. Some RTLM broadcasts linked the war to what were perceived and portrayed as inherent ethnic traits of the Tutsi. In a broadcast on 31 May 1994, for example, Kantano Habimana said:

The contempt, the arrogance, the feeling of being unsurpassable have always been the hallmark of the Tutsis. They have always considered themselves more intelligent and sharper compared to the Hutus. It's this arrogance and contempt which have caused so much suffering to the *Inyenzi-Inkotanyi* and their fellow Tutsis, who have been decimated. And now the *Inyenzi-Inkotanyi* are also being decimated, so much so that it's difficult to understand how those crazy people reason. [...]

413. In an RTLM broadcast on 5 June 1994, Kantano Habimana described an encounter with an *Inkotanyi* child:

Some moments ago, I was late due to a small *Inkotanyi* captured in Kimisagara. It is a minor *Inkotanyi* aged 14. [...] So *Inkotanyi* who may be in Gatsata or Gisozi were using this small dirty *Inkotanyi* with big ears who would come with a jerrican pretending to go to fetch water but he was observing the guns of our soldiers, where roadblocks are set and people on roadblocks and signal this after. It is clear therefore, we have been saying this for a long time, that this *Inkotanyi's* tactic to use a child who doesn't know their objective

making him understand that they will pay him studies; that they will buy him a car and make him do for their war activities, carry ammunitions on the head for them. And give him a machine to shoot on the road any passenger while they have gone to dig out potatoes. Truly speaking it is unprecedented wickedness to use children during the war, because you know that a child doesn't know anything.

414. This broadcast linked a small child to espionage without citing any evidence that the child was doing anything other than fetching water and looking around. The subsequent association with weapons would leave listeners with the impression that any boy fetching water could be a suspect, covertly aiding the enemy. RTLM promoted the idea that accomplices were everywhere. [...]
415. Many RTLM broadcasts used the word "extermination"; others acknowledged, as several broadcasts cited above, that the reality of extermination was underway. On 9 June 1994 in an RTLM broadcast, Kantano Habimana said:

I will also tell you about Kivugiza, where I went yesterday and where [I] saw *Inkotanyi* in the Khadafi mosque; over one hundred of them had been killed. However, others arrived. When they reached the place, I went there to take a look and saw that they looked like cattle for the slaughter. I don't know whether they have already been slaughtered today or whether they will be slaughtered tonight. But in fact, whoever cast a spell on these Rwandan children (or foreigners if that is the case) went all out They are braving the shots fired by the children of Rwanda in a suicidal manner. I feel they are going to perish if they are not careful.

416. The Chamber notes the striking indifference to these massacres evident in the broadcast, and the dehumanization of the victims. Although the text makes no reference to ethnicity, in light of the context in which Tutsi were fleeing and taking refuge in places of worship, as well as other broadcasts in which the terms *Inkotanyi* and Tutsi were equated, listeners might well have understood the reference to *Inkotanyi* as a reference to Tutsi civilians. Habimana's suggestion that a newly arrived group had already been slaughtered or was about to be slaughtered accepted, condoned and publicly presented the killing of hundreds of people in a mosque as normal.
417. In an RTLM broadcast on 31 May 1994 an unidentified speaker described the clubbing of a Tutsi child:

They have deceived the Tutsi children, promising them unattainable things. Last night, I saw a Tutsi child who had been wounded and thrown into a hole 15 meters deep. He managed to get out of the hole, after which he was finished with a club. Before he died he was interrogated. He answered that the *Inkotanyi* had promised to pay for his studies up to university. However, that may be done without risking his life and without devastating the country. We do not understand the *Inkotanyi's* attitude. They do not have more light or heavy weapons than us. We are more numerous than them. I believe they will be wiped out if they don't withdraw.

418. The Chamber finds no indication in this broadcast that the Tutsi child was armed or dangerous. His brutal death was described dispassionately, the point of the broadcast being that the *Inkotanyi* did not seem to understand that they would be annihilated.

[...]

425. In contrast, some broadcasts explicitly called for killing of civilians. In an RTLM broadcast on 23 May 1994, Kantano Habimana said:

Let me congratulate thousands and thousands of young men I've seen this morning on the road in Kigali doing their military training to fight the *Inkotanyi* ... At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country. Whether they reach at the airport or somewhere else, but they should leave their lives on the spot. That's the way things should be ... Some (passengers) may pretext that they are refugees, others act like patients and other like sick-nurses. Watch them closely, because *Inkotanyi's* tricks are so many... Does it mean that we have to go in refugee camps to look for people whose children joined the RPA and kill them? I think we should do it like that. We should also go in refugee camps in the neighbouring countries and kill those who sent their children within the RPA. I think it's not possible to do that. However, if the *Inkotanyi* keep on acting like that, we will ask for those whose children joined the RPA among those who will have come from exile and kill them. Because if we have to follow the principle of an eye for an eye, we'll react. It can't be otherwise.

426. The Chamber notes the call for extermination in this broadcast, and although there is some differentiation in the use of the term *Inkotanyi* from the Tutsi population, nevertheless the broadcast called for killing of those who were not *Inkotanyi*, the killing of those in refugee camps whose children joined the RPA. The broadcast also warned listeners to be vigilant at the roadblocks and to beware passengers using the "pretext" that they were refugees, in effect calling on the population to attack refugees.

427. In an RTLM broadcast on 28 May 1994, Kantano Habimana made it clear that even Hutu whose mothers were Tutsi should be killed:

Another man called Aloys, *Interahamwe* of Cyahafi, went to the market disguised in military uniform and a gun and arrested a young man called Yirirwahandi Eustache in the market. In his Identity Card it is written that he is a Hutu though he acknowledges that his mother is a Tutsi. Aloys and other *Interahamwe* of Cyahafi took Eustache aside and made him sign a paper of 150000 Frw. He is now telling me that they are going to kill him and he is going to borrow this amount of money. He is afraid of being killed by these men. If you are an *Inyenzi* you must be killed, you cannot change anything. If you are *Inkotanyi*, you cannot change anything. No one can say that he has captured an *Inyenzi* and the latter gave him money, as a price for his life. This cannot be accepted. If someone has a false identity card, if he is *Inkotanyi*, a known accomplice of RPF, don't accept anything in exchange. He must be killed.

428. From this broadcast it is clear that Yirirwahandi Eustache was perceived to be an *Inyenzi* and *Inkotanyi* because he acknowledged that his mother was a Tutsi. The chilling message of the broadcast was that any accomplice of the RPF, implicitly defined to be anyone with Tutsi blood, cannot buy his life. He must be killed. [...]
431. RTLM also broadcast lists of names of individuals. In an RTLM broadcast on 31 March 1994, for example, Mbilizi announced among the news headlines "13 students of Nyanza who form a brigade that is called Inziraguteba ["persons who are never late"] will soon be enrolled by the RPF." Shortly thereafter Mbilizi started his report of this news by saying that 13 students of Nyanza had just been enrolled by the RPF. He named five schools and then read a list of thirteen names of the people he said were in the Brigade Inziraguteba. Together with each name was broadcast the young man's post in the Brigade, his age, the name of his school, and what his RPF code name would be. The ages given ranged from 13 to 18 years old. After reading the list of names, Mbilizi said:

So, dear listeners, you have noticed that these students are very young and that can be very dangerous. We have to say that this confirms sufficiently the information that was diffused on RTLM saying that the RPF has infiltrated schools.

[...]

433. A number of broadcasts are addressed to those manning the roadblocks, in support of their activities. In a broadcast between 26 and 28 May, Kantano Habimana directly encouraged those guarding the trenches against the *Inyenzi* to take drugs:

I would like at this time to salute those young people near the slaughterhouse, the one near Kimisagara ... Yesterday I found them dancing zouk. They had even killed a small pig. I would like to tell you that ... Oh no! The thing you gave me to smoke it had a bad effect on me. I took three puffs. It is strong, very strong, but it appears to make you quite courageous. So guard the trench well so to prevent any cockroach [*Inyenzi*] passing there tomorrow. Smoke that little thing, and give them hell.[...]

Witness Evidence of RTLM Programming [...]

444. A number of Prosecution witnesses testified that individuals referred to in RTLM broadcasts were subsequently killed as a result of those broadcasts. Nsanzuwera, the Kigali Prosecutor at the time, characterized being named on RTLM as "a death sentence" even before 7 April. [...] One such incident, which took place on 7 or 8 April, was the killing of Desire Nshunguyinka, a friend of President Habyarimana, who was killed with his wife, his sister and his brother-in-law after RTLM broadcast the license plate of the car they were traveling in. The RTLM broadcast alerted the roadblocks in Nyamirambo and said they should be vigilant as a car with that identification would be passing through, with *Inkotanyi*. When the car arrived at the roadblock almost immediately after the broadcast, these four people were

killed by those manning the roadblock. Nsanzuwera said that RTLM broadcasting addressed itself to those at the roadblock and that the message was very clear: to keep the radio nearby as RTLM would provide information on the movements of the enemy. Many listened to RTLM out of fear because its messages incited ethnic hatred and violence, and Nsanzuwera said the station was called “Radio Rutswitsi” by some, which means “to burn”, referring to ethnic violence. After 6 April it was even called “Radio Machete” by some.

445. Prosecution Witness FS, a businessman from Gisenyi, testified that he heard his brother’s name, among others, mentioned on RTLM on 7 April 1994, and that shortly thereafter his brother was killed, together with his wife and seven children. He testified that his brother was not the only one, but that several people were killed following radio broadcasts. [...]
449. Prosecution witnesses also described RTLM broadcasts apparently designed to manipulate the movement of Tutsis so as to facilitate their killing. An incident recounted by Nsanzuwera involved Professor Charles Kalinjabo, who was killed at a roadblock in May 1994 after RTLM broadcast an appeal to all Tutsis who were not *Inkotanyi* but rather patriots to join their Hutu comrades at the roadblocks. Charles Kalinjabo was among those who consequently left his hiding place and went to a roadblock, where he was killed after RTLM then broadcast a message telling listeners not to go and search for the enemies in their houses because they were there at the roadblocks. Witness FW testified that on 11 April 1994, he heard an RTLM broadcast telling all Tutsis who had fled their homes that they should return because a search for guns was to be conducted, and that the houses of all those who were not home would be destroyed in this search. [...] Witness FW stated that most of those who returned home following this broadcast were killed. He did not go home but looked for a hiding place because he did not trust RTLM.
450. Witness FW also testified about an incident that took place at the Islamic Cultural Centre on 13 April 1994. The witness estimated that there were 300 men, 175 women and many children, all Tutsis taking refuge there. He described dire conditions and said that some Hutu youth were entering the compound and bringing food to those inside. On 12 April, he saw the RTLM broadcaster Noël Hitimana there, and heard him asking these youth why they were bringing food to the *Inyenzi* in the Islamic Cultural Centre. Witness FW testified that he told Hitimana that these people he was calling *Inyenzi* were his neighbours and asked him why he was calling them *Inyenzi*. Approximately one hour later, Witness FW said he heard Kantano Habimana on RTLM saying that in the Islamic Cultural Centre there were armed *Inyenzi* and that the Rwandan Armed Forces must be made aware of this fact. According to the witness, none of the refugees in the compound was armed; they were all defenceless. The next morning, on 13 April, the compound was attacked by soldiers and *Interahamwe*, who encircled and killed the refugees. From his place of hiding, Witness FW was able to see what was happening. He described the reluctance of some *Interahamwe* to kill people in a mosque, which led them to order everyone to come out, including elderly women and children. They were then taken to nearby houses, and almost everyone was subsequently

killed. The next morning the witness found six survivors, three of whom were severely wounded and died subsequently. They told him that once the refugees had been put into the houses, grenades were thrown into the houses, and that they were the only survivors of the attack. Among those killed was Witness FW's cousin, a seven year-old girl.

451. Witness FW testified that in May he heard an RTLM broadcast, which he described as one of the "inflammatory programs". Gahigi was interviewing Justin Mugenzi who was saying that in 1959 they had sent the Tutsi away but that this time around they were not going to send them away, they were going to kill them, that the Hutu should kill all the Tutsi – the children, women and men – and if they had come back it is because they were not killed last time. The same mistake should not be made again, they should kill all the Tutsi. Witness FW said this statement made them very scared because they realised that their chances of survival were very slim and that if they were alive it would not be for too long. [...]
457. Prosecution Witness Philippe Dahinden, a Swiss journalist who followed RTLM from its beginnings, delivered a statement to the United Nations Human Rights Commission on 25 May 1994, calling for the condemnation of the role played by RTLM since the beginning of the massacres and asking that the UN demand the closing down of the radio. In his statement he noted, "Even prior to the bloody events of April 1994, RTLM was calling for hatred and violence against the Tutsis and the Hutu opponents. Belgian nationals and peacekeepers were also among the targets and victims of the '*radio que tue*' [the killer radio station]." Calling RTLM "the crucial propaganda tool" for the Hutu extremists and the militia in the launching and perpetuating of the massacres, Dahinden said that beginning on 6 April 1994, RTLM had "constantly stirred up hatred and incited violence against the Tutsis and Hutu in the opposition, in other words, against those who supported the Arusha Peace Accords of August 1993".
458. Expert Witness Des Forges testified that the message she was getting from the vast majority of people she talked to at the time of the killings was "stop RTLM". She noted that potential victims listened to RTLM as much as they could, from fear, and took it seriously, as did assailants who listened to it at the barriers, on the streets, in bars, and even at the direction of authorities. She recounted one report that a *bourgmestre* had said, "Listen to the radio, and take what it says as if it was coming from me". Her conclusion on the basis of the information she gathered was that RTLM had an enormous impact on the situation, encouraging the killing of Tutsis and of those who protected Tutsis. [...]
460. With regard to broadcasts after 6 April 1994, Nahimana testified that he was revolted by those which left listeners with the impression that Tutsis generally were to be killed. He distanced himself from these activities, which he characterized as "unacceptable", stating that RTLM had been taken over by extremists. He stated that RTLM did incite the population to seek out the enemy. While saying that he did not believe that RTLM "systematically called for people to be murdered", he said he was shocked to learn in detention that broadcasters were highlighting the physical features of Tutsis, whom he acknowledged might

well be killed as a consequence at a roadblock. Nahimana hypothesized that had he tried to stop RTLM from broadcasting details about individuals named as *Inkotanyi*, he might have been himself made the subject of an RTLM broadcast endangering his life. On cross-examination, he specifically condemned several broadcasts he was questioned about, and he requested that his condemnation be taken as a global one for all such broadcasts. [...]

461. In response to questioning from the Chamber regarding the RTLM journalists, noting that the same journalists were broadcasting before and after 6 April 1994, Nahimana attributed their changed conduct to a breakdown in management, which allowed a number of radicals to control RTLM. He said during his time in detention he had become more familiar with the programming of RTLM after 6 April, and again he denounced it, particularly the broadcasts of Kantano Habimana, who he said often took drugs, after which he would broadcast unacceptable material. He noted that Habimana had lost his leg in the bombing of RTLM in April, and he said some of the anger in his programming could be understood, though not justified, by the fact that his entire family was killed by RPF forces. Kantano was a trained and good journalist, Nahimana said, recalling that he only learned in detention that the journalists were taking drugs, which had not happened before 6 April.
462. Nahimana firmly rejected the proposition that the difference between RTLM broadcasts before and after 6 April 1994 was merely a matter of degree. He said the kind of debates aired before were not possible after 6 April. He praised Gaspard Gahigi as “the cream of the cream of the cream of the print media”, noting that he had trained journalists in the Great Lakes region. He agreed that mistakes were made but said mistakes happen anywhere and he deplored such mistakes, recalling that he had said that the person slighted should be given a right of reply. After 6 April, he said some journalists were like madmen, either because of drugs or because they were upset about what happened to their colleagues. He stated that he never saw any journalist on drugs and mentioned Kantano Habimana as having joined “the camp of criminals”. [...]

Discussion of Evidence

[...]

468. The Chamber notes that in the RTLM broadcasts highlighted above, there is a complex interplay between ethnic and political dynamics. This interplay was not created by RTLM. It is to some degree a reflection of the history of Rwanda. The Chamber considers the broadcast by Barayagwiza on 12 December 1993, to be a classic example of an effort to raise consciousness regarding a history of discrimination against the Hutu majority by the privileged Tutsi minority. The discrimination detailed relates to the inequitable distribution of power in Rwanda, historically. As this distribution of power followed lines of ethnicity, it necessarily has an ethnic component. Barayagwiza’s presentation was a personal one clearly designed to convey a political message: that the Hutu had historically been treated as second-class citizens. The Chamber notes the underlying concern running

through all the RTLM broadcasts that the armed insurgency of the RPF was a threat to the progress made in Rwanda following 1959 to remedy this historical inequity. In light of the history of Rwanda, the Chamber accepts that this was a valid concern about which a need for public discussion was perceived. [...]

472. [...] Prosecution Expert Witness Alison Des Forges acknowledged several of these types of RTLM broadcasts but stated that they were very exceptional. The Chamber accepts that this was the case, both on the basis of witness testimony and on the basis of the sampling of broadcasts it has reviewed, which indicate that RTLM had a well-defined perspective for which it was widely known. RTLM was not considered, and was not in fact, an open forum for the expression of divergent points of view.
473. Many RTLM broadcasts explicitly identified the enemy as Tutsi, or equated the *Inkotanyi* and the *Inyenzi* with the Tutsi people as a whole. Some others implied this identification. Although some of the broadcasts referred to the *Inkotanyi* or *Inyenzi* as distinct from the Tutsi, the repeated identification of the enemy as being the Tutsi was effectively conveyed to listeners, as is evidenced by the testimony of witnesses. Against this backdrop, calls to the public to take up arms against the *Inkotanyi* or *Inyenzi* were interpreted as calls to take up arms against the Tutsi. Even before 6 April 1994, such calls were made on the air [...].
474. The Chamber notes that in his testimony Nahimana suggested repeatedly that whether these individuals were in fact members of the RPF, or were legitimately thought to be members of the RPF, was a critical factor in judging the broadcasts. The Chamber recognizes that in time of war, the media is often used to warn the population of enemy movements, and that it might even be used to solicit civil participation in national defense. However, a review of the RTLM broadcasts and other evidence indicates that the individuals named were not in fact members of the RPF, or that RTLM had no basis to conclude that they were, but rather targeted them solely on the basis of their ethnicity. [...]
477. Nahimana insisted, with regard to the broadcast on 14 March 1994, by Gaspard Gahigi, reading a letter written by an *Inkotanyi*, that the letter proved the existence of RPF brigades. If authentic, it is true that the letter was written by a self-identified member of the RPF, but RTLM broadcast the names of his children, who, according to Chrétien, were subsequently killed. Even Nahimana acknowledged finally in his testimony with regard to this broadcast that he did not like the practice of airing peoples' names, especially when it might bring about their death. The Chamber recognizes the frustration expressed by Nahimana over the lack of attention, or even bare acknowledgement, that the letter was written by an RPF member, proving the existence of RPF brigades. However, many Prosecution witnesses acknowledged in their testimony that these brigades existed, and the Chamber notes that several Prosecution witnesses such as Witness AEN and WD testified that they were themselves members of the RPF inside Rwanda at the time. In this case, the issue was not whether the author of the letter was a member of the RPF but that his children were mentioned by name in an RTLM broadcast. Nahimana conceded in his testimony that this was bad practice.

478. Among the Tutsi individuals mentioned specifically by name in RTLM broadcasts prior to 6 April 1994 are a number that were subsequently killed. [...]
481. After 6 April 1994, the fury and intensity of RTLM broadcasting increased, particularly with regard to calls on the population to take action against the enemy. RTLM continued to define the *Inkotanyi* and the *Inyenzi* as the Tutsi in the same manner as prior to 6 April. This does not mean that all RTLM broadcasts made this equation but many did and the overall impression conveyed to listeners was clearly, as evidenced by witness testimony, that the definition of the enemy encompassed the Tutsi civilian population. Nahimana again asserted in the context of a particular broadcast just after 6 April that the question of whether the enemy whom listeners were told to seek out was in fact the RPF was a critical factor in judging the broadcasts. The Chamber notes that this particular broadcast called on the public to look carefully for *Inyenzi* in the woods of Mburabuturo. In the context of other broadcasts that explicitly equated the *Inyenzi* with the Tutsi population, and without any reference in this broadcast to the *Inyenzi* carrying arms or in some way being clearly identified as combatants, the Chamber finds that a call such as this might well have been taken by listeners as a call to seek out Tutsi refugees who had fled to the forest. The 23 May 1994 RTLM broadcast by Kantano Habimana suggested that *Inkotanyi* were pretending to be refugees, directing listeners that even if these people reached the airport, presumably to flee, "they should leave their lives on the spot". Habimana's 5 June 1994 RTLM broadcast called attention to a young boy fetching water as an enemy suspect, without any indication as to why he would have been suspect. In the 15 May 1994 broadcast, Gaspard Gahigi, the RTLM Editor-in-Chief, told his audience "the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi." In the 29 May 1994 RTLM broadcast, a resident described checking identity papers to differentiate between the Hutu and the *Inkotanyi* accomplices, and in the 4 June 1994 RTLM broadcast, Kantano Habimana advised listeners to identify the enemy by his height and physical appearance. "Just look at his small nose and then break it", he said on air.
482. Many of the individuals specifically named in RTLM broadcasts after 6 April 1994 were subsequently killed. [...]
484. The Chamber has considered the extent to which RTLM broadcasts calling on listeners to take action against the Tutsi enemy represented a pattern of programming. While a few of the broadcasts highlighted asked listeners not to kill indiscriminately and made an apparent effort to differentiate the enemy from all Tutsi people, most of these broadcasts were made in the context of concern about the perception of the international community and the consequent need to conceal evidence of killing, which is explicitly referred to in almost all of them. The extensive witness testimony on RTLM programming confirms the sense conveyed by the totality of RTLM broadcasts available to the Chamber, that these few broadcasts represented isolated deviations from a well-established pattern in which RTLM actively promoted the killing of the enemy, explicitly or implicitly defined to be the Tutsi population.

485. The Chamber has also considered the progression of RTLM programming over time – the amplification of ethnic hostility and the acceleration of calls for violence against the Tutsi population. In light of the evidence discussed above, the Chamber finds this progression to be a continuum that began with the creation of RTLM radio to discuss issues of ethnicity and gradually turned into a seemingly non-stop call for the extermination of the Tutsi. Certain events, such as the assassination of President Ndadaye in Burundi in October 1993, had an impact by all accounts on the programming of RTLM, and there is no question that the events of 6 April 1994 marked a sharp and immediate impact on RTLM programming. These were not turning points, however. Rather they were moments of intensification, broadcast by the same journalists and following the same patterns of programming previously established but dramatically raising the level of danger and destruction.

Factual Findings

486. The Chamber finds that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the enemy. The enemy was identified as the RPF, the *Inkotanyi*, the *Inyenzi*, and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts. After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group.
487. Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement.
488. Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.

4.2 Ownership and Control of RTLM [...]

Discussion of Evidence on Control of RTLM After 6 April 1994

561. The Chamber notes that the corporate and management structure of RTLM did not change after 6 April 1994. [...]

Factual Findings

566. The Chamber finds that RTLM was owned largely by members of the MRND party, with Juvenal Habyarimana, President of the Republic, as the largest shareholder and with a number of significant shareholders from the Rwandan Armed Forces. CDR leadership was represented in the top management of RTLM through Barayagwiza as a founding member of the Steering Committee and Stanislas Simbizi, who was subsequently added to the Steering Committee of RTLM.
567. The Chamber finds that Nahimana and Barayagwiza, through their respective roles on the Steering Committee of RTLM, which functioned as a board of directors, effectively controlled the management of RTLM from the time of its creation through 6 April 1994. Nahimana was, and was seen as, the founder and director of the company, and Barayagwiza was, and was seen as, his second in command. Nahimana and Barayagwiza represented RTLM externally in an official capacity. Internally, they controlled the financial operations of the company and held supervisory responsibility for all activities of RTLM, taking remedial action when they considered it necessary to do so. Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read.
568. The Chamber finds that after 6 April 1994, Nahimana and Barayagwiza continued to have *de jure* authority over RTLM. They expressed no concern regarding RTLM broadcasts, although they were aware that such concern existed and was expressed by others. Nahimana intervened in late June or early July 1994 to stop the broadcasting of attacks on General Dallaire and UNAMIR. The success of his intervention is an indicator of the *de facto* control he had but failed to exercise after 6 April 1994.

4.3 Notice of Violations [...]

Factual Findings

617. Concern over RTLM broadcasting was first formally expressed in a letter of 25 October 1993 from the Minister of Information to RTLM. This concern grew, leading to a meeting on 26 November 1993, convened by the Minister and attended by Nahimana and Barayagwiza, together with Félicien Kabuga. At this meeting, Nahimana and Barayagwiza were put on notice of a growing concern, expressed previously in a letter to RTLM from the Minister, that RTLM was violating Article 5, paragraph 2 of its agreement with the government, that it was promoting ethnic division and opposition to the Arusha Accords and that it

was reporting news in a manner that did not meet the standards of journalism. Nahimana and Barayagwiza both acknowledged that mistakes had been made by RTLM journalists. Various undertakings were made at the meeting, relating to the program broadcasts of RTLM. Nahimana was referred to as “the Director” of RTLM, and Barayagwiza was referred to as “a founding member” of RTLM. They were both part of a management team representing RTLM at the meeting, together with Félicien Kabuga, and they both actively participated in the meeting, indicating their own understanding, as well as the perception conveyed to the Ministry, that they were effectively in control of and responsible for RTLM programming.

618. A second meeting was held on 10 February 1994, in which reference was made to the undertakings of the prior meeting, and concern was expressed by the Minister that RTLM programming continued to promote ethnic division, in violation of the agreement between RTLM and the government. The speech made publicly and televised is strong and clear, and the response from RTLM, delivered by Kabuga, is equally strong and clear in indicating that RTLM would maintain course and defend its programming, in defiance of the Ministry of Information. RTLM broad-casting, in which the Minister was mentioned, as was his letter to RTLM, publicly derided his efforts to raise these concerns and his inability to stop RTLM. By Witness GO’s account, Barayagwiza threatened the Ministry. By Nsanzuwera’s account, the Minister was well aware of such threats. Nevertheless, he told Witness GO to continue his work, and the Minister pressed forward with a case against RTLM he was preparing for the Council of Ministers shortly before he and his family were killed on 7 April 1994.
619. It is evident from the letter of 26 October 1993, the meeting of 26 November 1993 and the meeting of 10 February 1994, that concerns over RTLM broadcasting of ethnic hatred and false propaganda were clearly and repeatedly communicated to RTLM, that RTLM was represented in discussions with the government over these concerns by its senior management. Nahimana and Barayagwiza participated in both meetings. Each acknowledged mistakes that had been made by journalists and undertook to correct them, and each also defended the programming of RTLM without any suggestion that they were not entirely responsible for the programming of RTLM. [...]

CHAPTER IV

LEGAL FINDINGS

1. Introduction

944. A United Nations General Assembly Resolution adopted in 1946 declares that freedom of information, a fundamental human right, “requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to see the facts without prejudice and to spread knowledge without malicious intent”.

945. This case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.

2. Genocide

946. Count 2 of the Indictments charge the Accused with genocide pursuant to Article 2(3)(a) of the Statute, in that they are responsible for the killing and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.
947. Article 2(3) of the Statute defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
948. The Trial Chamber in *Akayesu* interpreted “as such” to mean that the act must be committed against an individual because the individual was a member of a specific group and specifically because he belonged to this group, so that the victim is the group itself, not merely the individual. The individual is the personification of the group. The Chamber considers that acts committed against Hutu opponents were committed on account of their support of the Tutsi ethnic group and in furtherance of the intent to destroy the Tutsi ethnic group.

RTLM

949. The Chamber found, as set forth in paragraph 486, that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy. The enemy was defined to be the Tutsi ethnic group. These broadcasts called explicitly for the extermination of the Tutsi ethnic group. In 1994, both before and after 6 April, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents who supported the Tutsi ethnic group. In some cases these persons were subsequently killed. A specific causal connection between the RTLM broadcasts and the killing of these individuals – either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed – has been established (see paragraph 487). [...]

Causation

952. The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.
953. The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM [...] w[as] the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM [...], before and after 6 April 1994.

[...]

Genocidal Intent

957. In ascertaining the intent of the Accused, the Chamber has considered their individual statements and acts, as well as the message they conveyed through the media they controlled.
958. On 15 May 1994, the Editor-in-Chief of RTLM, Gaspard Gahigi, told listeners:
- ... they say the Tutsi are being exterminated, they are being decimated by the Hutu, and other things. I would like to tell you, dear listeners of RTLM, that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi.
959. The RTLM broadcast on 4 June 1994 is another compelling illustration of genocidal intent:
- They should all stand up so that we kill the *Inkotanyi* and exterminate them the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.
960. Even before 6 April 1994, RTLM was equating the Tutsi with the enemy, as evidenced by its broadcast of 6 January 1994, with Kantano Habimana asking, "Why should I hate the Tutsi? Why should I hate the *Inkotanyi*?" [...]
963. [...] Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with "the enemy" and portraying its women as seductive enemy agents, the media called for the extermination of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity. [...]

965. The editorial policies as evidenced by [...] the broadcasts of RTLM constitute, in the Chamber's view, conclusive evidence of genocidal intent. Individually, each of the Accused made statements that further evidence his genocidal intent. [...]
969. Based on the evidence set forth above, the Chamber finds beyond a reasonable doubt that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze acted with intent to destroy, in whole or in part, the Tutsi ethnic group. The Chamber considers that the association of the Tutsi ethnic group with a political agenda, effectively merging ethnic and political identity, does not negate the genocidal animus that motivated the Accused. To the contrary, the identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted. [...]

3. Direct and Public Incitement to Commit Genocide

Jurisprudence

978. The Tribunal first considered the elements of the crime of direct and public incitement to commit genocide in the case of *Akayesu*, noting that at the time the Convention on Genocide was adopted, this crime was included "in particular, because of its critical role in the planning of a genocide". The *Akayesu* judgement cited the explanatory remarks of the delegate from the USSR, who described this role as essential, stating, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so." He asked "how in these circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed."
979. The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike *Akayesu* and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media. [...]

ICTR Jurisprudence

1011. The ICTR jurisprudence provides the only direct precedent for the interpretation of "direct and public incitement to genocide". In *Akayesu*, the Tribunal reviewed the meaning of each term constituting "direct and public incitement". With regard to "incitement", the Tribunal observed that in both common law and civil law systems, "incitement", or "provocation" as it is called under civil law, is defined

as encouragement or provocation to commit an offence. The Tribunal cited the International Law Commission as having characterized “public” incitement as “a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television”. While acknowledging the implication that “direct” incitement would be “more than mere vague or indirect suggestion”, the Tribunal nevertheless recognized the need to interpret the term “direct” in the context of Rwandan culture and language, noting as follows:

... [T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit...

The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

1012. In *Akayesu*, the Tribunal defined the mens rea of the crime as follows: The mens rea required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.
1013. The *Akayesu* judgement also considered whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful and concluded that the crime should be considered as an inchoate offence under common law, or an *infraction formelle* under civil law, i.e. punishable as such. The Tribunal highlighted the fact that “such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results” and held that “genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator”.
1014. In determining more precisely the contours of the crime of direct and public incitement to commit genocide, the Trial Chamber notes the factual findings of the Tribunal in *Akayesu* that the crowd addressed by the accused, who urged them to unite and eliminate the enemy, the accomplices of the *Inkotanyi*, understood his call as a call to kill the Tutsi, that the accused was aware that what he said would be so understood, and that there was a causal relationship between his words and subsequent widespread massacres of Tutsi in the community.

1015. In *Akayesu*, the Tribunal considered in its legal findings on the charge of direct and public incitement to genocide that “there was a causal relationship between the Defendant’s speech to [the] crowd and the ensuing widespread massacres of Tutsis in the community”. The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement. As set forth in the Legal Findings on Genocide, when this potential is realized, a crime of genocide as well as incitement to genocide has occurred.

Charges Against the Accused [...]

1025. The Accused have also cited in their defence the need for vigilance against the enemy, the enemy being defined as armed and dangerous RPF forces who attacked the Hutu population and were fighting to destroy democracy and reconquer power in Rwanda. The Chamber accepts that the media has a role to play in the protection of democracy and where necessary the mobilization of civil defence for the protection of a nation and its people. What distinguishes [...] RTLM from an initiative to this end is the consistent identification made [...] the radio broadcasts of the enemy as the Tutsi population. [...] [L]isteners were not directed against individuals who were clearly defined to be armed and dangerous. Instead, Tutsi civilians and in fact the Tutsi population as a whole were targeted as the threat. [...]

1029. With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect. [...]

RTLM

1031. RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase “heating up heads” captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as “Radio Machete”. The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice, heard by the Chamber when the broadcast tapes were played in Kinyarwanda, adds a quality and dimension beyond words to the message conveyed. In this setting, radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners. The denigration of Tutsi ethnicity was augmented by the visceral scorn coming out of the airwaves – the ridiculing laugh and the nasty sneer. These elements greatly amplified the impact of RTLM broadcasts.

1032. In particular, the Chamber notes the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTLM. Calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance, Habimana told his followers, "Just look at his small nose and then break it". The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group.
1033. The Chamber has found beyond a reasonable doubt that Ferdinand Nahimana acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Nahimana was responsible for RTLM programming pursuant to Article 6(1) and established a basis for his responsibility under Article 6(3) of the Statute [...]. Accordingly, the Chamber finds Ferdinand Nahimana guilty of direct and public incitement to genocide under Article 2(3)(c), pursuant to Article 6(1) and Article 6(3) of the Statute.
1034. The Chamber has found beyond a reasonable doubt that Jean-Bosco Barayagwiza acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Barayagwiza was responsible for RTLM programming pursuant to Article 6(3) of the Statute of the Tribunal [...]. Accordingly, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c), pursuant to Article 6(3) of its Statute. [...]

4. Conspiracy to Commit Genocide

1040. Count 1 of the Indictments charge the Accused with conspiracy to commit genocide pursuant to Article 2(3)(b) of the Statute, in that they conspired with each other, and others, to kill and cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such. [...]
1042. The requisite intent for the crime of conspiracy to commit genocide is the same intent required for the crime of genocide. That the three Accused had this intent has been found beyond a reasonable doubt and is set forth in paragraph 969. [...]
1047. The Chamber considers that conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework. A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.
1048. The Chamber further considers that conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action. The Chamber considers the act of coordination to be the central element that distinguishes conspiracy from

“conscious parallelism”, the concept put forward by the Defence to explain the evidence in this case. [...]

5. Complicity in Genocide

1056. Count 4 of the Nahimana Indictment, Count 3 of the Barayagwiza Indictment and Count 3 of the Ngeze Indictment charge the Accused with complicity in genocide, in that they are complicit in the killing and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such. The Chamber considers that the crime of complicity in genocide and the crime of genocide are mutually exclusive, as one cannot be guilty as a principal perpetrator and as an accomplice with respect to the same offence. In light of the finding in relation to the count of genocide, the Chamber finds the Accused not guilty of the count of complicity in genocide.

6. Crimes Against Humanity (Extermination)

1057. Count 6 of the Nahimana Indictment, Count 5 of the Barayagwiza Indictment and Count 7 of the Ngeze Indictment charge the Accused with extermination pursuant to Article 3(b) of the Statute of the Tribunal, in that they are responsible for the extermination of the Tutsi, as part of a widespread or systematic attack against a civilian population on political, racial or ethnic grounds.

1058. The Chamber notes that some RTLM broadcasts [...] preceded the widespread and systematic attack that occurred following the assassination of President Habyarimana on 6 April 1994 [...]. [T]he Chamber has found that systematic attacks against the Tutsi population also took place prior to 6 April 1994. The Chamber considers that the broadcasting of RTLM [...] prior to the attack that commenced on 6 April 1994 formed an integral part of this widespread and systematic attack, as well as the preceding systematic attacks against the Tutsi population. [...]

1061. [...] The Chamber agrees that in order to be guilty of the crime of extermination, the Accused must have been involved in killings of civilians on a large scale but considers that the distinction is not entirely related to numbers. The distinction between extermination and murder is a conceptual one that relates to the victims of the crime and the manner in which they were targeted.

1062. [...] RTLM instigated killings on a large-scale. The nature of media, particularly radio, is such that the impact of the communication has a broad reach, which greatly magnifies the harm that it causes. [...]

7. Crimes Against Humanity (Persecution)

1069. Count 5 of the Nahimana Indictment and Count 7 of the Barayagwiza and Ngeze Indictments charge the Accused with crimes against humanity (persecution) on political or racial grounds pursuant to Article 3(h) of the Statute, in that they are responsible for persecution on political or racial grounds, as part of a widespread

or systematic attack against a civilian population, on political, ethnic or racial grounds. [...]

1071. Unlike the other acts of crimes against humanity enumerated in the Statute of the Tribunal, the crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group, i.e. non-Serbs. As the evidence indicates, in Rwanda the targets of attack were the Tutsi ethnic group and the so-called "moderate" Hutu political opponents who supported the Tutsi ethnic group. The Chamber considers that the group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic component. [...] RTLM [...], as has been shown by the evidence, essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. In these circumstances, the Chamber considers that the discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character. [...]
1073. Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. [...]
1074. The Chamber notes that freedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law. In fact, governments have an obligation under the International Covenant on Civil and Political Rights to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Similarly, the Convention on the Elimination of all Forms of Racial Discrimination requires the prohibition of propaganda activities that promote and incite racial discrimination.
1075. A great number of countries around the world, including Rwanda, have domestic laws that ban advocacy of discriminatory hate, in recognition of the danger it represents and the harm it causes. [...]
1076. The Chamber considers, in light of well-established principles of international and domestic law, and the jurisprudence [...], that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.
1077. The Chamber has reviewed the broadcasts of RTLM [...] in its Legal Findings on Direct and Public Incitement to Genocide (see paragraphs 1019-1037). Having established that all communications constituting direct and public incitement to genocide were made with genocidal intent, the Chamber notes that the lesser

intent requirement of persecution, the intent to discriminate, has been met with regard to these communications. Having also found that these communications were part of a widespread or systematic attack, the Chamber finds that these expressions of ethnic hatred constitute the crime against humanity of persecution, as well as the crime of direct and public incitement to genocide.

1078. The Chamber notes that persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms. [...]

1079. The Chamber notes that Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM (). The Ten Commandments, broadcast on RTLM [...], vilified and endangered Tutsi women, as evidenced by Witness AHI's testimony that a Tutsi woman was killed by CDR members who spared her husband's life and told him "Do not worry, we are going to find another wife, a Hutu for you". By defining the Tutsi woman as an enemy in this way, RTLM [...] articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.

1080. The Chamber notes that persecution when it takes the form of killings is a lesser included offence of extermination. [...]

DISCUSSION

1. a. Would you qualify the situation in Rwanda from 6 April 1994 on as an armed conflict? Which were the parties to the conflict? (GC I-IV, Arts 2 and 3; P II, Art. 1)
- b. Do the killings of Tutsi civilians by members of militias or even by other Hutu civilians constitute acts of war? Can a genocide be committed in times of peace? What about a crime against humanity? Is war not a necessary condition for the commission of those crimes? How do you reconcile the definition of a crime against humanity, which has to be committed "as part of a widespread or systematic attack", with the fact that this crime can be committed in times of peace? Are these crimes violations of international humanitarian law (IHL)? (GC I, Arts 12(2) and 50; GC II, Arts 12(2) and 51; GC III, Arts 13 and 130; GC IV, Arts 32 and 147; P I, Art. 85(2))
2. What are the differences between genocide and grave breaches of IHL? What are the differences between crimes against humanity and genocide? More specifically, between the crime of persecution and genocide? Is it possible that a crime qualified as genocide does not constitute a crime of persecution? When does a crime of persecution not constitute genocide? [See also **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part B., paras 618-654 and Part C., paras 238-249 and 271-304]; **Case No. 234**, ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part A., paras 492-523]]
3. How can someone be condemned for having committed genocide while not having committed murders himself?
4. What do you think of the influence of the media in the commission of such crimes? What is the role of the media in time of war? What are the limits to the contents of their broadcasts in terms of international law? If one of the media is used as a means to incite the commission of crimes, as was the case during the genocide in Rwanda, would it become, under IHL, a legitimate military target? And if it is used to broadcast propaganda information or appeals for mobilization of the population against the enemy? (P I, Art. 52)

**Case No. 236, ICJ, Democratic Republic of the Congo/Uganda,
Armed Activities on the Territory of the Congo**

[Source: *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), ICJ, Judgement, 19 December 2005, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=4&lang=en>; footnotes omitted]

INTERNATIONAL COURT OF JUSTICE

[...]

19 December 2005**CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO****(DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA)**

[...]

JUDGMENT

[...]

1. On 23 June 1999, the Democratic Republic of the Congo (hereinafter “the DRC”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter “Uganda”) in respect of a dispute concerning “acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity” (emphasis in the original).¹

[...]

27. The Court finds it convenient, in view of the many actors referred to by the Parties in their written pleadings and at the hearing, to indicate the abbreviations which it will use for those actors in its judgment. Thus [...] the Alliance of Democratic Forces for the Liberation of the Congo (Alliance des forces démocratiques pour la libération du Congo) [will hereinafter be referred to] as the AFDL, the Congo Liberation Army (Armée de libération du Congo) as the ALC, [...] the Rwandan Armed Forces (Forces armées rwandaises) as the FAR, [...] the Congo Liberation Movement (Mouvement de libération du Congo) as the MLC, [...] the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) as the RCD, [...] [and] the Uganda Peoples’ Defence Forces as the UPDF [...].

[...]

28. In its first submission the DRC requests the Court to adjudge and declare:

¹ For a comprehensive study of the conflicts in the Great Lakes region, please refer to Case 228, Case Study, Armed Conflicts in the Great Lakes Region, CD, and more specifically to Part 3, “The Conflicts in the Democratic Republic of the Congo”

"1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated [...] principles of conventional and customary law [...]."

29. The DRC explains that in 1997 Laurent-Désiré Kabila, who was at the time a Congolese rebel leader at the head of the AFDL (which was supported by Uganda and Rwanda), succeeded in overthrowing the then President of Zaire, Marshal Mobutu Ssesse Seko, and on 29 May 1997 was formally sworn in as President of the renamed Democratic Republic of the Congo. The DRC asserts that, following President Kabila's accession to power, Uganda and Rwanda were granted substantial benefits in the DRC in the military and economic fields. The DRC claims, however, that President Kabila subsequently sought a gradual reduction in the influence of these two States over the DRC's political, military and economic spheres. It was, according to the DRC, this "new policy of independence and emancipation" from the two States that constituted the real reason for the invasion of Congolese territory by Ugandan armed forces in August 1998.
30. The DRC maintains that [...] in an official statement published on 28 July 1998 [...], President Kabila called for the withdrawal of foreign troops from Congolese territory. Although his address referred mainly to Rwandan troops, the DRC argues that there can be no doubt that President Kabila intended to address his message to "all foreign forces". The DRC states that [...] during the night of 2 to 3 August 1998 Congolese Tutsi soldiers and a few Rwandan soldiers not yet repatriated attempted to overthrow President Kabila. According to the DRC, Uganda began its military intervention in the DRC immediately after the failure of the coup attempt.
31. The DRC argues that on 4 August 1998 Uganda and Rwanda organized an airborne operation, flying their troops from Goma on the eastern frontier of the DRC to Kitona, some 1,800 km away on the other side of the DRC, on the Atlantic coast. The DRC alleges that the aim was to overthrow President Kabila within ten days. According to the DRC, in the advance towards Kinshasa, Ugandan and Rwandan troops captured certain towns and occupied the Inga Dam, which supplies electricity to Kinshasa. The DRC explains that Angola and Zimbabwe came to the assistance of the Congolese Government to help prevent the capture of Kinshasa. The DRC also states that in the north-eastern part of the country, within a matter of months, UPDF troops had advanced and had progressively occupied a substantial part of Congolese territory in several provinces.
32. The DRC submits that Uganda's military operation against the DRC also consisted in the provision of support to Congolese armed groups opposed to President Kabila's Government. The DRC thus maintains that [...] at the end of September 1998 Uganda supported the creation of the new MLC rebel group [...]. According to the DRC, Uganda was closely involved in the recruitment, education, training, equipment and supplying of the MLC and its military wing, the ALC. The DRC

alleges that the close links between Uganda and the MLC were reflected in the formation of a united military front in combat operations against the FAC. The DRC maintains that in a number of cases the UPDF provided tactical support, including artillery cover, for ALC troops. Thus, the DRC contends that the UPDF and the ALC constantly acted in close co-operation during many battles against the Congolese regular army. The DRC concludes that Uganda, "in addition to providing decisive military support for several Congolese rebel movements, has been extremely active in supplying these movements with a political and diplomatic framework".

33. [...] The DRC claims that at the Victoria Falls Summit, which took place on 7 and 8 August 1998, [...] "member countries of the SADC [Southern African Development Community], following the submission of an application by the Democratic Republic of the Congo, unequivocally condemned the aggression suffered by the Congo and the occupation of certain parts of its national territory". [...] On 18 April 1999 the Sirte Peace Agreement was concluded, in the framework of the Lusaka peace process, between President Kabila of the DRC and President Museveni of Uganda. The DRC explains that, under this Agreement, Uganda undertook to "cease hostilities immediately" and to withdraw its troops from the territory of the DRC. The Lusaka Agreement was signed by the Heads of State of the DRC, Uganda and other African States (namely, Angola, Namibia, Rwanda and Zimbabwe) on 10 July 1999 and by the MLC and RCD (rebel groups) on 1 August 1999 and 31 August 1999, respectively. The DRC explains that this Agreement provided for the cessation of hostilities between the parties' forces, the disengagement of these forces, the deployment of OAU verifiers and of the United Nations Mission in the Democratic Republic of the Congo (hereinafter "MONUC"), to be followed by the withdrawal of foreign forces. On 8 April 2000 and 6 December 2000 Uganda signed troop disengagement agreements known as the Kampala plan and the Harare plan.
34. According to the DRC, following the withdrawal of Ugandan troops from its territory in June 2003, Uganda has continued to provide arms to ethnic groups confronting one another in the Ituri region, on the boundary with Uganda. The DRC further argues that Uganda "has left behind it a fine network of warlords, whom it is still supplying with arms and who themselves continue to plunder the wealth of the DRC on behalf of Ugandan and foreign businessmen".
[...]
36. According to Uganda, in 1997 the AFDL, made up of a loose alliance of the combined forces of the various Congolese rebel groups, together with the Rwandan army, overthrew President Mobutu's régime in Zaire. Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to "eliminate" the anti-Ugandan insurgents operating in that zone and to secure the border region. According to Uganda, it was on this understanding that Ugandan troops crossed into eastern Congo and established bases on

Congolese territory. Uganda further alleges that in December 1997, at President Kabila's further invitation, Uganda sent two UPDF battalions into eastern Congo, followed by a third one in April 1998, also at the invitation of the Congolese President. Uganda states that on 27 April 1998 the Protocol on Security along the Common Border was signed by the two governments in order to reaffirm the invitation of the DRC to Uganda to deploy its troops in eastern Congo as well as to commit the armed forces of both countries to jointly combat the anti-Ugandan insurgents in Congolese territory and secure the border region. Uganda maintains that three Ugandan battalions were accordingly stationed in the border region of the Ruwenzori Mountains within the DRC.

37. [...] With regard to the official statement by President Kabila published on 28 July 1998 calling for the withdrawal of Rwandan troops from Congolese territory, Uganda interprets this statement as not affecting Uganda, arguing that it made no mention of the Ugandan armed forces that were then in the DRC pursuant to President Kabila's earlier invitation and to the Protocol of 27 April 1998.
38. Uganda affirms that it had no involvement in or foreknowledge of the FAC rebellion that occurred in eastern Congo on 2 August 1998 nor of the attempted coup d'état against President Kabila on the night of 2-3 August 1998. [...]
39. [...] Uganda states, however, that by August-September 1998, as the DRC and the Sudan prepared to attack Ugandan forces in eastern Congo, its security situation had become untenable. Uganda submits that "[i]n response to this grave threat, and in the lawful exercise of its sovereign right of self-defence", it made a decision on 11 September 1998 to augment its forces in eastern Congo and to gain control of the strategic airfields and river ports in northern and eastern Congo in order to stop the combined forces of the Congolese and Sudanese armies as well as the anti-Ugandan insurgent groups from reaching Uganda's borders. According to Uganda, the military operations to take control of these key positions began on 20 September 1998. Uganda states that by February 1999 Ugandan forces succeeded in occupying all the key airfields and river ports that served as gateways to eastern Congo and the Ugandan border. Uganda maintains that on 3 July 1999 its forces gained control of the airport at Gbadolite and drove all Sudanese forces out of the DRC.
40. Uganda notes that on 10 July 1999 the on-going regional peace process led to the signing of a peace agreement in Lusaka [...] followed by the Kampala (8 April 2000) and Harare (6 December 2000) Disengagement Plans. Uganda points out that, although no immediate or unilateral withdrawal was called for, it began withdrawing five battalions from the DRC on 22 June 2000. On 20 February 2001 Uganda announced that it would withdraw two more battalions from the DRC. On 6 September 2002 Uganda and the DRC concluded a peace agreement in Luanda ([...] hereinafter "the Luanda Agreement"). Under its terms Uganda agreed to withdraw from the DRC all Ugandan troops, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that, in fulfilment of its obligations under the Luanda Agreement, it completed the withdrawal of all of its troops from the DRC in June 2003. Uganda asserts that

"[s]ince that time, not a single Ugandan soldier has been deployed inside the Congo".

41. As for the support for irregular forces operating in the DRC, Uganda states that it has never denied providing political and military assistance to the MLC and the RCD. However, Uganda asserts that it did not participate in the formation of the MLC and the RCD. "[I]t was only *after* the rebellion had broken out and *after* the RCD had been created that Uganda began to interact with the RCD, and even then, Uganda's relationship with the RCD was strictly political until after the middle of September 1998." (Emphasis in the original.) According to Uganda, its military support for the MLC and for the RCD began in January 1999 and March 1999 respectively. Moreover, Uganda argues that the nature and extent of its military support for the Congolese rebels was consistent with and limited to the requirements of self-defence. Uganda further states that it refrained from providing the rebels with the kind or amount of support they would have required to achieve such far-reaching purposes as the conquest of territory or the overthrow of the Congolese Government.

ISSUE OF CONSENT

[...]

51. The Court notes, first, that for reasons given above, no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil. As to the content of President Kabila's statement, the Court observes that, as a purely textual matter, the statement was ambiguous.
52. More pertinently, the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border. Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.

[...]

FINDINGS OF FACT: MILITARY ACTION IN THE EAST OF THE DRC AND IN OTHER AREAS OF THAT COUNTRY

[...]

80. The Court will [...] consider the events of September 1998 on the basis of the evidence before it. Uganda acknowledges that it sent part of a battalion to Kisangani Airport, to guard that facility, on 1 September 1998. It has been amply demonstrated that on several later occasions, notably in August 1999 and in May and June 2000, Uganda engaged in large-scale fighting in Kisangani against Rwandan forces, which were also present there.

81. The Court notes that a schedule was given by the Ugandan military to the Porter Commission² containing a composite listing of locations and corresponding “dates of capture”. The Court observes that the period it covers stops short of the period covered by the DRC’s claims. This evidence was put before the Court by Uganda. It includes references to locations not mentioned by the DRC, whose list [...] is limited to places said to have been “taken”. The Court simply observes that Ugandan evidence before the Porter Commission in relation to the month of September 1998 refers to Kisangani (1 September); Munubele (17 September); Bengamisa (18 September); Banalia (19 September); Isiro (20 September); Faladje (23 September); and Tele Bridge (29 September). Kisangani (1 September) and Isiro (20 September) are acknowledged by Uganda as having been “taken” by its forces (and not just as locations passed through).

FINDINGS OF LAW ON THE PROHIBITION AGAINST THE USE OF FORCE

[...]

155. The Court [...] observes that Uganda [...] decided in early August 1998 to launch an offensive together with various factions which sought to overthrow the Government of the DRC. The DRC has in particular claimed that, from September 1998 onwards, Uganda both created and controlled the MLC rebel group led by Mr. Bemba.

[...]

157. For its part, Uganda acknowledges that it assisted the MLC during fighting between late September 1998 and July 1999, while insisting that its assistance to Mr. Bemba “was always limited and heavily conditioned”. Uganda has explained that it gave “just enough” military support to the MLC to help Uganda achieve its objectives of driving out the Sudanese and Chadian troops from the DRC, and of taking over the airfields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.

158. The Court observes that the pages cited by the DRC in Mr. Bemba’s book³ do not in fact support the claim of “the creation” of the MLC by Uganda, and cover the later period of March-July 1999. The Court has noted the description in Mr. Bemba’s book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time [...]. The Court has equally noted Mr. Bemba’s insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. [...]

[...]

² Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo, set up by the Ugandan Government in May 2001 and headed by Justice David Porter.

³ Mr. Bemba, the leader of the MLC, published a book in 2001 entitled *Le choix de la liberté*, which gives an account of the conflicts in the Democratic Republic of the Congo.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of “an organ” of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Article 5). The Court has considered whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Article 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. [See *Case No. 53*, International Law Commission, Articles on State Responsibility [Arts 4, 5, 8]] Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries [...] [See *Case No. 153*, ICJ, *Nicaragua v. United States* [para. 115]]

[...]

166. Before turning to the second and third submissions of the DRC, dealing with alleged violations by Uganda of its obligations under [...] international humanitarian law and the illegal exploitation of the natural resources of the DRC, it is essential for the Court to consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time.

THE ISSUE OF BELLIGERENT OCCUPATION

[...]

172. The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised [...] [See *Case No. 123*, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory* [paras 78 and 89]].
173. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.

174. The Court will now ascertain whether parts of the territory of the DRC were placed under the authority of the Ugandan army in the sense of Article 42 of the Hague Regulations of 1907. In this regard, the Court first observes that the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present, as has been done on the sketch-map presented by the DRC [...].
175. It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new “province of Kibali-Ituri” in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as “provisional Governor” and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC [...] states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).
176. The Court considers that regardless of whether or not General Kazini, commander of the Ugandan forces in the DRC, acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.
177. The Court observes that the DRC makes reference to “indirect administration” through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised “administrative control” at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC’s contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were “under the control” of Uganda (see paragraph 160 above).
178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of [...] international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.
180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of [...] international humanitarian law which are relevant and applicable in the specific situation.
- [...]

**VIOLATIONS OF [...] INTERNATIONAL HUMANITARIAN LAW:
FINDINGS OF THE COURT**

205. The Court will now examine the allegations by the DRC concerning violations by Uganda of its obligations under [...] international humanitarian law during its military intervention in the DRC. [...]
- [...]
206. The Court first turns to the DRC's claims that the Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, and destroyed villages and dwellings of civilians. The Court observes that the report of the Special Rapporteur of the Commission on Human Rights of 18 January 2000 [...] refers to massacres carried out by Ugandan troops in Beni on 14 November 1999. The Secretary-General in his Third report on MONUC concluded that Rwandan and Ugandan armed forces "should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani" [...]. Security Council resolution 1304 (2000) of 16 June 2000 deplored "the loss of civilian lives, the threat to the civilian population and the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population". Several incidents of atrocities committed by Ugandan troops against the civilian population, including torture and killings, are referred to in the report of the Special Rapporteur of the Commission on Human Rights of 1 February 2001 [...]. MONUC's special report on the events in Ituri [...] contains much evidence of direct involvement by UPDF troops, in the context of the Hema-Lendu ethnic conflict in Ituri, in the killings of civilians and the destruction of their houses. In addition to particular incidents, it is stated that "[h]undreds of localities were destroyed by UPDF and the Hema South militias" [...]; "UPDF also carried out widespread bombing and destruction of hundreds of villages from 2000 to 2002" [...].
207. The Court therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches

of international humanitarian law were committed by the UPDF on the territory of the DRC.

208. The Court further finds that there is sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops, especially the FAR. According to the report of the inter-agency assessment mission to Kisangani (established pursuant to paragraph 14 of Security Council resolution 1304 (2000) [...]), the armed conflict between Ugandan and Rwandan forces in Kisangani led to

"fighting spreading into residential areas and indiscriminate shelling occurring for 6 days ...

Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests."

MONUC's special report on the events in Ituri [...] states that on 6 and 7 March 2003, "during and after fighting between UPC [Union des patriotes congolais] and UPDF in Bunia, several civilians were killed, houses and shops were looted and civilians were wounded by gunshots ... Stray bullets reportedly killed several civilians; others had their houses shelled." [...] In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights [...] state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. According to these reports, land was seized from the Lendu by the Hema with the encouragement and military support of Ugandan soldiers. The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence. The Sixth report of the Secretary-General on MONUC [...] stated that "UPDF troops stood by during the killings and failed to protect the civilians". It is also indicated in MONUC's special report on the events in Ituri [...] that "Ugandan army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests". [...]
210. The Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control. The Fifth report of the Secretary-General on MONUC [...] refers to the confirmed "cross-border deportation of recruited Congolese children from the Bunia, Beni and Butembo region to Uganda". The

Eleventh report of the Secretary-General on MONUC [...] points out that the local UPDF authorities in and around Bunia in Ituri district “have failed to prevent the fresh recruitment or re-recruitment of children” as child soldiers. MONUC’s special report on the events in Ituri [...] refers to several incidents where Congolese children were transferred to UPDF training camps for military training.

211. Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.
212. With regard to the claim by the DRC that Uganda carried out a deliberate policy of terror, confirmed in its view by the almost total impunity of the soldiers and officers responsible for the alleged atrocities committed on the territory of the DRC, the Court, in the absence of specific evidence supporting this claim, does not consider that this allegation has been proven. The Court, however, wishes to stress that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.
213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, “the conduct of any organ of a State must be regarded as an act of that State” [...]. The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.
214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.
215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda’s international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.

[...]

216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that

“the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” [...] [See **Case No. 123**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [para. 106]]

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories (*ibid.*, pp. 178-181, paras 107-113).

217. The Court considers that the following instruments in the fields of international humanitarian law [...] law are applicable, as relevant, in the present case:

- Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907. Neither the DRC nor Uganda are parties to the Convention. However, the Court reiterates that “the provisions of the Hague Regulations have become part of customary law” [...] [See **Case No. 123**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [para. 89]] and as such are binding on both Parties;
 - Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. The DRC’s (at the time Republic of the Congo (Léopoldville)) notification of succession dated 20 February 1961 was deposited on 24 February 1961, with retroactive effect as from 30 June 1960, the date on which the DRC became independent; Uganda acceded on 18 May 1964;
- [...]
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;

[...]

218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

“[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

- Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;
- International Covenant on Civil and Political Rights, Articles 6, paragraph 1 [right to life], and 7 [prohibition of torture or to cruel, inhuman or degrading treatment or punishment];
- First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
- African Charter on Human and Peoples’ Rights, Articles 4 [respect for life and integrity of a person] and 5 [right to the respect of dignity and prohibition of slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment];
- Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
- Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

220. The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed

by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

ILLEGAL EXPLOITATION OF NATURAL RESOURCES

222. In its third submission the DRC requests the Court to adjudge and declare:

“3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

– the applicable rules of international humanitarian law [...].

[...]

223. The DRC alleges that, following the invasion of the DRC by Uganda in August 1998, the Ugandan troops “illegally occupying” Congolese territory, acting in collaboration with Congolese rebel groups supported by Uganda, systematically looted and exploited the assets and natural resources of the DRC. According to the DRC, after the systematic looting of natural resources, the Ugandan military and the rebel groups which it supported “moved on to another phase in the expropriation of the wealth of Congo, by direct exploitation of its resources” for their own benefit. The DRC contends that the Ugandan army took outright control of the entire economic and commercial system in the occupied areas, with almost the entire market in consumer goods being controlled by Ugandan companies and businessmen. The DRC further claims that UDPF forces have engaged in hunting and plundering of protected species. The DRC charges that the Ugandan authorities did nothing to put an end to these activities and indeed encouraged the UDPF, Ugandan companies and rebel groups supported by Uganda to exploit natural resources on Congolese territory.

224. The DRC maintains that the highest Ugandan authorities, including President Museveni, were aware of the UDPF forces’ involvement in the plundering and illegal exploitation of the natural resources of the DRC. Moreover, the DRC asserts that these activities were tacitly supported or even encouraged by the Ugandan authorities, “who saw in them a way of financing the continuation of the war in the DRC, ‘rewarding’ the military involved in this operation and opening up new markets to Ugandan companies”.

[...]

234. Uganda states that the DRC's contentions that Uganda failed to take action against illegal activity are without merit. In this regard it refers to a radio broadcast by President Museveni in December 1998, which made "it clear that no involvement of the members of the Ugandan armed forces in commercial activities in eastern Congo would be tolerated". [...]
- [...]

FINDINGS OF THE COURT CONCERNING ACTS OF ILLEGAL EXPLOITATION OF NATURAL RESOURCES

[...]

238. According to the Porter Commission Report, the written message sent by General Kazini in response to the radio message broadcast by the Ugandan President in December 1998 demonstrated that the General was aware of problems of conduct of some UPDF officers, that he did not take any "real action until the matter became public" and that he did not inform the President. The Commission further states that it follows from General Kazini's message that he, in point of fact, admitted that the allegation that "some top officers in the UPDF were planning from the beginning to do business in Congo was generally true"; "that Commanders in business partnership with Ugandans were trading in the DRC, about which General Kazini took no action"; and that Ugandan "military aircraft were carrying Congolese businessmen into Entebbe, and carrying items which they bought in Kampala back to the Congo". The Commission noted that, while certain orders directed against the use of military aircraft by businessmen were made by General Kazini, that practice nonetheless continued. The Commission also referred to a radio message of General Kazini in which he said that "officers in the Colonel Peter Kerim sector, Bunia and based at Kisangani Airport were engaging in business contrary to the presidential radio message". The Commission further stated that General Kazini was aware that officers and men of the UPDF were involved in gold mining and trade, smuggling and looting of civilians.
239. The Commission noted that General Kazini's radio messages in response to the reports about misconduct of the UPDF did not intend, in point of fact, to control this misconduct. It stated as follows:
- "There is no doubt that his purpose in producing these messages was to try to show that he was taking action in respect of these problems... There appears to have been little or no action taken as a result of these messages... all this correspondence was intended by General Kazini to cover himself, rather than to prompt action. There also appears to be little or no follow up to the orders given."
240. The Commission found that General Kazini was "an active supporter in the Democratic Republic of the Congo of Victoria, an organization engaged in smuggling diamonds through Uganda: and it is difficult to believe that he was

not profiting for himself from the operation". The Commission explained that the company referred to as "Victoria" in its Report dealt "in diamonds, gold and coffee which it purchased from Isiro, Bunia, Bumba, Bondo, Buta and Kisangani" and that it paid taxes to the MLC.

241. The Commission further recognized that there had been exploitation of the natural resources of the DRC since 1998, and indeed from before that. This exploitation had been carried out, *inter alia*, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings; by cross-border trade and by private individuals living within Uganda. There were instances of looting, "about which General Kazini clearly knew as he sent a radio message about it. This Commission is unable to exclude the possibility that individual soldiers of the UPDF were involved, or that they were supported by senior officers." The Commission's investigations "reveal that there is no doubt that both RCD and UPDF soldiers were imposing a gold tax, and that it is very likely that UPDF soldiers were involved in at least one mining accident".
242. Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities did not take any measures to put an end to these acts. [...]
243. As the Court has already noted (see paragraph 213 above), Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls (see paragraph 214 above) that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority. Thus the Court must now examine whether acts of looting, plundering and exploitation of the DRC's natural resources by officers and soldiers of the UPDF and the failure of the Ugandan authorities to take adequate measures to ensure that such acts were not committed constitute a breach of Uganda's international obligations.

[...]
245. As the Court has already stated (see paragraph 180 above), the acts and omissions of members of Uganda's military forces in the DRC engage Uganda's international responsibility in all circumstances, whether it was an occupying Power in particular regions or not. Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The

Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage.

[...]

246. The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources.

As already noted, it is apparent that, despite instructions from the Ugandan President to ensure that such misconduct by UPDF troops cease, and despite assurances from General Kazini that he would take matters in hand, no action was taken by General Kazini and no verification was made by the Ugandan Government that orders were being followed up [...]. In particular the Court observes that the Porter Commission stated in its Report that

"[t]he picture that emerges is that of a deliberate and persistent indiscipline by commanders in the field, tolerated, even encouraged and covered by General Kazini, as shown by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels".

[...] It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its armed forces (see paragraph 214 above).

247. As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (see paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.
248. The Court further observes that the fact that Uganda was the occupying Power in Ituri district (see paragraph 178 above) extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces. It is apparent from various findings of the Porter Commission that rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities by commercial entities. In this regard, the Report of the Commission mentions a company referred to as "Victoria" (see paragraph 240 above), which operated, *inter alia*, in Bunia. In particular the Report indicates that "General Kazini gave specific instructions to UPDF Commanders in Isiro, Bunia, Beni, Bumba, Bondo and Buta to allow the Company to do business uninterrupted in the areas under their command". [...]
249. Thus the Court finds that it has been proven that Uganda has not complied with its obligations as an occupying Power in Ituri district. The Court would

add that Uganda's argument that any exploitation of natural resources in the DRC was carried out for the benefit of the local population, as permitted under humanitarian law, is not supported by any reliable evidence.

250. The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.

[...]

345. For these reasons,

THE COURT,

(1) By sixteen votes to one,

Finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;

[...]

(3) By sixteen votes to one,

Finds that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

[...]

(4) By sixteen votes to one,

Finds that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated

obligations owed to the Democratic Republic of the Congo under international law;

[...]

SEPARATE OPINION OF JUDGE KOOIJMANS

[...]

C. Belligerent occupation

36. The Court is of the view that Uganda must be considered as the occupying Power, in the sense of the *jus in bello*, in Ituri district. It further concludes that it has not been provided with evidence to show that authority as occupying Power was exercised by Ugandan armed forces in any areas other than in Ituri district (Judgment, paragraphs 176 and 177).
37. Although I have no difficulty with the Court's finding with regard to Ituri district, I have some doubts in respect of the Court's reasoning leading to the conclusion that Uganda was not in the position of an occupying Power in other areas invaded by the UDPF.
38. Article 42 of the 1907 Hague Regulations provides that:
"territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."
To all appearances this definition is based on factual criteria. [...]
[...]
43. The Court has deemed it its task
"to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government" (Judgment, paragraph 173; emphasis added).
44. It is in particular this element of "substitution of the occupant's authority for that of the territorial power" which leads in my opinion to an unwarranted narrowing of the criteria of the law of belligerent occupation as these have been interpreted in customary law since 1907.
45. Article 41 of the "Oxford Manual" adopted in 1880 by the Institut de droit international already stated:
"Territory is regarded as occupied when, as the consequence of invasions by hostile forces, the State to which it belongs has ceased, in fact, to exercise its authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation." (Emphasis added.)

It is noteworthy that these criteria have remained virtually unaltered. In modern national manuals on the law of armed conflict these criteria are expressed in similar terms; they are, firstly, that

“military occupation presupposes a hostile invasion, resisted or un-resisted, as a result of which the invader has rendered the invaded government incapable of exercising its authority, and [secondly] that the invader is in a position to substitute its own authority for that of the former government”.

46. In the present case the first criterion is certainly met; even if the actual authority of the DRC government in the north-eastern part of the country was already decidedly weak before the invasion by the UPDF, that government indisputably was rendered incapable of exercising the authority it still had as a result of that invasion. By occupying the nerve centres of governmental authority – which in the specific geographical circumstances were the airports and military bases – the UPDF effectively barred the DRC from exercising its authority over the territories concerned.
47. The Court, without explicitly mentioning this criterion, nevertheless seems to assume that it has been met. It concentrates, however, on the second criterion, the actual exercise of authority by the Ugandan armed forces and concludes that it has not been provided with “any specific evidence that authority was exercised by [them] in any other areas than in Ituri district”. It seems to adopt the view that in these areas authority was exercised by the rebel movements which cannot be considered to have been controlled by Uganda. (Judgment, paragraph 177.)
48. The Court in my view did not give sufficient consideration to the fact that it was the Ugandan armed invasion which enabled the Congolese rebel movements to bring the north-eastern provinces under their control. Had there been no invasion, the central government would have been in a far better position to resist these rebel movements. Uganda’s invasion was therefore crucial for the situation as it developed after the outbreak of the civil war. As the decisive factor in the elimination of the DRC’s authority in the invaded area, Uganda actually replaced it with its own authority.
49. I am, therefore, of the opinion that it is irrelevant from a legal point of view whether it exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority. Its argument that it cannot be considered to have been an effective occupying Power, in view of the limited number of its troops, cannot therefore be upheld.
50. As long as Uganda maintained its hold on these locations, it remained the effective authority and thus the occupying Power, until a new state of affairs developed. Such a new state of affairs was effected by the Lusaka Ceasefire Agreement of 10 July 1999. In normal circumstances, a ceasefire agreement as such does not change the legal situation, at least as long as the occupying Power remains in control. But the Lusaka Agreement is, as the Court states,

“more than a mere ceasefire agreement, in that it lays down various ‘principles’ (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours”. [...]

51. The Lusaka Agreement laid the foundation for the re-establishment of an integrated Congolese State structure. For this purpose the status of the two most important rebel movements – the MLC and the RCD – now called the “armed opposition”, was modified; they became formal participants in the open national dialogue (Art. III, para. 19). This new position was reflected in their signing of the agreement as separate parties per the attached list.
52. In my opinion the “upgraded” status of the two rebel movements directly affected Uganda’s position as occupying Power. These movements had become – in the formulation of Chapter VI – the two parties who, together with the central government, had primary responsibility for the re-establishment of an integrated State administration, as spelled out in paragraph 2 of Chapter VI.
53. The Lusaka Agreement certainly did not automatically bring to an end Uganda’s status as occupying Power since that status is based on control in fact. The recognition of the formal status of the RCD and MLC cannot, however, be disregarded.

After Lusaka, territorial authority could no longer be seen as vested exclusively in the central government but as being shared with “armed opposition” movements which had been recognized as part of the national authority.

54. Only in those places where it remained in full and effective control, like Ituri district, did Uganda retain its status as occupying Power and in this respect I share the Court’s view that Uganda occupied Ituri district until the date its troops withdrew. As for the other areas where it had carried out its military activities, Uganda should, however, be considered as the occupying Power from the date when it seized the various locations until the signing of the Lusaka Agreement. Even if it retained its military grip on the airports and other strategic locations, it can, as a result of the arrangements made in the Lusaka Agreement, no longer be said to have substituted itself for or replaced the authority of the territorial government since under the terms of the Agreement that authority was also exercised by the rebel movements.
55. Whereas my disagreement with the way in which the Court interpreted the criteria for the applicability of the law of belligerent occupation is to a certain extent merely technical (although not without legal consequences), I have more substantive reservations as to the way in which the phenomenon of “occupation” is dealt with in the *dispositif*.
56. In the first paragraph of the operative part the Court finds that Uganda, by engaging in military activities against the DRC on the latter’s territory, by occupying Ituri and by supporting the irregular forces having operated on the territory of the DRC, violated the principle of non-use of force and the principle of non-intervention. In my view, the occupation of Ituri should not have been

characterized in a direct sense as a violation of the principle of the non-use of force.

[...]

58. In their interrelationship the rules on occupation form an important part of the *jus in bello* or international humanitarian law. The main purpose of that law is to protect persons caught up in conflict, even if it does take into account the interests of the belligerent parties. It does not differentiate between belligerents. In particular, no distinction is made in the *jus in bello* between an occupation resulting from a lawful use of force and one which is the result of aggression. The latter issue is decided by application of the *jus ad bellum*, the law on the use of force, which attributes responsibility for the commission of the acts of which the occupation *is the result*.
 59. In the present case, the Court has found that Uganda has violated its obligation under the principle of the non-use of force, since its military activities do not constitute self-defence. It thus has breached its obligations under the *jus ad bellum*. The Court has also found that Uganda has violated its obligations under the *jus in bello*, in particular in regard to the district of Ituri, the occupation of which was the outcome of its illegal use of force.
 60. It goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its régime do not characterize the origin of the result as lawful or unlawful.
- [...]
62. Earlier I drew attention to the fact that the reluctance of governments to declare the law of belligerent occupation applicable may be due to the impression that "occupation" has become almost synonymous with aggression and oppression.
 63. I am aware that this impression is lent credibility by Article 3 of General Assembly resolution 3314 (XXIX) on the Definition of Aggression, which under (a) qualifies as an act of aggression: "The invasion or attack by the armed forces of a State of the territory of another State, or *any military occupation*, however temporary, resulting from such invasion or attack . . ." (Emphasis added.)

This resolution, as important as it may be from a legal point of view, does not in all its terms reflect customary law. The reference to military occupation as an act of aggression is in my opinion less than felicitous.

[...]

(Signed) P.H. KOOIJMANS.

DISCUSSION**A. Qualification of the conflict**

1. (*Paras 29-31, 178, 217-218*) Was there an international armed conflict between the Democratic Republic of the Congo (DRC) and Uganda? Does the Court qualify the conflict? Which law does it apply? (GC I-IV, Art. 2)
2. (*Paras 33, 51-52*) Does it make a difference for the applicability of IHL whether the DRC had requested, or consented to, the presence of Ugandan forces on its territory? Did the international armed conflict begin only after the DRC had withdrawn its consent? (GC I-IV, Art. 2)

B. Effective control

(*Paras 155-160*)

3. Which test is the ICJ using to determine whether the acts of the MLC are attributable to Uganda? Is it the same test as in *Nicaragua*? [See **Case No. 153**, ICJ, *Nicaragua v. United States*]
4. Do you agree with the Court that Uganda is not responsible for the acts committed by the MLC, although it is proved to have provided them with some military support and training? What was missing for the Court to hold Uganda responsible?

C. Conduct of Ugandan forces

(*Paras 205-220*)

5. Please provide, from the facts mentioned by the Court in paragraphs 206-212, examples of violations of the IHL provisions mentioned in para. 219.
6. Is pillage prohibited in IHL only in occupied territories? Is it prohibited only when it occurs in either a State's own territory or territory occupied by it? Is it prohibited only when it concerns the property of protected persons? (HR, Arts 28 and 47; GC IV, Art. 33)

D. Military occupation

(*Judgement, paras 80-81, 172-179; Separate opinion of Judge Kooijmans, paras 36-49*)

7. Do you agree with the Court's definition of occupation? How would you yourself define occupation? Accordingly, would you also conclude that only the district of Ituri was occupied by Uganda? According to you, should Kisangani Airport have been qualified as occupied by Ugandan troops? (HR, Art. 42; GC I-IV, Art. 2) If it was not an occupied territory, would Ugandan forces have been bound by Convention IV in Kisangani Airport (e.g. regarding the prohibition of looting, as affirmed in para. 245)? Does Art. 33 of Convention IV only apply in occupied territory? Could Kisangani possibly be considered Uganda's own territory?
8.
 - a. Do you agree with the Court's interpretation of Art. 42 of the Hague Regulations? Is it using the same threshold as in the *Separation Wall/Security Fence* Case [See **Case No. 123**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory* [para. 78]]? Or do you agree with Judge Kooijmans's argument that the Court is thereby narrowing the notion of belligerent occupation?
 - b. Does the Court use Convention IV at all to define occupation? Do you think that all the provisions contained in Part III, Section III, of Convention IV entitled "Occupied Territories" apply only to situations of occupation complying with the ICJ's interpretation of Art. 42 of the Hague Regulations, i.e. when the occupying power has in actual fact substituted its own

authority for that of the local government? If no, which kind of articles could apply to broader situations of occupation? (GC IV, Part III, Section III)

- c. Does the Court give any indication as to the scope of application *ratione materiae* of the notion of occupation as contained in Convention IV? Should it have done so? Does Convention IV have the same scope of application *ratione materiae* as the Hague Regulations?
- d. If Uganda was not an occupying power in the DRC outside Ituri, were Ugandan soldiers nevertheless bound by Convention IV in such places? Were nationals of the DRC in such places who fell into the power of Ugandan forces protected persons according to Art. 4 of Convention IV? If yes, which provisions of Convention IV applied to such persons? Does any provision of Convention IV cover protected persons who are neither in territory occupied by a warring party nor in a warring party's own territory? Could places in the DRC outside Ituri, in which the Court holds Uganda responsible for the conduct of its forces (para. 180), have been considered Uganda's own territory for the purpose of application of IHL?

(*Judgement, para. 345(1); Separate opinion of Judge Kooijmans, paras 55-63*)

9. Do you agree with the Court's conclusion that occupation may be regarded as a form of violation of the principle of non-use of force in international relations?

E. Exploitation of natural resources

(*Paras 240-245, 250*)

10. What are the obligations of an occupying power with regard to natural resources? In what circumstances may it use those resources? (HR, Arts 47, 53 and 55; GC IV, Art. 33)
11. (*Para. 245*) Does IHL contain any specific provision on natural resources? Are the articles used by the Court relevant for natural resources? (HR, Arts 47, 53 and 55; GC IV, Art. 33) Are these provisions applicable whether Uganda was the "occupying Power in particular regions" or not?
12. Are the three forms of misappropriation for which the Court finds Uganda responsible all prohibited by IHL? Does the Court define them?
13. Is the exploitation by the occupying power, for economic purposes, of specific resources of an occupied territory prohibited or limited by IHL?
14. Did the members of the UPDF commit war crimes when "looting, plundering and exploiting" the DRC's natural resources? (ICC Statute, Art. 8(2)(b)(xvi)) [*See Case No. 23*, The International Criminal Court [Part A.]]

F. IHL and Human Rights

(*Paras 206-221*)

15.
 - a. Is international human rights law applicable in armed conflicts? If yes, how must it be determined whether that law or IHL prevails in the event of contradiction between them?
 - b. Does international human rights law apply in an occupied territory? Is it binding upon Uganda in areas of the DRC outside Ituri?
 - c. Please provide, from the facts mentioned by the Court in paras 206-212, examples of violations of the provisions of international human rights law mentioned in para. 219.
 - d. Are the human rights mentioned by the ICJ also protected by IHL? Are there any contradictions between those human rights and IHL? Do they lead the ICJ to reach any conclusion in this case which it would not have reached under IHL?

G. State Responsibility

(Paras 177-179)

16. May Uganda be held responsible because it did not prevent the violations of IHL committed by rebel groups in the occupied territories? What is the legal basis used by the Court? Does such an “obligation of vigilance” exist in GC IV?
17. *See supra question 8 under “D. Military occupation”* – Using a broader definition of occupation, do you think it would be possible to extend Uganda’s responsibility for lack of vigilance to other territories considered by the Court as not occupied, but where Ugandan forces were stationed and where violations of IHL were committed by rebel groups?

(Paras 213-214, 243, 245-246)

18. What is the status of the UPDF according to the ICJ? When is Uganda consequently to be held responsible for the acts of UPDF members? Is it to be held responsible for the acts committed by UPDF members acting *ultra vires*? Acting outside their official capacity? Acting contrary to their instructions? According to the Court? According to you? Is such an attribution based upon a general rule of the law of state responsibility or on a special rule in Art. 3 of Hague Convention No. IV and Art. 91 of Protocol I? [See **Case No. 53**, International Law Commission, Articles on State Responsibility [Part A., Art. 7 and Part B.]]

(Paras 246-250)

19. Do you agree with the Court that Art. 43 of the Hague Regulations contains an obligation of “vigilance” which may be extended to the preservation of natural resources?
20.
 - a. According to the Court, whose acts should Uganda have tried to prevent? Why? Could Uganda also be held responsible for not preventing violations of IHL in non-occupied territories committed by private persons? Committed by rebel groups over which it had some influence? According to the Court? According to you?
 - b. Had Uganda an “obligation of vigilance” with regard to the conduct of its own soldiers? Including in non-occupied territory? If Uganda had complied with this obligation of vigilance and its soldiers had nevertheless committed violations of IHL, would Uganda have been absolved of its responsibility for such violations?

Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo

[Source: ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007, available at www.icc-cpi.int, Footnotes omitted]

PRE-TRIAL CHAMBER I

Date: 29 January 2007

[...]

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO**

[...]

DECISION ON CONFIRMATION OF CHARGES

[...]

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively), having held the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,

HEREBY RENDERS THE FOLLOWING DECISION.

I. INTRODUCTION

A. Factual Background

1. *The District of Ituri before 1 July 2002*

1. Ituri is a district in the Orientale Province of the Democratic Republic of the Congo (the DRC). It is bordered by Uganda to the east and Sudan to the north. Its population is between 3.5 and 5.5 million people, of whom only about 100,000 live in Bunia, the district capital. [...]
4. In the summer of 1999, tensions developed as a result of disputes over the allocation of land in Ituri and the appropriation of natural resources. During the second half of 2002, there was renewed violence in various parts of the district.

2. *Thomas Lubanga Dyilo*

[...]

6. [...] [I]t would appear that Thomas Lubanga Dyilo entered politics between late 1999 and early 2000. Soon thereafter, he was elected to the Ituri District Assembly.
7. On 15 September 2000, the statutes of the *Union des Patriotes Congolais* (UPC) were signed by Thomas Lubanga Dyilo, as the first signatory, and several other

persons who subsequently held leadership positions within the party and its armed military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). In August 2002, the UPC took control of Bunia.

8. In early September 2002, the UPC was renamed *Union des Patriotes Congolais/Réconciliation et Paix* (UPC/RP) and Thomas Lubanga Dyilo appointed its President. A few days later, in Bunia, Thomas Lubanga Dyilo signed the decree appointing the members of the first UPC/RP executive for the Ituri District. At the same time, a second decree officially established the FPLC. Immediately after the establishment of the FPLC, Thomas Lubanga Dyilo became its Commander-in-Chief.

3. Prosecution allegations against Thomas Lubanga Dyilo

9. In the "Document Containing the Charges [...]," filed on 28 August 2006, the Prosecution charges Thomas Lubanga Dyilo under articles 8(2)(e)(vii) and 25(3) (a) of the Statute with the war crimes of conscripting and enlisting children under the age of fifteen years into an armed group (in this case, the FPLC, military wing of the UPC since September 2002) and using them to participate actively in hostilities. The Prosecution submits that "the crimes occurred in the context of an armed conflict not of an international character."
10. The Prosecution asserts that even prior to the founding of the FPLC, the UPC actively recruited children under the age of fifteen years in significant numbers and subjected them to military training in its military training camp in Sota, amongst other places.
11. The Prosecution further submits that, after its founding and until the end of 2003, the FPLC continued to systematically enlist and conscript children under the age of fifteen years in large numbers in order to provide them with military training, and use them subsequently to participate actively in hostilities, including as bodyguards for senior FPLC military commanders. [...]

IV. MATERIAL ELEMENTS OF THE CRIME

A. Existence and nature of the armed conflict in Ituri

[...]

2. The characterisation of the armed conflict

200. In his Document Containing the Charges, the Prosecutor considers that the alleged crimes were committed in the context of a conflict not of an international character. The Defence contends however that consideration should be given to the fact that during the relevant period, the Ituri region was under the control of Uganda, Rwanda or MONUC. In the view of the Defence, the involvement of foreign elements, such as the UPDF [Ugandan People's Defence Forces], could internationalise the armed conflict in Ituri. [...] [R]egardless of the type of armed conflict, the Statute offers exactly the same protection, adding that the UPC had

set up a quasi-state structure which could be described as a “national armed force”.

201. According to articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute and the Elements of the Crimes in question, conscripting or enlisting children under the age of fifteen years and using them to participate actively in hostilities entails criminal responsibility, if

[t]he conduct took place in the context of and was associated with an international armed conflict; or the conduct took place in the context of and was associated with an armed conflict not of an international character.

[...]

- a. *From July 2002 to June 2003: Existence of an armed conflict of an international character*

[...]

217. The ICJ finds in its disposition [in the case of the Democratic Republic of the Congo v. Uganda] [See *Case No. 236*, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo] “that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention” and that it can be considered as an occupying Power.

[...]

220. On the evidence admitted for the purpose of the confirmation hearing, the Chamber considers that there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.

[...]

- b. *From 2 June 2003 to December 2003: Existence of an armed conflict not of an international character involving the UPC*

[...]

235. In the instant case, the Chamber finds that an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri. In fact, many armed attacks were carried out during that period, causing many victims. [...]

B. Existence of the offence under articles 8(2)(b)(xxi) and 8(2)(e)(viii) of the Statute

238. The application of articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute is predicated upon a showing that the offence as such has been committed.

239. The relevant parts of article 8(2) read as follows:

2. For the purpose of this Statute, “war crimes” means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

[...]

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

[...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”

[...]

1. Enlisting or conscripting children under the age of fifteen years

242. The concept of children participating in armed conflicts emerged in international law in 1977 during the drafting of the Protocols Additional to the Geneva Conventions.

243. In this regard, the Chamber recalls that Article 77(2) of Protocol Additional I which applies to international armed conflicts, provides that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

Article 4(3) of Protocol Additional II, which applies to non-international armed conflicts, provides that:

Children shall be provided with the care and aid they require, and in particular:

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

244. The term used in this article – recruitment – differs from those used in the Rome Statute – enlisting and conscripting. Whereas the preparatory work of the Protocols Additional appears to consider only the prohibition against forcible recruitment, the commentary on Article 4(3)(c) of Protocol Additional II refers to “[t]he principle that children should not be recruited into the armed forces” and makes clear that this principle “also prohibits accepting voluntary enlistment.”
245. Numerous international instruments have since been adopted, prohibiting the recruitment of minors of a certain age. A review of these international instruments and the two Protocols Additional to the Geneva Conventions shows that a distinction can be drawn as to the very nature of the recruitment, that is to say between forcible and voluntary recruitment.
246. The Rome Statute prefers the terms “conscripting” and “enlisting” to “recruitment”. In light of the foregoing, the Chamber holds the view that “conscripting” and “enlisting” are two forms of recruitment, “conscripting” being forcible recruitment, while “enlisting” pertains more to voluntary recruitment. In this regard, the Chamber points out that this distinction was also made by Judge Robertson in his separate opinion appended to the judgement rendered by the Appeals Chamber of the Special Court for Sierra Leone on 31 May 2004 in the case of *The Prosecutor v. Sam Hinga Norman*. [See Case No. 276, Sierra Leone, Special Court Ruling on the Recruitment of Children]
247. It follows therefore that enlisting is a “voluntary” act, whilst conscripting is forcible recruitment. In other words, the child’s consent is not a valid defence.
- [...]
- a. *Conscripting and enlisting children under the age of fifteen years by the UPC/FPLC between July 2002 and 2 June 2003*
- [...]
253. The Chamber holds the view that the evidence admitted for the purpose of the confirmation hearing is sufficient to establish that there are substantial grounds to believe that the recruitment policy established by the FPLC also affected minors under the age of fifteen years.
- b. *Conscripting and enlisting children under the age of fifteen years by the FPLC between 2 June 2003 and late December 2003*
- [...]
258. Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that from 2 June to late December 2003, in the

context of an armed conflict not of an international character, the FPLC enlisted and conscripted children under the age of fifteen years into its armed group.

2. *Active participation in hostilities*

259. Regarding the involvement of children in armed conflicts, Article 77(2) of Protocol Additional I to the Geneva Conventions states that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities [...].

260. According to the commentary on Article 77(2) of Protocol Additional I to the Geneva Conventions, the intention of the drafters of the article was clearly to keep children under fifteen outside armed conflict, and consequently they should not be required to perform services such as the gathering and transmission of military information, transportation of arms and ammunition or the provision of supplies.

261. "Active participation" in hostilities means not only direct participation in hostilities, combat in other words, but also covers active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points.

262. In this respect, the Chamber considers that this article does not apply if the activity in question is clearly unrelated to hostilities. Accordingly, this article does not apply to food deliveries to an airbase or the use of domestic staff in married officers' quarters.

263. Nevertheless, the Chamber finds that articles 8(2)(b)(xxvi) and 8(2)(e)(vii) apply if children are used to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders (in particular, where children are used as bodyguards). These activities are indeed related to hostilities in so far as i) the military commanders are in a position to take all the necessary decisions regarding the conduct of hostilities, ii) they have a direct impact on the level of logistic resources and on the organisation of operations required by the other party to the conflict whose aim is to attack such military objectives.

264. In view of these considerations, the Chamber finds that in the instant case there are substantial grounds to believe that the FPLC used children under the age of fifteen years to participate actively in hostilities.

265. Indeed, the Chamber notes that after their recruitment, children were allegedly taken to FPLC training camps [...] where they allegedly received military training. [...]

266. The Chamber points out that it appears that upon completion of their military training, the children were deemed fit for combat and that FPLC commanders then sent them to the front line to fight. [...]

267. In addition, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that children under the age of fifteen years were also used as bodyguards by the FPLC commanders and that Thomas Lubanga Dyilo personally used them.

[...]

DISCUSSION

[See also **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]

1. (*Paras 200-235*) Does the classification of the conflict as international or non-international matter? Was Mr Lubanga bound by the IHL of international armed conflict between July 2002 and June 2003 if Uganda was an occupying power in Ituri? Even if he was neither linked to Uganda nor an organ of the DRC? Could he have committed an offence under Art. 8(2)(b)(xxvi) of the ICC Statute?
2. (*Paras 259-267*) According to the Pre-Trial Chamber, when is a child under the age of fifteen actively participating in hostilities? Does the Chamber give a detailed definition of “active participation in hostilities”? Is the Chamber’s conclusion on the acts and activities that amount to active participation in hostilities in accordance with the ICRC’s Interpretive Guidelines on Direct Participation in Hostilities?
3. Is there a difference between “active participation”, “direct participation”, “participation” and “use” in hostilities? Does IHL prohibit the use of children in armed conflicts only for activities which constitute direct participation in hostilities? By States? By armed opposition groups? (P I, Art. 77; P II, Art. 4(2) and (3); See **Document No. 24**, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict)
4. (*Paras 260 and 261*) Do transportation of arms and ammunitions and provision of supplies amount to active participation in hostilities according to the Chamber? Do these acts amount to direct participation in hostilities as defined by the ICRC’s Interpretive Guidelines? What about scouting, spying, sabotage, acting as a decoy or a courier? What about guarding a military objective or acting as a bodyguard for military commanders?
5. When can someone be directly targeted? Do children also lose their protection as civilians when they directly participate in hostilities? If so, can they be directly targeted when they are engaged in any of the activities mentioned by the Chamber?
6. Is there a contradiction between the notion of “direct participation in hostilities”, allowing targeting of persons directly involved in combat, and the purposes of the special protection granted to children by IHL? Should children be excluded from the notion of direct participation in hostilities? Would it be realistic to require from the parties to a conflict not to target children even when they are directly engaged in combat?

Case No. 238, France, Radio Mille Collines

[Source: *Situation*, Journal of "Droit International 90" Research Centre, Winter 1995-1996, pp. 48-51; original in French, unofficial translation.]

**RSF v. Mille Collines
PARIS COURT OF APPEAL
First Criminal Appeal Division**

Appeal against an order establishing partial lack of jurisdiction and the inadmissibility of a civil suit in criminal proceedings.

Judgment delivered in chambers on November 6, 1995. [...]

Decision taken after deliberation thereof in accordance with Article 200 of the Code of Penal Procedure. [...]

On the merits

[...]

In support of its case the association *Reporters sans frontières* essentially claims that, on the one hand, the four persons to whom it refers [...] were behind the creation, organization, funding and content of the broadcasts of *Radio-Télévision Libre des Mille Collines*, which was a notorious means of inciting the commission of the reported crimes, and, on the other, some of them were members of the Réseau Zéro or "death squads" in Rwanda. [...]

Before examining the admissibility of the civil suit brought by the association *Reporters sans frontières*, the investigating judge ruled on his jurisdiction. [...]

From the perspective of international criminal law, the civil party claims that the French courts have jurisdiction, invoking the provisions of international instruments relating to the repression of genocide, war crimes, crimes against humanity and torture.

In its statement of grounds for appeal the civil party further cites international custom in support of the jurisdiction of the French courts with respect to genocide, war crimes and crimes against humanity.

The Court maintains, however, that in the absence of provisions in domestic law, international custom cannot have the effect of extending the extraterritorial jurisdiction of the French courts. In that respect, only the provisions of international treaties are applicable under the national legal system, on condition that:

- said treaties have been duly approved or ratified by France;
- the provisions of those treaties have in themselves direct effect on account of their content. [...]

The investigating judge also declared that he had no jurisdiction on the basis of the four Geneva Conventions of August 12, 1949 or Additional Protocol II of June 8, 1977, to which France is party.

Under the four Geneva Conventions, which entered into force with respect to France on December 28, 1951, the High Contracting Parties undertake to adopt the legislative measures necessary to punish grave breaches by means of appropriate sanctions.

[From] Articles 49, para. 2, of the First Convention, 50, para. 2, of the Second Convention, 129, para. 2, of the Third Convention, and 146, para. 2, of the Fourth Convention, which are identical in wording, [...]

[i]t may be deduced from the use of the words “*each High Contracting Party shall be under the obligation*” that the above obligations are incumbent solely upon the States Parties.

Moreover, the aforementioned provisions are too general in nature directly to create rules governing extraterritorial jurisdiction in respect of criminal matters, as such rules must be worded in precise terms. [...]

DISCUSSION

1. Does IHL provide that France is competent to prosecute crimes even if they were not committed in France or committed by or against a French citizen? Does France have an obligation to exercise that competence?
2. Are Arts 49(2)/50(2)/129(2)/146(2) respectively of the four Conventions self-executing? Is the argument that their wording places obligations on the Parties and not on their courts relevant? Are those provisions too general? Is paragraph 1 of those articles self-executing? Could paragraph 2 be self-executing and paragraph 1 not?

Case No. 239, France, Dupaquier, et al. v. Munyeshyaka

[Source: *RGDIP*, vol. 4, 1996, pp. 1084-1089; original in French, unofficial translation, footnotes omitted.]

DUPAQUIER, ET AL. v. MUNYESHYAKA
Indictment Division of the Nîmes Court of Appeal,
France,

March 20, 1996

On June 21, 1995, Maître Rigal, Deputy Bailiff at Nîmes, delivered to the Chief Public Prosecutor in Nîmes a summons on behalf of Jean-François Dupaquier [*et al.*] to proceed without delay with the immediate arrest of Father Wenceslas Munyeshyaka and any other person on French territory alleged to have participated in the Rwandan genocide.

On July 12, 1995 the same persons filed a complaint citing the same acts with the Public Prosecutor of the Paris *Tribunal de Grande Instance* [Court of Major Jurisdiction].

In the complaint and the appended depositions, 16 persons affirmed that in *La Sainte Famille* parish in Kigali, Father Wenceslas Munyeshyaka had, during the months of April and May 1994 in particular, ill-treated Tutsi refugees by depriving them of food and water, sold his services, delivered the refugees up to the Hutu militia and forced women to have sexual intercourse with him in exchange for their lives.

This religious figure was, according to witnesses, armed and wore a bullet-proof vest, and participated actively in the selection of Tutsis to be handed over to their Hutu enemies for execution.

Since September 24, 1994, Wenceslas Munyeshyaka has taken refuge in France and has been living in Bourg-Saint-Andéol (Ardèche), where he has held the post of parish curate. [...]

Questioned on August 1, 1995, Wenceslas Munyeshyaka denied the acts of which he was accused. A committal warrant was issued against him.

By order of the Indictment Division of August 11, 1995, Wenceslas Munyeshyaka was released under judicial supervision.

Meanwhile, further depositions, testimonies and applications to join the proceedings as civil parties have increased the number of complaints by civil parties, with the result that by September 18, 1995, 15 such applications had been recorded in the file (D45).

In the ruling of partial lack of jurisdiction of January 9, 1996 referred to the Court, the Investigating Judge declared that he did not have jurisdiction to examine the classifications of genocide, crimes against humanity and war crimes and on the basis of the international conventions of December 9, 1948, August 12, 1949 and January 27, 1977; [...]

The claimants in the civil action Jean-Louis Nyilinkwaya [*et al.*], in a brief filed on March 1, claimed that the ruling should be reversed and that the investigating judge,

before whom the acts of genocide, crimes against humanity and war crimes had legitimately been referred, had jurisdiction.

Whereas a case has been referred to the Investigating Judge of Privas concerning acts which, assuming that they are established, were committed during April and May 1994 in Kigali (Rwanda) against foreigners by a Rwandan national, Wenceslas Munyeshyaka, who is currently residing in the Ardèche region of France; [...]

Whereas, pursuant to the provisions of Articles 689 *et seq.* of the Code of Criminal Procedure, the presence of the person under investigation in Ardèche does not give the Investigating Judge of Privas jurisdiction to deal with crimes committed abroad by a foreigner against foreigners; [...]

Whereas the jurisdiction of the Investigating Judge of Privas cannot be established on the basis of the international conventions of Geneva of August 12, 1949 relative to the protection of civilians and the condition of prisoners in times of war, which cover different types of situations; [...]

In view of the above

The Indictment Division of the Nîmes Court of Appeal [...]

On the merits sets aside the ruling handed down,

Declares that the acts attributed to Father Wenceslas Munyeshyaka constitute, assuming that they are established, crimes of genocide and complicity in genocide,

Declares that the Investigating Judge of Privas does not have jurisdiction to examine them.

DISCUSSION

1. How can the Geneva Conventions be considered to “cover different types of situations” than that in which Munyeshyaka’s alleged crimes were committed?
2. Was there not an armed conflict in Rwanda? Did Munyeshyaka’s alleged acts not violate the Geneva Conventions? (GC I-IV, Art. 3; P II)
3. Did the Court consider that the rules on universal jurisdiction of the Geneva Conventions were not directly applicable before French courts? That they did not cover violations of the law of non-international armed conflicts? (GC I-IV, Arts 49/50/129/146 respectively)

Case No. 240, Switzerland, X. v. Federal Office of Police

[Source: *Recueil officiel des arrêts du Tribunal Fédéral Suisse* (Judgements of the Swiss Federal Tribunal), Official Collection, Vol. 123, Part II, 1997, pp. 175-191; original in French, unofficial translation.]

**Extract from the judgment of the First Court of Public Law
of April 28, 1997
in the case of X. v. the Federal Police Office (administrative-law appeal)**

[...]

X. was arrested in Switzerland on February 11, 1995. A criminal investigation was instituted against him on the count of violation of the laws of war and placed in the hands of a military judge advocate. Essentially he was charged with having promoted, funded and organized massacres of civilians in the Bisesero region of the Kibuye prefecture during the ethnic war which took place in Rwanda from April to July 1994.

On March 12, 1996 the Trial Chamber of the International Criminal Tribunal for Rwanda in Arusha, Tanzania (hereinafter referred to as the "ICTR") officially requested the deferment to its jurisdiction of all the proceedings brought against X.

By a decision of July 8, 1996 the Military Court of Cassation responded to that request. [...]

On August 26, 1996 the Registrar of the ICTR submitted to Switzerland a request for the transfer of the accused in support of which he produced the following documents:

- an indictment dated July 11, 1996 from the Prosecutor of the ICTR. In it X. is accused of bringing armed persons into the Bisesero region between April and June 1994 and ordering them to attack civilians who had come there to seek refuge; X. is claimed to have personally taken part in certain attacks. The charges are as follows: crimes of genocide for the killing or serious injury to the physical or mental health of members of a population, committed with intent to destroy, in whole or in part, an ethnic or racial group as such; (2) conspiracy to commit genocide; (3, 4, 5) crimes against humanity for killing and exterminating persons as part of a widespread and systematic attack and committing other inhuman acts against a civilian population on political, ethnic or racial grounds; (6) violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for committing or ordering to be committed acts of violence to life, health and the physical or mental well-being of persons;
- a decision confirming the indictment issued on July 15, 1996 by the Trial Chamber of the ICTR;
- an "arrest warrant with an order for transfer" issued the same day. In it the ICTR requests the surrender of X. so that he may answer for the crimes referred to in the indictment; the accused was to be informed of his procedural rights and take cognizance of the indictment.

[...]

By a decision of December 30, 1996 the Federal Police Office [*Office Fédéral de la Police* – the “OFP” –] ordered the transfer of X. to the ICTR on account of the acts referred to in the request of August 26, 1996. Those acts were also punishable in Swiss law and fell within the jurisdiction of the ICTR. [...]

By means of an administrative-law appeal X. requests the following: that the decision to transfer him be declared void; that the OFP be asked to obtain from the ICTR exact figures on the sums allocated to the defence and the facilities granted to the latter; and that the OFP be questioned or asked to question the Federal Council on Switzerland’s commitment to allow X. to serve a possible custodial sentence in its territory.

[...]

Extract from reasons:

[...]

2. (a) In its resolution 827 (1993), the United Nations Security Council decided to establish an “*ad hoc*” International Tribunal to try war crimes committed in the Former Yugoslavia; at the same time it adopted a Statute for that Tribunal, drawn up by the UN Secretary-General. Under the terms of the Statute, “all States” are under the obligation to cooperate fully with the Tribunal and to amend, where necessary, their domestic legislation.

In its resolution 955 of November 8, 1994, the UN Security Council decided to set up a special Tribunal to try those presumed responsible for acts of genocide and other serious violations of international humanitarian law committed in Rwanda and in the neighbouring States by Rwandan citizens between 1 January and December 31, 1994, and adopted the Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as “ICTR”)

[See Case No. 230, UN, Statute of the ICTR] That resolution lays down the same obligations on States as resolution 827 (1993). In accordance with Article 8, para. 2, of its Statute, the International Tribunal has “primacy” over national courts in the event of concurrent jurisdiction and may request that a case be deferred to its jurisdiction at any time. [...]

- (b) On February 2, 1994, and then on March 20, 1995, the Federal Council decided unilaterally to apply those two resolutions in view of the fact that they fall within the scope of Chapter VII of the Charter of the United Nations (maintenance of peace), they seek to ensure the actual application of international humanitarian law, in particular the Geneva Conventions, and Switzerland took an active part in the preparation of the two Statutes, the character and, to a large extent, the contents of which are identical. The obligations imposed on States include cooperation in the search for persons, the arrest and surrender of remanded prisoners and accused persons, and other acts of judicial cooperation (Article 28 of the Statute of the ICTR). A national law appeared necessary in order to ensure effective cooperation with the two International Tribunals. [...]

(c) On December 21, 1995 the Federal Assembly adopted the Emergency Federal Decree [*“arrêt fédéral urgent”*, a form of urgent legislation adopted by parliament and subject to the possibility of a popular referendum only after its entry into force] Relating to Cooperation with International Tribunals Responsible for the Prosecution of Grave Breaches of International Humanitarian Law. The provisions contained in the Decree, which deal with the particular problems posed by that specific type of cooperation and are intended to simplify procedures by avoiding delays [...], are in part completely new and in part inspired by the Federal Law on Mutual International Assistance in Criminal Matters (EIMP) with the necessary amendments. Subject to provisions to the contrary, the rules contained in the Decree and the implementing regulations thereof are applicable by analogy to cooperation with those international tribunals (Article 2 of the Decree).

The Decree governs cooperation with the International Tribunals for the Former Yugoslavia and for Rwanda and the Federal Council may extend the scope thereof to cooperation with other tribunals of the same type set up by the Security Council (Article 1). [...]

4. In accordance with Article 10 of the Decree, any person may be transferred to the international tribunal concerned for the purpose of criminal prosecution where it is apparent from the request and the attached documents that the breach (a) falls within the jurisdiction of that tribunal and (b) is punishable in Switzerland. [...] In order to guarantee effective cooperation with the international tribunals, Switzerland decided to reduce as much as possible the grounds likely to stand in the way of surrender. Therefore, the expression “transfer” was chosen deliberately by the legislature to make it clear that “classic” extradition within the meaning of the EIMP is not involved, having regard to the nature of the requesting authority and the terms governing the grant thereof. [...]

[...] [W]hen a transfer request is pending before it, the Swiss authority to which it is made does not have to verify the substance of the charge brought against the person concerned. The requesting authority does not have to provide evidence of the acts which it alleges or even show that they are likely to have happened. Only a request which is clearly incorrect or incomplete, and thus makes the representation from the requesting authority look like an obvious abuse, will be rejected. [...] Those principles, which were developed with respect to extradition, apply all the more with respect to the procedure for transfer. The legislature intended that procedure be simpler and quicker so as to preclude both verification of the alibi and a defence alleging that the breach was political in nature (first paragraph of Article 13 of the Decree). [...]

- (b) The appellant does not deny, with good reason, that the two conditions laid down in Article 10 of the Decree are met in this case. The acts with which he is charged in accordance with the indictment of 11 July 1996 are considered to constitute genocide and conspiracy to commit genocide, a crime against humanity and a grave breach of Article 3 common to the Geneva Conventions and Additional Protocol II thereto and they fall within the jurisdiction of

the ICTR in accordance with Articles 2, 3, and 4 of the Statute. In respect of acts committed on Rwandan territory in 1994, the territorial and temporal jurisdiction of the ICTR is not in doubt (Article 7 of the Statute). Moreover, as has already been pointed out by the Courts-Martial Appeal Court, civilians who, during an armed conflict, commit a breach of public international law, render themselves liable to prosecution for breaches of the laws of war within the meaning of Article 109 of the Military Penal Code [*Code pénal militaire* – the “CPM” – See **Case No. 63**, Switzerland, Military Penal Code]. Therefore, the acts with which X. is charged are also punishable in Swiss law. [...]

7. Essentially, the appellant contends that the proceedings before the ICTR do not meet the requirements of a fair trial. He claims that since it was established the tribunal has had management and funding problems and has not functioned satisfactorily. He submits that the substantial expenses necessary for the defence of the appellant will not be reimbursed. Furthermore, the information requested from the ICTR on that matter has not been forthcoming and there are concerns that Article 6 (1) of the European Convention on Human Rights [the “ECHR”] (equality of arms) and 6 (3) (c) and (d) of the ECHR (rights of the defence) may be contravened. In any event the requesting authority should be asked to specify which sums will be allocated to the assigned defence counsel to cover his fees.
 - (a) Where it grants extradition or assistance in legal matters, Switzerland must assure itself that the proceedings for which it is providing cooperation guarantee those being prosecuted a minimum standard which corresponds to that provided by the law of democratic States as laid down in particular in the European Convention on Human Rights and the UN Covenant on Civil and Political Rights (UN Covenant II [...]). [...] Switzerland would be contravening its own commitments if it deliberately granted assistance or the extradition of a person to a State in which there were serious grounds to believe that the person concerned might be subject to treatment which violated the ECHR or UN Covenant II. [...]
 - (b) Those principles, which were developed in connection with international assistance involving third States, should not be applied automatically in the specific case of assistance to be granted to international criminal courts whose jurisdiction Switzerland has expressly and unreservedly recognized. When they decided unilaterally to apply resolutions 827 (1993) and 955 (1994) the Federal Council, and then the Swiss legislature, assumed that those international tribunals, which are products of the community of States, would provide sufficient guarantees with respect to the proper course of proceedings. [...] Contrary to the assertions of the appellant, it is not possible to see a gap in the law which could to be filled by the Tribunal [...]. Therefore, there is no need to examine, as the appellant would like, whether the proceedings before the ICTR conform to the minimum standards laid down in the ECHR and UN Covenant II, as such conformity must be presumed. In any case, such an examination would not make it possible to reject a request for cooperation, as is demonstrated below.

- (aa) The presumption which the requesting tribunal enjoys on the basis of its very nature is borne out by the wording of its Statute. That is because Article 20 cited above grants the accused all the procedural rights afforded by the ECHR and UN Covenant II. Furthermore, Rule 44 [*sic*] of the ICTR's rules of procedure and evidence, which were adopted on July 5, 1996, provide for the assignment of counsel to indigent accused persons. The criteria governing indigence, the list of counsel willing to be appointed and the scale of fees are determined by the Registrar of the Tribunal. Exercising that power, the Registrar of the ICTR drew up a directive, approved by the Tribunal on January 9, 1996, concerning the assignment of counsel which lays down the terms and procedure governing their appointment and remuneration.

Moreover, the counsel for the appellant was herself assigned by the ICTR on December 12, 1996 to defend the appellant. On that occasion, the Registrar sent her the three instruments already attached to the request for transfer, the Statute of the Tribunal and an interlocutory law for pre-trial detention.

- (bb) In its resolution 50/213 C of June 7, 1996 the General Assembly of the United Nations asked the Office of Internal Oversight Services to carry out an inspection at the ICTR. That inspection took place from September 30, to November 1996. The report by that Office, which was submitted to the General Assembly on February 6, 1996, referred to the deficient management of the ICTR, several failures within the system and internal differences between its bodies (the President of the Tribunal, the Registry, and the Office of the Prosecutor) which resulted in the replacement of a number of officials. It stated that the Tribunal was not achieving its objectives and would not do so without the necessary support. Certain changes were under way but many more appeared to be necessary. The Office drew up several recommendations, in particular with respect to the role of the Registrar and his organization. A further, limited, examination was to take place during the second quarter of 1997. In his note of February 6, 1997, which accompanied the report, the Secretary-General accepted those conclusions as his own. He committed himself to fill the gaps which had been exposed and take all the measures necessary to rationalize and increase the support which the Secretariat gives to the Tribunal. As "immediate follow up" to the above-mentioned recommendations additional assistance is now being given on the spot to the Tribunal and more systematic support procedures have been developed to meet its needs.
- (cc) It should be pointed out that the above-mentioned criticisms regarding the effectiveness of the Tribunal [...] relate only to its management and organizational problems. By contrast, no fears have been voiced specifically with regard to respect for the rights of the accused. Moreover, the failures referred to have been taken seriously by the competent international authorities and specific measures have been taken to remedy them effectively. The stringent checks to which the ICTR has been submitted

constitute the best guarantee that the Tribunal will have sufficient means to function satisfactorily and that the right of the appellant to a fair trial will be safeguarded there.

Therefore, the appellant's allegations regarding the ICTR's poor organization and lack of funds do not preclude the assumption that the criminal proceedings as a whole will, in accordance with its Statute, meet the minimum requirements imposed by the instruments relating to human rights. In accordance with a request for assistance granted on the basis of the confidence which is legitimately inspired by the requesting tribunal, there is no reason to impose conditions on the transfer or to question that Tribunal on the procedures governing the defence assigned to the accused.

- (c) The appellant would also like the Federal Council to be questioned and to commit itself to permitting him to serve any custodial sentence imposed upon him in Switzerland and to expressing that intention to the ICTR. In accordance with Rule 103 of the ICTR's rules, "Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons..." [first paragraph]. "Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed" [second paragraph]. Invoking his status as an asylum-seeker in Switzerland, the appellant states that he fears imprisonment in Rwanda in view of the deplorable prison conditions which prevail there and other violations of human rights which are being committed in that State at present.

That request likewise has no place within the context of those proceedings. That is because the surrender of the appellant to the ICTR is in no way comparable with straightforward extradition to Rwanda. Prior to the trial the appellant will be detained in Tanzania. Furthermore, there is no indication that in the event that he were found guilty the sentence would be served in Rwanda if there were any grounds to believe, in particular, that he would be exposed to treatment which violated Article 3 of the ECHR or Article 7 of UN Covenant II. Article 26 of the Statute and Rule 104 of the rules [of procedure and evidence] stipulate that all sentences of imprisonment shall be supervised by the Tribunal or a body designated by it and that should dispel the fears of the appellant.

Article 29, para. 1, of the Decree permits enforceable decisions of an international tribunal to be implemented in Switzerland where the convicted person is habitually resident in Switzerland and where the sentence relates to offences punishable in Switzerland. However, that presupposes a request by the ICTR. Other than where the convicted person is a Swiss national, [...] no right exists to serve a sentence imposed by the International Tribunal in Switzerland and the Decree does not permit the Federal Court to draw up, under the present procedure, any proviso or condition concerning the place or conditions of imprisonment. [...]

DISCUSSION

1. Is X. accused of grave breaches of IHL? Taking into account Art. 109 of the Swiss Military Penal Code [See **Case No. 63**, Switzerland, Military Penal Code], can Switzerland punish X. for the alleged acts? From the point of view of IHL, can it prosecute such acts? Must it prosecute such acts?
2. Why was Switzerland bound by the ICTR Statute, even though it was not a UN member State?
3.
 - a. Is the transfer of an accused to the ICTR an extradition? Under IHL, can a State transfer an accused charged with grave breaches of IHL to the ICTR? (GC I-IV, Arts 49(2) /50(2) /129(2) /146(2) respectively)
 - b. Under the ICTR Statute [See **Case No. 230**, UN, Statute of the ICTR], can a State consider a transfer to the ICTR an extradition and subject it to the usual procedures of its extradition laws? Which conditions of such procedures might run counter to the ICTR Statute?
 - c. On what grounds could Switzerland refuse to transfer an accused to the ICTR? Under the ICTR Statute? Under Swiss law?
4.
 - a. Does IHL prescribe judicial guarantees and guarantees of treatment for the benefit of suspected perpetrators of grave breaches? Are such guarantees applicable in States not party to the conflict? (GC I-IV, Arts 49(4)/50(4)/129(4)/146(4) respectively)
 - b. Must Switzerland ensure that the aforementioned guarantees will be respected before it extradites a suspected perpetrator of a grave breach to a third State? Under IHL? Under international human rights law? Would your answer be the same with respect to transfers to the ICTR? If not, how would it be different?
 - c. Is there a risk that the aforementioned guarantees for the accused will be violated in Arusha?
5.
 - a. Can the ICTR transfer the accused to Rwanda to serve a possible sentence?
 - b. Could Switzerland insist that the accused serve his possible sentence in Switzerland? If he were a Swiss citizen? Under the ICTR Statute? Under Swiss Law?
 - c. Could Switzerland refuse to transfer an accused to the ICTR if he were a Swiss citizen? If he were prosecuted for his crimes in Switzerland?

Case No. 241, Switzerland, The Niyonteze Case

[See also **Case No. 234**, ICTR, The Prosecutor v. Jean-Paul Akayesu, and **Case No. 63**, Switzerland, Military Penal Code [hereafter MPC]]

[N.B.: In accordance with the practice of Swiss tribunals, the name of the accused is not published in the public decisions of this case. However, we have taken the liberty to reveal it as was done by the Federal Council in its message to Parliament on the Rome Statute of the ICC of 15 November 2000, *Feuille fédérale* (Federal Gazette) 2001, 487, n. 270, and Luc REYDAMS, "International Decisions, Niyonteze v. Public Prosecutor", *AJIL* 96 (2002), pp. 231-236.]

[In order to facilitate comprehension of this case, the decision of the Court of Cassation (27 April 2001) is reproduced below before the Appeals Chamber Judgement of 26 May 2000.]

A. Military Court of Cassation

[Source: Switzerland, *Tribunal militaire de cassation* (Military Court of Cassation), decision of 27 April 2001 in the N. case, available (in French) at <http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.Par.0004.DownloadFile.tmp/N.pdf>; unofficial translation.]

THE MILITARY COURT OF CASSATION
[the supreme military tribunal of Switzerland]
rules as follows
at its hearing of 27 April 2001 in Yverdon-les-Bains, [...]
on the application for judicial review
filed by
N., represented by [...],
and by
the Prosecutor of Divisional Chamber 2, Lieutenant-Colonel [...],
against
the decision handed down on 26 May 2000 by Military Appeals Chamber 1A,
in which N. was found guilty of breaches of the laws of war
(Art. 109 of the Swiss military code), sentenced to 14 years' imprisonment
(less the time already spent in pre-trial detention) and deportation
from Switzerland for a period of fifteen years,
and ordered to pay the costs of the case

Details of the case:

- A. An investigation in support of evidence, followed by an ordinary military criminal investigation, were ordered on 3 July and 20 August 1996 respectively, with regard to N., a Rwandan citizen living in Switzerland as a refugee.

The Prosecutor of Military Divisional Chamber 2 (hereinafter referred to as "the Prosecutor,") prepared an indictment on 3 July 1998. In substance, the facts alleged against the Accused were as follows: between the beginning of the month of May and 15 July 1994, during which time a widespread or systematic attack was in progress against the Hutu opposition and the Tutsi minority, acting in his capacity as *bourgmestre* of Mushubati commune, Prefecture of Gitarama, Rwanda, he called together a number of the residents of his commune, which was poorly regarded

by those in power, at the top of a hill named Mont Mushubati, where he exhorted or ordered them to kill other Rwandans, namely Tutsis and moderate Hutus who were not taking part in the conflict; during the same period, in the refugee camps at Kabgayi in Rwanda, he encouraged a number of Tutsis and moderate Hutus from his commune to return there, with the intention of having them killed, perpetrating acts of violence against them and despoiling them of their property, and also ordered the soldiers accompanying him to kill two persons; finally, he took no steps to prevent the massacre of the Tutsi and moderate Hutu population in his commune. The facts set out in the indictment are to be seen in the context of the massacres that occurred in Rwanda between April and July 1994.

- B. In its judgment delivered on 30 April 1999, Military Divisional Chamber 2 (hereinafter referred to as “the Divisional Chamber”) found N. guilty of murder (Art. 116 of the Military Penal Code, [hereinafter referred to as “the MPC”], [...] of incitement to murder (Articles 22 and 116 MPC), of attempted murder (Articles 19a and 116 MPC) and of grave breaches of international conventions governing the conduct of hostilities and the protection of persons and property (Art. 109 MPC) and sentenced him to life imprisonment and to deportation from Switzerland for a period of 15 years. The Divisional Chamber found the accused guilty on the first two counts, regarding the meeting on Mont Mushubati and the events in the camps at Kabgayi, but found him not guilty on the third count related to breach of his duty as *bourgmestre*.
- C. N. lodged an appeal against this judgment. Military Appeals Chamber 1A (hereinafter the Appeals Chamber) heard the appeal between 15 and 26 May 2000. In its decision handed down on 26 May, it allowed N.’s appeal in part. The Chamber found him guilty of breaches of the laws of war (Art. 109 MPC) and sentenced him to 14 years’ imprisonment and deportation from Switzerland for a period of 15 years [...].
- D. N. applied for review [...]. He claimed [...] that there had been a breach of the provisions of the MPC that deal with breaches of the law of nations during armed conflict (Military Penal Procedure, hereafter MPP [MPP, http://www.admin.ch/ch/f/rs/c322_1.html], Art. 185 (1) (d) as it relates to Articles 108 and 109 of the MPC [...]).
- E. The Prosecutor also applied for review [...], maintaining that in respect of one matter the Appeals Chamber had dealt with the facts in an arbitrary manner by rejecting one of the counts on which the Divisional Chamber had found N. guilty. He also criticized the length of sentence imposed. [...]

Whereas: [...]

II. Application for judicial review filed by N. (hereinafter “the accused”) [...]

- 3. In order to deal with the accused’s claims regarding the taking of evidence or the contents of the indictment, it is first necessary to outline the elements constituting the offence of which he has been found guilty, so as then to be able to determine

the pertinent or essential facts (see MPP Art. 185 (1) (f) [Military Penal Procedures, http://www.admin.ch/ch/f/rs/c322_1.html]) to the application of criminal law.

- a) The Appeals Chamber has found the accused guilty under Art. 109 MPC (breaches of the laws of war). That article forms part of the chapter of the MPC that deals with breaches of the law of nations during armed conflicts (Articles 108 to 114 MPC). Paragraph 1 of that article reads as follows:

“Any person violating the provisions of international conventions concerning the conduct of hostilities or the protection of persons and property,

any person violating other recognized laws and customs of war, shall, unless more stringent provisions apply, be subject to imprisonment.

The penalty for grave breaches shall be imprisonment.” [...]

In principle, the provisions of Articles 108 to 114 MPC apply where war has been declared and to other conflicts between two or more States (Art. 108 (1) MPC). However, Art. 108 (2) MPC stipulates that breaches of international agreements are punishable if those agreements specify a broader field of application. It therefore follows that the ‘international conventions governing the conduct of hostilities and the protection of persons and property’ that apply to non-international conflicts, and which hence have a wider field of application than those of the conventions applicable exclusively to international conflicts, also fall under the provisions of Art. 109 (1) MPC.

- b) [...] The impugned judgment also refers to [...] Protocol II of 8 June 1977, which came into force for Switzerland on 17 August 1982 and for Rwanda on 19 May 1985 and which “develops and supplements Art. 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application.” (Protocol II, Art. 1 (1)). In particular, it sets out in more detail than does common Article 3 the fundamental guarantees for humane treatment of “persons who do not take a direct part or who have ceased to take part in hostilities.” (Protocol II, Art. 4). Specifically, it prohibits at any time and in any place whatsoever: “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.” (Protocol II, Art. 4 (2) (a)).
- c) It is not in dispute that Article 3 common to the four Geneva Conventions (hereinafter ‘common Article 3’), along with the further provisions of Protocol II, forms part of the ‘provisions of international conventions’ mentioned under Art. 109 (1) MPC, thereby making it possible to punish breaches of common Article 3 and of Protocol II Art. 4 under that provision. Furthermore, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has recently confirmed the conclusion that a breach of common Article 3 constitutes a crime and can hence lead to criminal prosecution under the domestic legislation of a State (see the judgment of 20 February 2001 in the *Celebici* case, para. 168). Nor is it in dispute that a foreign perpetrator of breaches of the laws of war, acting against foreigners,

during a non-international conflict on the territory of another State, can be prosecuted and sentenced by the Swiss courts under Art. 109 MPC, as ordinary Swiss criminal law contains no comparable provisions. This extension of the territorial jurisdiction of Swiss criminal law arises out of Art. 2 (9) MPC, which provides that civilians (by which are meant persons not liable for military service in Switzerland) who, during an armed conflict, commit breaches of the law of nations (Articles 108 to 114) are subject to Swiss military criminal law. This rule must be read in conjunction with Art. 9 MPC, which states that the MPC applies to offences committed in Switzerland and in other countries. Courts-martial have jurisdiction, as Art. 218 MPC stipulates that all persons subject to military law are liable to be tried before courts-martial (para. 1), even if the offence has been committed outside Switzerland (para. 2). [...]

4. [...] the accused claims a breach of an essential element of procedure, on the grounds that the Appeals Chamber found him guilty of acts not mentioned in the indictment [...]. [...] the Appeals Chamber points out that the eldest daughter of one witness (Witness 21, whose anonymity is guaranteed under this procedure, a protective measure afforded to most witnesses from Rwanda), first name D., aged 23, and the wife of the uncle of Witness 3, were killed following the Mont Mushubati meeting and that these two deaths were a result of the accused's speech inciting the population of his commune to eliminate Tutsis. According to the accused, the victims had to be cited by name in the indictment and this procedural error prevented the Appeals Chamber from convicting him on the corresponding count. [...]
- b) [...] The indictment mentions the meeting on top of Mont Mushubati, during which the accused is alleged to have "exhorted, then given the formal order to the participants [...] to commit murder, kill and attack the property of opposition Hutus mentioned above and the Tutsi minority." It does not give further details as to the identities of the victims, but does state that they "were not participating in the conflict."

The alleged breach of common Article 3 (via Art. 109 MPC) is in this instance related to "murder of all kinds" (common Article 3 (1) and (2) (a)). In other words, and in terms of Swiss law, the accused is alleged to be the indirect perpetrator or instigator of murders which, in the context of the massacres carried out in Rwanda during this period, were alleged to be a direct consequence of the meeting on Mont Mushubati. Criminal proceedings for breaches of the laws of war do not automatically require that the precise identity of the victims be given. Mentioning certain of these victims in the judgment could be seen as providing additional information in the context already defined at the opening of the trial by the indictment; this would add detail to the accusation presented by the Prosecutor, without modifying the objective in terms of the alleged facts [...].

Furthermore, the accused advances a rule supposedly applicable before the ICTR, the effect of which would be that the victims must be named where breaches of common Article 3 are alleged. In his arguments, the accused cites

no provision of that tribunal's statute or rules of procedure, nor any precise jurisprudence of the tribunal. In any case, the Swiss courts are not bound to apply foreign or international rules of procedure. [...] This ground for review is therefore unfounded.

5. The accused criticises the examination of evidence in a number of respects [...].
6. a) The Appeals Chamber found (in Chapter 3 of the impugned judgment) that the accused, who had returned to Mushubati in the night of 18/19 May 1994 following a period spent in Europe between 12 March and 14 May 1994, returning via Libreville, Kinshasa and Goma, summoned the population of the commune to a meeting on top of Mont Mushubati somewhere in the second half of May 1994, acting in his capacity as *bourgmestre*. On the appointed day, part of the population made their way to the top of the hill via various paths. On arrival, following approximately 1 ½ hours' walk, the accused gave a speech in front of a crowd of some two hundred persons, probably using a public address system or a megaphone. He was accompanied by a number of soldiers. The substance of his speech was that Mushubati commune was poorly regarded by the government because, during his absence, the population had merely killed Tutsis' livestock and burned down their houses, allowing them to escape to the camps at Kabgayi. The authorities were accusing the inhabitants of Mushubati of having allowed numerous Tutsis and moderate Hutus to escape the large-scale massacre that had recently taken place in the region.

At the time of the meeting there were few Tutsis remaining in the commune and they were in hiding, particularly in the forests on Mont Mushubati. The aim of the meeting was to flush out any surviving Tutsis and to incite hatred of Tutsis among those present. During his speech, the accused exhorted the population to kill the surviving Tutsis, together with pregnant Hutu women where the father of the child was a Tutsi. More precisely, he issued a formal instruction to those present to carry out "ground clearing" ["*débroussaillage*" in French], by which was meant to kill Tutsis and moderate Hutus of the opposition, and to attack their property. The participants at the meeting obeyed the orders and exhortations of their *bourgmestre*, which led to the deaths of an unknown number of persons, including the daughter of Witness 21, D., aged 23, and the wife of the uncle of another witness (Witness 3). D. (whose father was a Tutsi) was killed on the Kabgayi road the day of the Mont Mushubati meeting and her body was thrown into a latrine. She is on a list of missing persons. The (Tutsi) wife of the uncle of Witness 3 was killed and her body thrown into a river.

[...] According to the accused, the decision to call the population together had been taken at a meeting attended by the *bourgmestre* and the councillors of the commune's sectors, the aim being to organize community work in the form of "ground clearing" in the normal sense of the word, i.e. clearing away undergrowth along the forest paths on the slopes of Mont Mushubati. The work was intended to facilitate action against looting, arson, illegal logging, banditry and the activities of the Interahamwe (the Interahamwe movement was at the origin of the youth wing of the majority party, the MRND and, in

1994, the members of that movement played an active role in the massacre of the Tutsis). The accused agreed that it had taken approximately 1 ½ hours to climb the hill. He claimed to have made a speech thanking those present for attending, encouraging them to fight bandits and the Interahamwe and calling on them to resist incitation to hatred or violence.

The Appeals Chamber found that the accused's version of the aims of the Mont Mushubati meeting, the "ground-clearing" and the content of his speech (discouraging aggression and re-establishing security) was not plausible. By contrast, the Chamber had been convinced by the statements of witnesses, of which it had summarized the decisive elements.

- b) In his application for review, the accused calls into question the credibility of the witnesses whose testimony the Appeals Chamber has accepted. He points out numerous contradictions between their depositions. From those discrepancies he concludes that these depositions are generally unconvincing.

[...] It is true that discrepancies or errors in witnesses' testimony can raise questions as to their credibility. In referring to the first-instance judgment, the Appeals Chamber took account of the specific situation applying to witnesses who had experienced the bloody events of spring 1994 in Rwanda, who had in many cases lost members of their families and suffered trauma, some of whom were illiterate and had no knowledge of calendars. These are not typical situations for Swiss courts. Furthermore, the judges of the ICTR have also pointed out the specificities of this situation as it applies to assessing the probative value of testimony. They have noted in this context that, unlike the leaders of Nazi Germany, who went to great lengths to record their deeds committed during the Second World War, the planners and perpetrators of the Rwandan massacres in 1994 left virtually no trace of what they had done, making the testimony of survivors all the more important (see the ICTR judgment in the *Kayishema and Ruzindana* case, 21 May 1999, para. 65). In the view of the ICTR, therefore, one must take into account the influence of traumatic experiences on witnesses' testimony, but one should not dismiss such testimony merely because it relates to traumatic events; certain discrepancies and errors are to be expected under such circumstances (*ibid.*, para. 75). In the instant case, Swiss judicial bodies took steps to render themselves capable of assessing the reliability of testimony in this particular context: examining magistrates and trial judges traveled to Rwanda, heard numerous witnesses in Rwanda and in Switzerland of the events of 1994, and also heard journalists and specialists on the contemporary history or the culture of the country. The Appeals Chamber was also able to draw on the book by US historian and leader of a group of experts Alison Des Forges (*Leave None to Tell the Story: Genocide in Rwanda*, published by Human Rights Watch and the International Federation for Human Rights, Paris, 1999), which presents a survey of events in Rwanda during 1994, together with their historical, political and cultural background. The book, which mentions neither the accused nor the massacres in Mushubati commune, does not constitute evidence, but the

work of historians does represent an important and uncontested documentary resource for a Swiss judge called upon to consider related testimony. [...]

- c) Turning to the first-instance judgment, the Appeals Chamber found that the version of the facts presented by the accused was of itself implausible. For the Divisional Chamber, it was in particular hardly likely that “ground clearing” would succeed in re-establishing security and that priority would be given in wartime to the problems of arson, illegal logging and illegal charcoal-making. It was not untenable [for the Divisional Chamber] to take such elements into account. But, above all, the Appeals Chamber was able to base its decision on statements from persons who claimed to have attended the Mont Mushubati meeting and from others to whom the speech made by the accused at that meeting had been communicated. [...]

To support his version of the events concerning the Mont Mushubati meeting, the accused stated that “ground clearing” or clearing the edges of the forest along the forest paths was necessary at the time, that the work was intended to prevent illegal usage of the forest and that this was borne out by an expert opinion concerning the condition of vegetation in the area, submitted in evidence. However, there is little to be gained from discussing the necessity or existence of forestry work in 1994; even if one accepts that it was necessary to clear away undergrowth along the forest paths, none of the testimony heard indicates that this was the purpose – even the secondary purpose – of the meeting in question. [...]

- 8. a) In considering the personal situation of the accused (Chapter 3 of the impugned judgment), the Appeals Chamber summed up the circumstances under which the accused decided to return to Rwanda following the outbreak of the conflict and of the massacres. The Chamber also mentioned the activities of the accused during the weeks he spent in his commune (from 18/19 May to 11/12 June 1994) and the manner in which his departure and that of his family for Zaire (now the Democratic Republic of the Congo) was arranged.

[...] The Chamber also found that on returning to Mushubati the accused enjoyed effective and significant powers. [...]

- c) The factual conclusions regarding the political affiliation and the powers of the *bourgmestre* of Mushubati in May 1994 could also be relevant to application of Art. 109 MPC as it applies to common Article 3 (see 3. above and 9. below). Action against breaches of the laws of war presupposes that certain objective conditions are met with respect to the perpetrator and the context in which he acts uring the course of a conflict. [...]

The accused does not dispute the extent of the powers exercised by a *bourgmestre* in peacetime, but claims that following the outbreak of the conflict, and in particular after the interim government was set up in Gitarama, a few kilometres from Mushubati, he exercised no more than purely administrative power in his commune, owing to the presence of large numbers of soldiers and militia. In support of his arguments, the accused outlined the conditions

under which he had acted during the events set out in the impugned judgment. Clearly, it is difficult for a foreign court to determine, several years after the event, the extent of the powers exercised by an agent of the Rwandan civilian administration in dramatic circumstances over a period of a few weeks. However, all the facts established show that the accused retained certain of his powers, that his authority as *bourgmestre* was not called into question and that there was no direct confrontation with the government, the prefect, the army or the militia regarding the administration of his commune or his political status. In this very special situation, where State bodies at all levels could no longer function as they had hitherto and where institutions were no longer as structured or as effective as before, a *bourgmestre* clearly did not exercise as much power as he would under normal circumstances. Indeed, the impugned judgment speaks of a “chaotic situation”, and one that left the accused with only limited freedom of decision and action in comparison with a normal situation. This being so, the Chamber’s findings with regard to the extent of the powers enjoyed by the accused under these circumstances appears neither untenable nor manifestly at variance with the actual situation as it emerges from the proceedings and testimony. On this point, therefore, the factual findings of the impugned judgment are not arbitrary.

9. The accused claims that criminal law has not been respected [...], specifically in relation to Arts. 108 (3), and 109 (1) of the MPC, Article 3 common to the Geneva Conventions, Articles 146 and 147 of the Fourth Geneva Convention and Art. 4 of Additional Protocol II. He claims that the actions of which he is accused [...] have no proximate connection with the armed conflict in Rwanda and that he therefore does not fulfil the objective conditions required in order to be considered the perpetrator of breaches of these provisions of international humanitarian law. [...]
 - a) As mentioned above, [...] a conviction can be secured only on the basis of Art. 109 MPC, and the “provisions of international conventions” to which that article refers are those of common Article 3 and of Art. 4 of Protocol II. Article 108 (2) MPC does not apply in this context. Articles 146 and 147 of the Fourth Geneva Convention (relative to the protection of civilian persons in time of war) set out the obligations on the Contracting Parties: to enact legislation to provide penal sanctions for persons committing grave breaches of the Convention, to search for persons alleged to have committed breaches of the Convention and to try such persons or surrender them to another State for trial. They do not contain any rules directly applicable to the conduct of hostilities. Moreover, by enacting Art. 109 MPC, Switzerland has discharged the obligation to enact legislation contained in Art. 146 (1) of the Fourth Convention [...].

The category into which the Rwandan conflict of 1994 falls is not in dispute [...]: this was an armed conflict not of an international character within the meaning of common Article 3. The conflict also falls within the scope of Protocol II, which is somewhat narrower than that of common Article 3: it corresponds to the definition of Protocol II, Art. 1 (1): a conflict taking place in the territory of a High Contracting Party between its armed forces and dissident armed

forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations (common Article 3 applies only to conflicts of lesser intensity [...]).

The accused does not dispute the fact that the acts of which he is accused, and the reality of which is not contested (see 6. and 7. above) could be classified as intentional homicides, with him the indirect perpetrator, co-perpetrator or instigator. The victims of these acts, of whom an unknown number were killed, in particular Tutsis hiding in Mushubati or refugees in Kabgayi, were “persons taking no active part in the hostilities” protected by common Article 3 and Protocol II. The violence to life perpetrated upon these persons is explicitly prohibited by these instruments of international humanitarian law (common Article 3 (1), (2) (a) and Protocol II, Art. 4 (2) (a)) which prohibit various forms of participation in homicide [...]. This is in accordance with the point generally accepted under international criteria, that the notion of intentional homicide or murder covers all situations in which the perpetrator, by his behaviour, causes the death of a person and acts with intent as regards his behaviour and the expected result (see the message from the Swiss federal council regarding the Rome Statute of the International Criminal Court, the Swiss federal law on cooperation with the ICC and the revision of criminal law, *Feuille fédérale* 2001 I, p. 474, n. 5.3.2.1).

Nonetheless, for common Article 3 and Art. 4 of Protocol II to be applicable under Art. 109 MPC, there must be a certain nexus between the acts (and their perpetrator) and the armed conflict, as not every act of violence to life that occurs in the territory of a country involved in such a conflict is covered by international humanitarian law. The Appeals Chamber found that this condition was satisfied. The accused disputed this. [...]

- b) According to the impugned judgment, there is no justification for applying the criteria of the ICTR, which would require a proximate connection between the offence and the armed conflict and would restrict the scope of the Geneva Conventions to persons holding functions in either the armed forces or the civilian government. In the view of the Appeals Chamber, the concept of perpetrator should be seen in the broad sense; any person, military or civilian, who attacks a person protected by the Geneva Conventions breaches these provisions and falls under Art. 109 MPC. Moreover, a link must still exist between the offences and the armed conflict. Having established these principles, the Appeals Chamber ruled on the relationship between the functions of the accused, which conferred upon him a certain degree of power over the population of his commune, the armed forces and the militia, and the acts committed with regard to the meeting on Mont Mushubati and the visits to Kabgayi. The Chamber found that the accused met the objective criteria for being the perpetrator of the offences of which he was accused, and that a connection existed between his actions and the armed conflict.

- c) Certain first-instance judgments of the ICTR have described in some detail the twofold condition of a nexus between the accused and the armed forces and between the armed conflict and the crime. In its judgment of 21 May 1999 in the *Kayishema and Ruzindana* case, Trial Chamber II of the ICTR found that persons who were not members of the armed forces could only be held criminally responsible if a link existed between them and the armed forces. As the armed forces were at all times under the authority of officials representing the government, such officials were expected to support the war effort and to play a certain role (see *Kayishema and Ruzindana* judgment, para. 175). In its judgment of 2 September 1998 in the *Akayesu* case (*Akayesu* having been *bourgmestre* of Taba commune), Trial Chamber II of the ICTR found that the list of persons subject to the provisions of common Article 3 and Protocol II included individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war effort. In spring 1994, it was not to be excluded that a *bourgmestre* – who was not simply a civilian – might belong to this category (see *Akayesu* judgment, paragraphs 631 and 634).

As regards the link between the armed conflict and the crime, Chamber II of the ICTR had mentioned a “direct connection” and not some vague and indefinite link. However, the Chamber did not attempt to define a test *in abstracto* (*Kayishema and Ruzindana* judgment, para. 188). In the *Akayesu* judgment (para. 641), Chamber I of the ICTR also mentioned the need for a “nexus,” without describing it in more detail.

It should be pointed out that in the above two cases tried in first instance by the ICTR, both of which involved civilians (a *bourgmestre*, a prefect and a businessman), the Chamber found that the prosecution had not proved the existence of a nexus between the alleged crimes and the armed conflict (see *Akayesu*, para. 643 and *Kayishema and Ruzindana*, paragraphs 615 and 623).

The Appeals Chamber also cited the judgment handed down by ICTR Chamber I on 27 January 2000 in the *Musema* case. That judgment made reference to the two judgments cited above regarding the nexus between the crime and the armed conflict, i.e. the condition that the crimes be closely linked with the hostilities or committed in connection with the armed conflict (paragraphs 259 and 260). That judgment also refers to the principle set out in the other judgments regarding the criminal responsibility of civilians with respect to breaches of the laws of war (para. 264 *et seq.*). The Chamber found that *Musema*, the director of a tea factory appointed by the State, could fall into the category of individuals liable to be held responsible for grave breaches of international humanitarian law (para. 275). However, this question was left undecided, as the prosecution failed to prove the nexus required beyond all reasonable doubt (para. 974).

- d) In its role as supreme court, the Military Chamber of Cassation interprets Art. 109 MPC independently. It has not previously had the opportunity to rule on the conditions under which, in the context of a non-international armed conflict, civilians can be held responsible for breaches of the laws of war or the provisions of international humanitarian law set out in common Article 3 and Protocol II. [...]

The criteria applied by the Trial Chambers of the ICTR to decide whether a breach of common Article 3 or of Protocol II has occurred need not necessarily be applied by the Swiss courts. However, it is difficult to find grounds for not doing so, particularly in view of the fact that these criteria are relatively broad. The criterion of a “direct” connection, i.e. not vague or indeterminate, between the offences and the armed conflict is not very precise, and rests on an assessment of the specific case. Regarding the categories of civilians who may be the perpetrators of such crimes, the ICTR has adopted a concept that does not appear particularly restrictive: all individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war effort. The ICTR does not exclude the possibility that a Rwandan *bourgmestre* could be subject to the corresponding provisions. In the instant case, one must therefore take these criteria and interpret them in the light of the concrete situation of the accused.

It is unfortunate that the Appeals Chamber stated that it was departing from current jurisprudence of the ICTR whereas, notwithstanding that statement, it applied that jurisprudence to the specific case of the criteria outlined above. There is hence no need to analyse further this alleged divergence in the interpretation of international humanitarian law. However, it is necessary to verify whether, in applying these criteria on the basis of facts established in a non-arbitrary manner, the Appeals Chamber was correct in finding that the elements constituting the crime described under Art. 109 MPC were present.

- e) Under the Rwandan administrative system, the *bourgmestre* is considered an agent of the State. The position is a prominent one, as the number of communes is limited (145 in 1991, with a typical population of between 40,000 and 50,000. See Des Forges, *op. cit.*, p. 55 in the French version). While the *bourgmestre* has no official military function, the case has shown that the accused was regularly accompanied by soldiers, over whom he exercised a certain degree of authority. Both during the Mont Mushubati meeting and during his visits to Kabgayi, he acted using his functions as *bourgmestre* or taking advantage of the authority that the position of *bourgmestre* conferred upon him, giving orders to inhabitants of his commune. His aim was to “support or fulfil the war efforts,” to use the terminology of the ICTR, in other words to promote the achievement by the government of the day of its aim of massacring Tutsis and moderate Hutus. [...]

It is clear both that there is a sufficient nexus between the crimes committed at Mont Mushubati and Kabgayi and the armed conflict, and that his position

and the manner in which he discharged his function of *bourgmestre* mean that he fulfilled the conditions for being subject to common Article 3 and the provisions of Protocol II as a perpetrator of crimes. The complaint of a violation of Art. 109 MPC is therefore groundless.

10. The accused claims that criminal law has not been respected (Art. 185 (1) (d) MPP), criticizing the penalty of deportation from Switzerland for fifteen years. He criticizes the Chamber for not having taken into account his status of refugee in Switzerland, where he is well-integrated and where his wife and two children are also living, likewise as refugees. [...]

a) [...]

- b) As concerns deportation of a refugee on penal grounds, Art. 44 MPC should be interpreted and applied in the light of Art. 32(1) of the Convention relating to the Status of Refugees [...] and of Art. 65 of the law on asylum, hereinafter referred to as "Lasi" [available at http://www.admin.ch/ch/f/rs/c142_31.html], that is, in a manner more restrictive than in respect of other foreigners [...]. Those provisions allow deportation on grounds of public order. In view of the acts of which the accused has been convicted, those grounds apply. Consequently, there is no need to first consider whether the accused does indeed enjoy the protection of the above Convention. Article 1 (F) (a) of the Convention stipulates that it does not apply to persons who have committed "a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes," nor to consider whether there are grounds for revoking asylum or refugee status. Those measures are provided for under Lasi Art. 63 if the refugee has obtained asylum or refugee status by making false declarations or concealing essential facts, or if he has committed particularly reprehensible crimes. It is not for a judge in criminal proceedings to order such revocation. Furthermore, the fact that the family of the accused is living in Switzerland does not exclude deportation, given the seriousness of the crime (see Art. 8 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>]).

The Appeals Chamber applied legal criteria to determine whether and for how long the accused should be deported from Switzerland. Given the nature of the crimes committed, it is clearly legitimate to cite the protection of public security and the impugned decision does not appear excessively severe on this point. The Appeals Chamber has not, therefore, abused its powers of discretion in applying Art. 40 (1) MPC. [...]

III. Application for judicial review by the Prosecutor [...]

13. The Prosecutor maintains that, in determining the duration of imprisonment, the Appeals Chamber did not take sufficient account of the extreme gravity of the crimes committed by the accused, and that the cumulation of offences also

constituted aggravating circumstances. According to the Prosecutor, a sentence of 20 years' imprisonment was the only possibility.

- a) While the Military Chamber of Cassation does enjoy liberty to determine whether there has been a breach of federal law it cannot, in view of the discretionary powers conferred to lower courts in this domain, allow an appeal regarding sentencing unless the sentence: departs from the legal framework, is based on criteria other than those of Art. 44 MPC, fails to take account of the factors set out therein or appears so excessively severe or lenient that the question arises of abuse of such discretionary powers [...].
 - b) A sentence of 14 years' imprisonment is of itself severe. It is true that the Trial Chambers of the ICTR have imposed longer sentences on persons responsible for the genocide or massacres in Rwanda, particularly in the case of the *bourgmestre* of Taba, Jean-Paul Akayesu, but this is not a decisive factor. It is not certain that the sentencing criteria in the Statute of this international tribunal correspond to those of Art. 44 MPC, nor that one can compare the actions of the accused with those of Akayesu. But be that as it may, the sentence handed down in the instant case, based on an assessment made in accordance with legal criteria, does not appear to be excessively lenient. The Prosecutor's appeal is therefore also unfounded on this point. [...]
16. The Military Chamber of Cassation confirms the sentence of 14 years' imprisonment [...].

For the foregoing reasons

The Military Chamber of Cassation finds as follow:

1. The appeal lodged by N. is allowed in part, the impugned judgment is quashed in part insofar as it orders the deportation of the appellant and the case is returned to Military Appeals Chamber 1A for a new decision as to whether or not to grant a stay of deportation.
On all other points, the motion for review brought by N. is dismissed.
2. The motion for review brought by the Prosecutor of Divisional Chamber 2 is dismissed.
3. The period that the accused has spent in pre-trial detention between the date on which the appeal decision was handed down and the date of the present decision, being 336 (three hundred and thirty-six) days, shall be deducted from the sentence.
4. The sentence of 14 years' imprisonment is confirmed [...].

B. Appeals Decision

[Source: Switzerland, *Tribunal militaire d'appel* (Military Appeals Chamber) 1A, decision of 26 May 2000 in the N. case, available (in French) at http://www.vbs-ddps.ch/internet/groupgst/de/home/peace/kriegsv0/umund/chrechtsprechung.Par.0002.DownloadFile.tmp/Urteil_N_2_Instance.pdf]

MILITARY APPEALS CHAMBER 1A
Sitting from 15 May to 26 May 2000
Palais de Justice, salle G3, GENEVA [...]
CASE:

N, [...] currently in pre-trial detention [...]

accused of:

- I. Murder (Art. 116 MPC),
- II. Incitement to murder (Articles 116 and 22 MPC),
- III. Violation of the laws of war (Art. 109 MPC), namely:
 - a) breach of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 3 (1) (a) and (1) (c), Art. 3 (2) and Articles 12, 13 and 50),
 - b) breach of the Geneva Convention relative to the Treatment of Prisoners of War (Art. 3 (1) (a) and (c), 13, 14, 129 and 130),
 - c) breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Art. 3 (1) (a) and (c) 16, 27, 31, 32, 146 and 147),
 - d) breach of the Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Articles 4, 5 and 13).

IS CALLED

The accused is present, assisted by his appointed counsel. [...]

II. FACTUAL QUESTIONS

CHAPTER 1 – PRELIMINARY REMARKS

[...] In establishing the facts, the Chamber will draw on the testimony gathered by the examining magistrate, that presented to the Divisional Chamber and this Chamber, and all documents and statements filed. The Appeals Chamber will also examine the deliberations of the impugned judgment regarding assessment of the evidence in general and of testimony in particular. In assessing the testimony, it is important to bear in mind the system of norms and values obtaining in Rwanda, the time that has elapsed since the alleged offences and the level of education of the witnesses. The Chamber finds it unnecessary to examine minor discrepancies in detail to assess the plausibility or otherwise of testimony; rather, one must take the testimony as a whole.

This is all the more so in view of the fact that the defence has questioned the credibility of certain witnesses only at the appeal stage, when they were not in a position to explain discrepancies that might cast doubt upon their statements. [...]

CHAPTER 2 – THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

A) N. was born in the commune of M. [...] He is a Roman Catholic. He has three brothers and ten half-brothers and sisters. His parents are farmers. [...] In 1980, he underwent senior secondary education, specializing in sciences (mathematics, physics and chemistry) in Nyanza, Butare Prefecture. In 1983, he obtained the certificate of secondary education, which qualified him for university entry or for a career. Between 1983 and 1984, the accused attended an advanced course at the national postal and telecommunications college in Kigali, qualifying as a telecommunications technician. He then studied at the *Institut africain de statistique et d'économie* in Kigali, leaving in 1986 with a teaching diploma in economics and statistics. He pursued his career [...] until April 1993, when he took up his post as *bourgmestre* in the commune of Mushubati, with a monthly salary of 30,000 Rwandan francs (approximately \$ 300). He had been elected *bourgmestre* in autumn 1992 in the first round of elections, with 83% of the votes cast by an electoral college consisting of representatives of the various political parties, denominations and administrative bodies of the commune.

The accused married Ms M. in 1989. He has two children [...]. He first joined the opposition MDR (Mouvement démocratique républicain) in 1991, as an activist. He lived in Kigali from 1983 to 1993. Starting in April 1986, he served a number of internships abroad (in Canada, Italy and the United States). He went to France on 12 March 1994, to attend a course on local government. [...] He remained in Paris until 13 May 1994, while seeking the best way to return to his country. On 14 May 1994 he flew to Kinshasa via Libreville and then continued to Goma where he stayed for two days. From there he rented a vehicle and arrived in Mushubati on the night of 18/19 May 1994. By that time, the large-scale massacres had already ended and there were very few Tutsis in his commune, whereas they had previously accounted for 15% of the population. They were now dead, in hiding or had taken refuge in the parishes of Kabgayi and Nyarusange. [...]

CHAPTER 5 – BREACH OF THE DUTIES OF A BOURGMESTRE

The Divisional Chamber did not find it proven beyond reasonable doubt that the accused personally distributed rifles or grenades to certain persons, nor that he trained them in their use. The trial judges did find that the accused had acted in his capacity of *bourgmestre* to help certain persons in difficulty to flee the country, most of them Tutsis, in particular by providing them with false papers, and that he had in all probability saved a certain number of lives in so doing. They also found that the accused had not done all that one could expect him to do in his capacity of *bourgmestre* to prevent or limit the massacres, but that these omissions had to be compared with the accused's acts of commission and his general behaviour, and did not constitute crimes additional to those of which he was found guilty. As the Prosecutor did not

appeal from the first instance judgment, these aspects of the verdict will not be called into question (see Chapter 2, “Legal questions”).

[N.B.: In its (unpublished) decision, the Divisional Chamber acquitted N. of breach of the duties of a *bourgmestre*. It found that those omissions were absorbed by the acts of commission of which the accused was convicted and that they were not punishable under any applicable instrument.]

III. LEGAL QUESTIONS

CHAPTER 1 – THE *RATIONE MATERIAE* AND *RATIONE PERSONAE* JURISDICTION OF SWISS COURTS-MARTIAL [...]

B. *Ratione materiae* jurisdiction [...]

The Appeals Chamber finds that Art. 109 MPC contains a clause prohibiting not only breaches of the international conventions signed and ratified by Switzerland, but also breaches of the customary laws recognized by the international community (see the message from the Swiss Federal Council regarding partial revision of the Military Penal Code, 6 March 1967, [...]). The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter referred to as “the Convention on Genocide”), which has not yet been ratified by Switzerland, contains elements of customary law (see the message of the Federal Council concerning the Convention on the Prevention and Punishment of the Crime of Genocide and the corresponding revision of criminal law, [...]) which fall under Art. 109 MPC. This convention could hence be applicable as customary law. However, Art. 109 MPC must be interpreted in relation to Art. 108 MPC which, as its marginal note indicates, specifies the field of application of Chapter 6 of the Military Penal Code. That provision stipulates that in the case of war or international armed conflict, (para. 1), Art. 109 MPC applies without reservation. In the case, for instance, of the war in the former Yugoslavia, which had an international dimension, the Swiss courts-martial have jurisdiction on the basis of customary law to try persons accused of breaches of the Geneva Conventions and of the crime of genocide.

However, non-international armed conflicts are covered in particular by para. 2, which restricts international agreements to the wider field of application. In the case of such conflicts Art. 109 MPC does not apply automatically, but requires the existence of an international convention ratified by Switzerland. In the absence of such a convention, it is not possible to apply the customary law provided for under Art. 109 MPC to an internal armed conflict. In the case of the Rwandan conflict, which was non-international (see Chapter 3C, “Legal questions”), Swiss courts-martial do not have jurisdiction to try the case on the basis of the prohibition of genocide established by customary law, as Switzerland has not ratified the Convention on Genocide. However, they do have jurisdiction in the case from the point of view of Article 3 common to the Geneva Conventions and Protocol II, which apply to non-international armed conflicts, and which fall under the reservation made in Art. 108 (2) MPC [...].

The Appeals Chamber will therefore consider the breach of Art. 109 MPC exclusively as regards the Geneva Conventions and Protocol II.

C. *Ratione personae* jurisdiction

Article 218 (1) MPC provides that all persons to whom military law applies are liable to be tried by courts-martial, subject to the reservations of Art. 13 (2), and Art. 14. This rule also applies when the offence has been committed outside Switzerland (para. 2). The criminal law applicable is determined by Articles 1 to 9 MPC, contained in Chapter 1 of the Military Penal Code. Under Art. 2 (9) MPC, civilians who commit breaches of the law of nations during an armed conflict (Articles 108 to 114 MPC) are subject to military law.

Switzerland enacted Art. 2 (9) MPC to meet its international obligations and to allow international law to be applied. In this specific context, even if not at war or threatened by imminent danger of war, Switzerland has undertaken to prosecute anyone, irrespective of nationality, who may have committed grave breaches of the Geneva Conventions outside Switzerland [...].

Contrary to the findings of the trial judges, the clause in Art. 109 (1) (3) MPC (“sauf si des dispositions plus sévères sont applicables” [unless more severe provisions apply]) is not a cross reference but a reservation. Its effect is not to make civilians generally subject to military law. It concerns persons who would normally be subject to military law, and its effect is to prevent such persons from claiming that they may be punished exclusively in accordance with the Geneva Conventions, thereby avoiding the risk of any more severe penalty that military law might apply. It is worth pointing out at this point that the maximum penalty for breaches of the laws of war under Art. 109 MPC is 20 years’ imprisonment (Art. 28 MPC), whereas the Military Penal Code does provide for life imprisonment for certain offences (in particular under Art. 116, Art. 139 (2), Art. 140 (2) and Art. 151c, para. 4). The interpretation of the Appeals Chamber is further supported by Art. 6 MPC, in conjunction with Art. 220 MPC. Under those provisions, a civilian committing an ordinary crime (Articles 115 to 179 MPC) remains subject to civilian criminal law and civilian courts, even if he participates in crimes with military personnel.

The Appeals Chamber finds it contrary to the system of military law to make a person who is not a Swiss national and has committed offences outside Switzerland and against foreigners subject to that law, when Switzerland is neither at war nor facing imminent danger of war. The Appeals Chamber therefore does not have jurisdiction to try N. under Articles 115 to 179 MPC, even if he remains subject to Rwandan civilian or military jurisdiction for ordinary crimes (such as murder) or the crime of genocide. [...] On this point, the impugned judgment is erroneous and the appeal well founded. [...]

CHAPTER 3 – APPLICABILITY OF COMMON ARTICLE 3 AND OF PROTOCOL II [...]

B. *Ratione loci*

While common Article 3 and Protocol II, Art. 4(2) of Protocol II do prohibit the acts they describe “in any place,” that prohibition is clearly limited to the territory of a High Contracting Party (common Article 3 and Protocol II, Art. 1(2) of Protocol II). This territory extends beyond the front or the immediate area in which hostilities are occurring, to include the whole territory of the State in which hostilities are taking place [...].

In accordance with these principles, the provisions in question apply to the whole of Rwanda. [...]

C. *Ratione materiae*

Common Article 3 applies to any “armed conflict not of an international character.” This notion, which common Article 3 does not define in detail, implies a situation in which hostilities are occurring between armed forces or organized armed groups within a single State [...].

The notion of “armed forces” in Art. 1 (1) of Protocol II, must be seen in its widest sense, to include all armed forces described in domestic legislation (*see the Musema judgment*, para. 256, and the references cited). “Responsible command” implies some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations – operations that are kept up continuously and that are done in agreement according to a plan – and on the other, of imposing discipline [...].

This condition implies the concept of duration: international humanitarian law applies from the start of armed conflict and extends beyond the cessation of hostilities [...], in the case of internal conflicts, until a peaceful solution has been achieved [...].

D. *Ratione personae*

1. The victims

Common Article 3 protects 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*. This provision, which is very broad in scope, covers members of armed forces and persons taking no part in hostilities, but applies above all to civilians, i.e. persons who do not bear arms [...].

Art. 2 (2) of Protocol II applies to all persons affected by armed conflict within the meaning of Art. 1. By this one must understand in particular persons who do not, or no longer take part in hostilities and enjoy the rules of protection laid down by the Protocol for their benefit and all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons (*see [...]* Sandoz/[Swinarski]/Zimmermann. (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, 1986, nos 4485 and 4489 [available at <http://www.icrc.org/ihl>]). Article 4(1) of the Protocol concerns all persons not participating directly in hostilities, or who are no longer participating. In view of their similarity, the formulations of common Article 3 and Art. 4 of Protocol II must be considered synonymous (*See Akayesu judgment*, para. 629.).

ICTR jurisprudence uses a negative definition of “civilian,” taking the victim as its basis. A civilian is anyone who falls outside the category of “perpetrators,” namely individuals of all ranks belonging to the armed forces under the military command of

either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts (See *Musema* judgment, para. 280).

In the instant case, victim D., the wife of the uncle of Witness 3, Witness 32 and his brother F. are all civilians who possess the characteristics of victim within the meaning of common Article 3 and Protocol II, Art. 2(2) and Art. 4.

2. The perpetrators

A perpetrator must belong to a “Party to the conflict” (common Article 3) or to the “armed forces”, be they governmental or dissident (Protocol II, Art. 1). However, neither text specifies or defines the category of persons capable of committing war crimes. Given the primary purpose of these international instruments, which is to protect civilians against the atrocities of war, and given their humanitarian aim, the Appeals Chamber finds that the term “perpetrator” needs to be defined broadly. What has been said with regard to defining the category of victim applies also to that of potential perpetrator. Any person, military or civilian, who harms a person protected by the Geneva Conventions as defined above, has contravened these conventions and falls under Art. 109 MPC. The Appeals Chamber therefore diverges from the judgments of the ICTR, which require a proximate connection between the offence and the armed conflict, and restrict the application of the Geneva Conventions to persons holding positions in the armed forces or the civilian government (Cf. *Musema*, para. 259 and the references to the *Akayesu* judgment, paragraphs 642 and 643, where the ICTR found that this nexus did not exist, despite evidence of very substantial support for the war effort on the part of the accused. On that question in particular the Prosecutor of the ICTR lodged an appeal).

Nevertheless, the Appeals Chamber finds that under all of these circumstances there must be a nexus between the offence and the armed conflict. If, during a civil war in which the civilians on both sides are protected by the Geneva Conventions, one protected person commits an offence against another, it is necessary to establish a link between that act and the armed conflict. If such a link does not exist, the action constitutes not a war crime but an ordinary crime.

In this instance, N. was the *bourgmestre* of Mushubati, a commune of some 80,000 people. He was part of the Rwandan civilian administration, from which he had not resigned. On the contrary, when he returned to Rwanda on 19 May 1994 he once again took up the post he had delegated to his deputy during his absence in Europe, and the government of the day did not perceive him as a member of the opposition. At the time of the acts of which the appellant is accused, a war was in progress between the FAR and the FPR, a conflict that it would be very hard to dissociate from the massacres of Tutsis and of moderate Hutus. While the war had somewhat reduced the powers of *bourgmestre* N., there is considerable evidence that he still exercised effective *de jure* and *de facto* power over the citizens of his commune and over the military personnel and militias present therein. A number of points emphasize his links with the FAR,

which was a party to the armed conflict: he had received a recommendation from a senior officer, Colonel K.; during his two visits to Kabgayi he was accompanied by soldiers, and three soldiers provided an escort when his family and his sisters left the bishop's residence in Kabgayi. At Mont Mushubati he was also accompanied by soldiers. He was able to move around freely, not only in his own commune but as far as Gitarama. He moved freely through road-blocks and his wife had even been recognized as the wife of the *bourgmestre*, assuring her of favourable treatment by the militias. He was able to obtain petrol in Gitarama on a number of occasions and had no difficulty obtaining an exit visa for his family and his sisters.

It was in his capacity as a public servant that N. summoned the men of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder and to attack the property of moderate Hutus and the Tutsi minority. [...] N.'s status as perpetrator and the existence of a link between his actions and the armed conflict are therefore proven.

As all the conditions for applying common Art. 3 and Protocol II are satisfied, the facts proven will be assessed in the light of those provisions.

CHAPTER 4 – LEGAL CLASSIFICATION OF THE OFFENCES AND DETERMINATION OF PENALTY

A. Legal classification of the offences

Article 109 of the MPC is an independent provision [...] to which the general concepts of action, conspiracy, complicity and instigation apply. [...]

In his capacity as *bourgmestre*, N. summoned the people of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder, to attack the property of moderate Hutus and the Tutsi minority and to kill Hutu women pregnant by Tutsi men. This behaviour would of itself constitute attempted incitement to murder or homicide, and would be punishable without any need to find or identify victims. The Appeals Chamber notes in this connection that N.'s words led to the deaths of an unknown number of persons, including D. and the wife of the uncle of Witness 3.

The appellant is therefore guilty of incitement to breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC. The offences led to intentional homicides and constitute grave breaches within the meaning of Art. 109 (1) (3) MPC.

Again in his capacity as *bourgmestre*, the appellant went to Kabgayi on at least two occasions, accompanied by soldiers, to encourage the refugees from his commune to return to Mushubati, with the sole aim of having them massacred. He also ordered the soldiers accompanying him to kill Witness 32 and his brother F., only the former having survived.

The appellant is therefore guilty of grave breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC.

B. Determination of penalty

In the case of grave breaches, the penalty is between one and twenty years' imprisonment, as provided for under Art. 109 (1) (3) MPC, in conjunction with Art. 28 MPC. Within that legal framework, the sentence is to be determined in accordance with Art. 44 MPC and the criteria derived from jurisprudence [...].

The acts described above constitute intentional violence to life, life being the supreme right protected by criminal law. These acts constitute war crimes and are intrinsically very serious. They led to the deaths of at least three persons. These persons were not only literally executed, under horrific circumstances (e.g. using a rifle butt and bayonet); they were subsequently denied even a decent grave, being thrown into the gutter (in the case of the brother of Witness 32) or a latrine (in the case of D.). Considerable emotional detachment is required to incite others to murder and to have human beings killed in such a sordid manner. Hatred is also required. The appellant harboured genuine hatred of Tutsis and moderate Hutus, as evinced by his words on Mont Mushubati and in the telephone call of 14 August 1996. Furthermore, the Appeals Chamber has observed no feelings of pity, nor any sign of remorse or repentance with respect to the victims or in connection with the tragic events that ravaged Rwanda.

Because he was outside Rwanda from 12 March 1994 to 19 May 1994, N. did not participate in the meeting of 18 April 1994, and did not play an active role at the height of the massacres, which occurred during the second half of April 1994. Without being one of the originators, he participated in the massacre process following his return from Europe for a period of not more than three weeks. Certainly, his professional position and his capacity of *bourgmestre* obliged him to ensure the safety of all residents of his commune, whether Tutsi or Hutu moderate or, at least, to abstain from harming them. The Appeals Chamber does find that this constitutes aggravation. Nevertheless, the Chamber is mindful that on his return to Mushubati, the appellant was confronted with a chaotic situation, which left him with only limited freedom of decision and action. These circumstances reduce the criminal intent attributed to N. [...]

Under these circumstances, the Appeals Chamber considers fourteen years' imprisonment sufficient punishment. In accordance with Art. 50 MPC, the time spent in pre-trial detention (1,367 days) shall be deducted from the sentence. [...]

FOR THESE REASONS [...]

in accordance with Articles 3, 146 and 147 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and with Article 4 of Protocol II additional to the said Convention, [...]:

VERDICT

I. The appeal is allowed in part.

II. N. is found guilty of breaches of the laws of war (Art. 109 MPC)

He is therefore sentenced to fourteen years' imprisonment [...].

DISCUSSION

1. a. Was Rwanda in a state of armed conflict during the period in question? Was the conflict international or non-international? (GC I-IV, Arts 2 and 3; P II, Art. 1)
- b. Does Protocol II apply “until a peaceful settlement of a conflict is achieved”? (P II, Art. 2(2))
- c. Does Art. 2 define the field of application *ratione personae* of Protocol II?
2. a. Who is protected by Art. 3 common to the Geneva Conventions and by Art. 4 of Protocol II?
- b. Does the IHL of non-international armed conflicts protect, in their capacity as persons not taking part in hostilities, only those who are not perpetrators? (GC I-IV, Art. 3; P II, Art. 4)
3. a. Does the material field of application of the provisions of the Swiss Military Penal Code that concern offences against IHL meet the requirements of the provisions of IHL on grave breaches? Is it more restricted or does it go further? (GC I-IV, Arts 49/50/129/146 respectively) [See **Case No. 63**, Switzerland, Military Penal Code]
- b. Does Switzerland have the right to make violations of international agreements punishable even if the agreements themselves do not provide for criminal responsibility? Even concerning acts committed in foreign countries by foreigners against foreigners?
- c. Does Art. 109 of the Swiss Military Penal Code [See **Case No. 63**, Switzerland, Military Penal Code] make all violations of the Geneva Conventions punishable? Only grave breaches? Also violations of customary IHL?
- d. Is the wording of Art. 109 of the Swiss Military Penal Code sufficiently precise for a provision of criminal law?
4. a. Why could Mr Niyonteze not be prosecuted for genocide? Because genocide is not an offence in Switzerland? Or because the genocide was committed abroad and Switzerland therefore did not have jurisdiction?
- b. Is Switzerland bound by the prohibition of genocide? Is genocide punishable in Switzerland? Is the prohibition of genocide included in the “international treaties on the conduct of hostilities” or the “laws and customs of war”? Is genocide prohibited in the event of armed conflict? Only in the event of armed conflict?
- c. If a genocide is committed during an armed conflict, does it fall within the scope of Art. 109 of the Swiss Military Penal Code? Only if the armed conflict is international?
- d. Why can Swiss courts apply customary international law in the event of an international armed conflict but not of a non-international armed conflict? Is customary international law not part of domestic law in a monist legal system such as Switzerland's?
5. Can a violation of the customary IHL applicable to non-international armed conflicts be punished by Switzerland? Should a violation of Art. 3 common to the Geneva Conventions or of Protocol II be punished in Switzerland, according to these instruments? According to customary IHL as interpreted

by the ICTY in the *Tadic* case on jurisdiction? [See in particular para. 134 of that decision, See **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part A]]

6. a. Why is a Swiss military court competent to prosecute a Rwandan who committed violations of IHL against Rwandans in Rwanda? Is this prescribed by IHL? Would it be prescribed by IHL if the conflict in Rwanda had been classified as international? (GC I-IV, Arts 49/50/129/146 respectively)
- b. Is a Swiss military court competent to prosecute a Rwandan who committed ordinary crimes against Rwandans in Rwanda? Why not?
- c. In your country, in what circumstances can violations of IHL also be prosecuted as common crimes?
7. Were Art. 3 common to the Geneva Conventions and Protocol II applicable throughout the territory of Rwanda? Or only where there was fighting between the government and the Rwandan Patriotic Front?
8. a. Who are the addressees of IHL of non-international armed conflicts? Who can be said to have violated Art. 3 common to the Geneva Conventions? Protocol II? Anyone committing a prohibited act in a territory where a non-international armed conflict is under way? Does there need to be a link between the armed conflict and the prohibited act? Does the perpetrator have to belong to a party to the conflict? To the armed forces of a party? Does he have to be serving in the civilian administration or in the armed forces?
- b. On the question of determining for whom the prohibitions of the IHL of non-international armed conflicts are intended, are you inclined to agree with the Military Appeals Court, the ICTR Trial Chamber, the Swiss Military Court of Cassation or the ICTR Appeals Chamber? [See **Case No. 234**, ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part B.]] Does the Swiss Military Court have the right to deviate from ICTR case-law? Does the ICTR not, by virtue of Art. 8(2) of its Statute (adopted by the Security Council under Chapter VII of the United Nations Charter), have “primacy over the national courts of all States”?
- c. According to the ICTR Trial Chamber’s interpretation, could a doctor in a civilian hospital violate the obligation to care for the wounded laid down in Art. 3(2) common to the Geneva Conventions and in Art. 7 of Protocol II? Could a judge violate the judicial guarantees laid down in Art. 3(1)(d) common to the Geneva Conventions and in Art. 6 of Protocol II? Could a prison guard violate Art. 5 of Protocol II? Would the ICTR Trial Chamber’s interpretation render these provisions meaningless?
9. a. Did Mr Niyonteze violate Arts 3, 146 and 147 of Convention IV and Art. 4 of Protocol II or only some of these provisions?
- b. Under the laws of your country, does a prosecution for war crimes involve the need to specify the identity or the number of the victims? In what cases?
- c. Do Arts 146 and 147 of Convention IV contain rules that could be directly applied in a monist constitutional system such as Switzerland’s? Are these articles applicable to non-international armed conflicts?
10. a. Why was Mr Niyonteze acquitted of violating his duties as *bourgmestre*? Were his omissions with respect to the lives of thousands of inhabitants of his community considered to be part of the actions taken that led to charges against him? Were they not punishable under an applicable law? Does a non-military leader not bear penal responsibility owing to his position of authority? (P I, Arts 86(2) and 87)

- b. Is the fact that Mr Niyonteze was a *bourgmestre* an aggravating factor or a mitigating circumstance? Could he have prevented his community from taking part in the genocide even though doing so was badly thought of by those in power? If he had neither called the people to Mount Mushubati nor visited the Kabgayi camp, would he nevertheless have committed a wrongful act by the mere fact of having allowed the genocide to take place in his community?
11. What were the costs and the practical and intercultural problems for Switzerland arising from the prosecution of Mr Niyonteze? Were they worth it? Could Switzerland have handed the case over to the ICTR [See ICTR Statute, Arts 8, 17 and 28, **Case No. 230**, UN, Statute of the ICTR]? What in your view are the advantages and disadvantages of Mr Niyonteze being tried by a Rwandan, international or Swiss court?

Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium

[Source: International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement 14 February 2002; available on <http://www.icj-cij.org>; footnotes partially reproduced.]

INTERNATIONAL COURT OF JUSTICE YEAR 2002
14 February 2002
CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGEMENT [...]

13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued “an international arrest warrant *in absentia*” against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo. [...]

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, as amended by the Law of 19 February 1999 “concerning the Punishment of Serious Violations of International Humanitarian Law” (hereinafter referred to as the “Belgian Law”). [See **Case No. 68**, Belgium, Law on Universal Jurisdiction]

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, whosoever they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontested. Article 5, paragraph 3, of the Belgian Law further provides that “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law”. [...]

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings [...], in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April

2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a "[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations". Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5 ... of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, [...] ". [...]

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today. [...]
45. [...] [T]he Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.
46. [...] [I]n view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo. [...]
54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.
55. In this respect, no distinction can be drawn between acts performed [...] in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office [...] and acts committed during the period of office. [...]
56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. [...]
58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. The Court has also examined the rules

concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts. Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above. In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.
60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.
61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. [...]

75. The Court has already concluded [...] that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.
76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów: "[t]he essential principle [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., Series A, o. 17, p. 47). In the present case, "the situation which would, in all probability, have existed if [the illegal act] had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated. [...]
78. For these reasons,

THE COURT, [...]

- (2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge *ad hoc* Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge *ad hoc* Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge *ad hoc* Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge *ad hoc* Van den Wyngaert. [...]

SEPARATE OPINION OF PRESIDENT GUILLAUME [...]

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention: [...] This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of The Hague Convention [for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 provides: "Each Contracting State shall ... take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory [...]."] What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction *in absentia*. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law. [...]

If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law. [...]

SEPARATE OPINION OF JUDGE REZEK [...]

[N.B.: unofficial translation.]

7. Of all the existing provisions of treaty law, article 146 of the Fourth 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War – an article

that can also be found in the other three 1949 Conventions – is the one that offers the strongest support for the respondent State's claim that criminal jurisdiction may be exercised on the sole basis of the principle of universal jurisdiction. [...]

However, not only does the present case fall outside the strict field of application of the 1949 Conventions, but as Ms Chemillier-Gendreau pointed out in seeking to clarify the meaning of this provision, quoting the words of one of the most eminent specialists of international criminal law (and of criminal international law), Claude Lombois: "Wherever that condition is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand a criminal over if he were not present in its territory? Both searching and handing over presuppose acts of restraint, linked to the prerogatives of sovereign authority, the spatial limits of which are constituted by the territory."

8. Before attempting to steer the law of nations in a direction contrary to certain principles that still govern international relations today, every State needs to ask itself what the consequences would be if other States, and possibly a great number of other States, adopted the same practice. It is no coincidence that the Parties discussed before the Court the question of how certain European countries would react if a Congolese judge had charged members of their governments with crimes supposedly committed by them, or on their orders, in Africa. [...]

SEPARATE OPINION OF JUDGE BULA-BULA [...]

[N.B.: unofficial translation.]

65. The principle of a "universal jurisdiction" as so understood is asserted in Article 49 of the First Geneva Convention of 12 August 1949, among other places. But the conception which the respondent State has of this principle, and above all the way in which it seeks to apply it in the present case, deviate from the law as it stands.
66. According to the authorized interpretation of this treaty provision, the system is based on three fundamental obligations that are laid on each Contracting Party, namely "the obligation to enact *special legislation* on the subject, the obligation to search for any person accused of violation of the Convention, and the obligation to try such persons or, if the Contracting Party prefers, to hand them over for trial to another State concerned" [note 69: Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, p. 362; emphasis added.]. [...]
70. Not only does the Commentary lay emphasis on the prosecution of suspects without regard for their nationality, it also stresses territorial jurisdiction. This is only to be expected under classical international law as it was codified in Geneva: as soon as one of the Contracting Parties "is aware that a person on its territory has committed such an offence, it is its duty to see that such a person is arrested and prosecuted without delay." It is not, therefore, merely on request by a State that the necessary police searches should be undertaken, but also spontaneously. Beyond the national territory to which, in principle, a State's authority – be it legislative,

executive or judicial – is limited, the Commentary, in my opinion, quite naturally refers to the mechanism of judicial cooperation constituted by extradition – a mechanism that requires “sufficient charges” to be brought against the accused. [...]

DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT [...]

34. I now turn to the Court’s proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: [...] (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the first two cases presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect. [...]

54. There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IVth Geneva Convention of 1949, which lays down the principle *aut dedere aut judicare*. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo’s reasoning in this respect is interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IVth Geneva Convention a limitation on a State’s right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law. [...]
59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists.

For crimes against humanity, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. In the case of war crimes, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IVth Geneva Convention, which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians.

DISCUSSION

1. a. Is it a grave breach of IHL to make statements constituting incitement to racial hatred? In August 1998 was there an international armed conflict in the Democratic Republic of the Congo? Can grave breaches of IHL also be committed in the context of a non-international armed conflict? Under IHL? Under Belgian law? (See **Case No. 68**, Belgium, Law on Universal Jurisdiction; **Case No. 228**, Case Study, Armed Conflicts in the Great Lakes Region; GC I-IV, Art. 2 and Arts 50/51/130/147 respectively; GC IV, Art. 4)
- b. Is it a crime against humanity to make statements constituting incitement to racial hatred?
2. Does the reasoning by which the Court granted full immunity to the foreign minister in office and a degree of immunity to the former foreign minister apply only to foreign ministers? To all government ministers? Also to heads of State? Also to heads of government? Also to diplomats? (All are referred to collectively below as “rulers”.)
3. (Para. 60) What is the difference between the concepts of “impunity” and “immunity”?
4. Does IHL allow States to provide for granting of impunity (unilaterally or by treaty) to persons being prosecuted for grave breaches? (GC I-IV, Arts 51/52/131/147 respectively)
5. a. Does IHL allow States to grant immunity unilaterally to persons being prosecuted for grave breaches? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
- b. (Paras 56-58) Is there a customary exception to the immunity *ratione personae* provided for under IHL in the event of prosecutions for international crimes? To the obligation to search for and prosecute perpetrators of grave breaches of IHL when those concerned are immune *ratione personae* under international law?
- c. Does the obligation under IHL to prosecute grave breaches hold also with respect to persons having international immunity? (GC I-IV, Arts 49/50/129/146 respectively)
6. (Para. 59) Is there a contradiction between the obligation to prosecute and immunity *ratione personae*, both of which are provided for under international law? If yes, which of the two takes precedence? That which belongs to *jus cogens*? Does the principle according to which there is an obligation to prosecute belong to *jus cogens*? Does the immunity *ratione personae* provided for under international law belong to *jus cogens*? (GC I-IV, Art. 1, Arts 49/50/129/146 and Arts 51/52/131/148 respectively)
7. a. Was the issue before the Court the immunity of the ruler in office or of the former ruler? Does the decision also relate to the immunity of the former ruler?
- b. Why does the former ruler continue to benefit from immunity for acts committed in the discharge of his duties during his term in office?
- c. Can it be supposed that rulers committing grave breaches of IHL do so in a private capacity?

8. Does the reasoning by which the Court granted full immunity to rulers in office and a degree of immunity to former rulers apply only to prosecutions based on universal jurisdiction by default or also when the suspected criminal is present in the territory of the prosecuting State? When the prosecuting State exercises its competence in relation to a crime committed on its territory?
9.
 - a. If we assume that the obligation to prosecute takes precedence over immunity, would this hold for rulers in office as well?
 - b. What would the consequences be if the obligation to prosecute were systematically given priority over international immunity?
10. (*Para. 61*) Is the Court's list of circumstances authorizing the prosecution of rulers sufficient effectively to fight the rulers' impunity? Does the obligation to prosecute laid down in IHL need to be interpreted as limited, as far as rulers are concerned, to the four cases listed by the Court? (GC I-IV, Arts 49/50/129/146 respectively)
11. How would you propose to reconcile the obligation to prosecute under IHL and international immunities?
12.
 - a. Does the obligation to prosecute the perpetrators of grave breaches of IHL provide for universal jurisdiction in the event such offences are committed? Does it oblige States to provide for universal jurisdiction? Even with respect to a perpetrator outside the territory of a prosecuting State? What would be the practical consequences of such an obligation? (GC I-IV, Arts 49/50/129/146 respectively)
 - b. Does IHL allow universal jurisdiction to be established by default?
13. Why did Belgium have to withdraw the arrest warrant at a time when Mr Yerodia was no longer a government minister? Was this a case of immunity of former rulers for official acts? Was it a consequence of the general obligation to stop a continuing violation? A re-establishment of the situation which existed before the wrongful act was committed? A kind of satisfaction? Could Belgium issue a new warrant?

Case No. 243, Colombia, Constitutional Conformity of Protocol II

[Source: RULING No. C-225/95, Re: File No. L.A.T.-040; original in Spanish, unofficial translation, footnotes partially omitted.]

**REPUBLIC OF COLOMBIA,
CONSTITUTIONAL COURT**

Constitutional review of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, and of Law 171 of December 16, 1994, whereby said Protocol is approved.

[...]

II. LEGAL BASIS**Jurisdiction and scope of the powers of the Court**

1. The Constitutional Court has jurisdiction to review the constitutionality [...] [of] Protocol II and the law approving it, in conformity with Article 241, para. 10, of the Constitution. Moreover, as this Body has repeatedly stated, this is a preliminary, full and automatic procedure for confirming the constitutionality of the draft treaty and the law approving it, for reasons of substance as well as form. [...]

[...]

The nature of international humanitarian law and its mandatory character at the international and internal levels [...]

6. As regards the law of armed conflicts, traditional doctrine made a distinction between the law of The Hague, as it is known, or the law of war in the strict sense, as codified in the Hague Conventions of 1899 and 1907, the aim of which was to regulate the conduct of hostilities and lawful means of combat, and the law of Geneva, or international humanitarian law in the strict sense, the purpose of which is to protect persons not participating directly in hostilities. This might suggest that when the Constitution speaks of humanitarian law it is referring only to what is known as the Geneva Law. Such is not the case, however, since legal opinion considers that nowadays it is impossible to make a clear-cut distinction between these two bodies of law, because protection of the civilian population (i.e., the conventional aim of international humanitarian law in its strict sense) logically implies the regulation of legitimate means of combat (i.e., the aim of the traditional law of war), and vice-versa. Furthermore, Hague Law has been absorbed to some extent by Geneva Law, as demonstrated by the broad regulation of means of combat in Part III of Protocol I additional to the Geneva Conventions of 1949. [...]
7. International humanitarian law essentially stems from a number of practices which are understood to form part of what is known as the customary law of

civilized peoples. Most of the treaties of international humanitarian law should consequently be viewed more as a simple codification of existing obligations than as the creation of new rules and principles. In the aforementioned rulings, and in accordance with the authoritative nature of international doctrine and jurisprudence, this Body has therefore considered the rules of international humanitarian law as forming an integral part of *jus cogens*. Now, Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a *jus cogens* norm, or peremptory norm of general international law, as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Consequently, according to the same article of the Vienna Convention, a treaty that conflicts with the above principles is void under international law. This explains why the humanitarian rules are binding on States and parties to a conflict, even if they have not approved the treaties in question, since the mandatory nature of these rules does not derive from the consent of the States but from their customary character. This Body has already stated the following, in this respect:

“To summarize, since the principles of international humanitarian law embodied in the Geneva Conventions and their two Protocols constitute a set of minimum ethical standards applicable to situations of internal or international conflict and widely accepted by the international community, they form part of jus cogens or the customary law of nations. Consequently, their binding force derives from their universal acceptance and the recognition which the international community of States as a whole has conferred upon them by adhering to this set of rules and by considering that no contrary rule or practice is acceptable. It does not derive from their codification as rules of international law, as will be explained in greater detail below. Hence respect for these principles does not depend on whether or not States have ratified or acceded to the international instruments enshrining those principles.

International humanitarian law is, above all, a set of ethical standards whose absolute and universal validity does not depend on it being enshrined in positive law”.

8. [...]

It can therefore be concluded from the foregoing that the compulsory nature of international humanitarian law applies to all parties to an armed conflict, and not only to the armed forces of States which have ratified the relevant treaties. Irregular armed individuals or national armed forces may not then legitimately consider that they do not have to respect the minimum standards of humanity in an armed conflict because they are not party to the relevant international agreements, since, once again, the regulatory force of international humanitarian law derives from the universal acceptance of its rules by civilized peoples and from the fundamental humanitarian values enshrined in these international instruments. All armed individuals, whether or not they are part of a State force, are therefore under the obligation to respect the rules embodying those basic humanitarian principles, from which there is no possible derogation even in the extreme situation of armed conflict.

9. An armed individual may not cite failure to comply with humanitarian law by his adversary as an excuse for his own violations of these rules, since the restrictions pertaining to behaviour in combat apply for the benefit of the individual. The distinctive feature of this law is therefore that its rules constitute inalienable guarantees that are unique in that they impose obligations on armed individuals not for their own benefit but for that of third parties, namely the non-combatant population and the victims of the conflict. That explains why humanitarian obligations are not based on reciprocity; indeed, they are incumbent upon each of the parties and do not depend on compliance by the other party, because the beneficiary of those guarantees is the non-combatant third party – not the parties to the conflict. In this respect, this Court has already noted that “the traditional principle of reciprocity does not operate in these treaties and, as the International Court of Justice states in the case of the conflict between the USA and Nicaragua, no exception can be made”.

Colombia has the honour of being one of the first independent nations to have defended the principle that humanitarian obligations are not based on reciprocity. Indeed, long before the first Geneva or Hague Conventions were signed in Europe, “El Libertador”, Simón Bolívar, signed a “treaty to regulate warfare” with General Morillo to “avoid bloodshed whenever possible”. According to the French jurist Jules Basdevant, this agreement is one of the most important precursors of international law applicable to armed conflict, since not only does it contain innovative provisions on humane treatment for the wounded, the sick and prisoners, but it is also the first known application of the customs of war to what we would now call a war of national liberation. Soon after, on April 25, 1821, Bolívar issued a proclamation to his soldiers, ordering them to respect the rules regulating warfare. According to Bolívar, “even when our enemies break those rules, we must respect them, so that the glory of Colombia is not stained with blood”.

10. In the case of Colombia, the humanitarian provisions are especially binding due to the fact that Article 214, para. 2, of the Constitution provides that “the rules of international humanitarian law shall be respected in all cases”. As already stated by this Body, this means not only that international humanitarian law is valid at all times in Colombia, but also that it is automatically incorporated in the “national legal order, which is, moreover, consistent with the mandatory nature (as already explained) of the axioms which make this body of law an integral part of *jus cogens*”. Consequently both the members of irregular armed forces and all State officials, particularly all members of the police force whose duty it is to apply the humanitarian rules, are under the obligation to respect the provisions of international humanitarian law at all times and in all places, not merely because these are mandatory rules of international law (*jus cogens*) but also because they are binding rules *per se* of the legal order and must be adhered to by all inhabitants of the territory of Colombia. Indeed, the rules of international humanitarian law preserve that intangible and obvious core of human rights which can on no account be disregarded, even in the extreme situation of armed conflict. They represent the “elementary considerations of humanity” which the International Court of Justice referred to in its 1949 ruling on the Corfu Channel case. Hence there can be no justification, whether before the international community or before the laws of Colombia, for committing acts

which clearly violate the dictates of the public conscience, such as arbitrary killings, torture, ill-treatment, hostage-taking, forced disappearances, trial without judicial guarantees and the imposition of *ex post facto* penalties.

Constitutional incorporation of the rules of international humanitarian law

11. [...]

The human rights treaties and the conventions of international humanitarian law are complementary sets of regulations which, under the common concept of protection of the principles of humanity, form part of the international system for the protection of the rights of the individual. The difference between them is therefore one of applicability, since the former are intended essentially for peacetime situations and the latter for situations of armed conflict, but both bodies of law are designed for the protection of human rights. This Court has already stated in this respect that “international humanitarian law constitutes the application of the essential, minimum and inalienable principles enshrined in the human rights instruments to the extreme situation of armed conflict”.

Now, Article 93 of the Constitution establishes that certain parts of the human rights treaties ratified by Colombia take precedence over domestic legislation. This Court has previously specified that two conditions need to be fulfilled in order for these treaties to prevail over internal law. “The first is recognition that a human rights issue is involved, and the second is that that issue is connected with one of the rights which may not be restricted during states of emergency.” It is obvious that international humanitarian law treaties, such as the Geneva Conventions of 1949 or Protocol I, or this Protocol II under review, meet those conditions, since they recognize human rights which may not be limited either in times of armed conflict or in states of emergency. [...]

[...]

Protocol II, Common Article 3 and respect for national sovereignty [...]

14. On the one hand, Common Article 3 states that the application of its provisions “shall not affect the legal status of the Parties to the conflict”. From the legal standpoint this short phrase was of revolutionary import at the time, because it meant that, in internal conflicts, application of the humanitarian rules ceased to be dependent on the recognition of insurgents as belligerents.

Before the 1949 Geneva Conventions, some legal experts considered that the law of armed conflicts only applied once the State involved, or third-party States, had recognized those who had taken up arms as belligerents. This meant that for a rebel group to be considered subject to international humanitarian law, it was necessary for it to have been acknowledged as being subject to international law, since, in very simple terms, recognition of belligerent status gives rebels or irregular armed groups the right to wage war under equal conditions and with equal international guarantees as the State. Once belligerents have been recognized as such, they

cease to be subject to the national legal order, and the internal conflict becomes a civil war governed by the rules applicable to international conflict, since those who have taken up arms have been recognized, either by their own State or by third-party States, as a “belligerent community” with the right to wage war. In such circumstances, belligerents captured by the State automatically enjoy the status of prisoners of war and may not therefore be punished simply for taking up arms and participating in the hostilities, as their recognition as belligerents entitles them to serve as combatants.

Such a situation obviously resulted in disregard for the humanitarian rules in non-international conflicts, since acknowledgement of belligerent status has a significant impact in terms of national sovereignty. The 1949 Conventions therefore distinguished strictly between recognition of belligerent status and the application of humanitarian law, by stating that their provisions could not be invoked to alter the legal status of the parties. The phrase quoted above consequently removes any doubt that humanitarian law might erode the sovereignty of a State. In practice, it means that application of the humanitarian rules by a State in an internal conflict does not imply recognition of belligerent status for those who have taken up arms.

In a non-international armed conflict, individuals who take up arms are therefore subject to international humanitarian law, since they are under the obligation to respect the humanitarian rules on account of these being *jus cogens* provisions binding on all the parties in conflict. Nevertheless, rebels do not become subject to public international law simply by virtue of the application of humanitarian law, because they continue to be subject to the penal legislation of the State, and may be punished for taking up arms and disturbing the public order. [...]

15. [...]

The conclusion that may be drawn from the above is that Protocol II does not interfere with national sovereignty, nor does it imply recognition of groups of insurgents as belligerents. It is therefore wrong to assume, as some speakers have done, that by implementing Protocol II the State of Colombia would be conferring legitimacy upon irregular armed groups, since application of the humanitarian rules has no effect on the legal status of the parties. In an explanation of the reasons for the draft law approving this international instrument, the Government rightly stated as follows:

“What is important is that in international practice there are no known examples of States using the adherence of another State to the Protocol as a justification for recognizing subversive groups operating on the territory of that State as belligerents. Furthermore, with or without Protocol II, belligerent status can be acknowledged at any time, regardless of whether the State in which such groups are operating is a party to this instrument. [...]”

[footnote 25 reads: “Explanation of the reasons for the draft law approving the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts”, in *Gaceta del Congreso* [Gazette of the Congress], No. 123/94, August 17, 1994, p. 7.]

16. The foregoing does not mean that humanitarian law has no impact on the concept of sovereignty because, as pointed out by the Government Procurator's Office, these rules presuppose a new perspective of the relationship between the State and its citizens. Indeed, the fact that parties in conflict are restricted in the means of warfare they are entitled to use by the obligation to ensure protection of the individual means that the State no longer has absolute sovereignty over its citizens, and there is no longer a vertical relationship between the governing body and those governed by it, since State attributions are restricted by the rights of the individual. [...]
17. On the other hand, Common Article 3 states that the parties to a conflict can reach special agreements to strengthen application of the humanitarian rules. Agreements of this nature are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law. Furthermore, the legal validity of the humanitarian rules does not depend on the existence of such agreements. The latter do, on the other hand, serve a perfectly reasonable political purpose, because the practical and effective validity of international humanitarian law depends to a large extent on the resolve and commitment of the parties to respect its provisions. Obviously this does not mean that humanitarian obligations are subject to reciprocity, as they are independently binding on each of the parties, as was pointed out in paragraph 9 of this Ruling. The existence of such reciprocal undertakings appears to be politically desirable, however, because this will gradually ensure a more effective application of the humanitarian rules set out in Protocol II. [...]
18. The Constitutional Court similarly considers that the presence of neutral organizations, such as the International Red Cross, as provided for in Article 3 common to the 1949 Geneva Conventions and in Article 18 of Protocol II, does not constitute a threat to the sovereignty of the Colombian State, because the latter has freedom of decision whether or not to request their services or accept their offers. Furthermore, the Court agrees with the Government Procurator's Opinion that the activities of such organizations may play a crucial role in ensuring that international humanitarian law is truly put into practice and does not simply have regulatory validity. Experience at the international level has shown, moreover, that the participation of these organizations in monitoring compliance with the humanitarian rules can help not only to render armed conflicts more humane but also to promote the restoration of peace.

Protocol II, the humanization of warfare, the protection of human dignity and the rights and duties of peace [...]

20. [...]

This Body has already stated that a *de jure* State must not seek to deny the existence of conflicts, as these are inevitable in life in society. What the State can and must provide for are “adequate institutional channels, since the function of a constitutional system is not to suppress conflict, which is intrinsic to life in society, but to control it so that it is a source of wealth and develops peacefully and democratically”. Consequently, the primary duty of the State with regard to armed conflicts is to prevent them from happening; to achieve this, it must establish mechanisms that leave sufficient room at the social and institutional levels for the peaceful resolution of the various types of conflict that may arise in society. This is a major component of the State’s duty to preserve public order and guarantee peaceful coexistence.

Once conflict has broken out, ensuring that the war is waged in a humane manner does not absolve the State of its responsibility to restore public order, using the range of resources provided for in the country’s legal order, since, as stated earlier in this Ruling, application of international humanitarian law does not suspend the validity of national legislation.

21. This clearly shows that humanitarian law does not in any way legitimate war. Its purpose is to ensure that the warring parties adopt measures to protect the individual. As pointed out in the Government Procurator’s Opinion, and by government representatives and others, the humanization of war is, moreover, of special constitutional significance when it comes to efforts aimed at restoring peace. Both national and international legal opinion has, in fact, repeatedly emphasized that the humanitarian rules are not confined to limiting the ravages of war, but also have an unspoken goal that may, on occasion, be more valuable still. Indeed, by preventing unnecessary cruelty in military operations, they can also foster reconciliation between the parties. Thus, by recognizing a minimum set of applicable rules and ethical standards, international humanitarian law encourages mutual recognition by the protagonists and therefore promotes the peace process and the reconciliation of societies disrupted by armed conflict. [...]

The “Martens clause” and the relationship between Protocol II and the rules of international humanitarian law

22. The preamble [to Protocol II] also contains what international legal opinion refers to as the “Martens clause”, which is the principle according to which “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”.

The clause indicates that Protocol II must not be interpreted in isolation but must be viewed at all times within the context of the entire body of humanitarian principles, as the treaty simply extends the application of these principles to non-international armed conflicts. Hence the Constitutional Court considers that the absence of specific rules in Protocol II relating to the protection of the civilian

population and to the conduct of hostilities in no way signifies that the Protocol authorizes behaviour contrary to those rules by the parties in conflict. The rules contained in other international humanitarian conventions that are compatible with the nature of non-international conflicts should in general be considered applicable to the latter, even if they are not set out in Protocol II, since, once again, the codified rules in this field are the expression of the principles of *jus cogens* that are understood to be automatically incorporated in Colombian domestic legislation, as ruled by this Body in previous decisions.

23. Accordingly, none of the rules of international humanitarian law that expressly apply to internal conflicts, namely Common Article 3 and this Protocol under review, contains detailed provisions governing legitimate means of warfare and the conduct of hostilities. However, international legal opinion holds that these rules, which derive from the law of war, are applicable to internal armed conflicts, as this is the only way of affording effective protection to the potential victims of such conflicts.

At a meeting in Taormina, Italy, on April 7, 1990, the Council of the International Institute of Humanitarian Law adopted a Declaration on the rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts. [footnote 29 reads: "See the text of this declaration in the *International Review of the Red Cross*, September-October 1990, No. 278, pp. 404-408"]

According to this declaration, which may be considered the most authoritative expression of international legal opinion in this field, non-international conflicts are governed by the rules relating to the conduct of hostilities which, by virtue of the principle of proportionality, limit the right of the parties to choose means of warfare, in order to prevent superfluous injury or unnecessary suffering. Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of chemical or bacteriological weapons, mines, booby-traps, "dum-dum" bullets and similar devices apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.

24. In the case of Colombia, the applicability of these rules to internal armed conflicts is all the more obvious since the Constitution states that "the rules of international humanitarian law shall be respected in all cases" (Constitution, Art. 214, para. 2). [...]

Applicability of Protocol II in Colombia

25. Article 1 specifies the field of application of Protocol II and establishes certain requirements "*ratione situationis*" that are stricter than those contained in Article 3 common to the 1949 Geneva Conventions. Whereas Common Article 3 governs any internal armed conflict that extends beyond internal disturbances and tension, Protocol II requires that irregular armed groups be under responsible command and exercise such territorial control as to enable them to carry out sustained and

concerted military operations and to apply the rules of international humanitarian law.

The requirements set out in Article 1 could give rise to wide-ranging legal and empirical discussions on whether Protocol II is applicable in the case of Colombia. The Court considers that such discussions may be relevant in terms of the international obligations of the State of Colombia. With regard to Colombian constitutional law, however, the Court concludes that discussion is unnecessary because, as stated in the Government Procurator's Opinion, the requirements for the applicability of Article 1 are maximum requirements which may be waived by States, since Protocol II expands on and supplements Article 3 common to the 1949 Geneva Conventions. Now the Colombian Constitution clearly establishes that the rules of international humanitarian law shall be respected in all cases (Constitution, Art. 214, para. 2). This means that, in accordance with the Constitution, international humanitarian law – obviously including Protocol II – applies in all cases in Colombia, without it being necessary to determine whether the conflict in question reaches the level of intensity required by said Article 1.

Similarly, Article 1, para. 2, states that Protocol II does not apply "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". The Court considers that this too constitutes a requirement for applicability as regards the international obligations of the State of Colombia, but that, by virtue of Colombian constitutional law, the peremptory rule contained in Article 214, para. 2, of the Constitution takes precedence. Consequently, the requirements of humane treatment, as set out in international humanitarian law, are maintained in any case in situations of violence which are not defined as war and do not have the characteristics of an armed conflict. The humanitarian rules are thus extended in practical terms to cover such cases, since they can also serve as a model for regulating internal disturbances. This means that the rules of humanitarian law apply permanently and consistently at the domestic level, as they are not confined to international conflicts or declared civil wars. The humanitarian principles must be respected not only in states of emergency but also in all circumstances in which they are necessary to protect the dignity of the individual. [...]

The principle of distinction between combatants and non-combatants

28. One of the basic rules of international humanitarian law is the principle of distinction according to which the parties in conflict must differentiate between combatants and non-combatants, since the latter may never be the targets of acts of war. There is an elementary reason for this: although war seeks to weaken the enemy's military capacity, it may not target those who do not actively participate in the hostilities – either because they have never taken up arms (civilian population), or because they have ceased to be combatants (disarmed enemy troops) – since they are not military personnel. The law of armed conflicts therefore considers that military attacks against such persons are unlawful, as stated in Article 48 of Protocol I, applicable in this respect to internal conflicts, which establishes

that the “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.

Article 4 of the treaty under review takes up this rule, which is essential in introducing an effective measure of humanity in any armed conflict, because it states that non-combatants, whether or not their liberty has been restricted, have the right to be treated humanely and are entitled to respect for their person, honour, convictions and religious practices.

29. Article 4 also sets out objective criteria for the application of the principle of distinction, since the parties in conflict may not define at will who is and is not a combatant, and therefore who may or may not be a legitimate object of attack. Under this article, which must be interpreted in the light of the provisions of Articles 50 and 43 of Protocol I, combatants are persons who take a direct part in hostilities as active members of the armed forces or of an armed organization incorporated in those armed forces. Hence Article 4 protects, as non-combatants, “all persons who do not take a direct part or who have ceased to take part in hostilities”. Furthermore, Article 50 of Protocol I provides that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian; this means that he or she may not be the object of attack. Article 50 also stipulates that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. As stated in Article 13, para. 3, of the treaty under review, civilians do not lose that status, and may not therefore be the object of attack, “unless and for such time as they take a direct part in hostilities”.

Obligations deriving from the principle of distinction

30. The distinction between combatants and non-combatants has fundamental consequences. Firstly, as stated in the rule regarding immunity of the civilian population (Art. 13), the parties have the general obligation to protect civilians from the dangers arising from military operations. From this follows, as stated in paragraph 2 of this same article, that the civilian population as such may not be the object of attack, and acts or threats of violence the primary purpose of which is to spread terror are prohibited. General protection of the civilian population from the dangers of war also implies that it is not in keeping with international humanitarian law for one of the parties to involve the population in the armed conflict, as in so doing it would turn civilians into participants in the conflict and would thus expose them to military attacks by the adverse party.
31. This general protection of the civilian population also covers objects indispensable to the latter’s survival, which are not military objectives (Art. 14). Cultural objects and places of worship (Art. 16) may not be used for military purposes or be the object of attack, and it is prohibited to attack works and installations containing dangerous forces, if such attack may cause severe losses among the civilian population (Art. 15). Finally, Protocol II also prohibits ordering the displacement

of the civilian population for reasons related to the conflict, unless the security of civilians or imperative military reasons so demand. In the latter case, the Protocol states that “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, health, hygiene, safety and nutrition” (Art. 17).

32. Humanitarian protection extends, without discrimination, to the wounded, the sick and the shipwrecked, whether or not they have taken part in hostilities. Protocol II thus stipulates that all possible measures must be taken to search for and collect the wounded, sick and shipwrecked, to protect them and to provide them with the necessary assistance (Art. 8). They must therefore be treated humanely and must receive, to the fullest extent possible and with the least possible delay, the medical care and attention required by their condition (Art. 7).

These rules providing for humanitarian assistance to the wounded, the sick and the shipwrecked obviously imply that guarantees and immunities must be granted to persons entrusted with giving such aid; Protocol II thus protects medical and religious personnel (Art. 9), medical duties (Art. 10) and medical units and transports (Arts 11 and 12), which must be respected at all times by the parties in conflict.

33. [...]

As regards the situation in Colombia, application of these rules by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case. The Court cannot disregard the fact that, according to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence and that, as stated in the investigation in question, the principal cause of displacement involves violations of international humanitarian law associated with the internal armed conflict.

34. The Court does not share the rather confused argument put forward by one of the speakers that the protection of the civilian population is unconstitutional since combatants could use the population as a shield, thereby exposing it “to suffer the consequences of the conflict”. On the contrary, the Court considers that, pursuant to the principle of distinction, the parties to the conflict may not use and endanger the civilian population in order to gain a military advantage, as that contradicts their obligations to afford general protection to the civilian population and to direct their military operations exclusively against military objectives.

Furthermore, the feigning of civilian status to injure, kill or capture an adversary constitutes an act of perfidy which is prohibited by the rules of international humanitarian law, as clearly stipulated in Article 37 of Protocol I. Protocol II admittedly does not explicitly forbid this form of conduct by the parties in conflict, but, as already pointed out in this Ruling, that does not mean that it is authorized, since the treaty must be interpreted in the light of all the humanitarian principles. As stated in the Taormina Declaration, the prohibition of perfidy is one of the

general rules governing the conduct of hostilities that applies in non-international armed conflicts.

Fundamental prohibitions and guarantees

35. Article 4 of the treaty under review not only provides for the general protection of non-combatants but also, expanding on Article 3 common to the 1949 Geneva Conventions, lays down a series of absolute prohibitions which may be regarded as the hard core of guarantees afforded by international humanitarian law. [...]
36. By virtue of their direct and obvious link with the protection of the life, dignity and integrity of the individual, these prohibitions under international humanitarian law also have major consequences in constitutional terms, because they require the military principle of due obedience, set out in Article 91, sub-para. 2, of the Constitution, to be assessed in the light of those overriding constitutional values. This Body has in fact already pointed out that, since military discipline must be reconciled with respect for constitutional legislation, a distinction inevitably needs to be drawn between military obedience “which must be observed by subordinates so that discipline does not break down, and obedience which, by overstepping the limits of a reasonable order, involves blindly following instructions issued by superiors”. The Constitutional Court thus stated as follows:

“Accordingly, by virtue of the criterion which has been established, a subordinate may indeed refuse to obey an order given by his superior if it involves torturing a prisoner or causing the death of someone hors de combat, because the mere statement of such an act, without the person concerned requiring any special level of legal knowledge, shows that such conduct is clearly detrimental to human rights and in obvious contradiction with the Constitution.

The notion of a legitimate order, upheld by the Constitution in its preamble, could not be interpreted in any other way, nor could Article 93 of the Constitution, according to which “the international conventions and treaties ratified by the Congress, which recognize human rights and prohibit their restriction in states of emergency, take precedence over the domestic legal order.

Under the terms of the First Geneva Convention of August 12, 1949, approved by Law 5a of 1960 (Official Gazette No. 30318), which the High Contracting Parties undertook to respect and for which they pledged to ensure respect “in all circumstances”, there are serious violations against which States must take appropriate measures. [...]”

The above considerations show that the article regarding due military obedience (Constitution, Art. 91) cannot be interpreted in isolation, but its meaning needs to be determined systematically. It is therefore necessary to set this principle against the other principles, rights and duties enshrined in the Constitution, and in particular its scope must be brought in line with the minimal obligations imposed upon parties to a conflict by international humanitarian law. [...]

The circumstances described above lead to one obvious conclusion: due military obedience cannot be invoked to justify committing acts that are clearly

detrimental to human rights. [...] This is established, for example, in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [...] which takes precedence over the internal legal order, since it recognizes rights that cannot be suspended in states of emergency (Constitution, Art. 93), [and] states unequivocally that “an order from a superior officer or a public authority may not be invoked as a justification of torture”. [...]

Optional clause on the granting of amnesty upon the cessation of hostilities, for reasons related to the armed conflict

41. Article 6, para. 5, stipulates that once hostilities have ended, “the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

One of the speakers regards this provision as unconstitutional because of the unacceptable impunity it implies, since amnesty would be granted in advance for atrocious crimes. Furthermore, the speaker maintains that the granting of amnesty would cease to be a prerogative of the State and would become a commitment agreed beforehand and a kind of “pirate’s licence” for offences perpetrated during the armed conflict.

42. The Court does not share this opinion, and considers that the above interpretation of the scope of Article 6 is incorrect. Indeed, in order to understand the meaning of the aforementioned provision, it is necessary to take into consideration its purpose in a humanitarian law treaty designed to apply in internal conflicts, as this type of rule does not appear in the humanitarian treaties relating to international wars. A close examination of Protocol I applicable to international conflicts does not show any provision relating to the granting of amnesties and pardons between the parties in conflict, at the end of hostilities, even though this treaty contains more than one hundred articles. Moreover, the provision in Article 75 of Protocol I that establishes procedural guarantees is almost identical to Article 6 of Protocol II, but makes no reference to the question of amnesty.

This omission from Protocol I is not a careless oversight, nor does it mean that combatants captured by one of the parties will continue to be deprived of their liberty after the armed conflict has come to an end. The omission is clearly justified, because in the case of international wars, combatants captured by the enemy automatically enjoy the status of prisoners of war, as stipulated in Article 44 of Protocol I and Article 4 of the Third Geneva Convention relative to the Treatment of Prisoners of War. Now, as already stated in this Ruling, one of the essential characteristics of prisoner-of-war status is that prisoners may not be punished simply for having taken up arms and having participated in hostilities; indeed, if States are at war, the members of their respective armed forces are considered to have the right to serve as combatants. The party that captures them may retain them only in order to limit the enemy’s potential to wage war, but it may not punish them for having fought. Consequently, if a prisoner of war has

not violated humanitarian law, he must be released and repatriated without delay after the cessation of active hostilities, as stated in Article 118 of the Third Geneva Convention. Any prisoner who has violated humanitarian law should be punished as a war criminal in the instance of a grave breach, or could be subject to other penalties for other violations, but he may in no case be punished for having served as a combatant.

It is thus unnecessary for States to grant reciprocal amnesty after the end of an international war, because prisoners of war must be automatically repatriated. In internal armed conflicts, however, those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation. [...]

In situations such as those of internal conflict, where those who have taken up arms do not in principle enjoy prisoner-of-war status, it is easy to understand the purpose of a provision designed to ensure that the authorities in power will grant the broadest possible amnesty for reasons related to the conflict, once hostilities are over, as this can pave the way towards national reconciliation. [...]

III. DECISION

With regard to the foregoing, the Constitutional Court of the Republic of Colombia, in the name of the Colombian people and pursuant to the Constitution,

DECIDES:

1. To declare the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), drawn up in Geneva on June 8, 1977, to be APPLICABLE.
2. To declare Law 171 of December 16, 1994, approving the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), to be APPLICABLE. [...]

DISCUSSION

1. What are the advantages and disadvantages of the Colombian system, which prescribes a preliminary review by the Constitutional Court of whether an international treaty by which Colombia is about to be bound is compatible with the Colombian Constitution?
2.
 - a. Are States not party to a treaty which contains a rule of IHL still bound by that rule if it is a rule of customary law or it belongs to *jus cogens*? Do all rules of IHL belong to *jus cogens*? Is a rule of IHL not belonging to *jus cogens* binding?
 - b. Is every rule belonging to customary law or to *jus cogens* also binding on an armed group fighting within a State against the government? Are only such rules binding on such a group?

- c. Did Protocol II become part of Colombian law through Art. 214(2) of the Colombian Constitution even before Colombia became a party to Protocol II?
3. Are the rules of IHL subject to possible derogation in exceptional situations, e.g., in armed conflicts? In emergency situations not amounting to armed conflicts?
4. In which sense do rebels fighting against a government become subjects of international law thanks to IHL? Does your answer depend on whether the State in question is a party to Protocol II?
5. Are special agreements under common Art. 3(3) of the Conventions subject to the law of treaties? Are they legally binding? Do the humanitarian obligations such agreements foresee exist independently of such agreements? What purpose do they have in this case?
6. In which sense does a distinction between *jus ad bellum* and *jus in bello* exist in non-international armed conflicts? Are non-international armed conflicts prohibited under international law?
7.
 - a. Under the reasoning of para. 22 of the ruling, are all rules of IHL applicable in non-international armed conflicts? Because or insofar as they belong to *jus cogens*? At least in Colombia, owing to Art. 214(2) of the Colombian Constitution? Does Art. 214(2) make them applicable even outside armed conflicts? Does Art. 214(2) incorporate the treaties of IHL independently of their rules on their material scope of application?
 - b. Why is the principle of distinction applicable in non-international armed conflicts? Because it is the only way to protect the civilian population? Because it is a rule of customary law applicable to international armed conflicts? Because parties to non-international armed conflicts have created, through their behaviour, this rule of customary law? Because it is implicit in the prohibition to attack the civilian population set out in Art. 13(2) of Protocol II?
 - c. Do the laws of international and of non-international armed conflicts distinguish between the same categories of individuals under the principle of distinction? Does Protocol II, Art. 4 establish the principle of distinction between civilians and combatants? Is that principle mentioned anywhere else in Protocol II? Why do you think Protocol II is not worded the same way as Art. 48 of Protocol I?
 - d. According to the Court, did a non-international armed conflict exist in Colombia at the time of the decision? Were the conditions for the applicability of Protocol II fulfilled?
 - e. Why should Protocol II be read with Protocol I, Arts 43 and 50? How does the Court conclude that the rules of the law of international armed conflict not mentioned in Protocol II (or GC I-IV, Art. 3) nevertheless apply to non-international armed conflicts? Because they are customary? Because without them the guarantees foreseen in Protocol II are void? Are all paragraphs of Protocol I, Art. 50 equally applicable in non-international armed conflicts even if they do not appear in Protocol II, Art. 13? What elements of Protocol I, Art. 50 do not apply even by analogy in non-international armed conflicts?
 - f. Why is the prohibition of feigning civilian status not mentioned in Protocol II? Why is such behaviour nevertheless prohibited in non-international armed conflicts? Because of the Martens clause? Because it is prohibited by customary law? Because it is implicit in the prohibition to attack civilians?
8. Why may a superior order to commit a serious violation of IHL not be carried out?
9. In what respect does the interpretation of Protocol II, Art. 6(5) given in this decision contradict that of the Supreme Court of South Africa in **Case No. 169**, South Africa, AZAPO v. Republic of South Africa? Which arguments are similar? What additional arguments on the interpretation of Protocol II, Art. 6(5) appear in the Colombian decision?

Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation

[The authors would like to thank Mr Diego Valadares Vasconcelos Neto, LL.M. (Geneva Academy of International Humanitarian Law and Human Rights) for having prepared a summary of this case and its discussion.]

[Source: Constitutional Court of Colombia, Decision C-291/07, available in Spanish at www.corteconstitucional.gov.co. Footnotes partially omitted. Unofficial translation.]

Decision C-291/07 of 2007

Complaint challenging the constitutionality of Articles 135, 156 and 157 (in part) of Act 599 of 2000, and Articles 174, 175, 178 and 179 of Act 522 of 1999.

Plaintiff: Alejandro Valencia Villa

[...]

DECISION**I. THE COMPLAINT****1. COMPLAINT CONCERNING ARTICLE 135 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL****1.1. Contested rule**

The plaintiff challenges the constitutionality of paragraph 6 of the additional clause of Article 135 of Act 599 of 2000, reproduced below (the contested word is underlined):

“Article 135. Murder of a protected person.

Any person who, in connection with and during an armed conflict, causes the death of a person protected by the international conventions of humanitarian law ratified by Colombia commits [...]

ADDITIONAL CLAUSE. For the purposes of this Article and the other rules within the same title, protected persons are in accordance with international humanitarian law understood to be:

1. Members of the civilian population.
2. Individuals not participating in the hostilities and civilians in the hands of the adverse party.
3. The wounded, sick or shipwrecked placed *hors de combat*.
4. Medical or religious personnel.
5. Journalists on assignment or accredited war correspondents.
6. Combatants who have laid down their arms owing to capture, surrender or other similar reason.

7. Those who, prior to the onset of hostilities, were considered to be stateless persons or refugees.
8. Any other persons benefiting from this status under the First, Second, Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified."

1.2. Allegations of unconstitutionality set out in the complaint

It is the plaintiff's view that the term "combatants" found in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000 is incompatible with Articles 93¹ and 214² of the Constitution and must therefore be declared unconstitutional.

2. COMPLAINT CONCERNING ARTICLE 157 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

2.1. Contested rule

The underlined phrase from Article 157 of Act 599 of 2000 is called into question:

"Article 157. Attack on works or installations containing dangerous forces. Any person who attacks dams, dykes, nuclear or electric power stations or other works or installations containing dangerous forces, duly marked with the treaty-based signs, in connection with and during an armed conflict, without imperative military necessity, commits [...]"

2.2. Allegations of unconstitutionality set out in the complaint

The plaintiff alleges that the phrase in question is contrary to Articles 93 and 214 of the Constitution. Establishing a requirement for the objects of attack to be duly marked with the treaty-based signs as a normative element of the offence means that "a punishable act cannot be assimilated to this criminal offence unless this requirement is met." He stresses that the international rules that are binding on Colombia do not require this.

1 [N.B.] Article 93. International treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have priority domestically.

The rights and duties set forth in this Constitution shall be interpreted in accordance with international human rights treaties ratified by Colombia.

The Colombian State recognizes the jurisdiction of the International Criminal Court in the terms set forth in the Rome Statute adopted on 17 July 1998 by the United Nations Conference of Plenipotentiaries and hence ratifies this treaty pursuant to the procedure laid down in this Constitution.

Any alternative treatment by the Rome Statute in substantive matters relating to constitutional guarantees will be accepted only within the spheres regulated by the Statute.

2 [N.B.] Article 214(2). States of emergency [...] shall be subject to the following provisions: [...]

"Neither human rights nor fundamental freedoms may be suspended. In all cases, the rules of international humanitarian law shall be observed. A statutory law shall regulate the powers of the government during states of emergency and shall establish the legal controls and guarantees to protect rights, in accordance with international treaties. The measures which are adopted must be proportionate to the gravity of the events. [...]"

3. COMPLAINT CONCERNING ARTICLE 156 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

3.1. Contested rule

The underlined phrase from Article 156 of Act 599 of 2000 is called into question:

“Article 156. Destruction or illegal use of cultural objects and places of worship. Any person who, in connection with and during an armed conflict, without imperative military necessity and without previously taking appropriate and timely protective measures, attacks and destroys historical monuments, works of art, educational establishments or places of worship, which constitute the cultural and spiritual heritage of peoples, duly marked with the treaty-based signs, or uses such objects to support the military effort, commits [...]”

3.2. Allegations of unconstitutionality set out in the complaint

The plaintiff alleges that the phrase in question is contrary to Articles 93 and 214 of the Constitution, for reasons similar to those put forward in connection with the same phrase in Article 157: “since international norms do not make this a requirement”. [...]

4. COMPLAINT CONCERNING ARTICLE 148 OF ACT 599 OF 2000, STATEMENTS AND OPINION OF THE ATTORNEY-GENERAL

4.1. Contested rule

The underlined phrase from Article 148 of Act 599 of 2000 is called into question:

“Article 148. Hostage-taking. [Penalties increased by Article 14 of Act 890 of 2004, with effect from 1 January 2005. The text containing the increased penalties reads as follows:] Any person who, in connection with and during an armed conflict, deprives another person of their liberty and makes their release or their safety conditional on the satisfaction of demands made to the other party, or uses them as a means of defence, commits [...]”

4.2. Allegations of unconstitutionality set out in the complaint

The plaintiff considers this phrase to be incompatible with the aforementioned Articles 93 and 214 and requests that the Court declare it to be conditionally constitutional, for the following reasons:

“[...] we consider that the Constitutional Court must declare it to be conditionally constitutional and must point out that the phrase “to the other party” found in Article 148 has a broad meaning that covers not only the parties to armed conflict but also third parties such as a State, an international organization, a natural or legal person, or a group of persons.”

[...]

CONSIDERATIONS OF THE COURT

C. The legislature's margin of discretion in criminal matters; limits set by the Constitution and the corpus of constitutional law. Role of the corpus of constitutional law in the areas of interpretation and integration.

As previously explained, the principal legal problems brought before the Court in the present complaint require us (1) to determine the constitutional limits on the legislature's discretionary power to establish criminal offences, and (2) to determine the role and the scope of application of the corpus of constitutional law in the constitutional control of laws establishing criminal offences, in particular those prohibiting violations of international humanitarian law.

The legislature has a broad margin of discretion to draw up criminal policy [...]. There are nevertheless limits to this legislative power, which are set forth in the Constitution and in the norms making up the corpus of constitutional law. It is the responsibility of the Constitutional Court to implement these limits whenever the legislature fails to adhere to the principles, values and rights protected therein.

[...]

Hence, not all the international provisions that are binding upon the Colombian State have been incorporated into the corpus of constitutional law. For the matter at hand, suffice to say that the Court has accepted that human rights treaties and the treaty-based and customary rules of international humanitarian law form part of that corpus.

[...]

D. [...]

3.3.1. "Combatants"

The term "combatants" in international humanitarian law has both a generic meaning and a specific meaning. **Generically**, "combatants" refers to individuals who are members of the armed forces or irregular armed groups, or who participate in hostilities, and therefore do not benefit from the protection against attack accorded to civilians. **Specifically**, "combatants" is used only in the context of an international armed conflict to denote a special status, "combatant status," which encompasses not only the right to participate in hostilities and the possibility of being considered a legitimate military target, but also the right to attack other combatants or individuals who are taking part in the hostilities, and an entitlement to special treatment if placed *hors de combat* following surrender, capture or injury – in particular the related or secondary status of "prisoner of war."

The Court observes that when the principle of distinction is applied to internal armed conflicts, and the different rules that it comprises in particular, international humanitarian law uses the term "combatants" generically. There is no doubt that the term "combatants" in the specific sense and the related legal categories, such as "prisoner-of-war status," do not apply to internal armed conflicts.

3.3.2. “Civilians” and “civilian population”

When the principle of distinction is applied to internal armed conflicts, the term “civilian” is used to refer to individuals who fulfil the following two criteria: (i) they are not members of the armed forces or irregular armed opposition groups; and (ii) they are not participating in the hostilities, whether individually as “civilians” or collectively as the “civilian population.” The definition of “civilians” and “civilian population” is similar for the different purposes these terms have within international humanitarian law in its application to internal armed conflicts – for example, the same definition of “civilian” has been used in case law to classify specific conduct as a war crime or a crime against humanity.³

3.3.2.1. “Civilians”

When the principle of distinction is applied to non-international armed conflicts, a “civilian” is someone who meets the dual criteria of not being a member of the armed forces or an irregular armed opposition group, and not participating in hostilities.

The first requirement – that of not being a member of the armed forces or an irregular armed group – was identified in the ICRC’s study as a customary definition of “civilian.”⁴ [...]

The second requirement – that of not participating in the hostilities – has been mentioned by numerous international courts. [...] The International Criminal Tribunal for the former Yugoslavia has held that in order to establish the civilian character of individuals protected by the guarantees enshrined, for example, in common Article 3 – applicable to internal armed conflicts – “it is necessary to show that the violations were committed against persons not directly involved in the hostilities,”⁵ for which the criterion established in the Tadić case must be applied: “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.”⁶ Therefore, the civilian character of a person or a population is determined by comparing the evidence to the applicable criteria, rather than simply citing their legal status in abstract terms. This must take into consideration that – based on what was stated earlier – the concept of “hostilities,” in common with that of “armed conflict,” concerns more than the specific time and place of the fighting. It depends upon the geographical and temporal criteria governing the application of international humanitarian law.⁷

[...]

3 [FN 123] See for example ICTY, Case No. IT-98-29, *Prosecutor v. Galić*, Judgement of 5 December 2003.

4 [FN 124] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC/Cambridge University Press, Cambridge, 2005, Rule 5 [...]

5 [FN 127] [...] ICTY, Case No. IT-95-14, *Prosecutor v. Blaškić*, Judgement of 3 March 2000, para. 177.

6 [...] [FN 128] ICTY, Case No. IT-94-1, *Prosecutor v. Tadić*, Opinion and Judgement of 7 May 1997, para. 615.

7 [FN 130] See in this regard ICTY, Case No. IT-01-48, *Prosecutor v. Halilović*, Judgement of 16 November 2005.

3.3.3. “Persons *hors de combat*” as “non-combatants”

[...]

As in the case of civilians, when persons *hors de combat* begin participating directly in the hostilities, they lose their protection under the principle of distinction⁸ but only for as long as their participation in the conflict lasts.⁹

[...]

3.4.6. Prohibition on attacking persons *hors de combat*

Finally, as explained above, the principle of distinction protects civilians and the civilian population, as well as those *hors de combat*, within the wider category of “non-combatants.” The term “persons *hors de combat*” is understood to mean those who were participating in the hostilities but are no longer doing so because they have surrendered, been captured, detained or shipwrecked, or are unconscious, wounded, sick or in another analogous situation.

[...]

5.4.3. The fundamental guarantee prohibiting murder

In the case of non-international armed conflicts, the fundamental guarantee prohibiting murder, like most other fundamental guarantees, covers non-combatants, that is, civilians and those *hors de combat*, for as long as they do not take a direct part in the hostilities [...]

However, independently of the fact that murdering a civilian or a person *hors de combat* may constitute a war crime, it is the Constitutional Court’s view that the underlying material act, namely taking the life of someone protected by the principle of distinction, may constitute other offences under international humanitarian law, including genocide and crimes against humanity such as extermination, persecution, attacks on civilians or acts causing serious physical or mental harm. In each case, it depends on the context in which the act was committed and whether certain specific conditions have been met. All of the aforementioned offences share a common core of elements with the definition of murder as a war crime: “the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.”¹⁰

8 [FN 140] Inter-American Commission on Human Rights, “La Tablada” case – Report No. 55/97, Case 11.137 - *Juan Carlos Abella v. Argentina*, 18 November 1997: “Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the above-mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians. In contrast, these humanitarian law rules continued to apply in full force with respect to those peaceable civilians present or living in the vicinity of the La Tablada base at the time of the hostilities.”

9 [FN 141] Inter-American Commission on Human Rights, “La Tablada” case: “The Commission wishes to emphasize, however, that the persons who participated in the attack on the military base were legitimate military targets only for such time as they actively participated in the fighting. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth both in common Article 3 of the Geneva Conventions and Article 5 of the American Convention. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.”

10 [FN 267] ICTY, Case No. IT-02-60, *Prosecutor v. Blagojević and Jokić*, Judgement of 17 January 2005, para. 556. [...]

[...]

5.4.4. The fundamental guarantee prohibiting hostage-taking

The fundamental guarantee prohibiting hostage-taking during non-international armed conflicts, as part of the principle of humanity and in itself, has the threefold nature of being a treaty-based, customary and peremptory norm of international humanitarian law. Violation thereof constitutes a war crime that entails individual criminal responsibility. It may also constitute a crime against humanity when committed in the context of an internal armed conflict.

[...]

6. People and objects benefiting from special protection under international humanitarian law

During internal armed conflicts, treaty-based and customary international humanitarian law affords special protection to certain categories of people and objects that are particularly vulnerable to the harmful effects of war.

[...]

6.1. Special protection of cultural and religious property

International humanitarian law imposes on the parties to an internal armed conflict a special obligation to respect and protect cultural property [...]

Cultural property falls into the general category of “civilian objects,” and as such, benefits from protection under the principles of distinction and precaution explained above. However, international humanitarian law imposes on the parties to armed conflict duties of special care, respect, prevention and protection with regard to cultural property. Guarantees of protection of cultural property – including criminal guarantees – therefore constitute *lex specialis* in relation to the principles of distinction and precaution.

Violating these guarantees of special protection is a war crime under treaty-based and customary international humanitarian law.

[...]

The protection of cultural and religious property does not depend on their identification with a distinctive emblem. Although Articles 6 and 16 of the 1954 Hague Convention state that cultural property of special importance **may** be identified by an emblem established therein, this can in no way be regarded as an obligation. Full application of the treaty-based and customary safeguards provided for in international humanitarian law is not conditional upon use of the emblem.

6.2. Special protection of works and installations containing dangerous forces

Works and installations containing dangerous forces constitute another category of objects entitled to special protection under both treaty-based and customary international humanitarian law during an internal armed conflict.

[...]

E. FINDINGS OF THE COURT REGARDING THE SPECIFIC ALLEGATIONS SET OUT IN THE COMPLAINT

Drawing on the above considerations, the Court will now proceed to discuss the allegations.

1. Examination of the allegations concerning the term “combatants” found in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000.

The plaintiff asserts that the word “combatants” in paragraph 6 of the additional clause of Article 135 of Act 599 of 2000 is contrary to Articles 93 and 94¹¹ of the Constitution. He argues that “combatants” is not a category used in connection with non-international armed conflicts in the rules of international humanitarian law found in the corpus of constitutional law.

In the first instance, the Court notes that this word must be interpreted in the overall context of the article within which it appears. The legislature placed it in paragraph 6 of the additional clause of Article 135 of the Criminal Code as one of the categories of persons protected by international humanitarian law whose murder is punished by the offence in question, namely, “combatants” who have laid down their arms owing to capture, surrender or other similar reason. Other protected persons listed in the uncontested paragraphs of the offence are “members of the civilian population,” “individuals not participating in the hostilities and civilians in the hands of the adverse party,” “the wounded, sick or shipwrecked placed *hors de combat*,” “medical or religious personnel,” “journalists on assignment or accredited war correspondents,” “those who, prior to the onset of hostilities, were considered to be stateless persons or refugees” and “any other persons benefiting from this status under the First, Second, Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified.”

This article thus seeks to prohibit the murder of two categories of persons protected by international humanitarian law: non-combatants – including the civilian population and persons *hors de combat* – and certain individuals entitled to special protection – journalists, and medical and religious personnel. It represents the incorporation into the Colombian Criminal Code of the fundamental guarantee prohibiting the murder of non-combatants, which comes under the principle of humane treatment. This [...] is a peremptory norm, treaty-based and customary in nature, which compels national

11 [N.B.] Article 94. The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned therein.

authorities to respect and ensure respect for its content. The scope of this provision must therefore be interpreted in the light of the fundamental guarantee in question.

Interpreted thus within its own normative context and in the light of the applicable international humanitarian law, it is the Court's view that the term "combatants" refers to one of the sub-categories of persons *hors de combat*, itself one of the categories of persons protected by international humanitarian law – persons who have participated in the hostilities and are no longer doing so because they have laid down their arms as a result of capture, surrender or other similar reason. The term must be interpreted generically, as explained under heading 3.3.1 of section D above [...].

Furthermore, even if we were to interpret it specifically, the use of this term in itself would not be incompatible with the corpus of constitutional law. Its inclusion in the offence does not limit the protection afforded by the fundamental guarantee prohibiting the murder of those not participating in the hostilities during an internal conflict. Legal provisions incorporating the concept of "combatant" into the regulation of internal armed conflicts would only be contrary to the corpus of constitutional law if they diminished or reduced the scope or the efficacy of the guarantees, or if they prevented the guarantees from upholding the aforementioned principles of humanity [...] and distinction [...].

Viewed from this perspective, the term evidently does not restrict the scope of the protection that the corpus of constitutional law affords to those not taking part in the hostilities during a non-international armed conflict, whether because they are members of the civilian population or because they have ceased to participate in the conflict and hence benefit from the guarantees and safeguards enjoyed by the civilian population. They are legitimately entitled to protection under international humanitarian law and therefore continue to be protected by the safeguard clauses in question, even if the specific meaning were to be applied. This is because, in accordance with the classification of persons protected by international humanitarian law, Article 135 includes other categories of individuals not participating in the hostilities during a non-international armed conflict. The following therefore appear in the list: "members of the civilian population," "individuals not participating in the hostilities and civilians in the hands of the adverse party," "the wounded, sick or shipwrecked placed *hors de combat*," "medical or religious personnel," "journalists on assignment or accredited war correspondents," "those who prior to the onset of hostilities were considered to be stateless persons or refugees," and in a wider sense referring back to international humanitarian law, "any other person benefiting from this status under the First, Second Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 and others that may later be ratified." In the Court's opinion, these categories cover those who must be distinguished from active participants in a non-international armed conflict so that they may be protected by the humanitarian provisions under examination, described in detail earlier.

In other words, the term "combatants," whether generic or specific, has no impact on the principles of distinction or humanity, or on the guarantees of special protection set forth in international humanitarian law. These therefore retain their full force in situations of internal armed conflict such as that found in Colombia, in respect of all those not participating in the hostilities or those enjoying special protection under

international humanitarian law. In the view of this Court, they are all covered by the different categories of “protected persons” listed in Article 135 – for example, someone who previously participated in the hostilities and who has now laid down his arms.

Based on the above, the term “combatants” is compatible with the Constitution (Articles 93 and 94) and, as mandated by the Constitution, with the relevant principles and norms of the corpus of constitutional law [...]. The term must accordingly be declared constitutional. It is clear that whichever interpretation is chosen, the scope of protection provided for under international humanitarian law is not reduced for those who do not take part in the hostilities during a non-international armed conflict.

2. Examination of the allegations concerning the phrase “to the other party” in Article 148 of Act 599 of 2000.

The plaintiff argues that the phrase “to the other party” found in the definition of the offence of hostage-taking set out in the Colombian Criminal Code is prejudicial to Articles 93 and 94 mentioned above, inasmuch as the provisions in the corpus of constitutional law defining this act do not contain such a requirement. He asserts that domestic legislation reduces the scope of the protection afforded against this international criminal offence as a result.

In the first instance, the Court notes that the definition of the domestic criminal offence containing the contested phrase represents the incorporation within the domestic criminal system of the fundamental guarantee prohibiting hostage-taking established by international humanitarian law. This, as previously explained [...] is a peremptory norm, of a treaty-based and customary nature, binding upon the Colombian State. By defining this offence, the Colombian State is complying with its international obligation to respect and ensure respect for international humanitarian law, and the offence must be interpreted in accordance with the principles of this body of law.

[...] It is clear [...] that on the date this ruling is adopted, the offence of hostage-taking is identified as a punishable act in accordance with peremptory norms which, as part of the corpus of constitutional law, are binding on the Colombian State. These norms constitute a compulsory parameter for exercising constitutional control over the legal provision in question.

It is also relevant to note that the Constitutional Court, in Decision C-578 of 2002 reviewing the constitutionality of the Rome Statute of the International Criminal Court, stated that “[...] States must exercise their sovereign powers to define criminal penalties and procedures for grave breaches of human rights such as [...] war crimes in a way that is compatible with international human rights law, with international humanitarian law, and with the aim of fighting impunity set forth in the Rome Statute,” from which we may infer that the Colombian legislature, when defining the offence of hostage-taking, must comply with what has already been established regarding this in international humanitarian law, as a constitutive element of the corpus of constitutional law.

On the basis of the customary definition of the international crime of hostage-taking, [...] formalized in the definition found in the Elements of Crimes of the International

Criminal Court, the present Court upholds the plaintiff's argument that Article 148 of the Criminal Code violates the corpus of constitutional law by stipulating that any demands to release or protect the hostage be made to the other party in a non-international armed conflict. Customary rules defining the elements of this war crime do not contain this requirement. The introduction of such a condition therefore reduces without justification the scope of protection established by international humanitarian law, by restricting the possible permutations of the offence in question. It leaves unprotected hostages whose captors have made demands not to the other party in the armed conflict, but to other entities – which, as listed in the Elements of Crimes of the International Criminal Court, may be a State, an international organization, a natural or legal person, or a group of persons. Since individuals who find themselves in this situation are entitled to the full protection of international humanitarian law and there are no elements in the constitutional legal system that would justify a reduction in the level of protection set out in the definition of this war crime, the Court concludes that the introduction of this obligation is incompatible with the corpus of constitutional law and hence with Articles 93 and 94 of the Constitution [...].

It should be clarified at this point that the existence of the offence of kidnapping for extortion in the Colombian Criminal Code¹² does not compensate for the introduction of this phrase into the definition of the criminal offence of hostage-taking and the corresponding reduction in protection. Although the offences have similar constitutive elements – in the sense that both punishable acts involve illegally depriving a person of his freedom in order to demand a specific benefit in return for his release – it is clear that the element which distinguishes them is that hostage-taking, a war crime proscribed by international humanitarian law, applies to armed conflict, both international and non-international.¹³ This is confirmed by the fact that it is found in the section on "Offences against persons and objects protected by international humanitarian law" in the Colombian Criminal Code. Kidnapping for extortion meanwhile applies to contexts other than armed conflict.

It is clear to the Court that in the case of a non-international armed conflict – whose existence and character are in no way dependent upon the way that it is described or characterized by the parties to conflict, State or non-State, but rather on the objective factors listed in Section D of this ruling – reducing the scope of protection offered by the criminal offence under examination through the introduction of this phrase is contrary to the protective rules of international humanitarian law. This is not compensated for by the existence of other criminal offences in domestic legislation – given that the offence of kidnapping for extortion does not apply to armed conflict – and is therefore incompatible with the principles of humanity [...] and distinction [...].

12 [FN 291] Defined in Article 169 of the Criminal Code (Act 599 of 2000) as follows: "Article 169. Any person who seizes, takes, holds or hides another person with the aim of demanding in exchange for his freedom some benefit or profit, or demanding that certain action be taken or not taken, or with a politically or publicity-oriented aim, commits [...]."

13 [FN 292] ICTY, Case Nos IT-96-23 & IT-96-23/1-A, *Prosecutor v. Kunarac, Kovač and Vuković*. Appeals Chamber Judgement of 12 June 2002, para. 58: "What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed."

Nor is any reduction in the protection offered by the fundamental guarantee prohibiting hostage-taking, a peremptory norm in the corpus of constitutional law, compensated for by Colombia's acceptance of the complementary jurisdiction of the International Criminal Court with regard to war crimes – in relation to which the Colombian State in 2002 made a declaration of conformity with Article 124 of the Rome Statute temporarily excluding the jurisdiction of the International Criminal Court over war crimes. This declaration is only valid for a maximum of seven years. The fact that this international court may assume jurisdiction with regard to the commission of this offence whenever the criteria established in the Rome Statute are met does not give the Colombian State licence to ignore its fundamental duty to ensure that the rights of the civilian population are fully protected should the latter fall victim to one of the parties to conflict. Among other steps, this duty consists of adopting domestic legislative measures that are wholly compatible with the fundamental guarantees of international humanitarian law. [...]

For the above reasons, the Court will declare unconstitutional the contested phrase "to the other party." [...] In accordance with the content of the fundamental guarantee prohibiting hostage-taking – a peremptory norm – with effect from the adoption of the present ruling, the offence of hostage-taking in the Colombian criminal system no longer requires that demands regarding release or protection be directed at the other party in an armed conflict. Such demands may be made to a third party such as a State, international organization, natural or legal person, or a group of people, without misinterpreting the offence in question.

3. Examination of the allegations concerning the phrase "duly marked with the treaty-based signs" found in Articles 156 and 157 of Act 599 of 2000.

The plaintiff in this case argues that the legislature's use of the expression "duly marked with the treaty-based signs" in Articles 156 and 157 of Act 599 of 2000 (which define the offences of "destruction or illegal use of cultural objects and places of worship" and "attack on works or installations containing dangerous forces" respectively) is incompatible with Articles 93 and 94 of the Constitution on the grounds that the rules of international humanitarian law in the corpus of constitutional law defining these crimes at an international level do not make signalling a requirement. As such, domestic legislation reduces the scope of protection of the corpus of constitutional law in this area.

The allegations of unconstitutionality are upheld. Using a similar line of reasoning to that which guided the Court's decisions on the other allegations, the Court will declare unconstitutional the phrase "duly marked with the treaty-based signs" in Articles 156 and 157. As explained under headings 6.1 and 6.2 of Section D of this ruling, this requirement is not found within the treaty-based and customary rules of international humanitarian law protecting cultural property and works and installations containing dangerous forces. Therefore, introducing a signalling requirement into the definition of this offence restricts the scope of the applicable international safeguards, since any cultural and religious property or works and installations containing dangerous forces not bearing signs are excluded from the protection afforded by these rules.[...]

DECISION

Based on the foregoing, the Constitutional Court of the Republic of Colombia, administering justice on behalf of the people and under the authority given to it by the Constitution,

DECIDES

1. To declare **CONSTITUTIONAL** the term “combatants” found in paragraph 6 of Article 135 of Act 599 of 2000, for the reasons examined herein.
2. To declare **UNCONSTITUTIONAL** the phrase “to the other party” found in Article 148 of Act 599 of 2000.
3. To declare **UNCONSTITUTIONAL** the phrase “duly marked with the treaty-based signs” found in Articles 156 and 157 of Act 599 of 2000.

[...]

**DISSENTING OPINION OF JUDGE JAIME ARAÚJO RENTERÍA IN DECISION
C-291 OF 2007**

[...]

With all due respect for the findings of this Court, I would like to express my dissenting opinion regarding this ruling. I disagree with the decisions adopted concerning paragraph 6 of Article 135 of Act 599 of 2000 [...].

1. Unconstitutionality of paragraph 6 of Article 135 of Act 599 of 2000

In the first instance, I would like to emphasize why paragraph 6 of Article 135 is, in my view, unconstitutional. I consider that this rule, by excluding from special protection individuals who are not considered to be combatants but who participated in the conflict without belonging to a regular army, and for the purposes of the offence defined in this article, conflicts with the rules of international humanitarian law and thus with Articles 93 and 214 of the Constitution.

I also consider that limiting the offence of hostage-taking to the demands made to the other party is incompatible with the prohibition in international humanitarian law of hostage-taking, which is punishable regardless of the person to whom the demands are made.

I believe that the difficulties of the interpretation in case law of the word “combatants” stem from the fact that the word relates solely to internal conflicts – it is not used in connection with international conflicts. I reiterate that, in principle, paragraph 6 does not include members of illegal armed groups participating in the hostilities. Similarly, this word can in no way be understood to mean that those who are fighting the government are not entitled to humane treatment.

I must point out here that the undersigned was not opposed to declaring the contested article “conditionally constitutional,” or accepting the Attorney-General’s

proposal. I was opposed to incorporating paragraph 6 into paragraph 8 of the same provision, which to my understanding would lead to greater difficulties. In my view, if the intention is to protect everyone, both combatants and fighters, declaring the contested term unconstitutional would have the desired effect.

Finally, I consider that the difficulty of this rule resides in the fact that it can be understood in a restrictive sense, when, pursuant to the corpus of constitutional law, this is not the case. Hence, for the undersigned, unconstitutionality is the more obvious decision, because it would cover both those who fight and those who do so no longer.

Based on the above arguments, I disagree with the decision to declare paragraph 6 of Article

[...]

JAIME ARAÚJO RENTERÍA

Judge

—

PARTIAL DISSENTING OPINION OF JUDGE HUMBERTO ANTONIO SIERRA PORTO IN DECISION C- 291 OF 2007

[...]

With all due respect, I will now explain why I do not agree with Decision C-291 of 2007 adopted by the Court, in which the phrase “to the other party,” found in Article 148 of Act 599 of 2000, was declared unconstitutional.

1. Development of the international prohibition on hostage-taking

The international prohibition on hostage-taking has come about in two, not necessarily complementary, ways: first, through instruments of international humanitarian law; second, in connection with the fight against international terrorism.

Article 3 common to the four Geneva Conventions of 1949, which deals with the humanitarian rules applicable in situations of internal armed conflict, prohibits the respective parties from the “taking of hostages,” at any time and in any place. Similarly, Article 4 of Additional Protocol II of 1977, which sets forth the fundamental guarantees enjoyed by the civilian population, prohibits combatants from this conduct. Notwithstanding the foregoing, both articles consist of non-self-executing international rules, that is, treaty-based provisions which must be implemented by the respective domestic legislators, exercising their powers to create laws. In other words, we are dealing with incomplete international rules, which require action from Congress in order to be formally incorporated into the Colombian legal system (law approving the international treaty) and to be applied. This means the creation of criminal offences that detail specific conduct and a specific penalty (principle of criminal legality).

In this respect, we might point out that, in international humanitarian law terms, the international prohibition on hostage-taking is highly ambiguous, since the States did not agree on any elements which would enable us to define this criminal conduct easily. This contrasts with, for example, the prohibition on genocide (1948 Convention), torture (1984 Convention against Torture), or enforced disappearance (1994 Inter-American Convention against Enforced Disappearance). In those cases the States did specify certain key elements of the crimes, which domestic legislators could expand upon provided they did not misinterpret them (e.g. genocide of political groups).

[...]

[Towards] the end of the 1970s, the prohibition on hostage-taking was developed further, but in connection with the fight against international terrorism rather than internal or international armed conflicts. In this context, the International Convention against the Taking of Hostages was adopted in 1979 [...]

Article 1 of this Convention provides the following definition:

“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.”

Concerning the scope of this international treaty, Article 12 provides as follows:

“In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, **the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977**, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” (bold and underlining added by author).

Therefore, the International Convention against the Taking of Hostages of 1979 does not apply to internal armed conflicts, since there are usually no international factors, unless the hostage or the perpetrator is a non-national, or the crime was committed in another State. Indeed, we must not forget that this Convention was not designed to combat domestic acts of terrorism. Rather, it is aimed at those acts considered to constitute “international terrorism.” In other words, international humanitarian law and the 1979 Convention have different spheres of application.

The treaties of international humanitarian law that are currently binding upon the Colombian State do not state that the act of hostage-taking necessarily involves a demand made upon a State, an international intergovernmental organization, a natural or legal person or a group of persons, as in the Convention against the Taking of Hostages of 1979. Hence, in providing in Article 148 of the Criminal Code that the demand must be made “to the other party,” without specifying exactly who this is, the Colombian legislature has not failed to adhere to anything laid down in an international instrument of international humanitarian law. Quite the opposite: this provision is in keeping with the rationale of an internal armed conflict, in which one party makes demands upon the other and threatens to harm the hostages in its power if these are not met. Nor does it in any way breach the 1979 Convention, since, as explained, this does not apply to internal armed conflicts.

In conclusion, the phrase “to the other party” in Article 148 of the Criminal Code does not breach any treaties of international humanitarian law or any international instruments aimed at combating international terrorism, such as the International Convention against the Taking of Hostages of 1979.

2. The Court’s decision is based on an inapplicable normative text

Most members of the Court were of the view that the legislature had violated the corpus of constitutional law by limiting the scope of the offence of hostage-taking, contrary to the customary rules of international humanitarian law and to the definition of this offence which appears in the Elements of Crimes of the International Criminal Court. I disagree with this argument for the following reasons.

Article 8 of the Rome Statute of the International Criminal Court deals with war crimes. It defines hostage-taking as an act that violates the laws and customs of war during an internal or international armed conflict. It does not specify exactly what this criminal conduct consists of, a task which had to be carried out when the Elements of Crimes was drawn up. This is a normative text which complements and develops the Rome Statute of the International Criminal Court.

Hostage-taking is defined in the Elements of Crimes in the following terms:

Article 8 (2) (c) (iii)

War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. **The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.** (bold added by author)

4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. The perpetrator was aware of the factual circumstances that established this status.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Prima facie, then, it would appear that the majority were right, in the sense that the Elements of Crimes defines hostage-taking as a conduct by means of which a State, international organization or natural or legal person is compelled to act in a specific way. The phrase “to the other party” employed by the Colombian legislature would accordingly be excessively restrictive.

Notwithstanding the foregoing, the Court did not appreciate that for various reasons the Elements of Crimes is not at present a basis for deciding a constitutional case in Colombia.

[...]

HUMBERTO ANTONIO SIERRA PORTO
Judge

DISCUSSION

I. Duty to adopt legislation/ ensure respect

1. Do States have the obligation to adopt legislation which, like Law 599 of 2000, provides penal sanctions for persons who commit war crimes? As a minimum, which violations of IHL constitute war crimes? Do all violations of IHL entail criminal responsibility? (GC I-IV, Art. 1, Arts 49/50/129/146 and Arts 50/51/130/147 respectively; P I, Arts 11(4), 85 and 86; 1954 Hague Convention, Art. 28; Second Protocol to the 1954 Hague Convention, Art. 15; CIHL, Rule 161)

II. Definition of combatants/ prohibition of acts against persons *hors de combat*

2. What is the definition of combatants according to IHL? Is it different in international and non-international armed conflicts? What is the definition of civilians? Is it different in international and non-international armed conflicts? Is there any other category of persons under IHL? Does it matter for the classification of the conflict if such persons engage in hostilities? Do civilians who take part in hostilities become combatants? According to the Geneva Conventions and the Additional Protocols? According to the interpretation given by the Colombian Constitutional Court? (GC III, Art. 4; P I, Arts 43 and 50(1))
3. The Colombian Constitutional Court distinguishes between a general definition and a specific (or narrow) definition of “combatant”. How do these two definitions differ when it comes to the rights and responsibilities of the persons involved? What are the consequences of adopting the broader definition? Do you agree with the Court’s adoption of the general definition of “combatant”?

4. Can civilians take part in hostilities? Can they be criminally prosecuted for doing so? Can combatants take part in hostilities? Can they be criminally prosecuted for doing so?
5. Do civilians who take part in hostilities become legitimate targets of military attacks? For the duration of the conflict or just for as long as they directly participate in the hostilities?
6. Does the Colombian Constitutional Court's citation of the *La Tablada* case in [FN 141] (section D 5.4.3) contradict the general position of the Court that civilians engaged in hostilities are combatants *lato sensu*? [See **Case No. 192**, Inter-American Commission on Human Rights, *Tablada*]
7. Does the decision of the Court to uphold the use of the expression "combatants" in Art. 148 of Law 599 reduce the scope of protection of that article in relation to the applicable rules of IHL, and hence violate the Colombian constitutional block by violating minimum standards of protection of IHL? Is the Court's decision influenced by the fact that other categories of protected persons are already protected by other paragraphs of the same article? (Section E. 1)
8. Judge Jaime Araújo Rentería affirms that the expression "combatants" relates exclusively to internal conflicts and is not used in international conflicts (See *separate opinion of Judge Araújo de Rentería*, section 1). Do you agree with him? (GC III, Art. 4; P I, Art. 43)

III. Taking of hostages

9. Is the taking of hostages prohibited under IHL? In international armed conflicts? In non-international armed conflicts? Is it a war crime? (GC I-IV, Art. 3; GC IV, Arts 34 and 147; P I, Art. 75.2(c); P II, Art. 4.2(c); ICC Statute, Art. 8.2(a)(viii) and (c)(iii); CIHL, Rule 96)
10. Does IHL provide a definition of hostage-taking? Does it provide the elements of such crimes? Does the war crime of taking of hostages imply that the perpetrator intended to compel *the other party* to undertake or fail to undertake a particular act? Could the demands be formulated to a third party (natural or legal person)? What other international instruments provide guidance on the interpretation of the elements of such crimes? (Convention on the Taking of Hostages, Art. 1; ICC Elements of Crimes, Art. 8.2(a)(viii))
11. Is the taking of hostages always a war crime? Is the taking of hostages always a war crime in time of armed conflict? Does it necessarily violate Art. 3 common? If not, how can one differentiate between hostage-taking as a war crime and as a regular offence in times of armed conflicts? (See *footnote 292 in section E.2, citing the ICTY distinction between a war crime and a purely domestic offence*). During an armed conflict, when might hostage-taking be considered a purely domestic offence? A war crime? Was the original version of Art. 148 of Law 599 more suitable for the distinction between a purely domestic offence and a war crime?
12. Can combatants be victims of the crime of hostage-taking? What is the difference between taking hostages and interning prisoners of war?

IV. Works containing dangerous forces

13. a. Is attacking works and installations containing dangerous forces prohibited under IHL? In international armed conflicts? In non-international armed conflicts? Do the rules on attacks on such protected objects vary according to the nature of the conflict? (P I, Art. 56; P II, Art. 15; CIHL, Rule 42)
- b. Art. 157 of Law 599 criminalizes attacks against works and installations containing dangerous forces *in the absence of any justification whatsoever based on imperative military necessity*. Can works and installations be attacked if there is an "imperative military necessity"? Even if the attack can result in the release of dangerous forces and consequently in severe losses among the

civilian population? Does the prohibition of attacks exclude necessity as a ground for precluding wrongfulness? Are these objects protected as civilian objects? Are they still protected even when they are military objectives, and if so, under what conditions? Can military objectives located at or in the vicinity of such works and installations be made the object of attacks? If so, under what conditions? (P I, Art. 56; P II, Art. 15; CIHL, Rule 42; Articles on State Responsibility, Art. 25 – See **Case No. 53**, International Law Commission, Articles on State Responsibility)

- c. Does the destruction of a work or installation containing dangerous forces through means other than an attack also constitute a violation of IHL? If so, under what circumstances? (HR, Art. 23(g))
- d. Are the protected works and installations containing dangerous forces described in Art. 157 of Law 599 the same as those protected as such under IHL? Are dams, dykes and nuclear electrical generating stations the only works and installations containing dangerous forces afforded special protection as such by IHL? Does the rule include other works and installations that may contain dangerous forces, such as factories producing toxic goods and oil refineries? (Commentary on P I, Art. 56; CIHL, Rule 42)
14. a. Is an attack against a work or installation containing dangerous forces a grave breach of IHL? Is it a war crime in non-international armed conflicts? (P I, Arts 56 and 85.3(c); P II, Art. 15; CIHL, Rule 42)
- b. Is an attack against a work or installation containing dangerous forces a war crime under the ICC Statute? (P I, Art. 85.3(c); ICC Statute, Art. 8.2)
15. a. Do you recognize the international special sign for works and installations containing dangerous forces? Is it as well-known as other recognized emblems? Is there an obligation to identify or endeavour to identify works and installations containing dangerous forces with the respective international special sign? Is there an obligation to identify medical units with the emblems of the Geneva Conventions? Do you think that a different level of exigency should apply to the identification of medical units as opposed to works and installations containing dangerous forces? Why? (GC I, Art. 42(4); P I, Art. 18; P II, Art. 12)
- b. Are works and installations containing dangerous forces only specially protected under IHL when duly marked with the international special sign? Does the marking with any distinctive emblem or sign confer protection to an object? Is this required for the attack to constitute a war crime? (P I, Art. 85.3(c) and Art. 1 of Annex I)
- c. In terms of criminal policy, would it not make sense to criminalize only attacks against duly marked protected objects? Would this not amount to greater legal certainty with regard to the accused's *mens rea*? Are there any examples of war crimes which require that the protected object be identified with signs or emblems? (ICC Statute, Art. 8.2(b)(xxiv) and (e)(ii))

V. Cultural objects

16. a. What are cultural objects and places of worship? Is it prohibited to attack cultural property under IHL? In international armed conflicts? In non-international armed conflicts? Do the rules on respect for cultural property vary according to the nature of the conflict? (1954 Hague Convention, Art. 1; P I, Art. 53; P II, Art. 16; CIHL, Rules 38-40)
- b. Art. 156 of Law 599 criminalizes attacks against and destruction of cultural objects in the absence of any justification whatsoever based on imperative military necessity and of adequate and suitable prior measures of protection. What is the difference between an attack against cultural objects and the destruction of cultural objects? Can both acts be classified as “acts of hostilities” under IHL? (1954 Hague Convention, Art. 4; P I, Art. 53; P II, Art. 16; CIHL, Rules 38-40)

- c. Can any cultural objects only be attacked under “imperative military necessity”? What does “imperative military necessity” mean in respect of cultural property? Does this meaning conform to the concept of necessity under general international law? Are cultural objects protected as civilian objects? Are they still protected even when they are military objectives? What precautions should parties to a conflict take in relation to cultural objects? (1954 Hague Convention, Art. 4.2; Second Protocol to the 1954 Hague Convention, Arts 6-8; CIHL, Rule 42; Articles on State Responsibility, Art. 25 – See **Case No. 53**, International Law Commission, Articles on State Responsibility)
 - d. What is the difference between general protection, special protection and enhanced protection of cultural property? What are the conditions for the loss of protection in each case? (1954 Hague Convention, Arts 2-4 and 8; Second Protocol to the 1954 Hague Convention, Arts 6 and 10)
17. Is an act of hostility against cultural property a grave breach of IHL? Is it a war crime in non-international armed conflicts? Is an act of hostility against cultural property a war crime under the ICC Statute? Is the scope of Art. 156 of Law 599 broader or narrower than the provisions on the criminalization of acts against cultural property under IHL? (P I, Art. 85.4(d);, 1954 Hague Convention, Art. 28; Second Protocol to the 1954 Hague Convention, Art. 15; ICC Statute, Art. 8.2(b) (ix) and (e)(iv))
18. a. Do you recognize the distinctive emblem of the 1954 Hague Convention, also known as the *blue shield*? Is it as well-known as other recognized emblems? Is there an obligation to identify or endeavour to identify cultural property with the distinctive emblem? Was the Colombian Constitutional Court right when it stated that, according to the 1954 Hague Convention, cultural objects of special importance **may** be identified with the distinctive emblem, and that this possibility does not constitute an obligation (*section D.6.1. of the decision*)? Is there an obligation, ignored by the Court, to identify cultural property with the emblem? Does your answer change depending on whether the cultural property in question is entitled to general, special or enhanced protection? If there is an obligation, what consequences does it entail? Does failure to meet the obligation deprive the object of protection? Do you think it is proper to have different levels of exigency for identification for the different categories? Why? (1954 Hague Convention, Arts 6, 10 and 16)
- b. Is the distinctive emblem used differently depending on whether the cultural property benefits from general, special or enhanced protection? (1954 Hague Convention, Art. 17)
 - c. Is cultural property only protected under IHL when duly marked with the 1954 Hague Convention distinctive sign? Does the marking with any distinctive emblem or sign confer protection to an object? Does an object have to be marked with the distinctive sign for an act of hostility against it to constitute a war crime? If cultural property is a military objective but nonetheless marked with the sign, is an act of hostility against it still a war crime? In terms of criminal policy, would it not make sense to criminalize only attacks against duly marked protected cultural property? (P I, Art. 85.4(d); 1954 Hague Convention, Arts 6 and 10; ICC Statute, Art. 8.2(b)(ix) and (e)(iv))

Case No. 245, Human Rights Committee, Guerrero v. Colombia

[Source: Human Rights Committee, Communication No. 45/1979: Colombia, 31/03/82, CCPR/C/15/D/45/1979 (Jurisprudence), 31 March 1982, available at <http://www.ohchr.org>]

Communication No. 45/1979 : Colombia. 31/03/82.

[...]

Submitted by: Pedro Pablo Camargo on behalf of the husband of Maria Fanny Suarez de Guerrero

State party concerned: Colombia

Date of communication: 5 February 1979 (date of initial letter)

[...]

- 11.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5 (1) of the Optional Protocol. The Committee bases its views on the following facts, which are not in dispute or which are unrefuted by the State party.
- 11.2 Legislative Decree No. 0070 of 20 January 1978 amended article 25 of the Penal Code “for so long as the public order remains disturbed and the national territory is in a state of siege” [...]. The Decree established a new ground of defence that may be pleaded by members of the police force to exonerate them if an otherwise punishable act was committed “in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs”.
- 11.3 On 13 April 1978, the judge of the 77th Military Criminal Court of Investigation, himself a member of the police ordered a raid to be carried out at the house at No. 136-67 Transversal 31 in the “Contador” district of Bogota. The order for the raid was issued to [...] [the] Bogota Police Department. The raid was ordered in the belief that Miguel de German Ribon, former Ambassador of Colombia to France, who had been kidnapped some days earlier by a guerrilla organization, was being held prisoner in the house in question.
- 11.4 In spite of the fact that Miguel de German Ribon was not found, the police patrol decided to hide in the house to await the arrival of the “suspected kidnappers”. Seven persons who subsequently entered the house were shot by the police and died. [...]
- 11.5 Although the police initially stated that the victims had died while resisting arrest, brandishing and even firing various weapons, the report of the Institute of Forensic Medicine [...], together with the ballistics reports and the results of the paraffin test, showed that none of the victims had fired a shot and that they had all been killed at point-blank range, some of them shot in the back or in the

head. It was also established that the victims were not all killed at the same time, but at intervals, as they arrived at the house, and that most of them had been shot while trying to save themselves from the unexpected attack. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she already died from a heart attack.

- 11.6 The Office of the State Counsel for the national police instituted an administrative inquiry into the case. The administrative inquiry was completed and the Office of the State Counsel for the national police requested the dismissal of all the members of the patrol involved in the operation. This dismissal was ordered on 16 June 1980.
- 11.7 In addition, the judge of the 77th Military Criminal Court was ordered to hold a criminal investigation into the case. [...] This investigation did not prove that the victims of the police action were kidnappers. In July 1980, the Inspector General of Police, acting as judge of first instance, issued an order for all criminal proceedings against those charged with the violent death of these seven persons during the police operation on 13 April 1978 in the "Contador" district of Bogota to be discontinued. This order was grounded on article 7 of Decree No. 0070. A Higher Military Court as a result of an *ex officio* review, annulled the decision of the Inspector General of Police. On 31 December 1980 a military tribunal [...], to which the case had been referred for retrial, again acquitted the 11 members of the Police Department who had been involved in the police operation. The acquittal was again based on Decree-Law No. 0070 of 1978.

[...]

- 12.1 In formulating its views, the Human Rights Committee also takes into account the following considerations:
- 12.2 The Committee notes that Decree No. 0070 of 1978 refers to a situation of disturbed public order in Colombia. The Committee also notes that the Government of Colombia in its note of 18 July 1980 to the Secretary-General of the United Nations [...], which was designed to comply with the formal requirements laid down in article 4 (3) of the Covenant, made reference to the existence of a state of siege in all the national territory since 1976 and to the necessity to adopt extraordinary measures within the framework of the legal regime provided for in the National Constitution for such situations. [...] The Committee observes that [...] according to article 4 (2) of the Covenant there are several rights recognized by the Covenant which cannot be derogated from by a State party. These include articles 6 and 7 which have been invoked in the present case.
- 13.1 Article 6 (1) of the Covenant provides:
"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of

the utmost gravity. [...] The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

- 13.2 In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant. In the case of Mrs. Maria Fanny Suarez de Guerrero, the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol.
- 13.3 For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6 (1) of the International Covenant on Civil and Political Rights. [...]

DISCUSSION

1. Does IHL apply to the situation? How would you qualify the situation in Colombia at the time of the events? (GC I-IV, Art. 3; P II, Art. 1) [See **Case No. 243**, Colombia, Constitutional Conformity of Protocol II]
2. Does the Human Rights Committee refer to IHL? Should it have taken the rules of IHL into consideration, in view of the fact that Colombia has recognized the applicability of Protocol II? Would the conclusion have been different if it had done so? [See **Case No. 243**, Colombia, Constitutional Conformity of Protocol II]
3.
 - a. Under IHL, could the kidnappers have been shot on sight if they were members of a guerrilla organization? In a non-international armed conflict, may the police directly target suspected enemy fighters? Could the police target anyone affiliated to an armed group, or only those who are engaged in combat operations? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] What would the answer to those questions be if the IHL of international armed conflicts applied by analogy? What are the arguments in favour of and against applying the IHL of international armed conflicts by analogy in this situation? (GC I-IV, Art. 3; P II, Arts 4 and 13; CIHL, Rule 6)
 - b. Would the Human Rights Committee's decision have been different, under the International Covenant on Civil and Political Rights and under IHL, if the victims of the attack had been

proven members of the guerrilla organization that was responsible for the kidnapping? (P II, Art. 13; CIHL, Rule 6)

- c. Was there an obligation for the police to arrest, rather than kill, the suspected members of a guerrilla group? Under the IHL of international armed conflicts? Under IHL of non-international armed conflicts? Under IHRL?
4. Applying only IHL, was the attack lawful? If the persons killed were actually members of a guerrilla organization? If it was unclear whether the victims were members of a guerrilla organization? Does IHL prescribe precautionary measures in the latter case? (PI, Arts 52 and 57(2)(a)(i); PII, Arts 4 and 13; CIHL, Rules 1 and 6)
5. Under IHL, may a combatant in international armed conflicts, or a fighter in a non-international armed conflict, be directly targeted while he/she is trying to escape from the attack? Even if that person is not armed?
6. (para. 13.3) What do you think of the Committee's statement that the police action was "disproportionate"? Is it the same proportionality principle as that enshrined in Article 51(5)(b) of Protocol I? Under IHL, are combatants or fighters taken into consideration when assessing the proportionality of an attack? (P I, Art. 51(5)(b); CIHL, Rule 14)
7. (para. 13.2) In deciding the case before it, the Human Rights Committee took account of the fact that the victims were given no warning and no possibility to surrender before the attack. Do these elements matter under IHL? Does your answer differ when considering that the police had insufficient information on the status of the victims, and when assuming that the latter were proven members of the guerrilla organization? (P I, Art. 57(2)(a)(i) and (c))
8. If your answers to questions 3-7 under IHL and under IHRL differ, which law should prevail? Does it matter that the events happened in Bogotá and not in a place where fighting between guerrilla groups and security forces occurs?

Case No. 246, Inter-American Court of Human Rights, The Las Palmeras Case

[Source: Inter-American Court of Human Rights, *Las Palmeras Case*. Preliminary objections, Judgement of February 4, 2000. Available on http://www.corteidh.or.cr/index_ing.html; footnotes are partially reproduced.]

**INTER-AMERICAN COURT OF HUMAN RIGHTS
LAS PALMERAS CASE
PRELIMINARY OBJECTIONS**

JUDGMENT OF FEBRUARY 4, 2000 [...]

I. INTRODUCTION OF THE CASE

1. This case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) on July 6, 1998. The Commission’s application originates from a petition (No. 11.237) received by its Secretariat and dated in Bogota on January 27, 1994.

II. FACTS SET FORTH IN THE APPLICATION

2. [...] It is alleged that on January 23, 1991, the Departmental Commander of the Putumayo Police Force had ordered members of the National Police Force to carry out an armed operation in Las Palmeras, municipality of Mocoa, Department of Putumayo. Members of the Armed Forces would provide support to the National Police Force.

That, on the morning of that same day, some children were in the Las Palmeras rural school waiting for classes to start and two workers, Julio Milcíades Cerón Gómez and Artemio Pantoja, were there repairing a tank. The brothers, William and Edebraiz Cerón, were milking a cow in a neighboring lot. The teacher, Hernán Javier Cuarán Muchavisoy, was just about to arrive at the school.

That the Armed Forces fired from a helicopter and injured the child Enio Quinayas Molina, 6 years of age, who was on his way to school.

That in and around the school, the Police detained the teacher, Cuarán Muchavisoy, the workers, Cerón Gómez and Pantoja, and the brothers, William and Edebraiz Cerón, together with another unidentified person who might be Moisés Ojeda or Hernán Lizcano Jacanamejoy; and that the National Police Force extrajudicially executed at least six of these persons.

That members of the Police Force and the Army have made many efforts to justify their conduct. In this respect, they had dressed the bodies of some of the persons executed in military uniforms, they had burned their clothes and they had threatened those who witnessed the event. Also, that the National Police Force had presented seven bodies as belonging to rebels who died in an alleged confrontation. Among these bodies were those of the six persons detained by the Police and a seventh, the circumstances of whose death have not been clarified.

That, as a consequence of the facts described, disciplinary, administrative and criminal proceedings had been initiated. The disciplinary proceeding conducted by the Commander of the National Police Force of Putumayo had delivered judgment in five days and had absolved all those who took part in the facts at Las Palmeras. Likewise, two administrative actions had been opened in which it had been expressly acknowledged that the victims of the armed operation did not belong to any armed group and that the day of the facts they were carrying out their usual tasks. That these proceedings proved that the National Police Force had extrajudicially executed the victims when they were *[sic]* defenseless. As regards the criminal military action, after seven years, it is still at the investigation stage and, as yet, none of those responsible for the facts has been formally accused. [...]

IV. PROCEEDING BEFORE THE COURT [...]

16. On September 14, 1998, Colombia filed the following preliminary objections; [...]

Second:

The Inter-American Commission on Human Rights is not competent to apply international humanitarian law and other international treaties.

Third:

The Inter-American Court of Human Rights is not competent to apply international humanitarian law and other international treaties. [...]

VIII. THIRD PRELIMINARY OBJECTION: LACK OF COMPETENCE OF THE COURT

28. In the application submitted by the Commission, the Court is requested to "conclude and declare that the State of Colombia violated the right to life, embodied in Article 4 of the Convention and Article 3, common to all the 1949 Geneva Conventions... ." In view of this request, Colombia filed a preliminary objection affirming that the Court "does not have the competence to apply international humanitarian law and other international treaties."

In this respect, the State declared that Articles 33 and 62 of the Convention limit the Court's competence to the application of the provisions of the Convention. It also invoked Advisory Opinion OC-1 of September 24, 1982 (paragraphs 21 and 22) and stated that the Court "should only make pronouncements on the competencies that have been specifically attributed to it in the Convention."

29. In its brief, the Commission preferred to reply jointly to the objections regarding its own competence and that of the Court with regard to the application of humanitarian law and other treaties. Before examining the issue, the Commission stated, as a declaration of principles, that the instant case should be decided in the light of "the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in Article 3, common to all the 1949 Geneva Conventions". The

Commission reiterated its belief that both the Court and the Commission were competent to apply this legislation.

The Commission then stated that the existence of an armed conflict does not exempt Colombia from respecting the right to life. As the starting point for its reasoning, the Commission stated that Colombia had not objected to the Commission's observation that, at the time that the loss of lives set forth in the application occurred, an internal armed conflict was taking place on its territory, nor had it contested that this conflict corresponded to the definition contained in Article 3 common to all the Geneva Conventions.

Nevertheless, the Commission considered that, in an armed conflict, there are cases in which the enemy may be killed legitimately, while, in others, this was prohibited. The Commission stated that the American Convention did not contain any rule to distinguish one hypothesis from the other and, therefore, the Geneva Conventions should be applied. The Commission also invoked in its favor a passage from the Advisory Opinion of the International Court of Justice on The Legality of the Threat or Use of Nuclear Weapons as follows [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict that is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

The Commission stated that, in the instant case, it had first determined whether Article 3, common to all the Geneva Conventions, had been violated and, once it had confirmed this, it then determined whether Article 4 of the American Convention had been violated. [...] [footnote 2: Legality of the threat or use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]

30. During the public hearing, Colombia tried to refute the arguments set out by the Commission in its brief. In this respect, the State emphasized the importance of the principle of consent in international law. Without the consent of the State, the Court may not apply the Geneva Conventions.

The State's representative then affirmed that neither Article 25 or Article 27.1 of the American Convention may be interpreted as norms that authorize the Court to apply the Geneva Conventions.

Lastly, Colombia established the distinction between "interpretation" and "application." The Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention. [...]

32. The American Convention is an international treaty according to which States Parties are obliged to respect the rights and freedoms embodied in it and to

guarantee their exercise to all persons subject to their jurisdiction. The Convention provides for the existence of the Inter-American Court to hear “all cases concerning the interpretation and application” of its provisions (Article 62.3).

When a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention, even when the issue may have been definitively resolved by the domestic legal system. The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility.

33. In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention. The latter has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions.

Therefore, the Court decides to admit the third preliminary objection filed by the State.

IX. SECOND PRELIMINARY OBJECTION: LACK OF COMPETENCE OF THE COMMISSION

34. As its second preliminary objection, Colombia alleged the lack of competence of the Commission to apply international humanitarian law and other international treaties. [...]

Although the Inter-American Commission has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the State, confers competence on the Inter-American Court or Commission to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons.

Therefore, the Court decides to admit the second preliminary objected filed by the State. [...]

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE [...]

7. In sustaining, as I have been doing, for years, the convergences between the *corpus juris* of human rights and that of International Humanitarian Law (at normative, interpretative and operational levels), I think, however, that the concrete and specific purpose of development of the obligations *erga omnes* of protection (the necessity of which I have been likewise sustaining for some time)

can be better served, by the identification of, and compliance with, the *general obligation of guarantee* of the exercise of the rights of the human person, *common to the American Convention and the Geneva Conventions (infra)*, rather than by a correlation between substantive norms – pertaining to the protected rights, such as the right to life – of the American Convention and the Geneva Conventions.

8. That general obligation is set forth in Article 1.1 of the American Convention as well as in Article 1 of the Geneva Conventions and in Article 1 of the Additional Protocol I (of 1977) to the Geneva Conventions. Their contents are the same: they enshrine the duty *to respect*, and to *ensure respect* for, the norms of protection, in all circumstances. This is, in my view, the common denominator (which curiously seems to have passed unnoticed in the pleadings of the Commission) between the American Convention and the Geneva Conventions, capable of leading us to the consolidation of the obligations *erga omnes* of protection of the fundamental right to life, in any circumstances, in times both of peace and of internal armed conflict. It is surprising that neither doctrine, nor case-law, have developed this point sufficiently and satisfactorily up to now; until when shall we have to wait for them to awake from an apparent and prolonged mental inertia or lethargy?
9. It is about time, in this year 2000, to develop with determination the early jurisprudential formulations on the matter, advanced by the International Court of Justice precisely three decades ago, particularly in the *cas célèbre* of the *Barcelona Traction* (Belgium versus Spain, 1970). It is about time, on this eve of the XXIst century, to develop systematically the contents, the scope and the juridical effects or consequences of the obligations *erga omnes* of protection in the ambit of the International Law of Human Rights, bearing in mind the great potential of application of the notion of *collective guarantee*, underlying all human rights treaties, and responsible for some advances already achieved in this domain.
10. The concept of obligations *erga omnes* has already marked presence in the international case-law. [...] Nevertheless, in spite of the distinct references to the obligations *erga omnes* in the case-law of the International Court of Justice, this latter has not yet extracted the consequences of the affirmation of the existence of such obligations, nor of their violations, and has not defined either their legal regime.
11. But if, on the one hand, we have not yet succeeded to reach the opposability of an obligation of protection to the international community as a whole, on the other hand the International Law of Human Rights nowadays provides us with the elements for the consolidation of the opposability of obligations of protection to all the States Parties to human rights treaties (obligations *erga omnes partes* – cf. *infra*). Thus, several treaties, of human rights as well as of International Humanitarian Law, provide for the general obligation of the States Parties to guarantee the exercise of the rights set forth therein and their observance.
12. As correctly pointed out by the *Institut de Droit International*, in a resolution adopted at the session of Santiago of Compostela of 1989, such obligation is applicable *erga omnes*, as each State has a legal interest in the safeguard of human rights (Article 1). Thus, parallel to the obligation of all the States Parties to the American

Convention to protect the rights enshrined therein and to guarantee their free and full exercise to all the individuals under their respective jurisdictions, there exists the obligation of the States Parties *inter se* to secure the integrity and effectiveness of the Convention: this general duty of protection (the collective guarantee) is of direct interest of each State Party, and of all of them jointly (obligation *erga omnes partes*). And this is valid in times of peace as well as of armed conflict.

13. Some human rights treaties establish a mechanism of petitions or communications which comprises, parallel to the individual petitions, also the inter-State petitions; these latter constitute a mechanism *par excellence* of action of collective guarantee. The fact that they have not been used frequently (on no occasion in the inter-American system of protection, until now) suggests that the States Parties have not yet disclosed their determination to construct a the [sic] international *ordre public* based upon the respect for human rights. But they could – and should – do so in the future, with their growing awareness of the need to achieve greater cohesion and institutionalization in the international legal order, above all in the present domain of protection.
14. In any case, there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (at least in the relations of the States Parties *inter se*) than the methods of supervision foreseen in the *human rights treaties themselves*, for the exercise of the collective guarantee of the protected rights. In other words, the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need [sic] is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations.
15. At last, the absolute prohibition of grave violations of fundamental human rights – starting with the fundamental right to life – extends itself, in fact, in my view, well beyond the law of treaties, incorporated, as it is, likewise, in contemporary customary international law. Such prohibition gives prominence to the obligations *erga omnes*, owed to the international community as a whole. These latter clearly transcend the individual consent of the States, definitively burying the positivist-voluntarist conception of International Law, and heralding the advent of a new international legal order committed with the prevalence of superior common values, and with moral and juridical imperatives, such as that of the protection of the human being in any circumstances, in times of peace as well as of armed conflict. [...]

DISCUSSION

1. Was there a violation of the Geneva Conventions? Of Protocol II? If yes, what recourse is there to see the perpetrators brought to justice if the Inter-American Court does not have jurisdiction? Has Colombia fulfilled its obligations as party to the Geneva Conventions by initiating disciplinary, administrative and criminal proceedings?
2. a. On what basis does the Inter-American Commission of Human Rights want to apply IHL? On the basis of IHL? On the basis of the American Convention? In your opinion, is the Inter-American

Commission of Human Rights competent to apply IHL? In “the light of ‘the norms embodied in [...] the American Convention’”? Of those embodied in customary international law?

- b. What about the Court? Does it answer the arguments made by the Commission? Does its judgement mean that it cannot take IHL into account when interpreting the American Convention?
3. What do you think of the Commission’s use of the ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons to justify the application of the Geneva Conventions?
4. Is the right to life absolute (*See para. 29*)? Do you agree with the Commission’s arguments?
5. Why has the “doctrine” and “case-law” brought up by Judge A. A. Cançado Trindade in paras 8-10 not been developed? Do you agree with his opinion on the development of the concept of *erga omnes* obligations? Does he argue that the Court is necessarily competent to monitor compliance with all *erga omnes* obligations? That Art. 1 common to the Conventions makes the Court competent to apply those Conventions?

Case No. 247, Colombia, Misuse of the Emblem

[Source: "Uribe: Betancourt rescuers used Red Cross," Karl Penhaul, CNN, 16 July 2008, available at <http://edition.cnn.com/2008/WORLD/americas/07/16/colombia.cross/index.html>]

Uribe: Betancourt rescuers used Red Cross

[...]

BOGOTA, Colombia (CNN) – Colombian President Alvaro Uribe admitted Wednesday that the symbol of the neutral Red Cross organization was used in a hostage rescue mission that freed 15 people from leftist rebels two weeks ago.

Uribe made the admission after CNN reported on unpublished photographs and videos that clearly showed a man wearing a Red Cross bib. Wrongly using the Red Cross logo is prohibited by the Geneva Conventions.

The man was a member of the Colombian military intelligence team involved in the daring rescue, Uribe said in an address carried on national TV and radio.

The president said that as the constitutional head of the armed forces, he takes full political responsibility for what he described as a slip-up.

"This officer, upon confessing his mistake to his superiors, said when the [rescue] helicopter was about to land ... he saw so many guerrillas that he went into a state of angst," Uribe said.

"He feared for his life and put on the Red Cross bib over his jacket."

However, the confidential military source who showed CNN the photographs that included the man wearing the bib said they were taken moments before the mission took off.

Uribe said he was sorry for the mistake and has apologized to ICRC officials. There will be no official sanction against the man wearing the bib, he indicated.

Such a use of the Red Cross emblem could constitute a "war crime" under the Geneva Conventions and international humanitarian law and could endanger humanitarian workers in the future, according to international legal expert Mark Ellis, executive director of the International Bar Association.

[...]

The ICRC mission in Bogota said in a written statement: "As guardian of international humanitarian law, the ICRC reminds that the use of the Red Cross emblem is specifically regulated by the Geneva Conventions and its Additional Protocols.

"The Red Cross emblem has to be respected in all circumstances and cannot be used in an abusive manner.

"The ICRC as neutral and impartial must have the confidence of all the sides in the conflict in order to carry out its humanitarian work."

Colombian military intelligence used the Red Cross emblem in a rescue operation in which leftist guerrillas were duped into handing over 15 hostages, including former presidential candidate Ingrid Betancourt.

Photographs of the Colombian military intelligence-led team that spearheaded the rescue, shown to CNN by a confidential military source, show one man wearing a bib with the Red Cross symbol. The military source said the three photos were taken moments before the mission took off to persuade the Revolutionary Armed Forces of Colombia (FARC) rebels to release the hostages to a supposed international aid group for transport to another rebel area.

Ellis said the conventions were “very strict” regarding use of the symbol because of what it represented: impartiality, neutrality.

“If you use the emblem in a deceitful way, generally the conventions say it would be a breach. [Based on the information as explained to me,] the way that the images show the Red Cross emblem being used could be distinguished as a war crime,” Ellis added.

[...]

Misuse of the Red Cross emblem is governed by articles 37, 38 and 85 of Additional Protocol One to the Geneva Conventions, the international rules of war. The articles prohibit “feigning of protected status by the use of ... emblems” of neutral parties and say that such misuses are considered breaches of international humanitarian law that qualify as a “war crime.”

Colombia signed the Geneva Conventions in 1949.

That prohibition was put in place to protect the neutrality of the International Committee of the Red Cross and the United Nations in an armed conflict and to guarantee their access to all sides. Use of those emblems by one side of a conflict, for example, could endanger aid workers because those on another side might no longer trust that symbols they see really represent those humanitarian organizations.

[...]

In one of those photographs, about 15 members of a Colombian military intelligence-led team pose for a photo alongside a helicopter. One of the members, dressed in a dark red T-shirt or polo shirt, khaki cargo pants and a black-and-white Arab-style scarf, also wears a bib of the type worn by Red Cross workers.

The bib bears the Red Cross symbol in the center of two black circles on a white background. In the space between the two black circles appear in capital letters the French words “Comité International Genève” (International Committee Geneva).

The same man is standing in the doorway of the helicopter, a Russian-made MI-17 painted white and orange, in another photo. In a third photo, he is pictured walking near the helicopter still wearing the bib.

[...]

DISCUSSION

1.
 - a. What emblems are protected by IHL? Who can use them? For what purposes? Is misuse of the emblem governed only by the Additional Protocols, or also by the Geneva Conventions? At least for the present case, do the Geneva Conventions contain any applicable rules? (HR, Art. 23(f); GC I, Arts 38-44 and 53; GC II, Arts 41-43; GC IV, Art. 18; P I, Arts 8(1) and 18; P II, Art. 12)
 - b. For what purpose was the emblem of the red cross used in this situation? Does such use of the emblem constitute misuse? Do you agree that it constitutes a war crime? If yes, do all misuses of the protected emblems constitute war crimes? When does misuse become a war crime? (HR, Art. 34; GC I, Art. 53; P I, Arts 37(1)(d), 38 and 85(3)(f))
 - c. Does the prohibition to misuse the emblem protect mainly the ICRC's neutrality? Does it protect the neutrality of the UN in any way? Who and what is mainly protected by the prohibition to misuse the emblem?
2.
 - a. Does IHL provide for any automatic sanctions for misuse of the protected emblems? Who has the responsibility to punish such misuse? (GC I, Art. 54; GC II, Art. 45; P I, Art. 18)
 - b. How can misuse of the protected emblems be prevented?
3. Are your answers affected by the fact that the conflict in Colombia is non-international? Would your answers have differed had the conflict been international?

**Document No. 248, ICRC, Visits to Detainees:
Interviews without Witnesses****A. Withdrawal of the ICRC from Burma in 1995: newspaper article**

[Source: Reuters: "Red Cross shuts office in Burma out of frustration," in *Bangkok Post*, June 20, 1995.]

The International Committee of the Red Cross (ICRC) said yesterday it was closing down its office in Rangoon because it had failed to get proper access to political prisoners in Burma.

The ICRC said in a statement it first requested access to political prisoners in Burma in May last year. The ruling State Law and Order Restoration Council (SLORC) finally responded to that request in March.

"This reply was not satisfactory as it took no account of the customary procedures for visits to places of detention followed by the ICRC in all the countries where it conducts such activities," the statement said.

"The ICRC has tried to persuade the SLORC to reconsider its position, but in vain," it said.

Human rights groups and Rangoon-based diplomats estimate there are several hundred political prisoners in Burma including the 1991 Nobel Peace Prize winner Aung San Suu Kyi and many members of the pro-democracy political party she co-founded.

B. ICRC visits to people deprived of their freedom: purpose and conditions

[Source: ICRC Activities, Protection, Detention, Geneva, ICRC, April 4, 2004.
<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/detention-visits-010407>]

Purpose of ICRC visits

In any crisis situation, be it a full scale war or a case of internal political unrest, people deprived of their freedom can be subjected to various forms of abuse. Prisoners are part of the general population that finds itself at risk because of the conflict (in a broad sense). The reason why the ICRC is concerned by these victims of violence who happen to be behind bars is that this particular category of people is normally not accessible to other organizations.

The main purpose of ICRC visits is to ask the authorities to take any steps deemed necessary to improve the detainees' treatment. In case of emergency, the ICRC provides the inmates with medicines, clothing, toilet articles and food.

[...]

It should be underlined, however, that it is up to the detaining authorities to ensure the protection of the people they take into custody, and that they can be held accountable if they fail to do so.

The ICRC's activities on behalf of prisoners have four main objectives:

- to prevent or put a stop to disappearances and extra-judicial killings;
- to prevent or put an end to torture and ill-treatment;
- to improve conditions of detention where necessary;
- to restore contact between detainees and their families.

Experience has shown that prison visits and the physical presence in a place of detention of people from outside can be an effective way of preventing the occurrence of abuses.

[...]

All ICRC visits follow a standard procedure and take place only if certain conditions are fulfilled

ICRC visits to places of detention start with a preliminary exchange of views with the people in charge there to explain how the visits themselves are organized and carried out. Together with those same authorities, the delegates then inspect the entire premises (cells, dormitories, latrines, showers, exercise yards, visiting rooms, kitchens, workshops, sports areas, places of worship, infirmary, punishment and solitary confinement cells, etc.). The most important part of the visit is the private conversations the delegates have with each prisoner who so requests, as well as with those to whom the delegates themselves wish to speak in private, at which neither the authorities nor the guards are present. In this way the ICRC team tries to find out what the prisoners regard as their main problems.

After analysing the information gathered and their own observations, the delegates submit their findings, conclusions and recommendations, together with a plan of action, to the people in charge of the place of detention and take note of their comments. In many cases, problems can be solved by establishing an ongoing working relationship with the local prison authorities.

The next step is to approach the higher authorities. Problems such as overcrowding, medical transfers and water or food supplies very often depend not only on the prison director but also on other authorities such as the Prisons Department or the Ministry of Health. Such approaches may take the form of interviews at various levels or of correspondence or written reports, depending on how great and how urgent the problem is.

The ICRC regularly provides the national authorities with a summary report on its findings over a given period or in a specific category of places of detention, which covers not only the problems identified but also any improvements observed or steps taken.

Prior conditions

Drawing on the experience acquired over the years, the ICRC has established guidelines enabling it to evaluate a prison system with maximum objectivity and submit concrete and realistic proposals which take local customs and standards into account.

Whatever the circumstances, the ICRC visits people deprived of their freedom only if the authorities allow it:

- to see all prisoners who come within its mandate and to have access to all places at which they are held;
- to speak with prisoners in private, without any third parties being present;
- to draw up a list of prisoners during its visit whom it considers to come within its mandate, or to receive such a list from the authorities and to check and supplement it if necessary;
- to repeat its visits to all prisoners of its choice if it considers that the situation so warrants, and to do so as often as it wishes.

Confidential reports

Until the late 1940s, the ICRC used to publish its reports on visits to prisoners. However, because its reports were sometimes used polemically for political purposes, thereby jeopardizing further dialogue with the authorities, the ICRC had to stop publishing them. Since then, ICRC reports have been submitted solely to the authorities concerned.

The ICRC reserves the right to publish its entire report if a detaining authority issues an abridged and consequently incomplete version of it. Whenever the ICRC visits prisoners of war captured during an international armed conflict, it also sends a copy of its report to their power of origin.

[...]

Private interviews with prisoners: the cornerstone of ICRC action

Conversations in strict privacy between delegates and individual prisoners, without any authorities present, are the cornerstone of ICRC action on behalf of people deprived of their freedom. Such interviews without witnesses, as they are sometimes called, serve a dual purpose: they give the prisoners a break from prison routine, one in which they can speak freely about what matters most to them and be sure of being heard; and they enable the ICRC to find out all about the conditions of detention and the treatment of prisoners. The interviewing delegate also enquires how the arrest and the subsequent questioning took place, and about the conditions of detention at the various places where the prisoner was temporarily held before arriving at the place visited. In addition, the delegate may be given information about fellow prisoners whose arrest has not yet been notified to the ICRC or whom it has not been able to contact. He or she will ensure that the interview takes place without interference from other prisoners, who might seek to exert pressure.

The task of conducting such interviews is all the more delicate in that giving such an account often revives painful memories of traumatic experiences – and there is no question of subjecting the prisoners to a fresh interrogation. There are no precise rules for interviewing them: it is up to the delegate to assess the situation on a case-by-case basis and adjust to it to create an atmosphere of trust. Sometimes the chance to speak to somebody from outside is enough for the individual prisoners to confide in the delegate, while at others it may take several visits before they will tell their story. Then again, they may open up only to the ICRC doctor. On the strength of the information thus gathered and after cross-checking, the ICRC decides what action should be taken.

Whenever necessary, interpreters are used to communicate with the prisoners. They are recruited by the ICRC itself and, to avoid any pressure, they are never nationals of the country in which the visits take place. If it has no suitable interpreters available, the ICRC may ask the prisoners to appoint one or more from among themselves; this practice is seldom adopted, however, since the prisoner interpreting a fellow inmate's remarks may be endangered by doing so or may distort what he or she says.

A professional code of conduct drawn up with the prisoner interests in mind

To the ICRC, the interests of the individual prisoners visited prevail over all other considerations. Their situation may lead to diplomatic approaches or some other intervention, but must always be handled with the utmost caution: a risk of reprisals against prisoners if allegations of ill-treatment are reported to the prison authorities may cause the ICRC to postpone its call for an investigation. Delegates will nevertheless contact other officials – often at a higher level – to prevent such situations from recurring. On no account will the ICRC quote a prisoner's statements without his or her express permission. It takes care to see that its interventions do not have any negative impact on the day-to-day life of inmates, and adapts them accordingly. Where there is overcrowding, for example, the most logical solution would presumably be to transfer some prisoners to other places of detention. But in many cases they might thus be taken far away from their families and deprived of their material support, which is sometimes vital. So delegates make sure that any transfers make due allowance for that consideration.

The ICRC is also careful not to disrupt the prisoners' own internal organization. To withstand the pressures of prison life to the best of its ability, every group of prisoners sets up its own structures which sometimes reflect the social hierarchy and political movements of the outside world. To request the transfer of prisoners from one block to another may upset that internal structure and have serious repercussions such as fights, rivalries between groups or the deprivation of certain advantages linked to residence in a given block. On the other hand, the ICRC may ask for prisoners to be transferred because they are being taunted or ill-treated by cellmates for political or other reasons.

[...]

C. ICRC resumes its activities in Myanmar, May 6, 1999

[Source: ICRC News release 99/26, 06/05/1999,
<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jppe?opendocument>]

ICRC begins visits to detainees and prisoners in Myanmar

ICRC (Geneva) – The International Committee of the Red Cross (ICRC) today began visiting detainees and prisoners held at Insein Prison near Yangon, the capital of the Union of Myanmar.

Under the terms of a verbal agreement with the State Peace and Development Council (SPDC), the ICRC has access to all places of detention in the country. The visits are to take place in accordance with the ICRC's standard procedures.

[...]

D. ICRC pressed to close field offices, November 11, 2006

[Source: ICRC News release 06/133, 27/11/2006,
<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmar-news-27112006?opendocument>]

Myanmar: ICRC pressed to close field offices

Geneva/Yangon (ICRC) – The government of Myanmar [...] ordered the International Committee of the Red Cross (ICRC) to close its five field offices in the country [...] effectively making it impossible for the organization to carry out most of its assistance and protection work benefiting civilians who live in difficult conditions in border areas.

The Myanmar authorities also announced that ICRC visits to detainees would not be allowed to resume. Those visits were halted in December 2005 since the ICRC was no longer able to carry them out in accordance with its standard procedures.

The ICRC utterly deplores the decision by the Myanmar authorities to close its field offices as it places in jeopardy the accomplishments of the humanitarian work already carried out in behalf of the most vulnerable among the country's population, in particular people held in prison or living in sensitive border areas.

[...]

Owing to the ICRC's increasing inability to do effective work in Myanmar and to the deterioration, and subsequent cessation, of dialogue with the government, the organization's activities have had to be scaled down in recent months to a few limited projects [...].

Over the past 12 months, the ICRC has tirelessly sought to restore a constructive dialogue during meetings with the government of Myanmar to address pressing issues of humanitarian concern. [...] Unfortunately, despite the ICRC's strenuous efforts, there has been no sign of the deadlock being broken, a fact which now forces the organization to review its operational framework in the country.

E. ICRC Annual Report 2008

[Source: ICRC Annual Report 2008: Myanmar, 27/05/2009, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-myanmar/\\$File/icrc_ar_08_myanmar.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-myanmar/$File/icrc_ar_08_myanmar.pdf)]

[...]

The ICRC had not visited detainees or monitored their treatment and living conditions in Myanmar since December 2005, as the authorities would no longer allow the organization to carry out visits in accordance with its standard procedures. Detainees registered during previous visits and individual cases continued to receive ICRC-supported family visits once a month and, upon their release, had their travel costs home covered by the ICRC.

However, detainees and their relatives were unable to correspond with each other through RCMs owing to the suspension of ICRC visits to places of detention.

[...]

Detainees in places of detention affected by the cyclone

Twenty prisons and labour camps housing some 17,000 inmates and 2,000 staff were thought to have been affected by Cyclone Nargis. To help them cope with the effects of the cyclone, detainees in places of detention identified by the Ministry of Home Affairs received basic food items, blankets, clothing, essential medicines and soap provided by the ICRC.

Following a constructive dialogue with the Prisons Department, the ICRC was permitted to assess damage to infrastructure in the worst-affected prisons. Rehabilitation projects focusing on kitchens and water systems were then initiated.

[N.B.: Following the temporary authorization to access detainees affected by Cyclone Nargis, the ICRC was not able to resume its activities according to its standards procedures, as for April 2010.]

Case No. 249, Germany, Government Reply on the Kurdistan Conflict

[Source: German Bundestag, Document 12/8458, 12th legislative period, September 7, 1994; original in German, unofficial translation.]

**REPLY by the Federal Government to the written question
submitted by Bundestag member Vera Wollenberger
and the parliamentary party of the Alliance 90/Greens**

– Document 12/8219 – Kurdistan conflict

[The reply was issued on behalf of the Federal Government in a letter of the Federal Ministry of Foreign Affairs dated September 5, 1994. The document also sets out – in small type – the text of the questions.]

The Kurdish war of self-determination in Turkey claimed 4,200 lives on either side in 1993 (*Frankfurter Rundschau*, March 21, 1994). A total of 874 villages were destroyed. According to Prime Minister Tansu Ciller, in the last ten years the civil war has cost the Turkish State alone DM 95 billion (*Frankfurter Rundschau*, March 22, 1994). [...]

On April 28, 1994 the German Bundestag adopted a motion by the Parliamentary Social Democratic Party (in accordance with a resolution of April 12, 1994 put forward by the Foreign Affairs Committee, Document 12/7224), stating that the German Bundestag considers “the Turkish government’s policy of attempting to defeat the PKK by military force alone to be hopeless” and that “an escalation of the violence will not resolve the problem, but will simply cause greater harm and render means of reaching a peaceful solution more difficult.” [...]

The objective of German foreign policy should be to foster dialogue between the parties in conflict and to promote a peaceful solution. An initial step could, however, be to urge both sides to observe human rights and to comply with international humanitarian law applicable in armed conflict. At present both those principles are increasingly being violated in the conflict zone. [...]

8. To the knowledge and in the estimation of the Federal Government does the PKK satisfy the requirements of Article 1 of the regulations annexed to the Hague Convention of 1907? If not, which requirements does it fail to satisfy?
If so, how can that fact be reconciled with the accusation that the PKK is a terrorist organization?

The term “belligerent” is defined in Article 1 of the Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land. Under the Convention the laws, rights and duties of war apply not only to armies but also to militia and volunteer corps fulfilling specific conditions listed in Article 1.

Prior to any examination of whether the PKK is to be deemed a belligerent within the meaning of that provision of Article 1, it must first be established whether Hague Convention IV is in fact applicable to the Kurdistan conflict. Article 2 of the Convention, known as the all-participation clause, stipulates that the provisions contained therein

do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. Therefore, the Convention does not apply to the Kurdish conflict. [...]

12. The "International Conference on North-West Kurdistan", held in Brussels on March 12 and 13, 1994, called upon the PKK (para. 20 of the final resolution) "to submit to the Swiss government – as the depositary of 1977 Protocol I additional to the 1949 Geneva Conventions – a declaration expressing its willingness to be bound by the applicable rules of international law, as provided for in Article 96, para. 3, of said Protocol I." The Secretary General of the PKK, Abdullah Özalp, stated his willingness to comply with that request.

Is the Federal Government willing to demand the same from the Turkish government, as the very first step towards de-escalation?"

Under Article 96, para. 3, of Protocol I additional to the 1949 Geneva Conventions, an "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, para. 4," may address a unilateral declaration to the depositary by which it undertakes to apply the Conventions and the Protocol in relation to that conflict.

Conflicts of the type referred to in Article 1, para. 4, include armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". Neither of those criteria apply to the Kurdish conflict.

The Federal Government would, however, welcome a move by both parties to the Kurdish conflict to comply with the provisions relating to the law of war contained in the Geneva Conventions and Protocol I. In any event, Article 3 common to all the Geneva Conventions, which sets minimum standards to be observed by all parties to a non-international conflict, does apply. Furthermore, Article 3, para. 2, encourages the parties to an internal conflict specifically to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions.

DISCUSSION

1. Is the situation in eastern Turkey/Kurdistan an armed conflict? Does IHL cover the situation? How should a declaration by the PKK under Art. 96(3) of Protocol I be interpreted? Does it oblige Turkey to respect the IHL of international armed conflicts? How could that declaration be interpreted under the IHL of non-international armed conflicts? (GC I-IV, Art. 3)
2.
 - a. Does the Hague Convention IV apply to the conflict? If Art. 1 of the Hague Regulations does not apply to the PKK, is it because not all parties to the conflict are parties to the Hague Convention? Because the PKK is not party to that Convention? Because the PKK is not a party to an international armed conflict?
 - b. If the PKK is not bound by Art. 1 of the Hague Regulations, does it not have any obligation to distinguish its fighters from the civilian population?
3. If PKK fighters are not covered by or fail to respect Art. 1 of the Hague Regulations, do they lose any protection under IHL?

Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland

[Source: *IRRC*, No. 241, 1984, pp. 239-240.]

Conflict in Afghanistan

The first three Soviet soldiers, who had been captured in Afghanistan by opposition movements and transferred to Switzerland by the ICRC on May 28, 1982, have reached the end of their two-year period of internment agreed upon with the parties concerned. One of them, who confirmed his desire to be transferred to his country of origin, has returned to the USSR. The other two soldiers informed the Swiss authorities that they did not wish to return to their country. Their status will be determined by the Swiss authorities in accordance with the legislation in force.

The ICRC took this opportunity to make public its position regarding all the victims of the Afghan conflict in the following press release, published on May 20, in Geneva:

"Since 1979, the ICRC has made every effort to provide protection and assistance to the civilian and military victims of the armed conflict in Afghanistan, in accordance with the mandate conferred upon it in the Geneva Conventions and the statutes of the International Red Cross. On several occasions, it has reminded the parties whose armed forces are engaged in the conflict of their obligations under international humanitarian law. However, in spite of repeated offers of services to the Afghan government and representations to the government of the USSR, the ICRC has only on two occasions – during brief missions in 1980 and 1982 – been authorized to act inside Afghanistan. Consequently, the ICRC has to date been able to carry out very few of the assistance and protection activities urgently needed by the numerous victims of the conflict on Afghan territory.

Due to the serious consequences of the situation in Afghanistan, the ICRC decided in 1980 to undertake protection and assistance activities in Pakistan. It opened two surgical hospitals for Afghan war wounded, the first in Peshawar, the second, in July 1983, in Quetta. In addition, being deeply concerned by the plight of persons captured by the Afghan opposition movements and by information to the effect that several such persons had been executed, the ICRC tried to find a way of protecting the lives of both Afghan and Soviet captured persons.

Negotiations carried out by the ICRC, with successively, the USSR, the Afghan opposition movement, Pakistan and Switzerland led to partial success. The parties agreed to the transfer and internment in a neutral country of Soviet soldiers detained by the Afghan opposition movements, in application, by analogy, of the Third Geneva Convention, relative to the treatment of prisoners of war.

On the basis of this agreement, the ICRC has had access to some of the Soviet prisoners in the hands of the Afghan movements and has informed them, in the course of interviews without witness, of the possibility for transfer by the ICRC to Switzerland, where they would spend two years under the responsibility and watch of the Swiss government before returning to their country of origin.

The ICRC made this proposal to the Soviet prisoners on the basis of the principle worked out at the 1949 Diplomatic Conference and stipulated in the Geneva Conventions, i.e. that repatriation of a prisoner of war signifies the return to a normal situation and is in the best interests of the prisoner. The above-mentioned procedure therefore applies only to Soviet soldiers who consider themselves to be in a situation comparable to that of a prisoner of war in enemy hands. Consequently, the entire operation is based on respect for the principle according to which the ICRC never acts against the wishes of the person it is assisting.

To date, eleven Soviet soldiers have accepted the proposal. The first three were transferred to Switzerland on May 28, 1982. Eight others arrived in August and October 1982, January and October 1983, and February and April 1984. One of them escaped to the Federal Republic of Germany in July 1983.

The first three Soviet soldiers reach the end of their period of internment on May 27, 1984. In conformity with the spirit of the provisions of international humanitarian law in this respect, the Swiss authorities, under whose responsibility the soldiers are, have taken the measures necessary to repatriate those internees still wishing to return to their country of origin.

The ICRC's main concern since the beginning of the conflict has been the unacceptable restriction of its humanitarian activities. In view of the situation, which has inflicted so much suffering on the Afghan population for over four years, the ICRC expects all the parties to the conflict to enable it by all means possible to protect and assist in all places all of the victims of that conflict, and thereby fully respect International Humanitarian Law and its principles."

DISCUSSION

1. How would you qualify the conflict in Afghanistan? What consequences would the qualification of the conflict have upon the parties involved in Afghanistan?
2. When soldiers are captured by the adverse party, are they automatically considered POWs? Is the qualification of the conflict crucial in that regard? Why did the Soviet and Afghan authorities sign an agreement stating that after a period of two years the captured soldiers should be released? Theoretically, in an international armed conflict, would the parties need to have signed an agreement on the release of POWs during the conflict? Is there a provision in IHL which states that POWs have to be released at the end of hostilities? During the hostilities? (GC III, Arts 109 and 118)
3. Which Soviet soldiers consider themselves to be "in a situation comparable to that of prisoners of war"? Would they not automatically be considered POWs simply by virtue of the fact that one may assert that the situation is an international armed conflict? (GC III, Arts 2 and 4) Which Soviet soldiers do not "consider themselves to be in a situation comparable to that of prisoners of war"? What is their legal status? Which provisions of IHL would apply to those in the hands of the Afghan rebels? (GC III and IV, Art. 4)
4. When can a POW be interned in a third country? (GC III, Arts 110(2) and 111)
5. Under which provisions can the ICRC take the initiative as an intermediary between the parties in the Afghan armed conflict? (GC I-IV, Art. 3 and Arts 9/9/9/10 respectively; PI, Art. 81(1))
6. What is the status of the Soviet soldiers in Switzerland? Do they have to be treated as POWs? Does the ICRC have the right to visit them? What is the justification for detaining captured combatants

under IHL? Under international human rights law? How would you, as a Swiss judge, rule on their request for release? (GC III, Art. 4(B)(2))

7. Under IHL, does Switzerland have the right or perhaps even the obligation not to repatriate POWs who do not wish to be repatriated?
8.
 - a. At the end of the two-year period, the ICRC, in accordance with its standard practice, asked the captured soldiers whether or not they wanted to go back to their country of origin. Is this practice foreseen in IHL? On what premises can it be justified? (GC III, Art. 118)
 - b. In this case, could the two captured soldiers who refused to go back to the Soviet Union be considered at that point as refugees seeking asylum?
9. Why do you think that the ICRC did not have access to victims in Afghanistan? Was the refusal to give the ICRC access to Afghanistan a violation of IHL? What can the ICRC do to make the authorities grant its request to act inside the country? To make the parties to the conflict comply with Convention III? (GC III, Arts 3 and 126; GC IV, Arts 3 and 143)

Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women

[N.B.: After the events related in this case, the policy referred to was no longer applied by the Taliban Afghan authorities. See ICRC News: Afghanistan: Women gradually being re-admitted to Kabul Hospitals, 97/47, November 26, 1997.]

A. Women barred from Kabul hospitals

[Source: Perrin, J.-P., "Les hôpitaux de Kabul interdits aux femmes," in *Libération*, October 23, 1997; original in French, unofficial translation.]

Women Barred from Kabul Hospitals [...]

Taliban prohibiting treatment for sick women and turning them out of the hospitals [...]

First, the women of Kabul were forbidden to work. Next they were forbidden to study or train for a profession. Then it was decreed that they could go out in public only if accompanied by a husband, father or brother. But nobody in Kabul, previously a very Westernized city, would have imagined that the Taliban, who took control of the Afghan capital just over a year ago, would go so far as to prevent women from receiving medical attention. However, this was what the latest directive issued by the "students of Islamic theology" on 6 September ordered in very clear terms. It is now strictly forbidden for any of the town's public hospitals to treat women except in emergencies – a rather theoretical and flimsy proviso. And the few female staff remaining in these hospitals are not allowed to give any treatment at all. From now on, until the (hypothetical) opening of a hospital reserved for women, there is only one establishment to treat all the female inhabitants of Kabul. But, according to the Western doctors who have visited it, "the Central Polyclinic" has no running water, no electricity above the second floor, no laboratory, no functioning operating theatre and only one microscope. What is worse, it has a mere 45 beds available for the entire female population of a city which has almost one and a half million inhabitants and, moreover, is devastated by the war and plagued by shortages of all kinds.

Since the decree was issued, not only are sick women being refused treatment but those already in hospital are being turned out – and this is in a town with a large number of medical facilities. In a recently published document, *Médecins sans frontières* (MSF) reported that 12 female patients, some of them with bullet wounds, had been turned out of one of the major hospitals, Wazir Akbar Khan, on October 19, and only two of them were later found at the Polyclinic. That same day saw the dismissal of the last 15 female employees of the Karte Se hospital, which may soon cease to function because male workers are not willing to take charge of the laundry. Worse still, the decision whereby hospitals could treat women in emergencies, taken under Western NGO pressure by the Minister of Health, *Mullawi Abbas*, has been widely condemned. Already the emergency departments of two of the four large Kabul hospitals are refusing to admit women. At the beginning of October a woman in a deep coma was turned away and sent home. In September, another woman suffering from a highly

contagious form of tuberculosis was also sent home before she had completed her course of treatment, thus exposing her entire family to the risk of infection. And recently a doctor at one of the large hospitals disclosed that he had not dared to treat a woman suffering from 80% burns because he would have had to remove her clothing.

The NGOs present in Kabul are even more “sickened” by the violence with which the ministerial directives are applied. On September 27, the Ministry decided to close down all private clinics with in-patient facilities, and just two days later members of the Taliban entered one of these clinics and violently ejected two women who were in the process of giving birth. “What we are seeing is the total destruction of a health system which until now, in contrast to the education system, has remained relatively unscathed. People should be aware that today women are dying at home in Kabul because the Taliban will not allow them access to treatment. First of all, these women are afraid to go out. And then, when they do pluck up the courage to leave their homes, it is often too late and their condition is irremediable. The same applies to their children”, declared Pierre Salignon, the coordinator of the MSF mission in Kabul. [...]

What the military/religious order of the Taliban is endeavouring to establish is a system of health care conforming to the ideal Islamic society which they are advocating, a system in which men and women are kept strictly apart, the women often living a completely cloistered life. The most incredible aspect of the situation is that this policy of apartheid is being financed, initiated even, by the World Health Organization. MSF notes in its report that the notorious directive depriving Kabul’s female inhabitants of medical treatment coincided with the beginning of work on the renovation of the Rabia Balkhi hospital, which is destined to become the only “women’s hospital” in the capital and might open in a year’s time. The main donor for this construction project turns out to be WHO, which has made a contribution of \$64,000 for the first six months.

B. Security Council resolution 1193 (1998)

[Source: UN Doc. S/RES/1193 (August 28, 1998)]

The Security Council,

Having considered the situation in Afghanistan,

Recalling its previous resolution 1076 (1996) of October 22, 1996 and the statements of the President of the Security Council on the situation in Afghanistan,

Recalling also resolution 52/211 of the General Assembly,

Expressing its grave concern at the continued Afghan conflict which has recently sharply escalated due to the Taliban forces’ offensive in the northern parts of the country, causing a serious and growing threat to regional and international peace and security, as well as extensive human suffering, further destruction, refugee flows and other forcible displacement of large numbers of people, [...]

9. *Urges* all Afghan factions and, in particular the Taliban, to facilitate the work of the international humanitarian organizations and to ensure unimpeded access and adequate conditions for the delivery of aid by such organizations to all in need of it;

10. *Appeals* to all States, organizations and programmes of the United Nations system, specialized agencies and other international organizations to resume the provision of humanitarian assistance to all in need of it in Afghanistan as soon as the situation on the ground permits; [...]
12. *Reaffirms* that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of August 12, 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches; [...]
14. *Urges* the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights as well as violations of international humanitarian law and to adhere to the internationally accepted norms and standards in this sphere [...].

DISCUSSION

1. Is the fighting in Afghanistan an international or a non-international armed conflict? Are the provisions of the Conventions on grave breaches applicable in non-international armed conflicts? Does para. 12 of the Security Council resolution qualify the conflict as an international armed conflict? Or does it affirm that the concept of grave breaches applies in non-international armed conflicts? (GC I-IV, Arts 2 and 3, Arts 50/51/130/147 respectively; GC IV, Art. 4)
2.
 - a. Does the requirement to separate health facilities for women and men violate IHL? Would you answer differently if such separation meant that women did not receive equal care and treatment? (GC I-IV, Art. 3) Is a complete separation between the health systems for men and women compatible with IHL if both systems provide the same standard of treatment? Is such a separation compatible with international human rights law? (*See* para. 14 of the Security Council resolution)
 - b. Would the situation under IHL be different if the IHL of international armed conflicts were applicable? (GC I, Art. 12; P I, Art. 10)
 - c. In what circumstances does the treatment of women described in the newspaper article amount to a grave breach of IHL, if the law of international armed conflicts is applicable? (GC I, Art. 50; GC IV, Art. 147; P I, Arts 11(4) and 85)
3.
 - a. Do such restrictions for treatment make humanitarian action impossible in these particular circumstances?
 - b. If humanitarian organizations choose not to stay under such circumstances, is their departure a protest against the lack of adequate treatment and care for women? Or against the policy of separating men and women? Is the latter not a cultural judgement? Should aid organizations not respect and adapt to the culture and beliefs of the area in which they are working? Do they always have to adapt and to what extent? Should they ask Afghan women whether they agree to or wish to have separate treatment? Should they always respect the will of those concerned?
 - c. If a humanitarian organization chose to leave the region in protest at such circumstances would this not, in effect, punish the women, as they would receive even less aid?

Case No. 252, Afghanistan, Destruction of the Bamiyan Buddhas

[Source: MATSUURA Koichiro, "Les crimes contre la culture ne doivent pas rester impunis," in *Le Monde*, Paris, 16 March 2001. Original in French, unofficial translation.]

Crimes against culture must not go unpunished

A crime against culture has just been committed. By destroying the huge Buddha statues that had been watching over the Bamiyan Valley for 1,500 years, the Taliban have done irreparable damage. They have destroyed not only part of Afghanistan's historical legacy, but also exceptional evidence of the meeting of several civilizations and a heritage that belonged to the whole human race.

This crime was perpetrated coolly and deliberately. No military action under way in that part of Afghanistan can be invoked as an excuse. In recent years, the caves surrounding the Buddhas – with wall-paintings by the monks – were defiled and defaced by the soldiers of the various factions that had bivouacked there. Arms were stored there, at the very feet of the Buddhas, which were reduced to the level of shields. During those years, the statues were also targeted several times. That was intolerable enough but war might explain those attacks – even if it cannot justify them. The systematic destruction recently carried out cannot even find that feeble excuse.

This crime against culture was committed in the name of religion – or rather, in the name of a religious interpretation that is both questionable and controversial. Some of the leading theologians in Islam have challenged that interpretation. By ordering the destruction of masterpieces of Afghan heritage in the name of his faith, Mullah Omar claims to know more about that faith than all the generations of Muslims down the last 15 centuries, all the Muslim conquerors and leaders who spared Carthage, Abu Simb or Taxil – more even than the prophet Mohammed himself, who chose to preserve the architecture of the Kaaba at Mecca.

[...] Apart from these Buddhas being a huge loss, what has just been done is unprecedented. For the first time, a central authority – albeit unrecognized – has usurped the right to destroy part of our common heritage. It is the first time that UNESCO, mandated by its constituent act to preserve our universal heritage, has been confronted by such a situation. [...]

UNESCO had largely contributed to it by working in three main directions: the protection of cultural assets in case of armed conflict pursuant to the Hague Convention [See Document No. 10, Conventions on the Protection of Cultural Property [Part A.]]; the fight against illegal trading in those same goods pursuant to various normative measures; and since 1972, the promotion of the very concept of universal heritage. Moreover, the success of the World Heritage List aptly illustrates the extent of this awareness of and new concern for our heritage.

[...] It is not mere stones that have been destroyed. It was an attempt to wipe out a history, a culture or rather testimonies to the possibility of a meaningful encounter between two great civilizations and a lesson in intercultural dialogue.

That is why the act of madness perpetrated by the Taliban in Bamiyan or against the pre-Islamic statues in the museums in Afghanistan must be defined as a crime. A backward cultural step of this kind must not be permitted. This crime calls for a new type of sanctions. Just a few days ago, the International Criminal Tribunal for the former Yugoslavia set us an example by including the destruction of historic monuments in the 16 charges in its undertaking in respect of the 1991 attack against the historic port of Dubrovnik in Croatia [See **Case No. 219**, ICTY, *The Prosecutor v. Strugar* [Part B.]].

The international community must not remain passive; it must not tolerate crimes against cultural assets any longer. What the Taliban has done was an isolated act but one replete with danger and UNESCO will respond with appropriate measures. In particular, by combating the trade in Afghan cultural assets, which is unfortunately sure to increase, and by saving the rest of that country's heritage – pre-Islamic or Islamic – as well as by considering, within the framework of the World Heritage Committee, reinforcing protection. The international community has lost the Bamiyan Buddhas; it must not lose anything else.

Koïchiro Matsuura is Director-General of UNESCO.

DISCUSSION

1. Given that, at the time, an armed conflict was under way between the Taliban regime and the forces of the internationally recognized government, but that the fighting was not the cause of the Buddhas' destruction, do you think that IHL is applicable? (1954 Hague Convention, Art. 19 [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part A.]]; P II, Art. 16)
2. What are the rules of IHL protecting cultural property? Is it permitted to destroy such property? If yes, in what circumstances? Can weapons be stored in cultural property? Can cultural property be used to protect a military objective? (HR, Art. 27; 1954 Hague Convention, Arts 4, 9 and 19; P I, Art. 53; P II, Art. 16; the Second Protocol to the 1954 Hague Convention [See **Document No. 10**, Conventions on the Protection of Cultural Property [Part C.]])
3. Are these rules applicable in the event of a non-international armed conflict? Is the protection of cultural property part of customary IHL [See **Case No. 43**, ICRC, Customary International Humanitarian Law [Rules 38-41]]? Are these rules applicable even if Afghanistan is not party to some of the instruments of IHL prohibiting the destruction of cultural property?
4. From what additional legal protection would the Bamiyan Buddhas have benefited if they had been included on the World Heritage List established by the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (<http://whc.unesco.org/en/list>)? Or if they had been the subject of special or enhanced protection? (1954 Hague Convention, Arts 8 ff.; Second Protocol to the 1954 Hague Convention, Arts 10 ff.)
5. To what extent could destruction of this kind be considered a crime, or a war crime? Are the conditions for such offences met in this case? (1954 Hague Convention, Art. 28; P I, Art. 85(4); ICC Statute, Art. 8 (2)(b)(ix) and (e)(iv) [See **Case No. 23**, The International Criminal Court [Part A.]])

Case No. 253, Afghanistan, Operation “Enduring Freedom”**A. The United States uses cluster bombs**

[Source: GARDAZ, Samuel, “Les États-Unis utilisent des bombes à fragmentation”, in *Le Temps*, Geneva, 26 October 2001. Original in French, unofficial translation.]

The United States uses cluster bombs

The United Nations confirmed on Thursday that nine Afghan civilians had been killed by controversial weapons. [...]

The United States each day unleashes a little more of its range of weapons against the Taliban and seems to have gone one step further this week. On the twentieth day of the bombing of Afghanistan, US aircraft are said to have dropped cluster bombs on targets close to Herat in the west and on the fronts north of Kabul and near Mazar-i-Sharif. On Thursday a Pentagon official admitted anonymously that such weapons had been used.

Victims in Herat

According to the United Nations spokesperson in Islamabad, these missiles – which scatter hundreds of bomblets if they open before they touch the ground – have claimed the lives of nine civilians in Herat since the start of the week. For technical reasons, these sub-munitions, which are the size of a soft drink can, do not necessarily explode when they hit the ground and turn into *de facto* mines. One of the nine victims is said to have set off one of these sub-munitions by handling it.

The UN wants explanations

The United States’ use of cluster bombs, a controversial weapon which has not been formally prohibited by international treaty, has angered several humanitarian organizations. The United Nations, which is carrying out de-mining campaigns in Afghanistan, asked Washington for clarification. The International Committee of the Red Cross (ICRC) did not give an opinion. In an “official statement” issued on Wednesday, it merely expressed its increasing concern “about the impact in humanitarian terms of the war in Afghanistan”. Darcy Christen, deputy ICRC spokesman, pointed out that “the ICRC only gives an opinion about the legitimacy of military means employed as a last resort and always bases its views on its own intelligence gathered in the field”. Like the other international organizations, the ICRC has evacuated its expatriate staff from Afghanistan.

An ICRC project

Cluster bombs, which were last used by the United States in Kosovo in 1999, are controversial. According to a Human Rights Watch report dated January 2000, in

May 1999 the US supreme command issued a secret order prohibiting their use by its armed forces. Next December in Geneva, when the United Nations Convention on Certain Conventional Weapons of 1980 is reviewed, the ICRC will propose, among other recommendations, that it be prohibited to use sub-munitions, including cluster bombs, against military targets near populous civilian areas.

A bomb which splits into many others [...]

Cluster bombs are tubes which each contain 200 to 300 sub-munitions. Dropped by plane or fired by the artillery, the bombs release these sub-munitions, each the size of a soft drink can, at an altitude of between 100 and 1,000 metres. These sub-munitions can cover an area of 200 metres by 400 metres, the equivalent of eight football pitches. By scattering shrapnel over a range of 76 metres, each bomblet has an explosive force capable of piercing through armour plating, wiping out troop concentrations or neutralising minefields. Cluster bombs were used during the Viet Nam war and turn into mines when their sub-munitions do not explode: according to NATO, 29,000 sub-munitions did not explode in Kosovo.

B. Bombing of ICRC warehouses

1. ICRC, Press Release of 16 October 2001

[Source: ICRC, Press Release, 01/43, 16 October 2001; available on <http://www.icrc.org>]

ICRC warehouses bombed in Kabul

Geneva (ICRC) – Shortly after 1.00 p.m. local time today, two bombs were dropped on an ICRC compound in Kabul, wounding one of the organization's employees who was guarding the facility. He was taken to hospital and the latest reports from ICRC staff in the Afghan capital indicate that he is in stable condition.

The compound is located two kilometres from the city's airport. Like all other ICRC facilities in the country, it is clearly distinguishable from the air by the large red cross painted against a white background on the roof of each building.

One of the five buildings in the compound suffered a direct hit. It contained blankets, tarpaulins and plastic sheeting and is reported to be completely destroyed. A second building, containing food supplies, caught fire and was partially destroyed before the fire was brought under control.

The ICRC strongly regrets this incident, especially as one of its staff was wounded. It has approached the United States authorities for information on the exact circumstances.

International humanitarian law obliges the parties to conflict to respect the red cross and red crescent emblems and to take all the precautions needed to avoid harming civilians.

2. ICRC, Press Release of 26 October 2001

[Source: ICRC, Press Release, 01/48, 26 October 2001; available on <http://www.icrc.org>]

Bombing and occupation of ICRC facilities in Afghanistan

Geneva (ICRC) – The International Committee of the Red Cross (ICRC) deplores the fact that bombs have once again been dropped on its warehouses in Kabul. A large (3X3 m) red cross on a white background was clearly displayed on the roof of each building in the complex. Initial reports indicate that nobody was hurt in this latest incident.

At about 11.30 a.m. local time, ICRC staff saw a large, slow-flying aircraft drop two bombs on the compound from low altitude. This is the same compound in which a building was destroyed in similar circumstances on 16 October. In this latest incident, three of the remaining four buildings caught fire. Two are said to have suffered direct hits.

Following the incident on 16 October, the ICRC informed the United States authorities once again of the location of its facilities.

The buildings contained the bulk of the food and blankets that the ICRC was in the process of distributing to some 55,000 disabled and other particularly vulnerable persons. The US authorities had also been notified of the distribution and the movement of vehicles and gathering of people at distribution points.

The ICRC also deplores the occupation and looting of its offices in Mazar-i-Sharif which were taken over by armed men three days ago. Office equipment, including computers, and vehicles were stolen. ICRC representations both to local authorities and to the Taliban ambassador in Pakistan have had no effect.

The ICRC reiterates that attacking or occupying facilities marked with the red cross emblem constitutes a violation of international humanitarian law.

3. Release from the Central Command of the United States of America

[Source: *U.S. inadvertently strikes residential area and ICRC warehouses*, Centcom release number 01-10-06, 26 October 2001.]

October 26, 2001

Release number: 01-10-06

For immediate release

U.S. Inadvertently strikes residential area and ICRC warehouses

Macdill AFB, FL – At approximately 8 p.m. EDT yesterday (Oct. 25), two U.S. Navy F/A-18C Hornets each dropped one 2,000-pound GPS-guided Joint Direct Attack Munition (JDAM) on warehouses used by the International Committee of the Red Cross (ICRC) in Kabul, Afghanistan.

At approximately the same time, an F/A-18C intending to strike the warehouses inadvertently dropped one 500-pound GBU-12 bomb in a residential area approximately 700 feet south of the warehouses.

At 4 a.m. EDT today (Oct. 26), two B-52H Stratofortress bombers each dropped three 2,000-pound JDAMs on the same warehouse complex.

The ICRC in Geneva has issued a statement indicating that no one was hurt in this incident. The U.S. sincerely regrets this inadvertent strike on the ICRC warehouses and the residential area.

Although details are still being investigated, preliminary indications are that the warehouses were struck due to a human error in the targeting process. Two [sic] of the six warehouses hit had been inadvertently struck by the U.S. aircraft on Oct. 16 because the Taliban had used them previously for storage of military equipment, and military vehicles had been seen in the vicinity of these warehouses. Regarding the F/A-18C that inadvertently struck the residential area, initial indications are that the bomb's guidance system malfunctioned.

U.S. forces intentionally strike only military and terrorist targets. The U.S. is the largest donor of food and other humanitarian aid in Afghanistan, and U.S. forces are aggressive supporters of the worldwide effort to help the Afghan people. The U.S. has been a strong and longstanding supporter of the ICRC.

4. Fannie, 8 years old, on Radio-Canada.

[Source: Commentary by Fannie, 8 years old, Montréal, Canada, during the programme "Le Point," Télévision de Radio-Canada, 13 November 2001; unofficial translation.]

They made mistakes; this morning they launched missiles. I heard that they had launched them into a Red Cross building. I think that it is true we can make mistakes, but I think that they should have made the mistake elsewhere.

DISCUSSION

1. a. Although the use of cluster bombs was not specifically prohibited in 2001, was it authorized in all circumstances? In what circumstances could the use of such a weapon have constituted a violation of IHL? (P I, Arts 35 and 51(4))
- b. Is the use of a weapon that in most cases affects the civilian population indiscriminately prohibited in all circumstances?
- c. Is the fact that the sub-munitions of such a weapon are transformed *de facto* into anti-personnel mines sufficient grounds to prohibit it under the rules banning the use of mines? Does the fact that the United States of America is not party to the Mine Ban Convention authorize it to use anti-personnel mines? If it were party to the Convention, could it still use cluster bombs? Is the use of such weapons prohibited by the fact that the United States is party to Protocol II to the 1980 Convention on Certain Conventional Weapons? [See **Document No. 16**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention), and **Document No. 17**, Convention on

the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction]

2. a. Was the attack on the ICRC warehouses a violation of IHL? If so, because the red cross emblem was displayed on the warehouses? Because the warehouses were being used by the ICRC? Because they contained relief supplies intended for civilians? Because they were not military objectives? (GC I, Arts 9, 19, 38 and 44; GC IV, Arts 10, 18, 142 and 143; P I, Arts 48, 50, 51(2) and 52(2))
- b. What is the purpose of the emblem displayed on the ICRC warehouses? Would it have been lawful to attack the warehouses if the emblem had not been displayed on them? How would your legal opinion of the attack be different if the emblem had not been displayed on the warehouses? (P I, Arts 48, 50, 51, 52(2), 52(3) and 57)
- c. According to IHL, was Fannie right to think that the United States should not have made a mistake? Would it have been more acceptable if the United States had made a mistake elsewhere? Does an attack targeting or affecting civilian property “by mistake” (i.e., where the attacker does not intend to target or affect civilian property) violate IHL? Could this attack in particular, like any other attack carried out by mistake, be a violation of IHL? A war crime? (P I, Arts 57 and 85(3); ICC Statute, Arts 30 and 32)
- d. What precautions must the attacker take to avoid mistakes? What could indicate, in this case, whether the United States took or failed to take such precautions? (P I, Arts 51, 52(2), 52(3) and 57)
- e. If an attacker takes all precautions prescribed by IHL but nonetheless hits or affects civilian objects, does he violate IHL?
- f. What did the ICRC mean when it drew attention to the distance between the warehouses and the airport? Is it important that the aircraft was flying at low altitude and that the US authorities had been notified of the location of the warehouses and that vehicles might be moving and people gathering around them? What additional evidence would you like to see clarified in order to determine whether the attack was or was not a violation of IHL? (P I, Arts 51, 52(2), 52(3) and 57)
- g. Was the ICRC entitled to display the red cross on the warehouses? Even though they did not contain (only) medical supplies? Why does the ICRC use the red cross and not the red crescent in Afghanistan? (GC I, Arts 9, 19, 38, 42 and 44(3))
3. a. Did the occupation and looting of ICRC offices violate IHL? If so, is this because the offices displayed the red cross emblem? Because they were used for ICRC activities? Because they were not a military objective? (GC IV, Arts 4, 10, 33(2), 142 and 143(5))
- b. What additional evidence would you like to see clarified in order to determine whether the occupation and looting were or were not a violation of IHL?

Case No. 254, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners

[Source: ICRC, Press release, 01/69, Geneva, 12 December 2001; available on <http://www.icrc.org>]

Afghanistan: ICRC position on alleged ill-treatment of prisoners

Geneva (ICRC) – Allegations regarding massacres and serious ill-treatment of prisoners continue to emerge in connection with the war in Afghanistan despite repeated reminders to all parties of their obligations under international humanitarian law. The International Committee of the Red Cross (ICRC) has been asked many times whether it intends to carry out a public investigation of these allegations. To avoid any misunderstandings on this issue, the ICRC wishes to state the following:

- As the guardian of international humanitarian law, the ICRC takes any allegation of massacre or ill-treatment very seriously. Nothing can excuse wilful disregard for the basic humanitarian rules applicable to all individuals, whether they are foreign nationals in a country at war or not. These rules stipulate that prisoners must be treated humanely and their dignity respected.
- The ICRC has ceaselessly reminded all parties of their obligations under international humanitarian law, in particular the Geneva Conventions, as it applies to the Afghan conflict. It has received assurances in this connection from the highest authorities.
- The ICRC is currently collecting information on all allegations of ill-treatment. In accordance with the organization's standard procedure in such cases, this information will not be made public but will serve, depending on the findings, as the basis for representations to the relevant authorities.
- The international community has recognized the special role played by the ICRC in connection with armed conflicts and other situations of violence. Accordingly, the organization is not expected to take part in public enquiries or tribunals set up to assess the veracity of any given allegations, as this could jeopardize its access to vulnerable communities and individuals. The ICRC nonetheless welcomes all initiatives that may lead to greater compliance with international humanitarian law.
- To date, ICRC delegates have registered and visited over 1,000 prisoners in Afghanistan in order to check on the conditions of their arrest and detention. During these visits, which are ongoing, delegates provide basic medical care and offer the detainees a chance to write to their families.

DISCUSSION

1. What does the ICRC's recognized role as "guardian of the Geneva Conventions" entail? (GC I-IV, Arts 9/9/9/10 respectively; GC III, Art. 126; GC IV, Art. 143; Statutes of the International Red Cross and Red Crescent Movement, Art. 5(2)(c) and (g); See **Document No. 31**, Statutes of the International Red Cross and Red Crescent Movement)

2. Because of this role, must (can) the ICRC publicly condemn any ill-treatment of prisoners? What do you think are the considerations and criteria that will determine the ICRC's attitude in this respect? Would the ICRC still be able to visit prisoners if it publicly condemned any ill-treatment they were subjected to?
3. From what Fundamental Principles of the Red Cross and Red Crescent are the ICRC's working procedures derived?

Case No. 255, Afghanistan/Canada, Agreements on the Transfer of Detainees**A. Arrangement for the transfer of detainees between the Canadian forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 18 December 2005**

[Source: Arrangement for the transfer of detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 18 December 2005, available at <http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf>]

**ARRANGEMENT FOR THE TRANSFER OF DETAINEES
BETWEEN
THE CANADIAN FORCES
AND
THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN**

THE CANADIAN FORCES and THE MINISTER OF DEFENCE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”), have consented to the following Arrangement:

1. This arrangement establishes procedures in the event of a transfer, from the custody of the Canadian Forces to the custody of any detention facility operated by the Islamic Republic of Afghanistan of any detainee in the temporary custody of the Canadian Forces in Afghanistan.
2. “Detainee” means any person, other than a Canadian national, whose initial capture and detention, for whatever reason, occurred at the hands of members of the Canadian Forces.
3. The Participants will treat detainees in accordance with the standards set out in the Third Geneva Convention.
4. The International Committee of the Red Cross will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan. Visits may be delayed by a Detaining Power only as an exceptional and temporary measure for reasons of imperative military necessity.
5. The Afghan authorities will accept (as Accepting Power) detainees who have been detained by the Canadian Forces (the Transferring Power) and will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in Paragraph 3 above, to all such detainees whose custody has been transferred to them.
6. Detainees who are wounded or sick will be cared for by the Detaining Power at first instance. Sick or wounded detainees will not be transferred as long as their recovery may be endangered by the journey, unless their safety, or the safety of others, imperatively demands it. Arrangements to transfer wounded or sick detainees will be expedited in order to reduce risk to their health or facilitate medical treatment.

7. The Participants will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody. Such written records should, at a minimum, contain personal information (as far as known or indicated), gender, physical description and medical condition of the detainee, and, subject to security considerations, the location and circumstances of capture. Such written records will be available for inspection by the International Committee of the Red Cross upon request. Copies of all records relating to the detainee will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred. The originals of all records will be retained by the Transferring Power.
8. [...] The Detaining Power will be responsible for classification of detainee's legal status under international law. Should any doubt exist whether a detainee may be a Prisoner of War, the detainee will be treated humanely, at all times and under all circumstances, in a manner consistent with the rights and protections of the Third Geneva Convention, even if subsequently transferred to the custody of an Accepting Power.

[...]

10. Recognizing their obligations pursuant to international law to assure that detainees continue to receive humane treatment and protections to the standards set out in the Third Geneva Convention, the Participants, upon transferring a detainee, will notify the International Committee of the Red Cross through appropriate national channels.

[...]

12. No person transferred from the Canadian Forces to Afghan authorities will be subject to the application of the death penalty.

[...]

Signed in duplicate in Kabul, on the 18th of December, 2005 [...].

B. Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan, 3 May 2007

[Source: Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan, 3 May 2007, available at http://www.afghanistan.gc.ca/canada-afghanistan/documents/arrangement_detainee.aspx?lang=eng]

ARRANGEMENT FOR THE TRANSFER OF DETAINEES BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN

THE GOVERNMENT OF CANADA and THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”), have consented to the following Arrangement:

1. The following supplements the Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan of December 18, 2005, which continues in effect.
2. Representatives of the Afghanistan Independent Human Rights Commission (AIHRC), and Canadian Government personnel, including representatives of the Canadian Embassy in Kabul and others empowered to represent the Government of Canada will have full and unrestricted access to any persons transferred by the Canadian Forces to Afghan authorities while such persons are in custody. In addition to the International Committee of the Red Cross (ICRC), relevant human rights institutions with the UN system will be allowed access to visit such persons.
3. The Government of Canada will be notified prior to the initiation of proceedings involving persons transferred by the Canadian Forces and prior to the release of the detainee. The Government of Canada will also be notified of any material change of circumstances regarding the detainee including any instance of alleged improper treatment.
4. The Afghan authorities will be responsible for treating [detainees] in accordance with Afghanistan's international human rights obligations including prohibiting torture and cruel, inhuman or degrading treatment, protection against torture and using only such force as is reasonable to guard against escape.
5. The Afghan authorities will ensure that any detainee transferred to them by the Canadian Forces will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the Government of Canada.
6. Records required to be maintained by paragraph 7 of the December 2005 Arrangement will also be available for inspection by officials of the Government of Canada and the AIHRC on request.
7. In order to facilitate ongoing access and capacity building projects by the Government of Canada, the Afghan Government will hold detainees transferred by Canadian Forces in a limited number of facilities.
8. The AIHRC and officials of the Government of Canada will have full and unrestricted access to detention facilities where detainees transferred by Canadian Forces are held.
9. During such access, representatives will, upon request, be permitted to interview detainees in private, without Afghan authorities present.
10. In the event that allegations come to the attention of the Government of Afghanistan that a detainee transferred by the Canadian Forces to Afghan authorities has been mistreated, the following corrective action will be undertaken: the Government of Afghanistan will investigate allegations of abuse and mistreatment and prosecute in accordance with national law and internationally applicable legal standards; the

Government of Afghanistan will inform the Government of Canada, the AIHRC and the ICRC of the steps it is taking to investigate such allegations and any corrective action taken.

[...]

12. The Government of Afghanistan will ensure that all prison authorities under its jurisdiction are advised of the provisions of the December 2005 Arrangement and of this Arrangement.

[...]

Signed in duplicate in Kabul, on the 3rd day of May, 2007 [...].

DISCUSSION

1. Why did the Governments of Canada and Afghanistan conclude the Agreements in question? Would Convention III have applied to the detainees otherwise?
2. Does the first Agreement qualify the status of the detainees? Does Article 3 of the first Agreement mean that the detainees enjoy prisoner-of-war status?
3. Does Convention III cover the transfer of detainees from one party to another? If yes, what are the rules of IHL on such transfers? If no agreements had been concluded and the detainees concerned were prisoners of war, could Canada have transferred them to Afghanistan, their country of origin? Would Afghanistan have an obligation to treat them as prisoners of war? Could it then have tried them for their mere participation in hostilities? Could Canada transfer Afghan prisoners of war even though Afghanistan does not treat them as such? (GC III, Arts 12, 46-48)
4. According to IHL, should Canada retain some responsibility over the detainees once they have been transferred to Afghanistan? If yes, were the provisions of the first Agreement sufficiently developed to comply with the requirements of IHL? Why did the Governments concerned add the second Agreement? (GC III, Arts 12, 46-48)
5. What measures does the Canadian Government plan to take in order to ensure that the detainees are not mistreated after their transfer to Afghanistan? Are there any additional measures it could have taken?
6. Under the Agreements, can Afghanistan try the transferred detainees for having attacked Canadian soldiers? For having attacked Afghan soldiers?

Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets

[Source: Battling Afghan Drug Dealers: NATO High Command Issues Illegitimate Order to Kill, by Susanne Koelbl, Spiegel Online, 28 January 2009, available at <http://www.spiegel.de/international/world/0,1518,604183,00.html>]

[...]

BATTLING AFGHAN DRUG DEALERS**NATO High Commander Issues Illegitimate Order to Kill**

[...]

The approach to combatting the drug mafia in Afghanistan has spurred an open rift inside NATO. According to information obtained by SPIEGEL, top NATO commander John Craddock wants the alliance to kill opium dealers, without proof of connection to the insurgency. NATO commanders, however, do not want to follow the order.

A dispute has emerged among NATO High Command in Afghanistan regarding the conditions under which alliance troops can use deadly violence against those identified as insurgents. In a classified document, which SPIEGEL has obtained, NATO's top commander, US General John Craddock, has issued a "guidance" providing NATO troops with the authority "to attack directly drug producers and facilities throughout Afghanistan."

According to the document, deadly force is to be used even in those cases where there is no proof that suspects are actively engaged in the armed resistance against the Afghanistan government or against Western troops. It is "no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective," Craddock writes.

The NATO commander has long been frustrated by the reluctance of some NATO member states – particularly Germany – to take aggressive action against those involved in the drug trade. Craddock rationalizes his directive by writing that the alliance "has decided that (drug traffickers and narcotics facilities) are inextricably linked to the Opposing Military Forces, and thus may be attacked." In the document, Craddock writes that the directive is the result of an October 2008 meeting of NATO defense ministers in which it was agreed that NATO soldiers in Afghanistan may attack opium traffickers.

The directive was sent on Jan. 5 to Egon Ramms, the German leader at NATO Command in Brunssum, Netherlands, which is currently in charge of the NATO ISAF mission, as well as David McKiernan, the commander of the ISAF peacekeeping force in Afghanistan. Neither want to follow it. Both consider the order to be illegitimate and believe it violates both ISAF rules of engagement and international law, the "Law of Armed Conflict."

A classified letter issued by McKiernan's Kabul office in response claims that Craddock is trying to create a "new category" in the rules of engagement for dealing with opposing forces that would "seriously undermine the commitment ISAF has made to

the Afghan people and the international community ... to restrain our use of force and avoid civilian casualties to the greatest degree predictable.”

A value equivalent to 50 percent of Afghanistan’s gross national product is generated through the production and trade of opium and the heroin that is derived from it. Of those earnings, at least \$100 million flows each year to the Taliban and its allies, which is used to purchase weapons and pay fighters. That, at least, is the estimate given by Antonio Maria Costas, head of the UN’s Office on Drugs and Crime.

But the chain of people profiting from the drug trade goes a lot further – reaching day laborers in the fields, drug laboratory workers and going all the way up to police stations, provincial governments and high-level government circles that include some with close proximity to President Hamid Karzai. If Craddock’s order were to go into effect, it would lead to the addition of thousands of Afghans to the description of so-called “legitimate military targets” and could also land them on so-called targeting lists.

[...]

German NATO General Ramms made it perfectly clear in his answer to General Craddock that he was not prepared to deviate from the current rules of engagement for attacks, which reportedly deeply angered Craddock. The US general, who is considered a loyal Bush man and fears that he could be replaced by the new US president, has already made his intention known internally that he would like to relieve any commander who doesn’t want to follow his instructions to go after the drug mafia of his duties. Back in December, Central Command in Florida, which is responsible for the US Armed Forces deployment in Afghanistan, yet again watered-down provisions in the rules of engagement for the Afghanistan deployment pertaining to the protection of civilians. According to the new rules, US forces can now bomb drug labs if they have previous analysis that the operation would not kill “more than 10 civilians.”

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DISCUSSION

1. What was the nature of the armed conflict in Afghanistan in 2009? What branch of law was applicable? Who were the parties to the armed conflict? Can Afghan drug dealers be considered as belonging to a party to the conflict?
2. What is a military objective? Is it lawful to attack a facility without first checking whether it is a military objective? Can a narcotics facility be considered as making an effective contribution to military action? If its profits are partly or exclusively used by the Taliban, an armed group fighting the government and the outside forces supporting it? Would a positive answer to that question automatically turn all a country’s narcotics facilities into military objectives? Is your answer affected by the fact that drug dealing is unlawful under Afghan law and under international law? (P I, Art. 52(2) and (3); CIHL, Rule 8)
3. a. Who may be directly targeted in a non-international armed conflict? Under what circumstances can a drug dealer be directly targeted? Can someone be directly targeted “even in those cases where there is no proof that [he is] actively engaged in [hostilities]”? Is your answer affected by the fact that drug dealing is unlawful under Afghan law and under international law?

- b. Can drug dealing amount to direct participation in hostilities? Does it become direct participation in hostilities when some of the proceeds are used to finance a party to the conflict? Do you think that, in the present situation, all drug producers and dealers are directly participating in the hostilities? Would your answer have been different had the financial benefit of the opium trade gone entirely to the Taliban?
4. Is it lawful to declare that any attack on a military objective that would kill less than 10 civilians is lawful? Is it lawful if the declaration is limited to a certain category of military objectives, such as drug laboratories? How do you calculate proportionality? (P I, Art. 51(5)(b); CIHL, Rule 14)

Case No. 257, Afghanistan, Goatherd Saved from Attack

[Source: "Wandering Afghan goatherd holds up lethal attack on Taleban roadside bombers," Michael Evans, Times Online, 5 May 2009, available at <http://www.timesonline.co.uk/tol/news/world/asia/article6222494.ece>]

Wandering Afghan goatherd holds up lethal attack on Taleban roadside bombers

Four Taleban insurgents appeared at one end of a bridge on Route Cowboys and began to dig a hole for a roadside bomb. Buzzing above them at a height of 9,000ft was a Hermes unmanned aerial vehicle, relaying pictures of the scene to British commanders.

Soon, two Belgian Air Force F16s had flown in and were ready to pulverise the Taleban fighters. Just as they were about to swoop in for the kill there was a shout over the radio: "Stop, hold fire – there's a boy with goats approaching."

Sure enough, a young Afghan goatherd with a few goats around him was walking towards the bridge. The world seemed to freeze. The F16 pilots remained on alert. The Taleban continued burying their explosives, and with growing frustration British officers watched – in operations rooms within sight of the bridge, in battlegroup headquarters at Forward Operating Base Delhi farther north, and in Camp Bastion, the main base in central Helmand – the goatherd's slow progress.

[...] The nearest base is Patrol Base Hassan Abad, [...] and the bridge is Bridge Three.

If the insurgents registered the presence of the F16s it did nothing to stop them – two of them continued working while a third began to walk backwards holding a wire and disappeared from view. The fourth, apparently the leader, had left on a motorcycle.

Finally the goatherd was safely clear of the area and the jets were given the order to attack. Rather than dropping a 500lb bomb that would have damaged the bridge, one of the jets came roaring in and strafed the area with 30mm cannon where the two Taleban had nearly finished burying their improvised explosive device (IED). They both died.

The insurgent with the wire had climbed on to a motorbike and the Hermes drone followed him as he drove south, taking photographs that told the F16 pilots where he was heading. The man went into a compound to change his clothes and then drove off again to a rendezvous spot known to be a Taleban command centre. He was allowed to escape.

At 4.30am the next day, 100 soldiers set off from Hassan Abad base towards Bridge Three. They were accompanied by two US Marine bomb-disposal specialists. [...]

Progress is painstaking. Overnight it is possible that the Taleban have planted more IEDs. Every patrol "multiple" has a soldier with a metal detector sweeping the ground in front of him as the rest of us follow, knowing that the Taleban are watching from the poppy and wheat fields as the dim light turns to dawn. Hermes 450, with that reassuring and familiar buzzing engine, watches our progress.

[...]

We reach Bridge Three without being shot at. The journey – two miles as the crow flies – has taken nearly five hours, partly because a compound suspected of being used by the Taliban has had to be searched. [...] Soldiers spread out to control the ground and make sure there is no one concealed within sight of the bridge who might be able to detonate a bomb.

Lieutenant Ed Hattersley, 25, [...] approaches the area of the suspected IED, lies full stretch on the ground and starts to dig away gently with his knife, scooping away the dry earth with a paintbrush. All the rest of the group can do is wait.

The young lieutenant finds enough evidence to confirm the presence of an IED, and the two experts from the US Marine Corps move in. They uncover four mortar shells filled with explosives and linked – known as a “daisy-chain” device.

With no protection other than normal body armour and helmets, they pick up the bombs and carry them away from Bridge Three. They pack their own explosives around the bombs, draw back a distance, and give the signal: “Sixty seconds, heads down” ... fingers to ears, helmeted heads tucked into chests.

The bomb is destroyed and we return to camp. The IED was planted at about 5pm the previous day; it is now 11.30am the day after, and 100 men are exhausted from the strains of a seven-hour mission.

That was only one IED – and there are scores more.

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DISCUSSION

1. a. Did the soldiers have an obligation under IHL to save the goatherd’s life? If they had not waited for the goatherd to walk away from the targeted area, would the attack have been lawful under IHL? (P I, Art. 51(5)(b); CIHL, Rule 14)
- b. How do you calculate proportionality? Would the loss of the goatherd’s life have been “excessive in relation to the concrete and direct military advantage anticipated”? What was the “concrete and direct military advantage anticipated” in the present case? When calculating proportionality, would the fact that a delayed air attack could have been expected to allow the leader of those laying the bomb to escape be taken into account? The fact that 100 soldiers would need to be sent on a bomb-disposal mission the next day? (P I, Art. 51(5)(b); CIHL, Rule 14)
- c. Would it have been excessive to risk destroying the bridge by dropping a 500-lb bomb? Even if such a bomb would also have destroyed the IED?
2. Assuming that, first, launching an attack against those laying the bomb while the goatherd was in the area, and second, using a bomb that might have destroyed the bridge were not excessive compared with the direct military advantage anticipated by both measures, could IHL nevertheless require that neither measure be taken?
3. Is it realistic to expect armed forces always to react in this way?

Case No. 258, Afghanistan, Assessment of ISAF Strategy

[Source: Commander's Initial Assessment, Stanley A. McChrystal, available at http://static.nzz.ch/files/6/5/4/Afghanistan_Assessment_1.3630654.pdf]

HEADQUARTERS

INTERNATIONAL SECURITY ASSISTANCE FORCE [ISAF]

KABUL, AFGHANISTAN

30 August 2009

SUBJECT: COMISAF'S INITIAL ASSESSMENT

REFERENCE: Secretary of Defense Memorandum 26 June 2009,
Subject: Initial United States Forces – Afghanistan (USFOR-A)
Assessment

Stanley A. McChrystal
General, U.S. Army Commander,
United States Forces – Afghanistan/International Security Assistance Force, Afghanistan
[...]

PURPOSE

On 26 June, 2009, the United States Secretary of Defense directed Commander, United States Central Command (CDRUSCENTCOM), to provide a multidisciplinary assessment of the situation in Afghanistan. On 02 July, 2009, Commander, NATO International Security Assistance Force (COMISAF) I U.S. Forces-Afghanistan (USFOR-A), received direction from CDRUSCENTCOM to complete the overall review.

On 01 July, 2009, the Supreme Allied Commander Europe and NATO Secretary General also issued a similar directive.

COMISAF subsequently issued an order to the ISAF staff and component commands to conduct a comprehensive review to assess the overall situation, review plans and ongoing efforts, and identify revisions to operational, tactical and strategic guidance.

[...]

COMMANDER'S SUMMARY

The stakes in Afghanistan are high. NATO's Comprehensive Strategic Political Military Plan and President Obama's strategy to disrupt, dismantle, and eventually defeat al Qaeda and prevent their return to Afghanistan have laid out a clear path of what we must do. Stability in Afghanistan is an imperative; if the Afghan government falls to the Taliban – or has insufficient capability to counter transnational terrorists – Afghanistan could again become a base for terrorism, with obvious implications for regional stability.

[...]

Redefining the Fight

[...]

Our strategy cannot be focused on seizing terrain or destroying insurgent forces; our objective must be the population. In the struggle to gain the support of the people, every action we take must enable this effort. The population also represents a powerful actor that can and must be leveraged in this complex system. Gaining their support will require a better understanding of the people's choices and needs. However, progress is hindered by the dual threat of a resilient insurgency and a crisis of confidence in the government and the international coalition. To win their support, we must protect the people from both of these threats.

Many describe the conflict in Afghanistan as a war of ideas, which I believe to be true. However, this is a 'deeds-based' information environment where perceptions derive from actions, such as how we interact with the population and how quickly things improve. The key to changing perceptions lies in changing the underlying truths. We must never confuse the situation as it stands with the one we desire, lest we risk our credibility.

[...]

Change the Operational Culture

As formidable as the threat may be, we make the problem harder. ISAF is a conventional force that is poorly configured for COIN [Counterinsurgency], inexperienced in local languages and culture, and struggling with challenges inherent to coalition warfare. These intrinsic disadvantages are exacerbated by our current operational culture and how we operate.

Pre-occupied with protection of our own forces, we have operated in a manner that distances us – physically and psychologically – from the people we seek to protect. In addition, we run the risk of strategic defeat by pursuing tactical wins that cause civilian casualties or unnecessary collateral damage. The insurgents cannot defeat us militarily; but we can defeat ourselves.

[...]

The New Strategy: Focus on the Population

[...] Conventional wisdom is not sacred; security may not come from the barrel of a gun. Better force protection may be counterintuitive; it might come from less armor and less distance from the population.

[...]

INITIAL ASSESSMENT

[...]

ISAF's attitudes and actions have reinforced the Afghan people's frustrations with the shortcomings of their government. Civilian casualties and collateral damage to homes and property resulting from an over-reliance on firepower and force protection have severely damaged ISAF's legitimacy in the eyes of the Afghan people.

[...]

III. Getting the Basics Right

[...]

New Operational Culture: Population-Centric COIN

[...]

Build Relationships. In order to be successful as counterinsurgents, ISAF must alter its operational culture to focus on building personal relationships with its Afghan partners and the protected population. To gain accurate information and intelligence about the local environment, ISAF must spend as much time as possible with the people and as little time as possible in armored vehicles or behind the walls of forward operating bases. ISAF personnel must seek out, understand, and act to address the needs and grievances of the people in their local environment. Strong personal relationships forged between security forces and local populations will be a key to success.

Project Confidence. [...] Adjusting force protection measures to local conditions sends a powerful message of confidence and normalcy to the population. Subordinate commanders must have greater freedom with respect to setting force protection measures they employ in order to help close the gap between security forces and the people they protect. Arguably, giving leaders greater flexibility to adjust force protection measures could expose military personnel and civilians to greater risk in the near term; however, historical experiences in counterinsurgency warfare, coupled with the above mitigation, suggests that accepting some risk in the short term will ultimately save lives in the long run.

[...]

IV. A Strategy for Success

[...]

1. Increase Partnership with the ANSF [Afghan National Security Forces] to Increase Size and Capabilities

[...]

Detainee Operations. Effective detainee operations are essential to success. The ability to remove insurgents from the battlefield is critical to effective protection of

the population. Further, the precision demanded in effective counterinsurgency operations must be intelligence-driven; detainee operations are a critical part of this. Getting the right information and evidence from those detained in military operations is also necessary to support rule of law and reintegration programs and help ensure that only insurgents are detained and civilians are not unduly affected.

Detainee operations are both complex and politically sensitive. There are strategic vulnerabilities in a non-Afghan system. By contrast, an Afghan system reinforces their sense of sovereignty and responsibility. As always, the detention process must be effective in providing key intelligence and avoid 'catch and release' approaches that endanger coalition and ANSF forces. It is therefore imperative to evolve to a more holistic model centered on an Afghan-run system. This will require a comprehensive system that addresses the entire "life-cycle" and extends from point of capture to eventual reintegration or prosecution.

ISAF has completed a full review of current detainee policies and practices with recommendations for substantial revisions to complement ISAF's revised strategy. Key elements of a new detention policy should include transferring responsibility for long-term detention of insurgents to GIRoA [Government of the Islamic Republic of Afghanistan], establishing procedures with GIRoA for ISAF access to detainees for interrogation within the bounds of national caveats, application of counter-radicalization and disengagement practices, and training of ISAF forces to better collect intelligence for continued operations and evidence for prosecution in the Afghan judicial system. Afghanistan must develop detention capabilities and operations that respect the Afghan people. A failure to address GIRoA incapacity in this area presents a serious risk to the mission.

2. Facilitating Afghan Governance and Mitigating the Effects of Malign Actors

[...]

Rule of Law. Finally, ISAF must work with its civilian and international counterparts to enable justice sector reform and locate resources for formal and informal justice systems that offer swift and fair resolution of disputes, particularly at the local level. The provision of local justice, to include such initiatives as mobile courts, will be a critical enhancement of Afghan capacity in the eyes of the people. ISAF must work with GIRoA to develop a clear mandate and boundaries for local informal justice systems.

[...]

VII. Conclusion

The situation in Afghanistan is serious. The mission can be accomplished, but this will require [...] fundamental changes. [...] ISAF must focus on getting the basics right to achieve a new, population-centric operational culture and better unity of effort. [...]

ANNEX E: Civilian Casualties, Collateral Damage, and Escalation of Force

Background

Civilian casualties (CIVCAS) and damage to public and private property (collateral damage), no matter how they are caused, undermine support for GIRoA, ISAF, and the international community in the eyes of the Afghan population. Although the majority of CIVCAS incidents are caused by insurgents, the Afghan people hold ISAF to a higher standard. Strict comparisons of amount of damage caused by either side are unhelpful. To protect the population from harm, ISAF must take every practical precaution to avoid CIVCAS and collateral damage.

ISAF established a CIVCAS Tracking Cell in August 2008. This step was reinforced by a revised Tactical Directive (TO) issued to all troops in theatre on 1 July 2009, which, inter alia, clearly described how and when lethal force should be used. All subordinate commanders were explicitly instructed to brief their troops (to include civilian contractors) on the TO. Further, a thorough review of ISAF and USFOR-A operating procedures and processes has been ordered.

[...]

Key Findings

Training

Though it is not possible to prescribe the appropriate use of force for every situation on a complex battlefield, all troops must know, understand, comply, and train with the direction outlined in the TO. This implies a change in culture across the force. ISAF units and soldiers must be fully prepared to operate within the guidelines of the TO and other directives prior to deployment. Home-station training events must be nested within these directives. Training must continue in theater to ensure the guidance is being implemented correctly.

[...]

Troops In Contact (TIC)

The TO stresses the necessity to avoid winning tactical victories while suffering strategic defeats. Ground commanders must fully understand the delicate balance between strategic intent and tactical necessity. Commanders must prioritize operational effectiveness within their operating areas by considering the effects of their actions on the Afghan population at every stage.

Recommendation: Under the direction of Task Force Commanders, sub-unit ground commanders must plan for and rehearse a full range of tactical options to include application of force in unpopulated areas, de-escalation of force within populated ones, or even breaking contact as appropriate to accomplish the mission.

Proportionality

In order to minimize the risk of alienating the Afghan population, and in accordance with International Law, ISAF operations must be conducted in a manner that is both proportionate and reasonable.

Recommendation: When requesting Close Air Support (CAS) ground commanders and Joint Tactical Air Controllers (JTAC) must use appropriate munitions or capabilities to achieve desired effects while minimizing the risk to the Afghan people and their property. Ground commanders must exercise similar judgment in the employment of indirect fires.

Shaping the Environment and Preconditions

The importance of cultural awareness during the conduct of operations is highlighted in the TO. Specifically, it notes that a significant amount of CIVCAS occur during Escalation of Force (EoF) procedures (14% of people killed and 22% of those wounded during the last recorded 6 months). These incidents tend to occur in units with less training experience and lower unit cohesion. Fear and uncertainty among ISAF soldiers contributes to escalation of force incidents. Furthermore, although ISAF has refined and enhanced the warnings that are issued, many Afghans do not understand them and consequently fail to comply. Low literacy levels and cultural differences may explain a misunderstanding of EoF procedures and the actions that ISAF troop expect them to take.

Recommendation: Effective pre-deployment training and the development of unit cohesion are essential in honing the tactical judgment of soldiers and small unit leaders. Training scenarios at home station and combat training centers must improve. As ISAF reviews and modifies its escalation of force procedures to better fit the Afghan context, ISAF, and GIRoA must communicate those procedures more effectively to the Afghan people in appropriate media.

Press Release / Public Information

The TO also stresses the requirement to acknowledge any CIVCAS incident in the media expeditiously and accurately; timely engagement with key leaders is also a critical element. The aim is to be 'first with the known truth', based on the information available at the time. ISAF competes with insurgents (INS) information operations (IO), and the INS IO is not hampered by the need to be truthful; moreover, any statements made by the INS are rapidly disseminated, and can be persuasive to the Afghan population. As the TO notes, it is far more effective to release a factual statement with the known details early, and then a follow-on statement with additional clarification at a later stage. This procedure is more effective than simply issuing a rebuttal of an INS version of the account. Furthermore, debating the number of people killed or injured misses the point. The fact that civilians were harmed or property was damaged needs to be acknowledged and investigated, and measures must be taken for redress.

Recommendation: First, ISAF and GIRoA must aim for a consistent rather than conflicting message through appropriate media, to include word of mouth in affected local communities. Be first with the known truth; be transparent in the investigation. Second, ISAF and GIRoA should follow-up on any incident with periodic press updates

regarding the progress of the investigation, procedures for redress, and measures taken to ensure appropriate accountability.

Aircraft Video Release Procedures

The advantage of photographic imagery to support any Battle Damage Assessment (BOA) is covered in the TO. This can be expanded to include aircraft weapon system imagery. The NATO Comprehensive Strategic Political Military Plan (CSPMP) for Afghanistan requires nations to establish agreed procedures for declassifying and making use of national operational imagery to reinforce NATO messages. Presently, national caveats apply to the release of aircraft BOA and weapon release imagery, and these caveats have different procedures and timelines for release. Some nations do not comply with the CSPMP.

Recommendation: Establish a standard procedure for all nations and services to attain the necessary release approval and delivery of the footage.

Honor and “Assistance”

Under the terms of the Military Technical Agreement between ISAF and GIROA (dated 4 Jan 02), ISAF is not required to make compensation payments for any damage to civilian or governmental property. Contributing nations are responsible for damages caused by their soldiers. Some nations contribute to individual or collective compensation, a number do not, whilst others contribute in different ways. This creates an extremely unhelpful imbalance and undermines COIN Strategy. To address this, the NATO CSPMP for Afghanistan, encourages nations to fund the NATO Post Operations Emergency Relief Fund (POERF) to compensate or assist individuals and communities.

CIVCAS payments and compensation must be carefully considered against a large number of different factors. Whilst being sensitive to the affected families and communities, improper procedures and poor investigations and accountability may encourage subsequent exaggerated claims.

Recommendation: Develop and implement an equitable system of compensation for damages, whether individual or community based. ISAF TCNs [Troop Contributing Nations] must develop a common policy for compensation and redress due to injury, loss of life, and damage to property. Although compensation can never make up for such loss, appropriate measures to ensure accountability and recognition of the importance of Afghan life and property can help mitigate public anger over the incident.

ANNEX F: Detainee Operations, Rule of Law, and Afghan Corrections

Background

Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the U.S. and ISAF. With the

drawdown in Iraq and the closing of Guantanamo Bay, the focus on U.S. detention operations will turn to the U.S. Bagram Theater Internment Facility (BTIF). Because of the classification level of the BTIF and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process. It is critical that we continue to develop and build capacity to empower the Afghan government to conduct all detentions operations in this country in accordance with international and national law. The desired endstate must be the eventual turnover of all detention operations in Afghanistan, to include the BTIF, to the Afghan government once they have developed the requisite sustainable capacity to run those systems properly.

Currently, Taliban and Al Qaeda insurgents represent more than 2,500 of the 14,500 inmates in the increasingly overcrowded Afghan Corrections System (ACS). These detainees are currently radicalizing non-insurgent inmates and worsening an already over-crowded prison system. Hardened, committed Islamists are indiscriminately mixed with petty criminals and sex offenders, and they are using the opportunity to radicalize and indoctrinate them. In effect, insurgents use the ACS as a sanctuary and base to conduct lethal operations against GIRoA and coalition forces (e.g., Serena Hotel bombing, GIRoA assassinations, governmental facility bombings).

The U.S. came to Afghanistan vowing to deny these same enemies safe haven in 2001. They have gone from inaccessible mountain hideouts to recruiting and indoctrinating hiding in the open, in the ACS. There are more insurgents per square foot in corrections facilities than anywhere else in Afghanistan. Unchecked, Taliban/Al Qaeda leaders patiently coordinate and plan, unconcerned with interference from prison personnel or the military.

Multiple national facilities are firmly under the control of the Taliban. The Central Prisons Directorate (CPO) accepts a lack of offensive violence there as a half-win. Within the U.S. Bagram Theater Internment Facility (BTIF), due to a lack of capacity and capability, productive interrogations and detainee intelligence collection have been reduced. As a result, hundreds are held without charge or without a defined way-ahead. This allows the enemy to radicalize them far beyond their pre-capture orientation. This problem can no longer be ignored.

Scope

In order to transform detention and corrections operations in theater, U.S. Forces-Afghanistan (USFOR-A) proposes the formation of a new Combined Joint Interagency Task Force, CJIAF [...].

[...]

The CJIAF will train and apply sound corrections management techniques and Rule of law principles in all detention systems in Afghanistan, whether currently run by the U.S. government or the Afghan government. These sound corrections management techniques ("best practices") and Rule of law principles, applicable to all detention facilities, include: adherence to international humanitarian law; due process; vocational and technical training; de-radicalization; rehabilitation; education; and classifying and

segregating detainee populations (segregating hard-core insurgents from low level fighters, juveniles from adults, women from men, common criminals from insurgents, etc.).

Systemic Challenges in Detention and Corrections

The CJIATF [...] will address 10 systemic challenges in the current U.S., Afghan military, and CPO detention and prison systems. These include:

- Need for a country wide, coalition supported, corrections and detention plan to help establish unity of effort.
- Need for all detainees and prisoners to be correctly classified and separated accordingly.
- Need for a GIRoA and International community supported Rule of Law program which allows for and codifies alternatives to incarceration.
- Within U.S. Detention and Afghanistan Prison systems alike, take immediate measures to counter insurgent actions and minimize the religious radicalization process of inmates.
- Need to plan and provide for Afghanistan corrections infrastructure multi-year sustainment.
- Need to ensure meaningful corrections reform in both U.S. and Afghanistan detention/prison systems. These reforms include changing punishment from retribution to rehabilitation, purposeful and effective staff training, equity of pay, and improved alignment with law enforcement and legal systems, both formal and informal.
- Need to review and ensure the intelligence policy and procedures match the exigencies of the Government of Afghanistan and Coalition counter-insurgent activity.
- Need to address the current and projected over-crowding situation.
- Need to address the current shortage of knowledgeable, competent, and committed leadership within both U.S. and Afghanistan corrections systems and advisory groups.
- Need to address the command and control, and unity of command over both U.S. detention and Afghan advisory efforts.

Recommendations

Establish a CJIATF

Establish a CJIATF commanded by a General Officer, with a civilian deputy at the Ambassador level, to lead an organization of approximately 120 personnel (70 civilian, 50 military). The CJIATF will be a Major Subordinate Command under USFOR-A with a coordination relationship reporting to the U.S. Ambassador Afghanistan. The CJIATF

will have a Command/Control Headquarters Element and the following six Lines of Operation:

- The U.S. Detention Operations Brigade will provide safe, secure, legal and humane custody, care, and control of detainees at the BTIF.
- The Intelligence Group will support the Task Force's mission to identify and defeat the insurgency through intelligence collection and analysis, and improve interrogations intelligence collection through operations at the Joint Interrogation Debriefing Center and Strategic Debriefing Center, including input from field detention sites after capture.
- The Detention and Prisons Common Program Support Group will establish and conduct a series of programs designed to move detention/corrections operations from retribution to rehabilitation. A de-radicalization process will attack the enemy ethos center of gravity and enable successful reintegration of inmates back to the Afghan (or home origin) population.
- The Engagement and Outreach Group will formulate and implement strategic communication and outreach as a proactive tool to protect and defend the truth of U.S. detention and interrogation practices, to further assist in the development of the Rule of Law within Afghanistan.
- The legal Group will identify gaps in the Rule of law framework that are inhibiting U.S. and Afghan detention/corrections operations from completing their mission and will develop solutions through consistent engagement with GIRoA elements and the International Community.
- The Afghanistan Prison Engagement Group will assist GIRoA in reforming the Central Prisons Directorate (CPO) so it can defeat the insurgency within its walls. The reformed CPO National Prison System will meet international standards, employ best correctional practices, comply with Afghan laws, and be capable of sustaining de-radicalization, rehabilitation, and reintegration programs.

[...]

Endstate

The desired endstate is the turnover of all detention operations in Afghanistan, to include the BTIF, to the Afghan government once they have developed the requisite sustainable capacity to run those detention systems in accordance with international and national law. This will empower the Afghan government, enable counterinsurgency operations, and restore the faith of the Afghan people in their government's ability to apply good governance and Rule of Law with respect to corrections, detention, and justice.

[...]

DISCUSSION

1. What is the basic idea in General McChrystal's report? What major strategic change does he recommend in order to achieve stability in Afghanistan? What would be the consequences of further alienating the Afghan population?
2. Does the report refer to IHL, explicitly or implicitly? Does it use IHL terms?
3. What are the strategic measures recommended in the report? Which ones are in accordance with IHL? Which ones are promoted by IHL? Which ones are questionable, or difficult to implement, from an IHL point of view?
4. What are the advantages and disadvantages, from an IHL point of view, of soldiers being less concerned with their own protection? Of soldiers spending as much time as possible with the civilian population, in the midst of the civilian population, instead of staying in armoured personnel carriers and military bases?

Case No. 259, UN, Request for an Investigation on War Crimes

[Source: Brunnstrom, David, UN, Request for an Investigation on War Crimes; original in French, unofficial translation.]

**Afghanistan/UN, Request for an Investigation on War Crimes
by David Brunnstrom**

Reuters, 23 October 2002

Kabul (Reuters) – A United Nations expert called Wednesday for the establishment of an independent, international commission to investigate crimes against humanity and other human rights violations committed during Afghanistan's 23 years of armed conflict.

Asma Jahangir, a lawyer from Pakistan who is currently serving as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, said that the findings of such a commission would constitute the first step towards setting up a mechanism capable of bringing the perpetrators to trial.

Jahangir told a press conference at the end of her 10-day trip to Afghanistan that the number of people executed in 23 years of war was "staggering" and recommended that the death penalty be suspended until international standards for imposing capital punishment could be met.

At the same time, she said that the cycle of violence could not be halted until an end was put to impunity and that the perpetrators of crimes against humanity must be brought to trial. [...]

When asked whether she was referring to a tribunal inside or outside Afghanistan, Jahangir replied that it was too early to say which type of mechanism would be most appropriate. [...]

Justice must be done

While in Afghanistan, Jahangir visited the towns of Herat, Kandahar, Mazar-i-Sharif and Paghman, where the number of extrajudicial and summary killings seemed to have decreased.

However, she said that a climate of fear prevailed, especially outside of Kabul, and that various recent reports of extrajudicial killings were probably only the "tip of the iceberg."

These included the case of a man who had been killed after firing on a US marine in Kandahar and whose body had been strung up with a note of warning, and those of several women who had been killed by their families in the name of morality.

The UN expert said that she was "disturbed" by the alleged execution of prisoners after the fall of the Taliban and "deeply concerned" about reports of excessive use of force by the US-led coalition in Uruzgan province in July.

She also mentioned the discovery in northern Afghanistan of mass graves containing the remains of about 1,000 Taliban prisoners who had been handed over to coalition-backed warlords and the deaths of some 40 Afghans in Uruzgan villages after a mistaken attack by U.S. aircraft.

According to information gathered by Jahangir, perpetrators of war crimes still hold key positions in Kabul and elsewhere in the country.

“Our job is to ensure that justice is done. No one, whatever their rank or position, should be considered above the law.”

DISCUSSION

1. How would you qualify the conflict between the Northern Alliance and the Taliban armed forces? Between the latter and the United States?
2. If it is confirmed that there have been extrajudicial and summary executions of Taliban prisoners in the context of this armed conflict, do these constitute war crimes? Crimes against humanity? (GC I-IV, Art. 3; GC III, Arts 13, 14 and 130; GC IV, Arts 27, 32 and 147; P I, Arts 75(2) and 85(2); P II, Art. 4)
3. Was the bombing of villages in Uruzgan, which killed 40 Afghans, a war crime? Even if it was a mistake? (P I, Arts 48, 51, 52, 57 and 85(3))
4. What kind of commission could be considered in order to implement Ms Jahangir’s idea to create an international commission? (GC I-IV, Arts 52/53/132/149 respectively; PI, Art. 90)
5. What would be the role of an international fact-finding commission in Afghanistan? Under what conditions would it be able to act?
6. Could the work of investigation be entrusted to a non-governmental organization such as Human Rights Watch or Amnesty International? Could it be given to the ICRC or would this compromise the ICRC’s activities, which are based on neutrality and impartiality, and its work methods, which are based on dialogue and therefore on the confidentiality of any information it obtains? [See **Case No. 214**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel, and **Case No. 254**, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners]
7. Is Afghanistan obliged to prosecute perpetrators of war crimes? Would Afghanistan’s establishment of a commission allow it to fulfill this obligation? Of a “truth and reconciliation”-type commission? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)

Case No. 260, Afghanistan, Code of Conduct for the Mujahideen

[Source: Islamic Emirate of Afghanistan, "Code of Conduct for the Mujahideen," 9 May 2009, unofficial translation. Original text available at www.alemara.co.cc/]

Islamic Emirate of Afghanistan
Code of Conduct for the Mujahideen

[...]

In the name of Allah, the most Gracious and Merciful

[...]

Jihad in the way of Allah is the greatest action and a great duty. Carrying out this duty will bring the Honour of the Islamic Ummah (Global Community / Commonwealth) and will raise prestige of the Allah's words. [...]

In view of establishing a clearer strategy for Jihad, a comprehensive Code of Conduct or book of principles was awaited by all Mujahideen and Muslims. This Code of Conduct aims to clarifying their mission, in light of the Sharia laws. [...]

Considering these needs, the Leadership of the Islamic Emirate endorsed this Code of Conduct or the book of principles with 13 Chapters and 67 articles, based on advice given by famous religious scholars and specialists of the country, in light of the Mohammedan Sharia. Every Mujahid of the Islamic Emirate should comply with all the rules and regulations while conducting their Jihad. All the Mujahideen and authorities of the Islamic Emirate are bound to all principles and regulations of this Code of Conduct.

Preface

1. In the Code of Conduct "Imam" and "Deputy Imam" refer to Respected Amir ul Momineen Mullah Mohammad Omar Mujahid and his deputy respectively.
2. In the Code of Conduct "punishment" does not include collection of money.
3. In the Code of Conduct the power of decision for punishment may be delegated to a person other than the Imam or the Deputy Imam. However, the power to issue death penalty can not be delegated.
4. In the articles of the Code of Conduct, whenever "taking guarantee" is mentioned, it does not refer to the taking of cash and property.
5. This Code of Conduct was published and enforced on 9 May 2009.

All the bills, orders, and any other material that are contrary to this Code of Conduct and were issued before the above mentioned date are considered invalid. It is compulsory for all Mujahideen and authorities of Islamic Emirate to strictly follow the Code of Conduct.

Chapter One

Protection issues

[...]

- 4 If a Mujahid kills or harms a person who had stopped cooperating with the aggressors and their puppet administration and had received security guarantee from the Mujahideen, this Mujahid will be tried under the Islamic law.

[...]

Chapter Two

About the Detainees

- 7 A local or foreign enemy who is captured shall be immediately handed over to the Provincial authority. After the handover of the captive, the Governor either allows the Mujahideen who captured the enemy to keep him, or orders the transfer of the captive to other people.
- 8 If an employee, soldier, contractor or other worker of the slavery administration has been captured and punished, the Provincial authority may decide to release them in case of prisoners exchange. Releasing these people for money is prohibited. No one has the authority to give death sentence except the Imam and Deputy Imam. If the captive is a Director (in a governmental office), a Commander, a District Administrator, or a higher ranking official than them, or a foreign Muslim, the Imam and his deputy will decide whether the captive will be punished, executed or released in the framework of prisoners exchange.
- 9 If an infidel warrior has been captured, his fate (execution, release in prisoner exchange, release following negotiations, or release upon payment in case the Muslims need money) will be decided by the Imam and his deputy. No one else has this power of decision. If the captive becomes Muslim, the Imam and his deputy have the authority to release him in a prisoner exchange, provided that the captive will stay a Muslim after his release.
- 10 If the Mujahideen who captured the enemy were not able to transfer them to their own centres, if they faced danger outside the centre, or if they could not manage to transfer the captives in secure places, then the Mujahideen can kill them – provided that the captives are prisoners of war or members of the authority from the other side. If the captives do not fall into these categories, or if they are only suspected to fall into these categories, then the Mujahideen are not allowed to kill them. Eventually, the Mujahideen can leave the captives.
- 11 If a policeman or soldier surrenders to the Mujahideen, the Mujahideen should not kill him. If the policeman or soldier brought a weapon with him, or if he had participated in courageous fights, the Mujahideen should give him more respect.
- 12 When spies or other criminals are captured and sentenced to death by a Mujahideen judge in charge of the area: Even if the Provincial Governor or another leader of the Mujahideen considered that the captive deserved death, these authorities are

not allowed to kill the captive. From an Islamic Sharia point of view, they haven't been conferred such power. Only the Imam and his deputy have the authority to affirm death sentence.

Chapter Three **About the spies**

- 13 When a spy is captured, if evidence of espionage is found, the spy will be considered as a perpetrator of social destruction. The Provincial responsible has the power to punish him, exile him, or to prevent him from spying with appropriate measures. The Imam and his deputy are the only ones who have the power to kill the spy who was arrested. No one else can give him death penalty.

- 14 A person is identified as a perpetrator of social destruction through four ways, which are mentioned below.

- A. Two witnesses give testimonies on his espionage.
- B. The person in question willingly confesses about his espionage, without any pressure or violence
- C. The person is caught with materials raising strong suspicion, such as specific tools or equipments used for the purpose of spying.

Of course not everybody can detect whether the suspect was a perpetrator or not. In case there is a court, the judge will make an assessment. In there is no court, someone with a good observation, a tactful or religious person should assess the weakness and strength of the arguments for making a decision. If the arguments are weak, the perpetrator should be given light punishment. However if the arguments are strong, the punishment should be severe. If the arguments were strong enough and thoroughly examined, the perpetrator can be killed following the Imam and his deputy's approval.

- D. A person who is eligible to witness is someone who is fair, has no prejudice, keeps himself from major sins, and does not carry out minor sins repeatedly.
- 15 A crime cannot be proven if a person is forced to confess through beating, threats or other kinds of suffering. There are two types of promises that a Mujahid can make to a person if he confesses.

The first type of promises is similar to coercion and violence. As an example, the interrogator may tell the person that if he confesses he will not be killed or beaten, or that he will be released and not detained. In this case, the confession from the accused can be considered as forced confession, because the accused thinks that if he does not confess, he would be killed, beaten or detained. If a person confesses under these circumstances, his confession is not valid. Nevertheless, the interrogator is bound to fulfil the promise he made.

The second type of promises is not similar to coercion. As an example, the accused can be told that if he confesses he will receive money or a title / position. If he

confesses under these circumstances, his confession is valid. It is necessary to fulfil the promise made.

Of course the interrogator should be pious and tactful, and avoid taking forced confessions, because the latter are not valid under the Islamic Sharia. The Mujahideen should not make promises which they have no intention to fulfil.

It is not sufficient to take confession from the spy and testimonies from people. The four ways mentioned in article 14 shall apply. Afterwards, appropriate action should be taken.

[...]

- 18 If spies, detainees, or other criminals are convicted of murder and already sentenced to death, they should be executed by gun. Taking pictures of the person who was executed is prohibited.

Chapter Four **Regarding the individuals carrying out constructions and** **logistics activities for the enemy**

- 19 It is lawful to burn private cars which supply materials or carry out other services for the Infidels. It is also lawful to let them go after negotiations. However, letting them go against money or using their cars is prohibited.
- 20 Regarding the drivers who were captured while transferring the Infidels' materials: The Provincial authority has the power to punish them, release them in prisoner exchange, or release them with a solid guarantee (i.e. guarantee is given that no second offence would be committed; the drivers are put on probation). If the Mujahideen were unable to capture the above mentioned persons, then they can shoot at their cars.
- 21 Regarding the contractors who build military centres for the Infidels and their slavery administration, and supply fuel or other materials to them: If they do not leave their work despite the Mujahideen's warning, and if they are captured, only the Provincial authority can order imprisonment and other punishments. The Provincial authority can also exchange that contractor with other prisoners, or release him following strong guarantees given by people of trust in the relevant area or by his beloved ones (i.e. guarantee is given that no second offence would be committed; the contractor is put on probation). If the contractor deserved to be killed, the death sentence requires the permission of the Imam and his deputy. However, releasing the contractor against payment is prohibited. Contractors can be shot and killed if the elements mentioned above do not prevent them from carrying out their illegal activities, or if the Mujahideen cannot capture them.

Chapter Five Regarding the “Booty”

[...]

- 23 Booty refers to money or property which was taken following fighting with the foreign aggressors. Money or property taken by the Mujahideen without any fighting are considered as “Fay”, and go to the Public Treasury.

24 [...]

If they take items without fighting, then in any case these items will go to the Public treasury. Added to this, based on the orders given by the Imam or his deputy, these items may be used for the needs of the Jihad.

- 25 Regarding the money which was taken from the bank [...], money which has been already delivered to the employees and labourers are owned by the latter. The Imam and the Provincial Authority can give punishment to these individuals but cannot take their money from them. The same applies for wages received by NGO workers.

[...]

Chapter Seven The Mujahideen’s internal matters

- 34 It is compulsory for the Mujahideen to obey their own superior, as long as it is right under the Sharia. The Mujahideen obey their Group leader, their Group leader obeys the district leader, the district leader obeys the provincial leader, the provincial leader obeys the Director of the Organisation, and the Director of the Organisation obeys the Imam and his deputy.

[...]

- 37 If a Group leader in one province or district wants to carry out Jihad in another province or district, he can. However he needs to get permission from the Authority of the relevant Province or District. The authority of the relevant province or district will be his superior. He should be fully obedient to the authority in charge of the area.

[...]

- 41 Regarding Martyrdom attacks, the four following points should be considered.
- A. Martyrdom Mujahid should be well trained prior to the attack.
 - B. Martyrdom attack should be used on important and high targets. The heroic sons of the Islamic Ummah must not be used for low and worthless targets.
 - C. In Martyrdom attacks, much more care should be taken to prevent the deaths and injuries of civilians.

- D. Except for the Mujahideen who received individual instructions and permission from the Leadership, all other Mujahideen must receive instructions and permission from the Provincial Authority before carrying out Martyrdom attacks.

[...]

Chapter 10

Public/People's Affairs

[...]

- 46 The Provincial and District authorities, Group leaders and all other Mujahideen should take maximum measures to avoid civilian deaths and injuries, as well as the loss of their vehicles and other properties. In case of carelessness, each one will be held responsible according to their acts and position, and will be punished depending on the nature of their misconduct.
- 47 If a person or authority tried to harm the people in the name of the Mujahideen, the superior of the perpetrator is obliged to correct that person or authority. In case the superior failed to correct the perpetrator, they should report to the Leadership through the Provincial Authority. Then the Leadership will punish the person or authority according to its judgement. The leadership will fire the perpetrators from the lines of the Mujahideen's command if necessary.

Chapter Eleven

Regarding the Prohibitions

- 48 From the beginning of the Movement until now, weapons were collected at a huge scale. The collection of weapons from the public has provided the Public Treasury with enough weapons. From now on, no weapon shall be collected by force.

[...]

- 50 Underage boys without beard on their face are not allowed to live in the Mujahideen's residential places and military bases.
- 51 In light with the Holy Sharia, cutting parts of the human body (ears, nose, lips) is strictly prohibited. The Mujahideen should strictly avoid this kind of practices.
- 52 The Mujahideen of the Islamic Emirate must not collect the Tenth ("Ushur" tax), "Zakat" tax and forced donations by the people. The people must be free to voluntary donate or not.
- 53 The Mujahideen should not search the people's houses. If a search was strictly necessary, then they will get permission of the District authority. The Imam of the Mosque in the village and two village elders should accompany the Mujahideen during the search.
- 54 Kidnapping people for money under any reason is prohibited. The relevant authority of the area must firmly prevent this. If people committed this kind of act

in the name of the Islamic Emirate, the Provincial authority should disarm these criminals, following the instructions given by the Leadership.

Chapter 12

Advices

[...]

- 58 All staff of the Islamic Emirate should try their best to convince people who are deceived by the opposition to surrender and to put their weapons down. The promises made with them should be fulfilled. As a result the enemy will be weakened, and the problems for our own people will decrease. Added to this, in some cases the Mujahideen can get weapons and ammunitions from the surrenders.
- 59 The Mujahideen have the duty to behave well with people, and should try to win the normal Muslim's hearts and minds. Good behaviour of one Mujahid can represent the whole Islamic Emirate effectively. All fellow country people will welcome such Mujahid, and be ready to assist and collaborate with him.

[...]

- 63 Under the Sharia, the Mujahideen should adapt their physical appearance such as hair style, clothes, and shoes according to the local population of the area. It will bring more security for the Mujahideen, and allow them to move freely.

Chapter Thirteen

Recommendation regarding the Code of Conduct

[...]

- 65 The Central Military Commission, the District and Provincial Commission are responsible for delivering this Code of Conduct to the Mujahideen and implementing it.

[...]

- 67 It is mandatory to comply with the above mentioned articles. If someone violates the rules or oppose them, he should be tried under the Islamic law.

DISCUSSION

1. Which provisions of this code are incompatible with IHL? Which conform to IHL? Which deal with issues not covered by IHL?

I. Qualification and applicable law

2. According to the Code, who are the Mujahideen fighting against? Are they involved in an armed conflict? If yes, in an international or a non-international armed conflict? Does this make a difference for Islamic law? Does IHL apply to all Mujahideen acts?

3. Does the Code of Conduct refer to civilians? Does it distinguish between who may and may not be attacked? According to the Code, who may not be killed or harmed by the Mujahideen? Does this category correspond to that of civilians under IHL? According to the Code, who may be attacked? Does this category correspond to combatants or fighters under IHL? (P I, Art. 52; CIHL, Rules 1, 5-6)

II. Protection of persons

4. (*Arts 7-9*)
 - a. Who do the following categories refer to: “local or foreign enemy”, “employee, soldier, contractor or other worker of the slavery administration”, and “infidel warrior”? Do any of these categories correspond to a category under IHL? Does the Code provide information about when such persons may be arrested and detained? Under IHL, when could such persons be arrested and detained? If the fighting is an international armed conflict? If it is an armed conflict not of an international character?
 - b. What does the Code say about the way these categories of persons are to be treated during detention? Does the Code provide for the fundamental guarantees granted to prisoners of war by IHL? Does it provide for the fundamental guarantees granted to civilians deprived of their liberty? Does it provide for the fundamental guarantees granted to those detained for reasons related to a non-international armed conflict? (GC III, Arts 84-88; GC IV, Arts 43 and 78; P II, Arts 5-6; CIHL, Rules 118-128)
 - c. (*Arts 7-9, 54*) What does the Code say about hostage-taking and kidnapping? Are they prohibited under IHL? Can money be demanded in exchange for someone’s release? (GC I-IV, Art. 3; GC IV, Arts 34 and 147; P I, Art. 75(2)(c); P II, Art. 4(2)(c); CIHL, Rule 96)
5. (*Art. 8*) Under IHL, can “an employee, soldier, contractor or other worker” be punished solely because he is working for the enemy administration? Can soldiers be punished because they are participating in hostilities? For what acts can they be punished? For what acts can civilians be punished? Can anyone be sentenced to death? (GC I-IV, Art. 3; GC III, Arts 99-100; GC IV, Arts 68, 75 and 126)
6. (*Art. 10*) What do you think of Art. 10? Under IHL, can the detaining authorities ever kill a prisoner? What should a party to a conflict do when it is not able to detain captured enemies? (GC I-IV, Art. 3; GC III, Arts 13 and 130; P I, Art. 41(3))
7. (*Art. 11*) What does the Code say about policemen and soldiers who surrender? Does IHL distinguish between forced capture and surrender? Should a person be treated differently according to the way he was made prisoner? Does surrender grant broader protection under IHL?
8. (*Art. 12*) What does the Code say about spies? Does it offer them judicial guarantees when captured? What does IHL say about spies? What protection should they be granted? Can spies be sentenced to death? (GC I-IV, Art. 3; HR, Arts 29-31; GC IV, Arts 5 and 68; P I, Arts 45(3), 46 and 75)
9. (*Art. 18*) What do you think of the second sentence of Art. 18? Is there a corresponding provision under IHL? Is taking pictures prohibited only when the person being photographed has been executed? (GC III, Art. 13(2); GC IV, Art. 27(1))
10. (*Art. 21*) Under IHL, can private contractors be arrested and detained on the grounds that they are supplying material to a party to the conflict? Can all private contractors be considered as participating in hostilities? Does it depend on what kind of material / service they supply to the parties?
11. (*Art. 50*) What does Art. 50 mean? Can you find a corresponding provision in IHL? (P I, Art. 77(2); P II, Art. 4(3)(c); CIHL, Rules 136-137)

12. (*Art. 51*) Is there a provision under IHL corresponding to Art. 51 of the Code? What does IHL say about mutilations? Is the prohibition of mutilations limited to cutting certain parts of the body? (GC III, Art. 13; GC IV, Art. 32; P I, Art. 11(2)(a); P II, Art. 4(2)(a); CIHL, Rules 87, 90-92)

III. Protection of property

13. (*Arts 19-21*) Under IHL, may private property be destroyed? May it be destroyed only when it contributes to the military action of the enemy? Is supplying or performing services for the enemy a contribution to military action? (HR, Art. 23(g); GC IV, Art. 53; CIHL, Rules 50-51)
14. (*Arts 23-25, 52-53, 58*) Does the Code distinguish between public property and private property? Does such a distinction exist under IHL? When, if ever, may the public property of a party be taken by the enemy as booty of war? Is it lawful to take the weapons of an enemy who has surrendered or been captured? When, if ever, may private property be taken? Can money ever be taken from private individuals? (HR, Arts 23(g), 46, 53, 56; CIHL, Rules 49-52)

IV. Conduct of hostilities

15. (*Art. 20*) Can someone transporting material for the enemy be considered a legitimate target? Can the cars be shot at? Can they be destroyed when no one is inside? When someone is driving? Does it make a difference whether the driver can be considered as directly participating in hostilities?
16. (*Arts 41(C) and 46*) Does the Code specify how hostilities should be conducted? Could Art. 46 be understood as an obligation to take precautionary measures?
17. (*Art. 41*) Are “Martyrdom attacks” always unlawful? Are they lawful if they do not target civilians? How should the legality of “Martyrdom attacks” be assessed under IHL? (P I, Arts 51(5)(b), 52, 57 and 58; CIHL, Rules 7-24)
18. (*Art. 63*) What do you think of Art. 63 of the Code? Under IHL, is it lawful for fighters to hide among the civilian population? What are the risks if the Mujahideen cannot be distinguished from the civilian population? How else could the Mujahideen fight successfully against government and Western forces? (GC I-IV, Art. 3; P I, Arts 44(3) and 48; CIHL, Rules 1 and 106)

V. Responsibility

19. (*Arts 34-37, 46-47 and 67*) Are the Mujahideen an organized group under a command responsible for the acts of its subordinates? Does the Code provide for sanctions or disciplinary measures if violations are committed? Who may be held responsible for violations of the Code? Can you find similar provisions in IHL? (GC I-IV, Arts 49/50/129/146 respectively; P I, Arts 86-87; P II, Art. 1; CIHL, Rules 152-154)
20. Is this Code preferable to no instructions at all? Is it preferable to a declaration to comply with the Geneva Conventions and Protocol I?

**Case No. 261, United States, Status and Treatment of
Detainees Held in Guantánamo Naval Base****I. Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements**

[Source: ROTH Kenneth, U.S Officials misstate Geneva Convention requirements, Human Rights Watch, New York, 28 January 2002, <http://www.hrw.org>]

Human Rights Watch

January 28, 2002

The Honourable Condoleezza Rice
National Security Advisor
The White House
Washington, DC

Dear Ms. Rice,

We write concerning the legal status of the Guantanamo detainees. Our views reflect Human Rights Watch's experience of over twenty years in applying the Geneva Conventions of 1949 to armed conflicts around the world. We write to address several arguments advanced for not applying Article 5 of the Third Geneva Convention of 1949, which, as you know, requires the establishment of a "competent tribunal" to determine individually whether each detainee is entitled to prisoner-of-war status should any doubt arise regarding their status. Below we set forth each of the arguments offered for ignoring Article 5 as well as Human Rights Watch's response.

Argument: The Geneva Conventions do not apply to a war against terrorism.

HRW Response: The U.S. government could have pursued terrorist suspects by traditional law enforcement means, in which case the Geneva Conventions indeed would not apply. But since the U.S. government engaged in armed conflict in Afghanistan – by bombing and undertaking other military operations – the Geneva Conventions clearly do apply to that conflict. By their terms, the Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Both the United States and Afghanistan are High Contracting Parties of the Geneva Conventions.

Argument: A competent tribunal is unnecessary because there is no "doubt" that the detainees fail to meet the requirements of Article 4(A)(2) for POW status.

HRW response: Article 5 requires the establishment of a competent tribunal only "[s]hould any doubt arise" as to whether a detainee meets the requirements for POW status contained in Article 4. The argument has been made that the detainees clearly do not meet one or more of the four requirements for POW status contained in Article 4(A)(2) – that they have a responsible command, carry their arms openly, wear uniforms

with distinct insignia, or conduct their operations in accordance with the laws and customs of war. However, under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government's regular armed forces – for example, to those members of al-Qaeda who were operating independently of the Taliban's armed forces. But under Article 4(A)(1) these four requirements do not apply to "members of the armed forces of a Party to the conflict as well as members of militia forming part of such armed forces." That is, this four-part test would not apply to members of the Taliban's armed forces, since the Taliban, as the *de facto* government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban's armed forces, such as, perhaps, the Taliban's "55th Brigade," which we understand to have been composed of foreign troops fighting as part of the Taliban.

Administration officials have repeatedly described the Guantanamo detainees as including both Taliban and al-Qaeda members. A competent tribunal is thus needed to determine whether the detainees are members of the Taliban's armed forces (or an integrated militia), in which case they would be entitled to POW status automatically, or members only of al-Qaeda, in which case they probably would not be entitled to POW status because of their likely failure to meet the above-described four-part test. Until a tribunal makes that determination, Article 5 requires all detainees to be treated as POWs.

Argument: Even members of the Taliban's armed forces should not be entitled to POW status because the Taliban was not recognized as the legitimate government of Afghanistan.

HRW response: As Article 4(A)(3) of the Third Geneva Convention makes clear, recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power." That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government's armed forces, not to members of a recognized (Article 4(A)(1)) or unrecognized (Article 4(A)(3)) government's armed forces. Thus, whether a government is recognized or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

This reading of the plain language of Article 4 is consistent with sound policy and past U.S. practice. As a matter of policy, it would undermine the important protections of the Third Geneva Convention if the detaining power could deny POW status by simply withdrawing or withholding recognition of the adversary government. Such a loophole would swallow the detailed guarantees of the Third Geneva Conventions – guarantees on which U.S. and allied troops rely if captured in combat. This reading is also consistent with past U.S. practice. During the Korean War, the United States treated captured Communist Chinese troops as POWs even though at the time the United States (and the United Nations) recognized Taipei rather than Beijing as the legitimate government of China.

Argument: Treating the detainees as POWs would force the United States to repatriate them at the end of the conflict rather than prosecuting them for their alleged involvement in terrorist crimes against Americans.

HRW response: POW status provides protection only for the act of taking up arms against opposing military forces. If that is all a POW has done, then repatriation at the end of the conflict would indeed be required. But as Article 82 explains, POW status does not protect detainees from criminal offences that are applicable to the detaining powers' soldiers as well. That is, if appropriate evidence can be collected, the United States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law – more than enough to address any act of terrorism against Americans – whether or not a competent tribunal finds some of the detainees to be POWs. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only "if the Detaining Power [that is, the United States] consents."

Argument: Treating the detainees as POWs would preclude the interrogation of people alleged to have information about possible future terrorist acts.

HRW response: This is perhaps the most misunderstood aspect of the Third Geneva Convention. Article 17 provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to "restriction" of their privileges. However, nothing in the Third Geneva Convention precludes interrogation on other matters; the Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states that torture and other forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. (See, e.g., Article 2 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the U.S. has ratified: "No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." See also Articles 4 and 5, making violation of this rule a criminal offence of universal jurisdiction.)

Article 17 of the Third Geneva Convention provides that POWs shall not be "exposed to any unpleasant or disadvantageous treatment of any kind" for their refusal to provide information beyond their name, rank, serial number, and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining – that is, the offer of leniency in return for cooperation – or other incentives. Plea bargaining and related incentives have been used repeatedly with success to induce cooperation from members of such other violent criminal enterprises such as the mafia or drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

Argument: The detainees are highly dangerous and thus should not be entitled to the more comfortable conditions of detention required for POWs.

HRW response: In light of the two prisoner uprisings in Afghanistan, we do not doubt that at least some of the Guantanamo detainees might well be highly dangerous. Nothing in the Geneva Conventions precludes appropriate security precautions. But if some of the detainees are otherwise entitled to POW status, the Conventions do not allow them to be deprived of this status because of their feared danger. Introducing unrecognized exceptions to POW status, particularly when done by the world's leading military power, would undermine the Geneva Conventions as a whole. That would hardly be in the interest of the United States, since it is all too easy to imagine how that precedent will come back to haunt U.S. or allied forces. Enemy forces who might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying POW protections.

In conclusion, we hope the U.S. government will agree to establish the "competent tribunal" required by Article 5 of the Third Geneva Convention for the purpose of determining case by case whether each detainee in Guantanamo is entitled to prisoner-of-war status. That decision would uphold international law, further U.S. national interests, and not impede legitimate efforts to stop terrorism. [...]

Kenneth Roth

Executive Director

II. United States of America, Press Conference of Donald H. Rumsfeld

[Source: U.S. Department of Defence News Briefing, Secretary Rumsfeld and Gen. Myers, Washington, 8 February 2002, <http://www.defenselink.mil>]

United States Department of Defense News Transcript

**Presenter: Secretary of Defense Donald H. Rumsfeld
Friday, February 08, 2002 – 1:30 p.m. EST**

**DoD News Briefing – Secretary Rumsfeld and Gen. Myers
(Also participating: General Richard Myers, Chairman, Joint Chiefs of Staff)**

Rumsfeld: Good afternoon. The United States, as I have said, strongly supports the Geneva Convention. Indeed, because of the importance of the safety and security of our forces, and because our application of the convention in this situation might very well set legal precedence that could affect future conflicts, prudence dictated that the U.S. government take care in determining the status of Taliban and Al Qaeda detainees in this conflict.

The president has, as you know, now determined that the Geneva Convention does apply to the conflict with the Taliban in Afghanistan. It does not apply to the conflict with al Qaeda, whether in Afghanistan or elsewhere. He also determined that under the Geneva Convention, Taliban detainees do not meet the criteria for prisoner of war status.

When the Geneva Convention was signed in the mid-20th century, it was crafted by sovereign states to deal with conflicts between sovereign states. Today the war on

terrorism, in which our country was attacked by and is defending itself against terrorist networks that operate in dozens of countries, was not contemplated by the framers of the convention.

From the beginning, the United States armed forces have treated all detainees, both Taliban and al Qaeda, humanely. They are doing so today, and they will do so in the future. Last month I issued an order to our military, which has been reaffirmed by the president, that all detainees – Taliban and al Qaeda alike, will be treated humanely and in a manner that's consistent with the principles of the Geneva Convention.

As the president decided, the conflict with Taliban is determined to fall under the Geneva Convention because Afghanistan is a state party to the Geneva Convention. Al Qaeda, as a non-state, terrorist network, is not. Indeed, through its actions, al Qaeda has demonstrated contempt for the principles of the Geneva Convention. The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.

A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and non-combatants. This is why the convention requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.

What will be the impact of these decisions on the circumstances of the Taliban and al Qaeda detainees? And the answer, in a word, is none. There will be no impact from these decisions on their treatment. The United States government will continue to treat them humanely, as we have in the past, as we are now, and in keeping with the principles of the Geneva Convention. They will continue to receive three appropriate meals a day, medical care, clothing, showers, visits from chaplains, Muslim chaplains, as appropriate, and the opportunity to worship freely. We will continue to allow the International Committee of the Red Cross to visit each detainee privately, a right that's normally only accorded to individuals who qualify as prisoners of war under the convention.

In short, we will continue to treat them consistent with the principles of fairness, freedom and justice that our nation was founded on, the principles that they obviously abhor and which they sought to attack and destroy. Notwithstanding the isolated pockets of international hyperventilation, we do not treat detainees in any manner other than a manner that is humane. [...]

Q: Mr. Secretary, how do you respond to criticism from people who say that the reason you won't call these detainees prisoners of war is because, as prisoners of war, they might be tried by military courts martial, where their rights would be much more carefully spelled out, as opposed to possible tribunals, which the president has authorized?

Rumsfeld: Well, I'll respond factually, by saying that that's not correct. Those issues have never been discussed, nor have they ever been any part of the consideration in the determination. The considerations have been continuously, as they've been discussed by the lawyers, issues as to precedent, what is the right thing to do, what is consistent with the conventions, and what establishes a precedent that is appropriate for the future. We could try them any number of ways. And that has not been a factor at all.

The convention created rules to make soldiers distinguish themselves from civilians, and the reason for that was so that civilians would not be unduly endangered by war. The convention created, in effect, an incentive system, and it was an extremely important part of the conventions, that soldiers who play by the rules get the privileges of prisoner-of-war status. To give a POW status to people who did not respect the rules clearly would undermine the conventions' incentive system and would have the non-intuitive effect of increasing the danger to civilians in other conflicts. [...]

Q: Are you considering any limitations, new limitations or an outright ban on TV or photo coverage of Camp X-ray?

Rumsfeld: Am I currently considering anything like that? I don't know that we are. I must say, I have found the misrepresentation of those photos to be egregious, notwithstanding the fact that we had a caption under that, I'm told, from the outset.

Q: You're talking about the original photo?

Rumsfeld: The original photo. And it has – those people were there in the circumstance when they came out of the airplane, off the bus, off the ferry, off the bus, into that area. They were in there somewhere between 10 and 60 or 80 minutes at the maximum as they were taken individually and processed in a tent right nearby, where they were met, data gathered, and then they were placed in individual cells.

The newspaper headlines that yelled, "Torture! What's next? Electrodes?" and all of this rubbish was so inexcusable that it does make one wonder, as I said to Jamie, [Note: Jamie McIntyre, CNN Correspondent for Military Affairs.] why we put out any photographs, if that's the way they're going to be treated, so irresponsibly.

Jamie's contention was we should put out more photos with captions. I'm not sure – I almost always agree with Jamie, but in this case I'm not quite sure. One thought that someone has suggested, I don't know if it's still under consideration, is that we release photos but with a mandatory caption, that the caption we supply be used if someone wants to use the picture. But I haven't thought about that. I don't know if that's a good idea or a bad idea. [...]

Q: I'm asking you about independent news organizations' coverage by photo or TV. Is there any?

Rumsfeld: Well, as you know, there is a – there are – I'm not going to say there are not rules, but there are certainly patterns and practices that have evolved since the Geneva Convention where it is frowned upon to allow photos that could be seen as being embarrassing or there's a couple other words they use, invasive of their privacy, what?

Victoria Clarke, Assistant Secretary of Defense for Public Affairs: Curiosity – holding them up for public –

Rumsfeld: Holding them up for public curiosity. So we have to be careful about photographs that are taken. [...]

[On the topic of public curiosity, *see also* **Case No. 289**, United States, Public Curiosity]

Q: Can you explain – I know the administration has said that the Taliban do not qualify for POW status because of these four criteria – (inaudible) – uniforms, special insignia – [...] and yet there's another part of that that says the armed forces of any party in the conflict should qualify as a POW. Why would you not put the Taliban under that category, which does not have those four criteria?

Rumsfeld: Well, the president has said the Taliban does apply – the convention does apply to the Taliban.

Q: It applies to the Taliban – but not POW status. [?]

Rumsfeld: Well, that's a different set of criteria for that.

Q: Exactly, and that's what I'm saying. The second criteria – you have four criteria, and it's outside – [...]. One of the articles says that you qualify for POW status if you are a member of the armed forces of a party in conflict. Why does the Taliban not qualify as POW under that? Why have you put them in this separate category, where they would be militia?

Rumsfeld: I think you're – I may not be following the question, but I think we're mixing apples and oranges. [...]

Q: But there is another category that says they qualify for POW status if they are a member of the armed forces of the party to a conflict. I don't want to get in these big legal issues –

Rumsfeld: Yeah, because I'm not a lawyer, and –

Q: – but that's written exactly above the militia, where the four –

Rumsfeld: We'll ask the lawyers. This was a decision not made by me, not made by the Department of the Defense. It was made by the lawyers and by the president of the United States. And we'll –

Q: But would you say the Taliban is the armed forces of that country?

Rumsfeld: We will take your question and see if the lawyers that made the decision would like to address it. [...]

Q: [...] In Geneva, a spokesman for the International Red Cross is saying that the decision falls short because the International Red Cross says that all al Qaeda or Taliban are POWs unless a competent tribunal decides otherwise. What would be your reaction to that?

And also, you didn't mention how this decision would affect them legally, such as their access to legal counsel, the way they're interrogated. Two angles to that, first the International Red Cross.

Rumsfeld: With respect to the second part of the question, I'm told it doesn't affect their legal status at all, nor does it affect how they'd be treated. And – that is to say, it does not affect their status from the way they have been being handled prior to the decision by the White House or now. There's no change either – to my knowledge – in their status or how they'll be treated.

Q: Or answer questions like – they may not give any more than their name, rank, serial number? Does it affect how they're interrogated?

Rumsfeld: That, I believe, applies to a prisoner of war, under the Geneva Convention.

With respect to the International Committee of the Red Cross, my guess is that if they have lawyers who encourage them to say what they say, that very likely the lawyers that came to the opposite conclusion will have something to say about what they said. And that's the way the world works. These kinds of things – if we begin with the truth, and that is that it's not affecting how they're being treated, and then take this whole issue and say that it really revolves around a discussion between lawyers as to precedents for the future, it seems to me that it's appropriate to let the lawyers discuss those things. The announcement was made by the White House – Ari Fleischer – and I suppose that the answers to those kinds of legal questions should come from Ari Fleischer as well. [...]

Q: Have you made any progress that you can share with us in deciding the next step? In other words, will these people be sent to commissions, to tribunals, to the civilian justice system, back to their countries? Have you made any progress in any of that?

Rumsfeld: Sure. Sure. Sure. We are interviewing them. They've – I forgot what the number is, but it's something like, if there were 158 down there prior to the latest [look], I think something like 105 of those have been interrogated and met with, and the intelligence information is being gathered from them. The question as to whether any of them will be subject to the presidential military order for a military commission, some people call it tribunal, but commission I think is in the order, the answer is that's up to the president. He decides whom – which among these people – he would want to put into the category, and he has not made any decision with respect to anyone being dealt with in that manner.

Q: But I believe you were working on a plan here at the Defense Department on what the standards were for how these people would be sorted out and treated.

Rumsfeld: We have been, you're right.

Q: Is there anything you could share with us about any progress you've made in those decisions?

Rumsfeld: Except to say we've made a lot of progress, we've cleared away a lot of underbrush, we have four or five things that I think we're reasonably well settled on that we would use. And there, obviously, has to be then discretion – a degree of

discretion – left to the individual commissions as to how they deal with a variety of different issues. [...]

Q: Mr. Secretary, the Geneva Conventions of course cover many other things besides prisoners of war. They govern, for example, what's a legitimate target, what's not a legitimate target. As U.S. military operations go forward against al Qaeda in the future, will those operations be governed by any or bounded by any international legal constraints at all?

Rumsfeld: Well, I guess the phrase is, "In accordance with the laws and customs of war, that's how the men and women in the armed services are trained. That's how they conduct themselves" – I think is the appropriate answer.

Q: Because it's your own will to conduct that way. But you don't see any laws that actually would apply to U.S. military operations against al Qaeda, I mean international laws of war that would apply to military operations against al Qaeda?

Rumsfeld: We've not noted that the al Qaeda have adhered to any international laws of war or customs. The United States does, has and will. That is how every single man and woman in the United States armed forces is trained, and they understand that. [...]

Q: Whether it's obligated to or not?

Rumsfeld: Yeah. I mean, we have said that as a matter of policy, that's the way we behave, that's the way we will handle people, that's the way we will function, and have been.

Q: Mr. Secretary, you mentioned one of the principles from the Geneva Convention that soldiers should be distinguishable from civilian populations. But isn't it true that you have Special Forces in Afghanistan have grown beards, they're not wearing insignia uniform? And how would you feel if a member of the U.S. Special Forces – God forbid – were captured in Afghanistan, but were treated humanely, would you object if they were not given prisoner of war status?

Rumsfeld: The short answer is that U.S. Special Forces – I don't know that there's any law against growing a beard. I mean, that's kind of a strange question.

Q: Yeah, what about not wearing insignia – [...]

Rumsfeld: [...] They do wear insignia, they do wear uniforms. Those photographs you saw of U.S. Special Forces on horseback, they were in the official uniform of the United States Army, and they wear insignia and they do carry their weapons openly, and they do behave as soldiers. That's the way they're taught, that's what they do. They may have a beard, they may put a scarf over their head if there's a sand storm, but there's no rule against that.

They certainly deserve all of the rights and privileges that would accrue to somebody who is obeying the laws and customs of war. And they carry a card. You've probably got one in your pocket right now, of their Geneva Convention circumstance.

Myers: Yeah, the ID they carry are Geneva Convention cards. I mean, that's the standard.

Rumsfeld: And they all have that. [...]

Q: Can you say how many of the detainees are al Qaeda, how many are Taliban?

Rumsfeld: I don't know. I've looked at several of the forms that are being used to begin to accumulate the data. They have photographs, they have identifying features. Then they have the information that the individual has given us, that is to say their nationality, roughly when they were born, what languages they speak so you can talk to them, and a whole series of things like that. Whether they say they're al Qaeda, whether they say they were Taliban, what units – activities they were doing, where they were trained – those types of things. There's a form that they fill out that's the preliminary information. Whether it's true or not – there's a lot of them who don't tell quite the truth.

Q: But haven't they been screened at this point?

Rumsfeld: Yes.

Let's – you want to go through the screening process. Let's ... it might be useful.

Someone who is detained – and they may be detained by Afghan forces, Pakistani forces, U.S. forces – a sort is then taking place. The ones that we have, they will be interviewed by a team of people, three or four or five people – sometimes Department of Justice, sometimes Army, mixture of Army, sometimes CIA, sometimes whatever. And they're met with, and they're talked to, and they're interviewed. And a preliminary discussion takes place and a preliminary decision is made.

In some cases, they just let them go. They're foot soldiers, and they – they're going to go back into their village, and they're not going to bother anybody. In some cases, they're al Qaeda, senior al Qaeda, in which case they're treated in a totally different way, in a very careful way. In some cases, it's unclear, and they then are sent someplace, if we have custody of them, and they will go either to Bagram or they'll go to Kandahar. In one or two cases, they've gone to a ship for medical treatment. And then, in some cases, they end up at Guantanamo Bay.

If the Afghans hold them, they'll tell us what they've got, what they think they've got. And as we have time, we then send these teams in and do the same kind of a screening and make a judgment. Same thing with the Pakistanis when they have clusters of them.

There are, you know, 3,(000) or 4,(000), 5,(000), 6,(000), thousands of these people. We have relatively few that we have taken and retained custody over.

Q: But have you determined the – of the ones that you do have, have you determined their status individually, on an individual?

Rumsfeld: Yes, indeed, individually.

Q: So you know which are al Qaeda and which are Taliban?

Rumsfeld: "Determined" is a tough word. We have determined as much as one can determine when you're dealing with people who may or may not tell the truth. [...] So yes, we've done the best we can.

Q: So there's no need for status tribunals to decide who's Taliban and who's al Qaeda?

Rumsfeld: My understanding is that when there's – when doubt is raised about it – a process then is a more elaborate one, where they then are brought back into discussion and interrogation, and other people will ask about them. Well, we will ask other people in the mix who these people are and try to determine what the story is. But – and now, once they've gone through one or two sorts like that and they're determined to be people we very likely will want to have a longer time to interrogate and want to get out of the imperfect circumstance they're in – they may be in – that the Pakistanis would like to get rid of them or the Afghans would like to get rid of them, or there's not enough room in Kandahar – we take them to Guantanamo Bay as soon as the cells are made fast enough.

And there they will go through a longer process of interrogation. [...]

Q: And on the question of POW status, are you confident that you're not setting a precedent here that could rebound to the disadvantage of American troops captured sometime in the future in another conflict?

Rumsfeld: Of that I – again – first of all, to know what kind of a precedent you're setting you have to be very, very smart and see into the future. That's hard to do. It's hard even for very smart lawyers – which I'm not.

I am very confident that we are not doing anything to – in any way disadvantage the rights and circumstances of the U.S. military. I think that the decision was made by the president with that very much in mind, and it was expressed by a number of the people in the deliberative process, and it was expressed over a period of time because it was very carefully dealt with. It was not a hasty decision. This took us some days.

What I cannot say about the precedent is that that decision, or any other decision, conceivably could end up having an effect, a precedential effect down the road that is difficult to anticipate now. And it was because of that caution and that concern that they wanted to apply it very carefully that so much time was taken in attempting to make that judgment. But the one thing that I am reasonably satisfied with is the question you asked, and that is that we have taken every care to ensure that the decision would not in any way adversely affect U.S. armed forces. [...]

Q: Are the Afghan forces that are participating with the U.S. troops wearing clear uniforms, insignia and the other parts of that Geneva Convention?

Rumsfeld: You know, I can't speak to all of those units. But I certainly have seen Afghan forces that had uniforms on, and insignia, and were carrying their weapons openly, and were part of one of the various Northern Alliance elements. Have I seen them all in Afghanistan? No, so I can't answer your question as to whether there might be some. But I certainly have seen Afghan forces that do in fact comport themselves in a manner that would be consistent with the Geneva Convention. [...]

Q: ... are there not CIA agents or intelligence agents of some kind on the ground who are not wearing uniforms and insignia? And are they not in a combatant role, in other words, helping to coordinate things such as airstrikes?

Rumsfeld: I don't know of people doing that who are coordinating airstrikes. [...]

Q: And secondly, on the photos, a number of lawyers who deal in international law have suggested that this is kind of an unprecedented interpretation of the restriction on photographs. In other words, that the idea was that you not parade prisoners out to a jeering public.

Rumsfeld: Right.

Q: It wasn't intended to bar incidental news photos.

Rumsfeld: Yeah, so that's why you have to be somewhat careful. And that's why we've tried to be somewhat careful. You know, should the pendulum be over here or over here? It's hard to know. This is – this is a new set of facts for us. It's a new situation. They've been down there, these prisoners, detainees, what?, I don't know, 20 days. Something like that, 25? Not long.

Myers: And just to remind you, we have the International Committee of the Red Cross down there essentially continuously talking to the detainees. [...] You know, we get pretty far down on these arguments. We go down to the third and fourth level of detail on these arguments about the Geneva Convention and treatment and so forth, and I think we've answered those forthrightly and we've taken lots of people down. In fact, I think there's a congressional delegation down there today. But let's never forget why we have them in the first place. We have them because probably there's a good chance that one or two or all of them know of the next event. And that's – it's our obligation, consistent with humane treatment and the Geneva Convention, to try to find that out. And I think as we have these, in some cases, more esoteric debates on this business, we're trying to find out what's going to keep another incident from happening, in this country or in our friends' and partners' countries. [...]

Q: On the four criteria, and your description of why you believed the Taliban forces did not meet the criteria for POW status – you talked about lack of differentiation from civilians, no proper unit, no real hierarchy – but I wish we all had a dollar here for every briefing we heard during Enduring Freedom when we were told that we were attacking Taliban command and control, we were attacking identifiable Taliban forces, and that these were clearly differentiable by our Special Forces from civilians. Those seem to be rather different from your entire statement.

Rumsfeld: Well of course it's because it's of a different order. The kinds of things that the Geneva Convention talks about are the kinds of things you see when you're standing right next to a person looking at how they're handling themselves.

The kind of things that we were talking about on command and control would be communication intercepts, it would be people firing at Northern Alliance forces and attacking them, it would be concentrations of artillery or surface-to-air missiles, and those types of things that would – and knowledge that they are not Northern Alliance. And yet you see them there and you can identify a series of things that tell you they are combatant forces that are engaged in fighting against the Northern Alliance forces, and it enabled the people on the ground and the people in the air to make those kinds of judgments.

Is that pretty –

Q: But just to pursue, wasn't it clear that the Taliban forces were operating as units? Whether they call themselves companies or platoons or ... is another matter, but they were operating as coherent military, which our air strikes could attack, and it's clear they were receiving orders down the chain of command and control, which is why we're attacking command and control.

Rumsfeld: There's no question but that on any one of those things, you might be exactly right, that you could make that case. No one, I think, could make the case on all four of those criteria.

Q: But were they the armed forces of Afghanistan at the time that the United States was attacking them? Were they considered?

Rumsfeld: That's a legal question. The president has said he is going to – I shouldn't repeat what he said, what the statement from the White House said. You know what it said. And he applies the convention to the Taliban. And the answer to your question is, either as a matter of policy or a matter of law, they are being considered as being covered by the Geneva Convention. I don't know why you would ask the question. [...]

III. UN Human Rights Commission, Report on the situation of detainees at Guantánamo Bay

[Source: UN Human Rights Commission, "Situation of detainees at Guantanamo Bay", UN Doc. E/CN.4/2006/120, 27 February 2006; available at www.un.org. Footnotes omitted.]

UN COMMISSION ON HUMAN RIGHTS

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CIVIL AND POLITICAL RIGHTS

Situation of detainees at Guantánamo Bay

Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt

Summary

The present joint report is submitted by five holders of mandates of special procedures of the Commission on Human Rights who have been jointly following the situation of detainees held at the United States of America Naval Base at Guantánamo Bay since June 2004.

[...]

2. Since January 2002, the five mandate holders have been following the situation of detainees held at the United States Naval Base at Guantánamo Bay. In June 2004, they decided to continue this task as a group because the situation falls under the scope of each of the mandates.

[...]

4. The present report is [...] based on the replies of the Government to a questionnaire concerning detention at Guantánamo Bay submitted by the mandate holders, interviews conducted by the mandate holders with former detainees currently residing or detained in France, Spain and the United Kingdom and responses from lawyers acting on behalf of some Guantánamo Bay detainees to questionnaires submitted by the mandate holders. It is also based on information available in the public domain, including reports prepared by non-governmental organizations (NGOs), information contained in declassified official United States documents and media reports. [...]

I. THE LEGAL FRAMEWORK

[...]

B. The obligations of the United States of America under international law

8. The United States is party to several human rights treaties relevant to the situation of persons held at Guantánamo Bay, most importantly the International Covenant on Civil and Political Rights (ICCPR) [...].
9. The United States is also party to several international humanitarian law treaties pertinent to the situation in Guantánamo Bay, primarily the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), of 12 August 1949, many provisions of which are considered to reflect customary international law. Although the United States is not a party to the Additional Protocols I and II to the Geneva Conventions, some of their provisions – in particular article 75 of Additional Protocol I – are regarded as applicable as they have been recognized as declaratory of customary international law.

[...]

E. The complementarity of international humanitarian law and human rights law

15. The application of international humanitarian law and of international human rights law are not mutually exclusive, but are complementary. As stated by the Human Rights Committee in general comment No. 31 (2004):

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While in respect of certain Covenant rights, more specific rules of international humanitarian law may

be especially relevant for the purpose of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive”.

16. In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ clearly affirmed the applicability of ICCPR during armed conflicts [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]. The Court stated that “the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict”. The Court confirmed its view in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*: “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]” [See Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory].

II. ARBITRARY DETENTION AND INDEPENDENCE OF JUDGES AND LAWYERS

[...]

18. The legal regime imposed on detainees at Guantánamo is regulated by the Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001 (hereafter referred to as the “Military Order”). It allows suspects to be detained indefinitely without charge or trial, or to be tried before a military commission. [...]

A. Deprivation of liberty at Guantánamo Bay

19. The fundamental proposition of the United States Government with regard to the deprivation of liberty of persons held at Guantánamo Bay is that “[t]he law of war allows the United States – and any other country engaged in combat – to hold enemy combatants without charges or access to counsel for the duration of hostilities. Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States”. While the Chairperson of the Working Group and the Special Rapporteur would not use the term “enemy combatant”, they share the understanding that any person having committed a belligerent act in the context of an international armed conflict and having fallen into the hands of one of the parties to the conflict (in this case, the United States) can be held for the duration of hostilities, as long as the detention serves the purpose of preventing combatants from continuing to take up arms against the United States. Indeed, this principle encapsulates a fundamental difference between the laws of war and human rights law with regard to deprivation of liberty. In the context of armed conflicts covered by international humanitarian law, this rule constitutes the *lex specialis* justifying deprivation of liberty which would otherwise, under human rights law as enshrined by article 9 of ICCPR, constitute a violation of the right to personal liberty.
20. The United States justifies the indeterminate detention of the men held at Guantánamo Bay and the denial of their right to challenge the legality of the

deprivation of liberty by classifying them as “enemy combatants”. For the reasons the Chairperson of the Working Group and the Special Rapporteur will elaborate, [...] the ongoing detention of the Guantánamo Bay detainees as “enemy combatants” does in fact constitute arbitrary deprivation of the right to personal liberty.

21. Because detention “without charges or access to counsel for the duration of hostilities” amounts to a radical departure from established principles of human rights law, it is particularly important to distinguish between the detainees captured by the United States in the course of an armed conflict and those captured under circumstances that did not involve an armed conflict. In this context, it is to be noted that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law.

B. Detainees captured in the course of an armed conflict

22. The Third Geneva Convention provides that where, in the context of “cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” (art. 2 (1)), a person “having committed a belligerent act and having fallen into the hands of the enemy” may be detained as a prisoner of war until the end of the hostilities. The Fourth Geneva Convention allows a party to the conflict to detain (“intern”) civilians because they constitute a threat to the security of the Party or intend to harm it (arts. 68, 78 and 79), or for the purposes of prosecution on war crimes charges (art. 70). Once the international armed conflict has come to an end, prisoners of war and internees must be released, although prisoners of war and civilian internees against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings. As the rationale for the detention of combatants not enjoying prisoner of war status is to prevent them from taking up arms against the detaining power again, the same rule should be applied to them. In other words, non-privileged belligerents must be released or charged once the international armed conflict is over.
23. The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions. Information obtained from reliable sources and the interviews conducted by the special procedures mandate holders with former Guantánamo Bay detainees confirm, however, that the objective of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network.
24. The Chairperson of the Working Group and the Special Rapporteur note that, while United States Armed Forces continue to be engaged in combat operations in Afghanistan as well as in other countries, they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions. In the ongoing non-international armed conflicts involving United States forces, the *lex specialis* authorizing detention without respect for the guarantees set forth in article 9 of ICCPR therefore can no longer serve as a basis for that detention.

C. Detainees captured in the absence of an armed conflict

25. Many of the detainees held at Guantánamo Bay were captured in places where there was – at the time of their arrest – no armed conflict involving the United States. The case of the six men of Algerian origin detained in Bosnia and Herzegovina in October 2001 is a well-known and well-documented example, but also numerous other detainees have been arrested under similar circumstances where international humanitarian law did not apply. The legal provision allowing the United States to hold belligerents without charges or access to counsel for the duration of hostilities can therefore not be invoked to justify their detention.
26. This does not of course mean that none of the persons held at Guantánamo Bay should have been deprived of their liberty. Indeed, international obligations regarding the struggle against terrorism might make the apprehension and detention of some of these persons a duty for all States. Such deprivation of liberty is, however, governed by human rights law [...]. This includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of independence and impartiality, the right to be informed of the reasons for arrest, the right to be informed about the evidence underlying these reasons, the right to assistance by counsel and the right to a trial within a reasonable time or to release. Any person deprived of his or her liberty must enjoy continued and effective access to *habeas corpus* proceedings, and any limitations to this right should be viewed with utmost concern.

[...]

IV. US Government, Reply to the Report to the UN Human Rights Commission

[Source: Government of the United States, "Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba", 10 March 2006; available at www.asil.org]

Reply of the Government of the United States of America to the Report of the Five Special Rapporteurs on Detainees in Guantanamo Bay, Cuba

March 10, 2006

I. INTRODUCTION

[...]

- [1] The United States profoundly objects to the Report both in terms of process and of substance and underscores that the Report's factual and legal assertions are inaccurate and flawed. [...]

IV. LAW OF WAR

[...]

- [2] Nowhere does the Report set out clearly the rules that apply according to international and United States law. It is important to recall the context of the Guantanamo detentions. The war against Al Qaida and its affiliates is a real (not a rhetorical) war. The United States is engaged in a continuing armed conflict against Al Qaida, and customary law of war applies to the conduct of that war and related detention operations. The International Covenant on Civil and Political Rights, by its express terms, applies only to "individuals within its territory and subject to its jurisdiction" [...], and thus does not apply to Guantanamo.
- [3] The Report acknowledges that both lawful and unlawful combatants may be detained without charges, trial or counsel until the end of active hostilities [...]. The Report also acknowledges that the law applicable in armed conflict is the *lex specialis* [...]. However, the Report's legal discussion and conclusions rest on the erroneous position that the ICCPR applies to Guantanamo detainees because, "while United States armed forces continue to be engaged in combat operations in Afghanistan as well as in other countries, they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions" [...]. This is incorrect: the existence of an armed conflict is determined *inter alia* by the intensity, and scope and duration of hostilities, not by whether the situation is afforded Geneva Convention protection. [...].
- [4] Prisoners of war may be detained until the end of active hostilities, and in recognition of battlefield conditions, investigation and prosecution of combatant detainees is not required unless they are charged with a crime. The Report does not question this well-established precept of international humanitarian law, yet nevertheless assails the United States for applying a similar detention regime to unlawful combatants, who are not eligible for POW status due to their failure to heed the basic law of war. The approach called for by the Report is unprecedented, and indeed would turn international humanitarian law on its head by affording greater protections to unlawful combatants than to lawful ones. This is not, and cannot be, the law. To the contrary, it is the view of the United States Government that we cannot have an international legal system in which honorable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war without access to courts or counsel, but terrorist combatants who violate those very laws must be given special privileges or released and allowed to continue their belligerent or terrorist activities. Such a legal regime would signal to the international community that it is acceptable for armies to behave like terrorists.

V. ONGOING ARMED CONFLICT

- [5] As the Special Rapporteurs are aware, on September 11, 2001, the United States was the victim of massive and brutal terrorist attacks carried out by 19 Al Qaida suicide attackers who hijacked and crashed four U.S. commercial jets with

passengers on board, two into the World Trade Center towers in New York City, one into the Pentagon near Washington, D.C., and a fourth into a field in Shanksville, Pennsylvania, leaving more than 3000 innocent individuals dead or missing.

- [6] The United Nations Security Council condemned the terrorist attacks of September 11, 2001 as a “threat to international peace and security” and recognized the “inherent right of individual and collective self-defence in accordance with the Charter.” [...]
- [7] On October 7, 2001, President Bush invoked the United States inherent right of self-defense and, as Commander in Chief of the U.S. Armed Forces, ordered the U.S. Armed Forces to initiate action in self-defense against the terrorists and the Taliban regime that harbored them in Afghanistan. The United States was joined in the operation by the United Kingdom and coalition forces, comprising (as of December 2003) 5,935 international military personnel from 32 countries.
- [8] Prior to this, Al Qaida had directed the October 12, 2000 attack on the USS Cole in the port of Aden, Yemen, killing 17 US Navy members and injuring an additional 39. Al Qaida also had orchestrated the bombings in August 1998 of the US Embassies in Kenya and Tanzania that killed at least 300 individuals and injured more than 5,000. [...] Al Qaida additionally claimed to have shot down UN helicopters and killed US servicemen in Somalia in 1993 and to have conducted three bombings that targeted US troops in Aden, Yemen in December 1992. [...]
- [9] As the foregoing makes clear, the United States Government, and indeed the international community, concluded that Al Qaida and related terrorist networks are in a state of armed conflict with the United States. Al Qaida trained, equipped, and supported fighters and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity.

[...]
- [10] [...] [I]t is clear that Al Qaida and its affiliates and supporters have planned and continue to plan and perpetrate armed attacks against the United States and its coalition partners, and they directly target civilians in blatant violation of the law of war. Despite coalition successes in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise that has a global reach that exceeds that of any previous transnational group. The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from using lawful measures to defend itself.
- [11] The United States therefore fundamentally disagrees with the statement in the Report that “the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law” [...].

- [12] During the course of hostilities in Afghanistan, the United States military and its allies have captured or secured the surrender of thousands of individuals fighting as part of the Al Qaida terrorist network or who supported, protected or defended the Al Qaida terrorists. These were individuals captured in connection with the ongoing armed conflict. Their capture and detention were lawful and necessary to prevent them from returning to the battlefield or reengaging in armed conflict.
- [13] Examples of detainees held under U.S. Government custody during Operation Enduring Freedom include:
- Terrorists linked to documented Al Qaida attacks on the United States such as the East Africa U.S. embassy bombings and the USS Cole attack.
 - Terrorists who taught or received training on arms and explosives, surveillance, and interrogation resistance techniques at Al Qaida camps.
 - Terrorists who continue to express their desire to kill Americans if released.
 - Terrorists who have sworn personal allegiance to Usama bin Laden.
 - Terrorists linked to several Al Qaida operational plans, including the targeting of U.S. facilities and interests.
- [14] Representative examples of specific Guantanamo detainees include:
- An Al Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Masood.
 - An individual captured on the battlefield with links to a financier of the September 11th plots and who attempted to enter the United States in August 2001 to meet hijacker Mohammed Atta.
 - Two individuals associated with senior Al Qaida members developing remotely detonated explosive devices for use against U.S. forces.
 - A member of an Al Qaida supported terrorist cell in Afghanistan that targeted civilians and was responsible for a grenade attack on a foreign journalist's automobile.
 - An Al Qaida member who plotted to attack oil tankers in the Persian Gulf.
 - An individual who served as a bodyguard for Usama Bin Laden.
 - An Al Qaida member who served as an explosives trainer for Al Qaida and designed a prototype shoe bomb and a magnetic mine.
 - An individual who trained Al Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

VI. *LEX SPECIALIS*

- [15] The law of armed conflict is the *lex specialis* governing the international law obligations of the United States regarding the status and treatment of persons detained during armed conflict – a legal principle with which the Report agrees. To be sure, many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. Further, some of the principles of the law of armed conflict may be explicated by analogy or by reference to human rights principles. However, similarity of principles in certain respects does not mean identical or controlling principles, doctrine, or jurisprudence. [...]
- [16] The consequences of conflating the two bodies of law would be dramatic and unprecedented. For instance, application of principles developed in the context of human rights law would allow all enemy combatants detained in armed conflict to have access to courts to challenge their detention. This result is directly at odds with well-settled law of war that would throw the centuries-old, unchallenged practice of detaining enemy combatants into complete disarray.
- [17] Indeed, the Inter-American Commission on Human Rights has recognized that international humanitarian law (the law of war) is the *lex specialis* that may govern the issues surrounding Guantanamo detention. [...]
- [18] [...] [T]he law of war applies to the conduct of war and related detention operations. The law of war allows the United States – and any other country engaged in armed conflict – to hold enemy combatants without charges or access to counsel for the duration of active hostilities. [...] Our fight against Al Qaida is different from traditional armed conflicts in that it is not a state-to-state conflict, in which there generally is an identifiable conclusion of hostilities, after which each side releases those combatants it has detained. Sensitive to this reality, the United States evaluates each Guantanamo detainee individually, to determine whether he no longer poses a serious danger of returning to hostilities against us. This concept of an individual analysis has some support in historical practices that contemplate parole, as well as releases of enemy combatants held for extended periods, based on individualized determinations that the combatant does not present a continuing threat.
- [...]

DISCUSSION

I. Qualification of the conflict

1. How would you qualify the conflict in Afghanistan between the Taliban and the United States in 2001? Does the non-recognition of the Taliban regime as the legitimate government of Afghanistan influence the qualification of the conflict (*Document I*)? Can the Taliban be seen as a rebel group opposing an internationally recognized government, even though they had *de facto* control over most of the country, including the capital? Does IHL deal with issues of recognition?

2. a. How would you qualify the fighting between al-Qaeda and the United States in Afghanistan? As an international police operation? An armed conflict? An international armed conflict?
- b. Does IHL apply to that fighting? Does it apply because there is an armed conflict between al-Qaeda and the United States? Or because there already is an armed conflict on the territory of Afghanistan (between the United States and the Taliban)?
3. How would you qualify the conflict in Afghanistan between the Taliban, on the one hand, and the United States and its NATO allies, on the other, in 2010? What, if anything has, changed?
4. Do you think that in 2001 the two conflicts in Afghanistan (i.e. between the United States and the Taliban and between the United States and al-Qaeda) should be treated separately? Or do they constitute one single armed conflict? What is your answer in respect of 2010? What are the implications of the answers to these questions?
5. (*Document IV, paras [5]-[14]*) How would you qualify the fighting between the United States and al-Qaeda outside Afghanistan? As an international police operation? An armed conflict? An international armed conflict? A transnational non-international armed conflict?
6. Is every armed conflict not covered by Art. 2 common to the Conventions a non-international armed conflict? Is the treaty definition and the customary law definition of international armed conflicts the same? Do States apply the same IHL rules to certain armed conflicts against armed non-State actors as they do to conflicts between them? [*See also Case No. 263, United States, Hamdan v. Rumsfeld*]

II. Qualification of the persons

7. a. Under IHL, are members of the Taliban armed forces captured in 2001 combatants? Under what conditions? If they are captured, do they benefit from prisoner-of-war status? In case of doubt, how should they be treated? Is your answer different depending on whether they were captured by the Northern Alliance or the United States? (GC III, Arts 4(A) and 5; P I, Arts 43-45 and 75)
- b. (*Documents I and II*) When the United States considers that the conflict opposing it to the Taliban is covered by the Geneva Conventions, but that members of the Taliban armed forces “do not meet the criteria for prisoner-of-war status”, what criteria is it talking about? Do the members of the Taliban armed forces have to comply with the criteria of Art. 4(A)(2) of Convention III? Even if they fall under Art. 4(A)(1) or (3)?
8. a. How do you qualify al-Qaeda members captured in 2001 during the conflict in Afghanistan? Could they be considered combatants? Do they fall under any of the categories of Art. 4(A) of Convention III (GC III, Art. 4(A)(1)-(3))? Do they benefit from POW status? If they are not combatants, what is their status? In case of doubt, how should they be treated?
- b. Is question 8.a relevant if one is of the view that in 2001 there was a separate non-international armed conflict in Afghanistan between the United States and al-Qaeda?
9. (*Document III, para. 25*) How would you qualify the six men of Algerian origin arrested in Bosnia-Herzegovina? More generally, how would you qualify persons captured in territories on which there was no armed conflict at the time of capture? Can IHL apply to them? Is it necessary for there to be an armed conflict on the territory of capture for IHL to apply to their detention? What if the persons captured belong to a party to an armed conflict?
10. (*Document IV, paras [13]-[14]*)
 - a. How would you qualify each example of detainees mentioned by the United States and captured during Operation “Enduring Freedom”? [*See Case No. 253, Afghanistan, Operation “Enduring Freedom”*] Does it matter when and where they were captured? Does IHL necessarily apply

to them because they were captured during an armed conflict? Even if they were detained for reasons not related to that armed conflict? May they be detained for crimes committed before the armed conflict in Afghanistan? If IHL applies to them, were the acts committed unlawful under IHL? Does it depend on their status?

- b. How would you qualify each example of Guantanamo detainees mentioned by the United States? Does it matter when and where they were captured? Does IHL apply to them? If IHL applies to them, were the acts committed unlawful under IHL? Does it depend on their status?
11. If in your view alleged members of al-Qaeda or Taliban fighters detained following the conflict in Afghanistan in 2001 are not prisoners of war, what would their status be under IHL? Are they civilian internees under Convention IV? Are they “unlawful combatants”? Is this category foreseen by IHL? What is your response to the Commentary on Art. 4 of Convention IV that “there is no intermediate status; no individual in the hands of the enemy can be outside the law”? Does your response vary depending on the nationality of the detainee? (GC IV, Arts 4 and 5; the Commentary is available on <http://www.icrc.org/ihl>)
12. Must the status of a Taliban fighter be decided by a competent tribunal if the Detaining Power has doubts? If the Detaining Power considers that there is no doubt that a category of detainees does not benefit from prisoner-of-war status, but an objective evaluation raises doubts on this? Who decides on the status of prisoners and the need to determine this status before a competent tribunal? If it is the Detaining Power’s decision as to whether there is doubt, what is the significance and effect of Art. 5 of Convention III? (GC III, Art. 5; P I, Art. 45)
13. Do you think that IHL, having been “crafted by sovereign states to deal with conflict between sovereign states” (*Document II*), is not adequate for the kind of conflict dealt with in this case? Or do you think that IHL provides answers to the questions raised when determining the detainee’s status?

III. Treatment of detainees

14. a. On what basis can someone be detained during an international armed conflict? During a non-international armed conflict? On what basis can Taliban members arrested in 2001 be detained? Al-Qaeda members? What if they were arrested in 2010? (GC III, Arts 3, 21 and 118; GC IV, Arts 41-43, 68, 70, 78-79) Can someone be detained for the sole purpose of interrogation (*Document III, para. 23*)? Does your answer to this question change according to the status of the detainee?
- b. According to IHL, how should prisoners of war be treated? How should civilian internees be treated? (GC III, Arts 17-81; GC IV, Arts 79-116)
15. What does IHL say about the publication of photos of detainees that could expose them to public curiosity? Does such publication represent a grave breach of IHL? (GC III, Art. 13(2); GC IV, Art. 27(1)) What does IHL say in regard to the detainees practising their religion? (GC III, Arts 34-37; GC IV, Art. 93)
16. a. According to IHL, did the United States have the right to transfer detainees arrested in Afghanistan in 2001 out of the country? If they are prisoners of war? If they are civilians? Prisoners with no clearly defined status? Does it have the right to transfer them to the territory of a State not party to the conflict (Cuba)? To a military base controlled by the United States army on such territory? (GC III, Arts 12, 21, 22 and 46-48; GC IV, Arts 49(1), 76 and 127-128)
- b. Could Afghanistan at the end of 2001 be considered as a territory occupied by the United States? Only the areas under direct control of the United States (military bases, detention centres)? Are the rules of IHL regarding occupied territories applicable? Is the Afghan territory “effectively placed under the authority of the enemy army”? Does the fact that the United States captured

individuals in Afghan territory imply the automatic application of these provisions, especially Art. 49? If Section III of Part III of Convention IV on occupied territories is not applicable, were civilian Afghans arrested by the United States still protected civilians? Were they covered by Section II? Can there be protected civilians covered by neither Sections II nor III, but only Section I? What are the implications of the qualification of Afghanistan as being occupied for your answer to question 14.a? (HR, Art. 42; GC IV, Arts 4, 27-78 and 126)

17. a. According to IHL, when should the Guantanamo detainees arrested in Afghanistan in 2001 be repatriated? If they are prisoners of war? Civilian internees? If they do not have either status? If they are subject to penal prosecution? (GC III, Arts 118 and 119; GC IV, Arts 132-135)
- b. (*Document III, paras 19-26, and Document IV*) Assuming that some of the detainees in Guantanamo face no criminal charges, how long may they be detained? Should they have been released in 2002, when the Taliban regime collapsed and was replaced by the Karzai government? Or can it be considered that the armed conflict has continued into 2010? Can detainees be held in captivity for so long if they face no criminal charges? Does your answer vary according to whether the detainee is a Taliban or an al-Qaeda member? (GC III, Art. 118; GC IV, 46)
- c. May detainees who are neither Afghan nor US nationals but were arrested in Afghanistan in 2001 be repatriated to their country of origin? Under what conditions? What if, because of their supposed affiliation with al-Qaeda, they risk persecution? Must the United States ensure that they will not be tortured, that they will, if need be, benefit from a fair trial and be treated in conformity with human rights? Is the principle of *non-refoulement* prescribed by IHL? Is it part of customary law? (GC III, Art. 12; GC IV, Arts 45 and 134)
18. Does recognizing an individual as a prisoner of war prevent the detaining power from trying him for any crimes he is accused of? From questioning him? Is it true that prisoners of war are only obliged to give their "name, rank, serial number and birth date" (*Document I*)? (GC I-IV, Arts 49(2)/50(2)/129(2)/146(2) respectively; GC III, Arts 17(1) and (4), 82, 85, 99 and 102; P I, Art. 85(1))
19. a. Does the ICRC have the right to visit prisoners held following an international armed conflict? Is the detaining power obliged to accept these visits? Is it obliged to accept all the visiting procedures (interviews without witnesses, etc.)? (GC III, Art. 126(4); GC IV, Art. 143(5))
- b. Does this right vary depending on the status of the detainee?

IV. Human rights and IHL

20. (*Document III, paras 16, 19 and 24; Document IV, paras [2]-[4] and [15]-[18]*)
 - a. Why does the Report to the Human Rights Commission say that IHL is the *lex specialis* governing detention in international armed conflicts? Because it is more developed than human rights law? Why does the Commission say that IHL is no longer the *lex specialis* during non-international armed conflicts? Is the IHL of non-international armed conflicts less developed than human rights law on this issue?
 - b. Can customary IHL be taken into account when determining whether IHL or human rights law is the *lex specialis* on a specific issue? Can the practice and case-law of international human rights bodies be taken into account?
 - c. Do you agree with the United States that the ICCPR does not apply to the detention of al-Qaeda members? Do you agree that only IHL applies? If IHL applies, does it mean that human rights law cannot apply at the same time?
 - d. Do you agree with the United States that applying human rights law to al-Qaeda members detained in Guantanamo would give them greater protection than that granted to lawful

combatants captured during an international armed conflict? What privileges would such an al-Qaeda member have compared with a POW? How could such privileges be justified? (*Document IV, para. [4]*)

21. Do you agree with the United States that the ICCPR does not apply to detainees in Guantanamo because Guantanamo is not located on US territory? Is it not sufficient that the United States has effective control over the territory and the persons held in the camp?

Case No. 262, United States, President's Military Order

[Source: "President's Military Order," 13 November 2001, in Federal Registrar, vol. 66, no. 222, 16 November 2001, p.57833-57836. Available on <http://www.state.gov/>]

**White House Press Release
Office of the Spokesman
Washington, DC
November 13, 2001**

**Detention, Treatment, and Trial of Certain Non-Citizens
in the War Against Terrorism**

Military Order

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, [...] it is hereby ordered as follows:

Section 1. Findings

- (a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
- (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks [[Available on http://www.whitehouse.gov/news/proclamations](http://www.whitehouse.gov/news/proclamations)]).
- (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
- (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
- (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals

subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

- (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, [Available on <http://uscode.house.gov>] that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
- (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy

- (a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
 - (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Qaida;
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
 - (2) it is in the interest of the United States that such individual be subject to this order.
- (b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.
- (c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be –

- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;
- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order

- (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.
- (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
- (c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for –
 - (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
 - (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
 - (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;
 - (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any

successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law,

- (A) the handling of, admission into evidence of, and access to materials and information, and
 - (B) the conduct, closure of, and access to proceedings;
- (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;
 - (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
 - (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
 - (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense

- (a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.
- (b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums

- (a) Nothing in this order shall be construed to –
 - (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
 - (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
 - (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

- (b) With respect to any individual subject to this order –
 - (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
 - (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in
 - (i) any court of the United States, or any State thereof,
 - (ii) any court of any foreign nation, or
 - (iii) any international tribunal.
- (c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.
- (d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.
- (e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec.8. Publication

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001

DISCUSSION

1. Is the US President's military order in conformity with IHL? In regard to the detainees in the hands of the United States following the conflict in Afghanistan, what are the rules of IHL relating to penal prosecution and judicial guarantees that would be applicable? (GC I-IV, Art. 3(1)(1)(d); GC III, Arts 99-108; GC IV, Arts 66-68, 70-76 and 126; P I, Art. 75(4); P II, Art. 6)
2. Does the creation of military commissions to try people for acts of terrorism violate the prohibition of retroactive criminal legislation? According to the text of this presidential order, are these military commissions independent? (See for example P I, Art. 75(4)) Can they be considered as regularly constituted?

Case No. 263 , United States, Hamdan v. Rumsfeld**I. United States Supreme Court Decision**

[Source: United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05.184, 29 June 2006; available at <http://www.supremecourt.gov/>]

SUPREME COURT OF THE UNITED STATES

[...]

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 2006]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court [...]

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy “to commit ... offenses triable by military commission.” [...] [See **Case No. 262**, United States, President’s Military Order]

Hamdan filed petitions for writs of *habeas corpus* and *mandamus* to challenge the Executive Branch’s intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), [...] would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy, an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him. [...]

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra*, that the offense with which Hamdan has been charged is not an “offens[e] that by ... the law of war may be tried by military commissions.” [...]

[...] The charging document, which is unsigned, contains 13 numbered paragraphs [See Part B. of this case]. The first two paragraphs recite the asserted bases for the military commission's jurisdiction, namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." [...] There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy":

- (1) he acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001;
- (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them);
- (3) he "drove or accompanied [O]sama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and
- (4) he received weapons training at al Qaeda-sponsored camps. [...]

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's *habeas* and *mandamus* petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant." Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for *habeas corpus* and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," [...] that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [...] (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of

war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. [...]

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. [...] On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," [...] and two thought that the Conventions did not in any event apply to Hamdan [...].

IV

[...] Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

"Jurisdiction of courts-martial not exclusive.

"The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." [...]

We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions. [...]

V [Justice Stevens joined by Justice Souter, Justice Ginsburg and Justice Breyer]

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. [...] First, they have substituted for civilian courts at times and in places where martial law has been declared. [...] Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." [...]

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," [...] has been described as "utterly different" from the other two. [...] Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a fact finding one, to determine, typically on the battlefield itself, whether the defendant has violated the law of war. [...]

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" [...] describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military

commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." [...] The "field of command" in these circumstances means the "theatre of war." [...] Second, the offense charged "must have been committed within the period of the war." [...] [J]urisdiction exists to try offenses "committed either before or after the war." [...] Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." [...] Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." [...]

The charge against Hamdan, described in detail in Part I, *supra*, alleges a conspiracy extending over a number of years, from 1996 to November 2001. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF, the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore – indeed are symptomatic of – the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. [...] ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war"). [...]

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war. [...]

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, [...] none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and

common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a “concrete plan to wage war.” [...] As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that “[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.” [...]

The charge’s shortcomings are not merely formal, but are indicative of a broader inability on the Executive’s part here to satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity. Hamdan’s tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul v. Bush* [...] (KENNEDY, J., concurring in judgment) (observing that “Guantanamo Bay is ... far removed from any hostilities”). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime, but it is not an offense that “by the law of war may be tried by military commissio[n].” [...] None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court’s precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI [Opinion of the Court]

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the “rules and precepts of the law of nations,” [...] including, *inter alia*, the four Geneva Conventions signed in 1949. [...] The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.

A

The commission’s procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005, after Hamdan’s trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. [...] The presiding officer’s job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and,

if applicable, sentencing decisions. [...] The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher." [...]

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. [...] These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable ...; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." [...] Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. [...]

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." [...] Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. [...] Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," [...]) so long as the presiding officer concludes that the evidence is "probative" [...] and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." [...] Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members. [...]

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-third vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). [...] Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. [...] The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." [...] Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. [...] The President then, unless he has delegated the task to the Secretary, makes the "final decision." [...] He may change the commission's findings or sentence only in a manner favorable to the accused. [...]

C

[...] The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. [...]

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; [...]

i

The Court of Appeals relied on *Johnson v. Eisentrager*, [See Case No. 100, United States, Johnson v. Eisentrager] [...] to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. [...] We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war. [...] Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

"We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, [...] concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." [...]

The Court of Appeals, on the strength of this footnote, held that “the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.” [...]

Whatever else might be said about the *Eisentrager* footnote, it does not control this case. We may assume that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as an independent source of law binding the Government’s actions and furnishing petitioner with any enforceable right. For, regardless of the nature of the rights conferred on Hamdan, [...] they are, as the Government does not dispute, part of the law of war. [...] And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan’s trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive’s assertions that Hamdan was captured in connection with the United States’ war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. [...] We, like Judge Williams, disagree with the latter conclusion. The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” [...] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a “High Contracting Party”, i.e., a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.

[Footnote 61 reads: Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be “any doubt” whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a “competent tribunal.” [...] Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.]

Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “[p]ersons 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 ... detention." [...] One such provision prohibits "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 civilized peoples." [...]

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "'international in scope,'" does not qualify as a "'conflict not of an international character.'" [...] That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." [...] Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." [...] High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a non signatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. [...] Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, e.g., J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," i.e., a civil war, [...] the commentaries also make clear "that the scope of the Article must be as wide as possible," [...] In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. [...]

iii

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." [...] While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary

accompanying a provision of the Fourth Geneva Convention, for example, defines “regularly constituted” tribunals to include “ordinary military courts” and “definitely exclud[e] all special tribunals.” GCIV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as identical to “regularly constituted”); [...] see also *Yamashita*, [...] (Rutledge, J., dissenting) (describing military commission as a court “specially constituted for a particular trial”) [See Case No. 102, United States, *In re Yamashita*]. And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.” Int’l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005) [See Case No. 43, ICRC, Customary International Humanitarian Law]; see also GCIV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”). The Government offers only a cursory defense of Hamdan’s military commission in light of Common Article 3. [...] As JUSTICE KENNEDY explains, that defense fails because “[t]he regular military courts in our system are the courts-martial established by congressional statutes.” [...] At a minimum, a military commission “can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice.” [...] As we have explained, see Part VI. C, *supra*, no such need has been demonstrated here.

iv [Justice Stevens joined by Justice Souter, Justice Ginsburg and Justice Breyer]

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.” [...] Like the phrase “regularly constituted court,” this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” [...] Among the rights set forth in Article 75 is the “right to be tried in [one’s] presence.” Protocol I, Art. 75(4)(e).

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any “evident practical need,” [...] and for that reason, at least, fail to afford the requisite guarantees. [...] We add only that, as noted in Part VI. A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. [...] That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. [...] But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

v [Opinion of the Court]

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction. The judgment of the Court of Appeals is reversed, and Opinion of the Court the case is remanded for further proceedings.

It is so ordered.

II. US v. Hamdan – Military Commission Formal Charge Sheet

[Source: *United States of America v. Salim Ahmed Hamdan*, Formal Charge Sheet; available at <http://www.defenselink.mil/news/commissions.html>]

UNITED STATES OF AMERICA**v.****SALIM AHMED HAMDAN**

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid w'l'd Abdallah

CHARGE: CONSPIRACY

Salim Ahmed Hamdan [...] is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan ([...] hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."
11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan [...], in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a “the Doctor”), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:
 - a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.
 - b. From 1996 through 2001, Hamdan:
 - 1) delivered weapons, ammunition or other supplies to al Qaida members and associates;
 - 2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida’s security committee, in Qandahar, Afghanistan;
 - 3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and
 - 4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.
 - c. On diverse occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct “martyr missions” (meaning an attack wherein one would kill himself as well as the targets of the

attack) against the Americans, to engage in war against the Americans, and to drive the “infidels” out of the Arabian Peninsula.

- d. Between 1996 and November of 2001, Hamdan, on diverse occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

III. Office of the Secretary of Defense, Memorandum on the Application of Common Article 3

[Source: United States Office of the Secretary of Defense, Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, 7 July 2006; available at www.defense.gov]

OFFICE OF THE SECRETARY OF DEFENSE

[...]

July 7, 2006

MEMORANDUM [...]

SUBJECT: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense

The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.

It is my understanding that, aside from the military commissions procedures, existing DoD [Department of Defense] orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3. [...] In addition, you will recall the President’s prior directive that “the United States Armed Forces shall continue to treat detainees humanely,” humane treatment being the overarching requirement of Common Article 3.

You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.

Your reply confirming completion of this review should be submitted by a Component Head, General/Flag Officer, or SES member, including a reply of “reviewed and no effect” where applicable, to the Deputy Assistant Secretary of Defense (DASD) for Detainee Affairs, Office of the Under Secretary of Defense for Policy, no later than three weeks from the date of this memorandum. [...]

IV. Hamdan's trial and conviction

[N.B.: Following the U.S. Supreme Court's decision in *Hamdan*, the U.S. Congress passed the *Military Commissions Act of 2006*, which established new military commission procedures and stripped Guantanamo detainees of their *habeas corpus* under U.S. legislation. Under the *Military Commissions Act*, Mr. Hamdan was charged with conspiracy and providing material support for terrorism. On 12 June 2008, the U.S. Supreme Court held in the *Boumediene v. Bush* case [*Boumediene et al. v. Bush et al.* 553 U.S. 723 (2008)] that Guantanamo detainees have a U.S. constitutional right to *habeas corpus*. On 21 July 2008, the military commission trial of Mr. Hamdan commenced. He entered a plea of not guilty.]

[See also **Case No. 265**, United States, Military Commissions; and **Case No. 266**, United States, Habeas Corpus for Guantánamo Detainees]

[Source: Human Rights First, Law and Security Digest Issue #207, 25 July 2008]

FIRST GUANTÁNAMO MILITARY COMMISSION TRIAL BEGINS

The first military commission trial began on Monday, July 21, with Salim Hamdan, Osama bin Laden's alleged driver and bodyguard, entering a not guilty plea. Judge Allred ruled that evening that evidence from certain interrogations could not be used because it was obtained under "highly coercive" conditions. The ruling effectively prohibited the use of Hamdan's statements made during several interrogations held in Afghanistan following his capture in 2001, but allowed for the introduction of statements made after Hamdan's transfer to Guantánamo. Judge Allred also allowed evidence from two videotaped interrogations in Afghanistan, which were shown to the six-member jury on Wednesday. Hamdan appeared uncomfortable and left the courtroom soon after the first tape began to play. He reappeared during the showing of the second video and apologized to the jury for leaving. The videos showed Hamdan hooded, cuffed, at times wincing in pain, and surrounded by U.S. soldiers in masks and carrying weapons. While in the video Hamdan denied any involvement in al Qaeda, the prosecution painted a different picture. Key witnesses, including FBI interrogators and U.S. soldiers, stated that Hamdan had two missiles in his car at the time of his capture and that, during interrogations, Hamdan had admitted he was present when bin Laden praised the September 11 attacks and the destruction they caused.

[N.B.: On 6 August 2008, Hamdan was convicted by the Military Commission in Guantanamo for material support of terrorism, but acquitted of the charge of conspiracy of war crimes.]

DISCUSSION

1. a. Should you distinguish, among persons captured in Afghanistan, between those captured in the framework of the conflict between the United States and the Taliban and those captured in the conflict between the United States and al Qaeda? Do you think that the latter are not covered by the IHL of international armed conflicts, even if the IHL of international armed conflicts applies to the conflict between the United States and Afghanistan? Does the Supreme Court classify the conflict during which Hamdan was captured? (GC III and IV, Arts 2 and 4)
- b. Must Hamdan be treated as a prisoner of war until such time as his status has been determined by a competent tribunal? Does the Supreme Court decide this question? As a POW, could he be judged by a military commission? (GC III, Arts 5 and 102)
- c. Are the Geneva Conventions judicially enforceable? Is the question whether they are judicially enforceable the same as whether they are self-executing? Are at least the rules on the judicial

guarantees from which prisoners of war benefit judicially enforceable? Does the Supreme Court answer these questions?

2.
 - a. Why does common Art. 3 apply to Hamdan? (GC I-IV, Arts 2 and 3)
 - b. What makes an armed conflict international? Is every armed conflict which does not fulfil the criteria of an international armed conflict perform a non-international armed conflict? (GC I-IV, Arts 2 and 3)
 - c. Why does common Art. 3 bar Hamdan from being tried by a military commission? Does common Art. 3 require that the persons it protects be tried by the same courts as government soldiers? (GC I-IV, Art. 3)
 - d. If common Art. 3 bars Hamdan from being tried on the basis of evidence not disclosed to him, may an express statutory provision allow the contrary? In the view of the Supreme Court?
3.
 - a. Are the acts Hamdan is alleged to have committed war crimes? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85; ICC Statute, Art. 8) Are they illegitimate acts of warfare? May a detaining power try persons protected by Convention III, by Convention IV or by common Art. 3 for such illegitimate acts of warfare even if the latter do not constitute war crimes? (GC III, Arts 3 and 85; GC IV, Arts 3 and 64; P I, Art. 43(2))
 - b. Is conspiracy to commit war crimes a war crime? (ICC Statute, Art. 25 [See **Case No. 23**, The International Criminal Court])
4. Does the Supreme Court explicitly or implicitly authorize the detention of Hamdan as an unlawful combatant, without any trial or individual determination?

Case No. 264, United States, Trial of John Phillip Walker Lindh

A. American Taliban Flies Back, but not to the Cages of Guantanamo Bay

[Source: HUGGLER Justin, "American Taliban flies back, but not to the cages of Guantanamo Bay," in *The Independent*, London, 23 January 2002.]

**American Taliban flies back,
but not to the cages of Guantanamo Bay**

**by Justin Huggler
23 January 2002**

The American John Walker Lindh, who joined the Taliban, met Osama bin Laden and fought with al-Qa'ida troops as bombs fell on Afghanistan, began his journey home from the war yesterday, to face trial.

He was being flown from the navy assault ship USS Bataan in the Arabian Sea, where he has been held, to a prison in Alexandria, Virginia.

Mr Walker is an al-Qa'ida volunteer. But, unlike the other suspects, he will not be held in the cages of Guantanamo Bay, Cuba. And his fate will not be decided by a military commission. Mr Walker will face justice before a US civilian court, because he is an American citizen.

He was probably the only American who knew in advance of 11 September that something terrible was going to happen. In June, he was training at an al-Qa'ida camp in Afghanistan, where he was told by an instructor that Mr bin Laden had sent operatives to make an attack on America.

Mr Walker stunned America when he emerged, barely able to walk, from a flooded basement, out of one of the darkest episodes of the war – in which more than 150 Taliban prisoners of war were killed by US bombs after they staged a prison revolt in Mazar-i-Sharif.

As he crawled into the light, Americans could barely believe one of their citizens was fighting for the Taliban. Yet there was Mr Walker's face, heavily bearded and wild-eyed with fear, staring at them out of their television screens.

His face keeps coming back to haunt America. Mr Walker appears in the extraordinary video footage of CIA agents interrogating the foreign Taliban volunteers who surrendered at the Qalai Jangi fortress in Mazar. Johnny "Mike" Spann, a CIA agent who was killed hours later, crouches before Mr Walker and snaps his fingers in front of his face. Off camera, "Dave", another CIA man, says: "He needs to decide if he wants to live or die. If he wants to die, he's just going to die here – he can f***** die here." Shortly afterwards, the revolt began.

The charge sheet against Mr Walker contains startling revelations. Not only did he fight alongside the Taliban, he was a member of an al-Qa'ida brigade run by Mr bin Laden, the charges say. The young American allegedly met Mr bin Laden at least once, and spoke with him in a small group.

Many Americans are baying for revenge. The authorities say there isn't enough evidence for a treason charge, which could carry the death penalty. But Mr Walker could face life in prison under charges including conspiring to kill Americans and aiding a terrorist group.

Conditions at the Virginia jail will be very different from those of his affluent upbringing. Mr Walker's former friends say he was a typical American child. He played American football and basketball. His father was an attorney, his mother a housewife. He was named after John Lennon. When he was 10, the family moved from Maryland to California.

And when he was 16, he converted to Islam, reportedly after reading the autobiography of Malcolm X. He went to Friday prayers at an Islamic centre. He changed his name to Suleyman al-Faris.

In 1998, he left to study Arabic and Islam in Yemen. Mr Walker's father, Frank Lindh, says he was not concerned at the time. In October 2000, he moved to a religious school in Pakistan's North West Frontier Province, a recruiting ground for the Taliban. His family lost touch with him.

In May last year, the American charge sheet says, Mr Walker joined a training camp for Harakat ul-Mujahedin, an Islamic group active in Kashmir, identified by the US as a "terrorist organisation". He quickly left the camp and travelled to Afghanistan to join the Taliban. There, the FBI says, he was told he would have to join a brigade of Arabs, because he did not speak an Afghan language, but did speak Arabic.

He was sent to an al-Qa'ida training centre at al-Farooq, where recruits were addressed by Mr bin Laden on several occasions. According to the charges, Mr Walker learnt at the camp that Mr bin Laden was planning suicide attacks. He was asked if he wanted to launch attacks on American interests but chose instead to stay on Afghanistan's front line.

When the American bombing began, he was sent to the front line near Taloqan. When the Taliban started to collapse, he and the other foreign fighters fell back on Kunduz. Eventually, Afghan Taliban leaders negotiated the surrender of Kunduz. Mr Walker was one of about 400 foreign fighters who agreed to surrender to General Rashid Dostum. Which is how Mr Walker found himself on his knees in Qalai Jangi fortress, face to face with the CIA's Johnny Spann.

B. Lindh agrees to serve 20 years

[Source: BRAVIN Jess, "Lindh agrees to serve 20 years," in *The Wall Street Journal*, New-York, 16 July 2002.]

Lindh agrees to serve 20 years

In Plea Deal Approved by Bush

By Jess Bravin

Staff Reporter of The Wall Street Journal

ALEXANDRIA, Va. – John Walker Lindh agreed to serve 20 years in prison for spending five months as a Taliban soldier, in a plea bargain reached with approval from President Bush.

The surprise deal, announced to a packed courtroom Monday, spares the 21-year-old defendant a possible life sentence, had he been convicted of charges that included conspiring with al Qaeda and the Taliban to kill Americans.

It also relieves the government of a complicated criminal prosecution involving evidence from the battlefields of Afghanistan, testimony from intelligence officers and possibly even the appearance of Taliban and al Qaeda fighters brought from their prison at the U.S. Guantanamo Bay Naval Base in Cuba.

A hint of the deal came right before Monday's scheduled hearing on which some of Mr. Lindh's statements could be used against him. Frank Lindh, the defendant's father, made the puzzling gesture of greeting U.S. Attorney Paul McNulty, warmly shaking the hand of the man heading his son's prosecution.

U.S. District Judge T.S. Ellis III, who lawyers said learned of the deal a half-hour before the hearing, went through a colloquy with the defendant to establish that he understood the consequences of his plea. There is no parole from federal prison.

"Do you feel all right today?" Judge Ellis asked. "Do you feel like you can make decisions about your future?"

"Yes, sir," Mr. Lindh replied.

[...]

Mr. Lindh pleaded guilty to two charges, each carrying a 10-year sentence and a maximum fine of \$250,000. One count, from the original indictment, is supplying services to the Taliban regime, which has been illegal under an order issued by President Clinton in 1999.

In a new charge filed Monday, Mr. Lindh pleaded guilty to carrying an explosive while committing the first offense. He also agreed to cooperate with authorities, including possibly testifying against others before military tribunals. He promised to give the government any money he might earn from selling his story.

Prosecutors agreed to dismiss the indictment's remaining nine counts, dropping accusations that Mr. Lindh supported the al Qaeda terrorist network or conspired to kill Americans.

Lawyers in the case said informal talks about a plea bargain began six weeks ago, and that the defense initially proposed a 10-year sentence. President Bush approved a 20-year term Thursday. The two sides spent the weekend hammering out the particulars, and signed off on the terms around 1 a.m. Monday.

Mr. McNulty called the deal "an important victory for the American people," adding that it proved "the criminal justice system can be an effective tool in combating terrorism."

In recent months, the Bush administration hasn't been so sure. After coming up against such varying hurdles as Mr. Lindh's crackerjack defense team and the erratic courtroom behavior of Zacarias Moussaoui, who is representing himself at trial on charges of conspiring in the Sept. 11 hijackings, officials increasingly are seeking to bypass the justice system altogether.

Instead, officials have designated two U.S.-born men taken in antiterrorism operations as "enemy combatants," holding them in military jails without charge or access to lawyers.

And according to chief defense lawyer James Brosnahan, prosecutors suggested Mr. Lindh might face the same fate should he be acquitted of criminal charges, adding to the pressure for a plea deal.

Defense lawyer Tony West said his client hoped to pursue a Ph.D. in prison, perhaps in Islamic literature. Prosecutors agreed to recommend Mr. Lindh be sent to prison near his parents' home, but the Justice Department will have the final word. Mr. Lindh faces formal sentencing Oct. 4. Judge Ellis can reduce the punishment to less than 20 years, but said he is unlikely to do so.

[N.B.: John Walker Lindh was sentenced to 20 years in prison on 4 October 2002 by the Eastern District Court of Virginia.]

DISCUSSION

1. What is Mr. Lindh's status under IHL? Is he a prisoner of war? A civilian? Is the fact that he is a US citizen a relevant factor in determining his status? Under Convention III? Under Convention IV? (GC III, Art. 4; GC IV, Art. 4; P I, Art. 44)
2. If Mr. Lindh were a member of the Afghan armed forces, would he lose his POW status because of his citizenship when captured by the United States? Could Convention III prevent the United States from punishing a US prisoner of war for treason? (GC III, Arts 4 and 85)
3. Unlike Hamdan, why was Mr Lindh not eligible for trial by one of the military commissions set up by the President's Military Order of 13 November 2001? [See **Case No. 262**, United States, President's Military Order; and **Case No. 263**, United States, Hamdan v. Rumsfeld]

Case No. 265, United States, Military Commissions

[N.B.: The Military Commissions were first established by President George W. Bush in 2001. Following the Supreme Court's judgement in *Hamdan*, in which the Court ruled that the military commissions did not comply with common Article 3's requirements, the Congress passed the *Military Commission Act of 2006*, with the view to re-establishing the commissions.]

[See **Case No. 262**, United States, President's Military Order; and **Case No. 263**, United States, *Hamdan v. Rumsfeld*]

I. Military Commission Act of 2006

[**Source:** United States Department of Defense, "Military Commission Act of 2006", 17 October 2006; available at <http://www.defense.gov/news/commissionsacts.html>]

MILITARY COMMISSIONS ACT OF 2006

[...]

An Act

To authorize trial by military commission for violations of the law of war,
and for other purposes.

[...]

(a) SHORT TITLE.—This Act may be cited as the "Military Commissions Act of 2006".

[...]

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

[...]

"CHAPTER 47A—MILITARY COMMISSIONS

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 948a. Definitions

"In this chapter:

"(1) UNLAWFUL ENEMY COMBATANT.—

(A) The term 'unlawful enemy combatant' means—

"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);

or

“(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

“(B) CO-BELLIGERENT.—In this paragraph, the term ‘cobelligerent’, with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

“(2) **LAWFUL ENEMY COMBATANT.**—The term ‘lawful enemy combatant’ means a person who is—

“(A) a member of the regular forces of a State party engaged in hostilities against the United States;

“(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

“(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

“(3) **ALIEN.**—The term ‘alien’ means a person who is not a citizen of the United States.

[...]

“§ 948b. Military commissions generally

“(a) **PURPOSE.**—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

“(b) **AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.**—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

[...]

“(f) **STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.**— A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.

“(g) **GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.**—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

“§ 948c. Persons subject to military commissions

“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

“§ 948d. Jurisdiction of military commissions

“(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

“(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

[...]

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

[...]

“§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

“(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

“(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

“(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

“(2) the interests of justice would best be served by admission of the statement into evidence.

“(d) STATEMENTS OBTAINED AFTER ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

- “(2) the interests of justice would best be served by admission of the statement into evidence; and
- “(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

[...]

“SUBCHAPTER IV—TRIAL PROCEDURE

“§ 949j. Opportunity to obtain witnesses and other evidence

- “(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

[...]

“SUBCHAPTER VII—PUNITIVE MATTERS

[...]

“§ 950p. Statement of substantive offenses

- “(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
- “(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

[...]

“§ 950v. Crimes triable by military commissions

- “(a) DEFINITIONS AND CONSTRUCTION.—In this section:

- “(1) MILITARY OBJECTIVE.—The term ‘military objective’ means—
 - “(A) combatants; and
 - “(B) those objects during an armed conflict—
 - “(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s warfighting or war-sustaining capability; and
 - “(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

- “(2) PROTECTED PERSON.—The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including—
- “(A) civilians not taking an active part in hostilities;
 - “(B) military personnel placed *hors de combat* by sickness, wounds, or detention; and
 - “(C) military medical or religious personnel.
- “(3) PROTECTED PROPERTY.—The term ‘protected property’ means property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.
- “(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—
- “(A) collateral damage; or
 - “(B) death, damage, or injury incident to a lawful attack.
- “(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:
- (1) MURDER OF PROTECTED PERSONS. [...]
 - (2) ATTACKING CIVILIANS. [...]
 - (3) ATTACKING CIVILIAN OBJECTS. [...]
 - (4) ATTACKING PROTECTED PROPERTY. [...]
 - (5) PILLAGING. [...]
 - (6) DENYING QUARTER. [...]
 - (7) TAKING HOSTAGES. [...]
 - (8) EMPLOYING POISON OR SIMILAR WEAPONS. [...]
 - (9) USING PROTECTED PERSONS AS A SHIELD. [...]
 - (10) USING PROTECTED PROPERTY AS A SHIELD. [...]
 - (11) TORTURE. [...]
 - (12) CRUEL OR INHUMANE TREATMENT. [...]
 - (13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY. [...]
 - (14) MUTILATING OR MAIMING. [...]

- (15) MURDER IN VIOLATION OF THE LAW OF WAR. —Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.
- (16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR. [...]
- (17) USING TREACHERY OR PERFIDY. [...]
- (18) IMPORPERLY USING A FLAG OF TRUCE. [...]
- (19) IMPORPERLY USING A DISTINCTIVE EMBLEM. [...]
- (20) INTENTIONALLY MISTREATING A DEAD BODY. [...]
- (21) RAPE. [...]
- (22) SEXUAL ASSAULT OR ABUSE. [...]
- (23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT. [...]
- (24) TERRORISM. Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished [...].
- (25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.
 - “(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct. [...]
- (26) WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.
- (27) SPYING.—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

- (28) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

[...]

SEC. 7. HABEAS CORPUS MATTERS.

- “(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[...]

[N.B.: In early 2009, shortly after taking office, President Barack Obama suspended the military commissions. However, he later decided to re-establish the commissions and requested the Congress to draft a new Act. The 2009 Military Commission Act replaces the 2006 Act.]

II. Military Commission Act of 2009

[Source: United States Department of Defense, “Military Commission Act of 2009,” 28 October 2009; available at <http://www.defense.gov/news/commissionsacts.html>]

TITLE XVIII—MILITARY COMMISSIONS

[...]

SEC. 1801. SHORT TITLE.

This title may be cited as the “Military Commissions Act of 2009”.

[...]

“CHAPTER 47A—MILITARY COMMISSIONS

[...]

“SUBCHAPTER I—GENERAL PROVISIONS

[...]

“§ 948a. Definitions

“In this chapter:

- “(1) ALIEN.—The term ‘alien’ means an individual who is not a citizen of the United States.

[...]

- “(3) COALITION PARTNER.—The term ‘coalition partner’, with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.
- “(4) GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.—The term ‘Geneva Convention Relative to the Treatment of Prisoners of War’ means the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 [...].
- “(5) GENEVA CONVENTIONS.—The term ‘Geneva Conventions’ means the international conventions signed at Geneva on August 12, 1949.
- “(6) PRIVILEGED BELLIGERENT.—The term ‘privileged belligerent’ means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.
- “(7) UNPRIVILEGED ENEMY BELLIGERENT.—The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—
- “(A) has engaged in hostilities against the United States or its coalition partners;
- “(B) has purposefully and materially supported hostilities against the United States or its coalition partners;
- or
- “(C) was a part of al Qaeda at the time of the alleged offense under this chapter.
- [...]
- “(9) HOSTILITIES.—The term ‘hostilities’ means any conflict subject to the laws of war.

“§ 948b. Military commissions generally

- “(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.
- “(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.
- [...]
- “(e) GENEVA CONVENTIONS NOT ESTABLISHING PRIVATE RIGHT OF ACTION.—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.

“§ 948c. Persons subject to military commissions

“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.

“§ 948d. Jurisdiction of military commissions

“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, [...], or the law of war, whether such offense was committed before, on, or after September 11, 2001 [...].

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

[...]

“§ 948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

“(a) EXCLUSION OF STATEMENTS OBTAIN BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 [...], whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

“(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.

[...]

“SUBCHAPTER IV—TRIAL PROCEDURE**“§ 949j. Opportunity to obtain witnesses and other evidence**

“(a) IN GENERAL.—(1) Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.

[...]

“SUBCHAPTER VIII—PUNITIVE MATTERS

[...]

“§ 950p. Definitions; construction of certain offenses; common circumstances

[...]

“(c) COMMON CIRCUMSTANCES.—An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.

“(d) EFFECT.—The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

[...]

“§ 950t. Crimes triable by military commission

“The following offenses shall be triable by military commission under this chapter at any time without limitation:

[N.B.: The list of offenses from (1) to (26) reproduce the list of offenses contained in the 2006 Act.]

“(27) SPYING.—Any person subject to this chapter who, in violation of the law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

“(28) ATTEMPTS.—

“(A) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

“(B) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

“(C) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

“(29) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this subchapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(30) SOLICITATION.—Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, shall be punished as a military commission under this chapter may direct.

[...]

DISCUSSION

1. a. What do the expressions “unlawful enemy combatant” and “unprivileged enemy belligerent” mean? Do these expressions have a basis in IHL? Was it necessary to create these categories? In the first expression, why is the combatant referred to as “unlawful”? In the second expression, what does “unprivileged” mean for a belligerent? Why did the Obama administration decide to drop the term “unlawful enemy combatant”?
 - b. (2006 Act, §948a) Under the 2006 Act, who can be defined as an “unlawful enemy combatant”? Does IHL apply to these categories of persons?
 - c. (2009 Act, §948a) Under the 2009 Act, who can be defined as an “unprivileged enemy belligerent”? Does the definition refer to the same categories of persons as the definition of “unlawful enemy combatant”? Does IHL apply to these categories of persons?
2. (2009 Act, §948a)
 - a. Does the first category of persons defined as “unprivileged enemy belligerents” include all civilians who have participated in hostilities? Under IHL, can a civilian directly participating in hostilities be prosecuted by an enemy military court?
 - b. Does the second category mean that persons merely supporting hostilities can be defined as “unprivileged enemy belligerents”? Under IHL, can someone supporting a party to a conflict be automatically considered as participating in hostilities? Can such persons be treated as belligerents? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
 - c. What does the third category of persons mean (i.e. persons who were “part of al Qaeda at the time of the alleged offense”)? Does it mean that the new military commissions are authorized to prosecute all al-Qaeda members, even though they have not been involved in any armed conflict within the meaning of IHL? Would IHL apply to them? (See also 2009 Act, §950p(c)) [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
3. Why can military commissions, according to both Acts, only prosecute foreign nationals? Before which instances are American citizens to be prosecuted if they commit the same offences as those listed in the Acts? Do you agree that there should be two different processes, one for foreign nationals and one for American citizens? Does IHL say anything about persons fighting against their State of nationality? What would be the status of such persons under IHL? [See **Case No. 264**, United States, Trial of John Phillip Walker Lindh]
4. a. (2006 Act, §948b(f)) Why does the 2006 Act state that the military commissions are “regularly constituted” and afford all the necessary “judicial guarantees which are recognized as

indispensable by civilized peoples”? Is it sufficient to say that the military commissions meet the requirements of Art. 3 common to the Conventions for them to actually do so? Would such a provision have prevented US courts from declaring military commissions unlawful? Why did the drafters of the 2009 Act remove this provision? Do you agree that the military commissions of 2006 afford all necessary judicial guarantees? (See also 2006 Act, §949j; 2009 Act, §949j; **Case No. 263**, United States, *Hamdan v. Rumsfeld*)

- b. (2006 Act, §948b(b); 2009 Act, §948b(b)) Do you think that these two provisions on the President’s authority to establish military commissions are in accordance with the Supreme Court’s conclusions in *Hamdan*? Can it be said that the military commissions, as established by the US President, are “regularly constituted”?
5. (2006 Act, §948b(g); 2009 Act, §948b(e)) What is the difference between the two provisions? Does the provision in the 2006 Act mean that the Geneva Conventions do not confer any right on individuals? What does the 2009 provision mean (i.e. that the Geneva Conventions do not establish a private right of action)? Do you agree that the Geneva Conventions do not establish any private right of action? [See also **Case No. 158**, United States, *United States v. Noriega*]
6. (2006 Act, §948d(a); 2009 Act, §948d) What do you think of the fact that military commissions, in both Acts, may judge acts committed *before*, on or after 11 September 2001? Was the United States involved in an armed conflict before September 11? Would IHL apply to acts committed prior to that date? Should such acts be judged by a military commission? Do you think that all the acts mentioned in the list of offences can still be considered as crimes if committed before September 11? (See also 2009 Act, §950p(c))
7. (2006 Act, §950p; 2009 Act, §950p(d)) Do you agree that the Acts do not establish new crimes? Are the military commissions, when prosecuting crimes committed before the commissions were established, applying *ex post facto* law?
8. (2006 Act, §950v(b); 2009 Act, §950t)
 - a. Are all the crimes listed under the two Acts war crimes? Is “providing material support for terrorism” a violation of IHL? Are an attempt and a solicitation to violate IHL war crimes? Should they be regarded as substantive crimes?
 - b. Is conspiracy to commit a war crime a war crime? Is the fact that it is listed in both Acts in keeping with the Supreme Court’s conclusion in *Hamdan*? [See **Case No. 263**, United States, *Hamdan v. Rumsfeld*]
 - c. (2006 Act, §950v(b)(15); 2009 Act, §950t (b)(15)) Is murder of a combatant by a civilian a war crime? Can the United States try enemy civilians for acts other than war crimes? Can it try them before military commissions? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
9. (2006 Act, Sec.7) What do you think of the provision on *habeas corpus matters*? Can Guantanamo detainees apply for a writ of *habeas corpus*? Why did the drafters of the 2009 Act remove this provision? [See **Case No. 266**, United States, *Habeas Corpus for Guantanamo Detainees*]
10. In what ways is the 2009 Act an improvement over the 2006 Act? From an IHL point of view, what aspects of the new Act could be further improved?

Case No. 266, United States, Habeas Corpus for Guantánamo Detainees**I. Supreme Court, *Rasul v. Bush***

[Source: Shafiq Rasul, *et al.*, Petitioners 03-334 v. George W. Bush, President of the United States, *et al.*, 542 U.S. 466 (2004), Appeal, Columbia Circuit, June 28, 2004, available on www.supremecourt.gov]

[N.B.: To facilitate understanding the order of paragraphs has been modified.]

SUPREME COURT OF THE UNITED STATES**Nos. 03-334 and 03-343****SHAFIQ RASUL, *ET AL.*, PETITIONERS 03-334****v. GEORGE W. BUSH,****PRESIDENT OF THE UNITED STATES, *ET AL.*****FAWZI KHALID ABDULLAH FAHAD AL ODAH, *ET AL.*,****PETITIONERS 03-343****v. UNITED STATES *ET AL.*****ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT****[June 28, 2004]****JUSTICE STEVENS delivered the opinion of the Court**

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba. [...]

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities between the United States and the Taliban. Since early 2002, the U.S. military has held them – along with, according to the Government’s estimate, approximately 640 other non-Americans captured abroad – at the Naval Base at Guantanamo Bay. [...]

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at the Base. All alleged that none of the petitioners has ever been a combatant against the United States or has ever engaged in any terrorist acts. They also alleged that none has been charged with any wrong-doing, permitted to consult with counsel, or provided access to the courts or any other tribunal. [...]

Petitioners in these cases differ from the *Eisentrager* detainees [See Case No. 100, United States, *Johnson v. Eisentrager*] in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to

any tribunal, much less charged with and convicted of wrong-doing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. [...]

Syllabus [...]

Held: United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. [...]

- (a) The District Court has jurisdiction to hear petitioners' *habeas* challenges under 28 U.S.C. para. 2241, which authorizes district courts, "within their respective jurisdictions," to entertain *habeas* applications by persons claiming to be held "in custody in violation of the ... laws ... of the United States," [...]. Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." [...]
- (2) Also rejected is respondents' contention that para. 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent [...]. That presumption has no application to the operation of the *habeas* statute with respect to persons detained within "the [United States'] territorial jurisdiction." [...]. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses. Respondents concede that the *habeas* statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that para. 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' para. 2241 authority. [...]
- (b) The District Court also has jurisdiction to hear the Al Odah petitioners' complaint invoking 28 U. S. C. para. 1331, the federal question statute, and para.1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U.S. courts. [...]

II. Supreme Court, *Boumediene v. Bush*

[Source: Human Rights First, Law and Security Digest, Issue #201, 13 June 2008]

SUPREME COURT UPHOLDS CONSTITUTIONAL RIGHTS OF GUANTÁNAMO DETAINEES TO CHALLENGE IMPRISONMENT

On Thursday, June 12, the U.S. Supreme Court ruled in the case of *Boumediene v. Bush* [553 U.S. 723 (2008)] that detainees held at Guantánamo Bay have the rights to challenge their detention in U.S. civilian courts under the Constitution's *habeas corpus*

provision and to have access to a lawyer. [...] [T]he Court struck down a provision in the Military Commissions Act of 2006 (MCA) [See Case No. 265, United States, Military Commissions] that prohibited detainees from filing *habeas corpus* petitions and found its detainee screening process to be an inadequate *habeas* substitute. The MCA was passed by Congress in response to a previous Supreme Court decision that had rejected the administration's unilateral creation of a former military commission system for trying detainees outside the regular U.S. courts. In rejecting the *habeas*-stripping provision of the MCA, the *Boumediene* decision held that Congress could not constitutionally withhold the right of *habeas corpus* from Guantánamo detainees, many of whom have been held for over six years without charge, absent an imminent national emergency.

III. *Habeas corpus* for detainees in Bagram

[Source: United States District Court for the District of Columbia, *Fadi Al Maqaleh et al. v. Robert Gates et al.*, Memorandum Opinion, 2 April 2009, https://ecfdcd.uscourts.gov/cgi-bin/show_public_doc?2006cv1669-13]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[...]

MEMORANDUM OPINION

Before the Court are respondents' motions to dismiss these four petitions for *habeas corpus*. The petitioners are all foreign nationals captured outside Afghanistan yet held at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan for six years or more. The issue at the heart of these cases is whether these petitioners may, in the wake of *Boumediene v. Bush*, [...] invoke the Suspension Clause of the Constitution, [...]. If so, then section 7(a) of the Military Commissions Act of 2006 ("MCA") [See Case No. 265, United States, Military Commissions], [...] is unconstitutional as applied to these petitioners and they are entitled to seek the protection of the writ of *habeas corpus*. [...]

Applying the *Boumediene* factors carefully, the Court concludes that these petitioners are virtually identical to the detainees in *Boumediene* – they are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention. And as in *Boumediene*, these petitioners have been determined to be "enemy combatants," a status they contest. Moreover, the process used to make that determination is inadequate and, indeed, significantly less than the Guantanamo detainees in *Boumediene* received. [...]

Based on those conclusions driven by application of the *Boumediene* test, the Court concludes that the Suspension Clause extends to, and hence *habeas corpus* review is available to, three of the four petitioners. As to the fourth, his Afghan citizenship – given the unique "practical obstacles" in the form of friction with the "host" country – is enough to tip the balance of the *Boumediene* factors against his claim to *habeas corpus* review. When a Bagram detainee has either been apprehended in Afghanistan or is a citizen of that country, the balance of factors may change. Although it may seem odd that different conclusions can be reached for different detainees at Bagram,

in this Court's view that is the predictable outcome of the functional, multifactor, detainee-by-detainee test the Supreme Court has mandated in *Boumediene*. [...]

IV. Conclusion

[...] MCA § 7(a), the statute stripping *habeas corpus* jurisdiction, is unconstitutional as to three of the four petitioners. Under *Boumediene*, Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of *habeas corpus*, based on an application of the *Boumediene* factors.

Three petitioners are in that category. Because there is no adequate substitute for the writ of *habeas corpus* for Bagram detainees, those petitioners are entitled to seek *habeas* review in this Court. [...] As to the fourth petitioner, Wazir, the Court concludes that the possibility of friction with Afghanistan, his country of citizenship, precludes his invocation of the Suspension Clause under the *Boumediene* balance of factors.

DISCUSSION

1. Can a prisoner of war introduce a *habeas corpus* petition before the courts of the detaining power? Can an alien enemy civilian introduce a *habeas corpus* petition before the courts of the Detaining Power? Is every enemy national either a prisoner of war or a protected civilian? (HR, Art. 23(h); GC III, Arts 4, 5 and 14(3); GC IV, Arts 4 and 38)
2. How and why do the *Rasul* case and the court's ruling differ from the *Eisentrager* case? [See **Case No. 100**, United States, Johnson v. Einsentrager]
3. Does the Supreme Court's ruling in *Boumediene* also apply to persons detained by the United States outside Guantanamo? Can and should a distinction be made between Guantanamo detainees and Bagram detainees? Regarding the Bagram detainees, can and should a distinction be made between persons captured in Afghanistan and persons captured outside Afghanistan? Between detainees of Afghan nationality and detainees of another nationality? Why does the District Court conclude that the fourth petitioner, in *Fadi Al Maqaleh*, does not have a right to *habeas corpus*?

Case No. 267, United States, The Obama Administration's Internment Standards

[See also **Case No. 261**, United States, Status and Treatment of Detainees Held in Guantánamo Naval Base]

[Source: United States District Court of Colombia, "Respondents' Memorandum regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay," in re: Guantanamo Bay Detainee Litigation, 13 March 2009; available on www.usdoj.gov/opa/documents/memo-re-det-auth.pdf]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**IN RE: GUANTANAMO BAY DETAINEE LITIGATION****RESPONDENTS' MEMORANDUM REGARDING THE GOVERNMENT'S DETENTION
AUTHORITY RELATIVE TO DETAINEES HELD AT GUANTANAMO BAY****INTRODUCTION**

Through this submission, the Government is refining its position with respect to its authority to detain those persons who are now being held at Guantanamo Bay. The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force ("AUMF"), [...]. The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war. [...]

The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.

Thus, these habeas petitions should be adjudicated under the following definitional framework:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

There are cases where application of the terms of the AUMF and analogous principles from the law of war will be straightforward. It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of “substantial support,” or the precise characteristics of “associated forces,” that are or would be sufficient to bring persons and organizations within the foregoing framework. Although the concept of “substantial support,” for example, does not justify the detention at Guantanamo Bay of those who provide unwitting or insignificant support to the organizations identified in the AUMF, and the Government is not asserting that it can detain anyone at Guantanamo on such grounds, the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the “substantial support” and “associated forces” bases of detention will need to be further developed in their application to concrete facts in individual cases.

This position is limited to the authority upon which the Government is relying to detain the persons now being held at Guantanamo Bay. It is not, at this point, meant to define the contours of authority for military operations generally, or detention in other contexts. A forward-looking multi-agency effort is underway to develop a comprehensive detention policy with respect to individuals captured in connection with armed conflicts and counterterrorism operations, and the views of the Executive Branch may evolve as a result. [...]

DISCUSSION

In response to the attacks of September 11, 2001, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” [...] The September 11 attacks were carried out by al-Qaida, which was harbored by the Taliban regime in Afghanistan. In October 2001, under the authority of the AUMF, the United States launched Operation Enduring Freedom to remove the Taliban regime from power and to suppress al-Qaida. The United States and its coalition partners continue to fight resurgent Taliban and al-Qaida forces in this armed conflict. Below, we set out the Government’s position regarding the detention authority provided by the AUMF as it applies to those captured during that armed conflict and held at Guantanamo Bay.

I. THE AUMF GIVES THE EXECUTIVE POWER TO DETAIN CONSISTENT WITH THE LAW OF ARMED CONFLICT.

The United States can lawfully detain persons currently being held at Guantanamo Bay who were “part of,” or who provided “substantial support” to, al-Qaida or Taliban forces and “associated forces.” This authority is derived from the AUMF, which empowers the President to use all necessary and appropriate force to prosecute the war, in light of law-of-war principles that inform the understanding of what is “necessary and

appropriate.” Longstanding law-of-war principles recognize that the capture and detention of enemy forces “are ‘important incident[s] of war.’” [...]

The AUMF authorizes use of military force against those “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” [...] By explicitly authorizing the use of military force against “*nations, organizations, or persons*” that were involved in any way in the September 11 attacks (or that harbored those who were), the statute indisputably reaches al-Qaida and the Taliban. Indeed, the statute’s principal purpose is to eliminate the threat posed by these entities.

Under international law, nations lawfully can use military force in an armed conflict against irregular terrorist groups such as al-Qaida. [...]

[C]onsistent with U.S. historical practice, and international law, the AUMF authorizes the use of necessary and appropriate military force against members of an opposing armed force, whether that armed force is the force of a state or the irregular forces of an armed group like al-Qaida. Because the use of force includes the power of detention, [...] the United States has the authority to detain those who were part of al-Qaida and Taliban forces. Indeed, long-standing U.S. jurisprudence, as well as law-of-war principles, recognize that members of enemy forces can be detained even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.” [...] [S]ee also Geneva Convention (III) Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 4 [...] (contemplating detention of members of state armed forces and militias without making a distinction as to whether they have engaged in combat). Accordingly, under the AUMF as informed by law-of-war principles, it is enough that an individual was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF’s authorization of force.

Moreover, because the armed groups that the President is authorized to detain under the AUMF neither abide by the laws of war nor issue membership cards or uniforms, any determination of whether an individual is part of these forces may depend on a formal or functional analysis of the individual’s role. Evidence relevant to a determination that an individual joined with or became part of al-Qaida or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaida (as reflected in some cases by staying at al-Qaida or Taliban safehouses that are regularly used to house militant recruits) or taking positions with enemy forces. In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances.

Nor does the AUMF limit the “organizations” it covers to just al-Qaida or the Taliban. In Afghanistan, many different private armed groups trained and fought alongside al-Qaida and the Taliban. In order “to prevent any future acts of international terrorism against the United States,” [...], the United States has authority to detain individuals

who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency.

Finally, the AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation “would contradict Congress’s clear intention, and unduly hinder both the President’s ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary.” [...] Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous circumstances in a traditional international armed conflict, is sufficient to justify detention. [...]

Accordingly, the AUMF as informed by law-of-war principles supports the detention authority that the United States is asserting with respect to the Guantanamo detainees.

II. READ IN LIGHT OF THE LAWS OF WAR, THE AUMF AUTHORIZES THE NATION TO USE ALL NECESSARY AND APPROPRIATE MILITARY FORCE TO DEFEND ITSELF AGAINST THE IRREGULAR FORCES OF AL-QAIDA AND THE TALIBAN.

Petitioners have sought to restrict the United States’ authority to detain armed groups by urging that all such forces must be treated as civilians, and that, as a consequence, the United States can detain only those “directly participating in hostilities.” The argument should be rejected. Law-of-war principles do not limit the United States’ detention authority to this limited category of individuals. A contrary conclusion would improperly reward an enemy that violates the laws of war by operating as a loose network and camouflaging its forces as civilians.

It is well settled that individuals who are part of private armed groups are not immune from military detention simply because they fall outside the scope of Article 4 of the Third Geneva Convention, which defines categories of persons entitled to prisoner-of-war status and treatment in an international armed conflict. [...] Article 4 does not purport to define all detainable persons in armed conflict. Rather, it defines certain categories of persons entitled to prisoner-of-war treatment. [...] As explained below, other principles of the law of war make clear that individuals falling outside Article 4 may be detainable in armed conflict. Otherwise, the United States could not militarily detain enemy forces except in limited circumstances, contrary to the plain language of the AUMF and the law-of-war principle of military necessity.

For example, Common Article 3 of the Geneva Conventions provides standards for the treatment of, among others, those persons who are part of armed forces in non-international armed conflict and have been rendered *hors de combat* by detention. [...] Those provisions pre-suppose that states engaged in such conflicts can detain those who are part of armed groups. Likewise, Additional Protocol II to the Geneva Conventions expressly applies to “dissident armed forces” and “other organized armed groups” participating in certain non-international armed conflicts, distinguishing those forces from the civilian population. [...]

Moreover, the Commentary to Additional Protocol II draws a clear distinction between individuals who belong to armed forces or armed groups (who may be attacked and, *a fortiori*, captured at any time) and civilians (who are immune from direct attack except when directly participating in hostilities). That Commentary provides that “[t]hose who belong to armed forces or *armed groups* may be attacked at any time.” [...] Accordingly, neither the Geneva Conventions nor the Additional Protocols suggest that the “necessary and appropriate” force authorized under the AUMF is limited to al-Qaida leadership or individuals captured directly participating in hostilities, as some petitioners have suggested.

Finally, for these reasons, it is of no moment that someone who was part of an enemy armed group when war commenced may have tried to flee the battle or conceal himself as a civilian in places like Pakistan. Attempting to hide amongst civilians endangers the civilians and violates the law of war. *Cf.* ICRC, Commentary on the Additional Protocols of 8 June 1977 [...] (“Further it may be noted that members of armed forces feigning civilian non-combatant status are guilty of perfidy.”). Such conduct cannot be used as a weapon to avoid detention. A different rule would ignore the United States’ experience in this conflict, in which Taliban and al-Qaida forces have melted into the civilian population and then regrouped to relaunch vicious attacks against U.S. forces, the Afghan government, and the civilian population.

III. THE GOVERNMENT IS CONTINUING TO DEVELOP A COMPREHENSIVE DETENTION POLICY.

Through this filing, the Government has met the Court’s March 13, 2009 deadline to offer a refinement of its position concerning its authority to detain petitioners. The Court should be aware, however, that the Executive Branch has, at the President’s direction, undertaken several forward-looking initiatives that may result in further refinements. Although the Government recognizes that litigation will proceed in light of today’s submission, it nevertheless commits to apprising the Court of any relevant results of this ongoing process.

[...]

CONCLUSION

For the foregoing reasons, the Government’s new explication of who may be detained in this armed conflict is consistent with the AUMF and the laws of war that inform the scope of “necessary and appropriate” force the AUMF authorizes the President to use. If the judges of the Court desire oral argument relating to the scope of the Government’s detention authority in these cases, the Government urges the Court to consider conducting a single argument in a consolidated manner before the Court and that the Court endeavor, to the extent possible, to reach a common ruling regarding the framework to apply to these cases.

Dated: March 13, 2009

[...]

DISCUSSION

1. In what respect does the position reflected in the Memorandum of 13 March 2009 differ from the position of the Bush administration? Does the Obama administration still consider that the “global war on terror” is an armed conflict? Does it still consider members of al-Qaeda “combatants”? What has changed in substance? [See also **Case No. 261**, United States, Status and Treatment of Detainees Held in Guantánamo Naval Base]
2. Does the Memorandum classify the conflict in which the Guantanamo detainees have been arrested? Does it classify the detainees under IHL?
3. Does the Memorandum consider that anyone who does not have combatant status is a civilian?
4. May anyone who belongs to an enemy armed group be attacked in a non-international armed conflict? May any such person be detained under IHL?
5. May anyone against whom force may be used also be detained? Without trial? Without *habeas corpus*? Under IHL? Under human rights law?
6. May force be used in international armed conflicts only against persons directly participating in the hostilities? In non-international armed conflicts? May only such persons be detained? May only such persons be detained without trial? [See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
7. How does and how should the United States determine who may be detained in the conflict against the Taliban and al-Qaeda?
8. Does the IHL of international armed conflicts make a distinction, as far as the admissibility of detention is concerned, between enemy combatants arrested on the territory of one of the parties to the conflict and those arrested elsewhere in the world? Does the IHL of non-international armed conflicts make such a distinction?
9. Does the Memorandum state or imply that those the president is authorized to detain do not have to be tried? That they have no right to a fair trial?

Document No. 268, United States, Closure of Guantánamo Detention Facilities**I. President's Executive Order on Closure of Detention Facilities**

[Source: United States Government, "Executive Order. Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009; available on www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities]

EXECUTIVE ORDER**REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTÁNAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES**

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions.

As used in this order:

[...]

- (c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

- (a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.
- (b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the

United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

- (c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention. [See **Case No. 266**, United States, Habeas Corpus for Guantánamo Detainees]
- (d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.
- (e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.
- (f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.
- (g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, [...] as well as of the military commission process more generally. [See **Case No. 265**, United States, Military Commissions]

Sec. 3. Closure of Detention Facilities at Guantánamo.

The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

- (a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

[...]

- (c) **Operation of Review.** The duties of the Review participants shall include the following:

- (1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.
- (2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.
- (3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.
- (4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.
- (5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts.

The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement.

No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions.

The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted. [See Case No. 265, United States, Military Commissions]

Sec. 8. General Provisions.

- (a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.
- (b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

THE WHITE HOUSE,

January 22, 2009.

II. Presidential Memorandum on the Closure of Detention Facilities

[Source: United States, Presidential Memorandum on the Closure of Detention Facilities at the Guantánamo Bay Naval Base, 15 December 2009; available at www.whitehouse.gov]

The White House
Office of the Press Secretary

For Immediate Release
December 15, 2009

Presidential Memorandum – Closure of Detention Facilities at the Guantánamo Bay Naval Base

MEMORANDUM FOR THE SECRETARY OF DEFENSE THE ATTORNEY GENERAL

SUBJECT: Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantánamo Bay Naval Base

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force [...], and in order to facilitate the closure of detention facilities at the Guantánamo Bay Naval Base, I hereby direct that the following actions be taken as expeditiously as possible with respect to the facility known as the Thomson Correctional Center (TCC) in Thomson, Illinois:

1. The Attorney General shall acquire and activate the TCC as a United States Penitentiary, which the Attorney General has determined would reduce the Bureau of Prisons' shortage of high security, maximum custody cell space and could be used for other appropriate inmate or detainee management purposes. The Attorney General shall also provide to the Department of Defense a sufficient portion of the TCC to serve as a detention facility to be operated by the Department of Defense in order to accommodate the relocation of detainees by the Secretary of Defense in accordance with paragraph 2 of this memorandum.
2. The Secretary of Defense, working in consultation with the Attorney General, shall prepare the TCC for secure housing of detainees currently held at the Guantánamo Bay Naval Base who have been or will be designated for relocation, and shall relocate such detainees to the TCC, consistent with laws related to Guantánamo detainees and the findings in, and interagency Review established by, Executive Order 13492 of January 22, 2009.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Secretary of Defense is authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA

[**N.B.:** On 21 January 2010, the Interagency Task force mandated by President Obama to conduct the Review of the Guantánamo detainees' files submitted its conclusions. It recommended that Guantánamo detainees be divided into three groups:

1. About 35 detainees should be prosecuted in federal or military courts
2. About 110 should be released
3. About 50 must be detained without trial.

On 31 March 2010, the Guantánamo detention facilities were still operative.]

Document No. 269, United States, Treatment and Interrogation in Detention**I. President Bush's Executive Order 13440**

[Source: United States, Executive Order 13440, "Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency," 20 July 2007; available at <http://www.archives.gov/federal-register/executive-orders/2007.html>]

Executive Order 13440 of July 20, 2007**Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency**

By the authority vested in me as President and Commander in Chief of the Armed Forces by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force [...], the Military Commissions Act of 2006 [...]

[See **Case No. 265**, United States, Military Commissions], it is hereby ordered as follows:

Section 1. General Determinations.

- (a) The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world. On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination [See **Case No. 261**, United States, Status and Treatment of Detainees Held in Guantánamo Naval Base].
- (b) The Military Commissions Act defines certain prohibitions of Common Article 3 for United States law, and it reaffirms and reinforces the authority of the President to interpret the meaning and application of the Geneva Conventions.

Sec. 2. Definitions. [...]

- (c) "Cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Sec. 3. Compliance of a Central Intelligence Agency Detention and Interrogation Program with Common Article 3.

- (a) Pursuant to the authority of the President under the Constitution and the laws of the United States, including the Military Commissions Act of 2006, this order interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations, and shall be treated as authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States. I hereby determine that Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency as set forth in this section. The requirements set forth in this section shall be applied with respect to detainees in such program without adverse distinction as to their race, color, religion or faith, sex, birth, or wealth.
- (b) I hereby determine that a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3, provided that:
 - (i) the conditions of confinement and interrogation practices of the program do not include:
 - (A) torture, as defined in section 2340 of title 18, United States Code;
 - (B) any of the acts prohibited by section 2441(d) of title 18, United States Code, including murder, torture, cruel or inhuman treatment, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking of hostages, or performing of biological experiments;
 - (C) other acts of violence serious enough to be considered comparable to murder, torture, mutilation, and cruel or inhuman treatment, as defined in section 2441(d) of title 18, United States Code;
 - (D) any other acts of cruel, inhuman, or degrading treatment or punishment prohibited by the Military Commissions Act [...] and the Detainee Treatment Act of 2005 [...];
 - (E) willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or
 - (F) acts intended to denigrate the religion, religious practices, or religious objects of the individual;

- (ii) the conditions of confinement and interrogation practices are to be used with an alien detainee who is determined by the Director of the Central Intelligence Agency:
 - (A) to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations; and
 - (B) likely to be in possession of information that:
 - (1) could assist in detecting, mitigating, or preventing terrorist attacks, such as attacks within the United States or against its Armed Forces or other personnel, citizens, or facilities, or against allies or other countries cooperating in the war on terror with the United States, or their armed forces or other personnel, citizens, or facilities; or
 - (2) could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces;
 - (iii) the interrogation practices are determined by the Director of the Central Intelligence Agency, based upon professional advice, to be safe for use with each detainee with whom they are used; and
 - (iv) detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.
- (c) The Director of the Central Intelligence Agency shall issue written policies to govern the program, including guidelines for Central Intelligence Agency personnel that implement paragraphs (i)(C), (E), and (F) of subsection 3(b) of this order, and including requirements to ensure:
- (i) safe and professional operation of the program;
 - (ii) the development of an approved plan of interrogation tailored for each detainee in the program to be interrogated, consistent with subsection 3(b) (iv) of this order;
 - (iii) appropriate training for interrogators and all personnel operating the program;
 - (iv) effective monitoring of the program, including with respect to medical matters, to ensure the safety of those in the program; and
 - (v) compliance with applicable law and this order.

[...]

[Signed:] George W. Bush

THE WHITE HOUSE,

July 20, 2007.

II. President Obama's Executive Order 13491

[Source: United States, Executive Order 13491, "Ensuring Lawful Interrogations," 22 January 2009; available at <http://www.archives.gov/federal-register/executive-orders/2009-obama.html>]

Executive Order 13491 of January 22, 2009

ENSURING LAWFUL INTERROGATIONS

By the authority vested in me by the Constitution and the laws of the United States of America, in order to improve the effectiveness of human intelligence gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and to take care that the laws of the United States are faithfully executed, I hereby order as follows:

Section 1. Revocation.

Executive Order 13440 of July 20, 2007, is revoked. All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order. Heads of departments and agencies shall take all necessary steps to ensure that all directives, orders, and regulations of their respective departments or agencies are consistent with this order. Upon request, the Attorney General shall provide guidance about which directives, orders, and regulations are inconsistent with this order.

Sec. 2. Definitions. [...]

- (f) "Treated humanely," "violence to life and person," "murder of all kinds," "mutilation," "cruel treatment," "torture," "outrages upon personal dignity," and "humiliating and degrading treatment" refer to, and have the same meaning as, those same terms in Common Article 3.

[...]

Sec. 3. Standards and Practices for Interrogation of Individuals in the Custody or Control of the United States in Armed Conflicts.

- (a) **Common Article 3 Standards as a Minimum Baseline.** Consistent with the requirements of the Federal torture statute, [...] the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment),

whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.

- (b) **Interrogation Techniques and Interrogation-Related Treatment.** Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2 22.3 (Manual). [...] Nothing in this section shall preclude the Federal Bureau of Investigation, or other Federal law enforcement agencies, from continuing to use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.
- (c) **Interpretations of Common Article 3 and the Army Field Manual.** From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2 22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation – including interpretations of Federal criminal laws, the Convention Against Torture, Common Article 3, Army Field Manual 2 22.3, and its predecessor document, Army Field Manual 34 52 issued by the Department of Justice between September 11, 2001, and January 20, 2009.

Sec. 4. Prohibition of Certain Detention Facilities, and Red Cross Access to Detained Individuals.

- (a) **CIA Detention.** The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.
- (b) **International Committee of the Red Cross Access to Detained Individuals.** All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.

Sec. 5. Special Interagency Task Force on Interrogation and Transfer Policies.

- (a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Interrogation and Transfer Policies (Special Task Force) to review interrogation and transfer policies.

[...]

- (e) **Mission.** The mission of the Special Task Force shall be:

- (i) to study and evaluate whether the interrogation practices and techniques in Army Field Manual 2 22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies; and
- (ii) to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.

[...]

[Signed:] Barack Obama

THE WHITE HOUSE,

January 22, 2009

Case No. 270, India, Press Release, Violence in Kashmir

[Source: *Physicians for Human Rights and Human Rights Watch/Asia*, Press Release, India, May 9, 1993.]

Rape in Kashmir: A Crime of War

[...]

Indian security forces involved in counter-insurgency operations in Kashmir have committed rape with impunity, according to a report released today by two human rights organizations: Asia Watch, a division of the New York-based Human Rights Watch, and the Boston-based Physicians for Human Rights (PHR). The 18-page report, *Rape in Kashmir: A Crime of War*, is the result of a fact-finding mission in October 1992 to Kashmir by Asia Watch and PHR. It focuses on rape as a tactic of war in Kashmir, and argues that in conflict as well as non-conflict situations, the central element of rape is power. Indian security forces and militant forces in Kashmir use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade their female victims. Asia Watch and PHR call for international condemnation of this crime as a violation of international human rights and humanitarian law.

Since the government crackdown against militants in Kashmir began in earnest in January 1990, reports of rape by security personnel have become more frequent. Rape most often occurs during search operations, during which the security forces frequently engage in collective punishment against the civilian population, most frequently by beating or otherwise assaulting residents, and burning their homes. Rape has also occurred frequently during reprisal attacks on civilians following militant ambushes. In some cases, the victims have been accused of providing food or shelter to militants or have been ordered to identify their male relatives as militants. In other cases, the motivation for the abuse is not explicit. In many attacks, the selection of victims is seemingly arbitrary and the women, like other civilians assaulted or killed, are targeted simply because they happen to be in the wrong place at the wrong time. The report documents fifteen cases of rape by Indian security forces. The investigators interviewed the victims, a gynecologist who examined nine of the women, and obtained medical evidence in the cases documented in the report.

Indian government authorities have rarely investigated charges of rape by security forces in Kashmir. Although there is no evidence that this form of torture is sanctioned as a matter of government policy in Kashmir, by failing to prosecute and punish those responsible, the Indian authorities have signalled that the practice of rape is tolerated, if not condoned. Indeed, in responding to reports by the press and human rights groups about incidents of rape, government officials unfailingly attempt to dismiss the testimony of the women by accusing them of being militant sympathizers. In one case described in the report, a physician who assisted rape victims and arranged for them to be examined was detained and tortured by the security forces.

Reports of rape by militant groups in Kashmir have increased in since [sic] 1991, and the report includes information about these abuses. In some cases, women have

been raped and then killed after being abducted by rival militant groups and held as hostages for their male relatives. In other cases the victims or their families are accused of being informers or of being opposed to the militants or supporters of rival militant groups. Asia Watch and PHR are also unaware of any efforts by the militant groups to prevent their forces from committing rape. In fact, some groups have continued to encourage violent attacks on women who do not conform to prescribed social behavior. In doing so, these groups help to create a climate of fear for women.

The report included recommendations to the government of India, including prosecutions of security forces responsible for rape, training on adequate evidence gathering for rape prosecutions, and protections for medical workers involved in examining and treating rape victims. The report also calls on the international community to condemn rape as a crime of war and bring pressure on all parties, including militant groups, to end this abuse. [...]

DISCUSSION

1. Under what conditions could the situation in Kashmir be qualified as an international armed conflict between India and Pakistan? Would the rapes described in the press release then violate IHL? Would they be grave breaches of IHL? (GC I-IV, Art. 2, Arts 50/51/130/147 respectively; GC IV, Art. 27(2); P I, Arts 1(4), 11, 76(1) and 85)
2. If the situation in Kashmir is qualified as a non-international armed conflict, do the rapes described in the press release then violate IHL? Do they constitute grave breaches of IHL? Must they be punished? (GC I-IV, Arts 2 and 3, Arts 50/51/130/147 respectively; GC IV, Art. 4; P I, Art. 4(2)(e))
3. Is rape currently defined by the international community as “a crime of war”? What additional measures could help put an end to this practice? Would an additional international instrument be useful? What provisions should it contain? [See **Case No. 23**, The International Criminal Court [Part A., The Statute, Art. 8(b)(xxii) and (e)(vi)]]
4. Does it matter under IHL whether the rape victim is a civilian, a combatant, a fighter, a militant sympathizer, or a terrorist?
5. Is there any conceivable situation in which a rape committed in an armed conflict does not violate IHL?
6. Does a State violate IHL if rapes are committed by its security forces even though they are not government policy? Even though that State's laws prohibit them? (Hague Convention IV, Art. 3; P I, Arts 86 and 91)

Case No. 271, India, People's Union for Civil Liberties v. Union of India

[Source: The Report of the JAG seminar, People's Union for Civil Liberties, Petitioner v. Union of India, S.C. 1203-1208, 1997.]

AIR 1997 SUPREME COURT 1203

B.P. JEEVAN REDDY AND

SUHAS C. SEN.JJ.

Writ. Petn. (Cri) No. 612 of 1992. D/- 5-2-1997.

**People's Union for Civil Liberties,
Petitioner v. Union of India and another, Respondents. [...]**

B.P. JEEVAN REDDY, J.: – People's Union for Civil Liberties has filed this writ petition under Article 32 of the Constitution of India for [...] appropriate order or direction (1) to institute a judicial inquiry into the fake encounter by Imphal Police on April 3, 1991 in which two persons of Lunthilian village were killed, (2) to direct appropriate action to be taken against the erring police officials and (3) to award compensation to the members of the families of the deceased. According to the petitioner, there was in truth no encounter but it was a case where certain villagers were caught by the police during the night of April 3, 1991, taken in a truck to a distant place and two of them killed there. It is alleged that three other persons who were also caught and taken away along with two deceased persons were kept in police custody for a number of days and taken to Mizoram. They were released on bail only on July 22, 1991. It is further submitted that Hamar peoples' Convention is a political party active in Mizoram. It is not an unlawful organisation. Even according to the news released by the said organisation, it was a case of deliberate killing. Though representations were made to the Chief Minister of Manipur and other officials, no action was taken. [...] Affidavits of the wives of the deceased were [...] filed setting out the miserable condition of their families after the death of their respective husbands.

2. On notice being given, a counter-affidavit was filed by the Joint Secretary (Home), Government of Manipur denying the allegations. The allegation of 'fake encounter' was denied. It was submitted that there was genuine cross firing between the police and the activists of Hamar Peoples' Convention during which the said two deaths took place. The report of the Superintendent of Police, Churachandpur was relied upon in support of the said averment. It was submitted that Hamar Peoples' Convention was indulging in illegal and terrorist activities and in acts disturbing the public order. [...]
3. [...] The learned District and Sessions Judge has concluded that there was no encounter in the night between 3-4-1991 and 4-4-1991 at Nungthulien village. The two deceased, [...] were shot dead by the police while in custody on 4-4-1991. The State of Manipur has filed its objections to the report [...].

We have heard the counsel for the parties. We are not satisfied that there are any reasons for not accepting the report of the learned District and Sessions Judge which means that the said two deceased persons were taken into custody on the

night of April 3, 1991, taken in a truck to a long distance away and shot there. The question is what are the reliefs that should be granted in this writ petition?

4. It is submitted by Ms. S. Janani, learned counsel for the State of Manipur, that Manipur is a disturbed area, that there are several terrorist groups operating in the State, that Hamar Peoples' Convention is one of such terrorist organisations, that they have been indulging in a number of crimes affecting the public order – indeed, affecting the security of the State. It is submitted that there have been regular encounters and exchange of fire between police and terrorists on number of occasions. A number of citizens have suffered at the hands of terrorists and many people have been killed. The situation is not a normal one. Information was received by the police that terrorists were gathering in the house on that night and on the basis of that information, police conducted the raid. The raiding party was fortunate that the people inside the house including the deceased did not notice the police, in which case the police would have suffered serious casualties. The police party was successful in surprising the terrorists. There was exchange of fire resulting in the death of the terrorists.
5. In view of the fact that we have accepted the finding recorded by the learned District and Sessions Judge, it is not possible to accede to the contention of Ms. Janani insofar as the manner in which the incident had taken place. It is true that Manipur is a disturbed area, that there appears to be a good amount of terrorist activity affecting public order and, may be, even security of that State. It may also be that under these conditions, certain additional and unusual powers have to be given to the police to deal with terrorism. It may be necessary to fight terrorism with a strong hand which may involve vesting of good amount of discretion in the police officers or other paramilitary forces engaged in fighting them. [...] It is not for the Court to say how the terrorists should be fought. We cannot be blind to the fact that even after fifty years of our independence, our territorial integrity is not fully secure. There are several types of separatist and terrorist activities in several parts of the country. They have to be subdued. Whether they should be fought politically or be death [*sic*] with by force is a matter of policy for the government to determine. The Courts may not be the appropriate forum to determine those questions. All this is beyond dispute. But the present case appears to be one where two persons along with some others were just seized from a hut, taken to a long distance away in a truck and shot there. This type of activity cannot certainly be countenanced by the Courts even in the case of disturbed areas. [...] [T]he proper course for them was to deal with them according to law. "Administrative liquidation" was certainly not a course open to them. [...]
7. [...] "The question, however, arises whether it is open to the State to deprive a citizen of his life and liberty [...] and yet claim an immunity on the ground that the said deprivation of life occurred while the officers of the State were exercising the sovereign power of the State? ... Can the fundamental right to life guaranteed by Art. 21 [of the Constitution] be defeated by pleading the archaic defence of sovereign functions? [...] We think not. Article 21 does not recognize any exception, [...]"

[...]

9. [...] [T]his Court [...] held that award of compensation in a proceeding under Article 32 by the Supreme Court or under Article 226 by the High Court is a remedy available in public law based on strict liability for contravention of fundamental rights. It is held that the defence of sovereign immunity does not apply in such a case even though it may be available as a defence in private law in an action based on tort. [...] It is one mode of enforcing the fundamental rights by this Court or High Court. Reliance is placed upon Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which says, "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". [...]

"[...] In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. [...]"

[...]

14. Now coming to the facts of the case, we are of the opinion that award of compensation of Rs. 100,000/- [Rupees one lakh only] to the families of each of the deceased would be appropriate and just. [...]

Order accordingly.

DISCUSSION

1. a. Do the police actions in this case violate IHL? Is IHL even applicable here?
- b. Are the circumstances here those required for the application of Art. 3 common to the Conventions? What criteria have to be met? Are acts disturbing public order or threatening State security sufficient to invoke Art. 3 common to the Conventions? Is it sufficient for the encounters with organized opposition groups (e.g., Hamar Peoples' Convention) to occur regularly?
- c. Is the level of intensity required for Protocol II to apply to a conflict higher or lower than the threshold for the application of Art. 3 common to the Conventions? Is Protocol II applicable here? (P II, Art. 1)
2. a. Could the situation in this case be described as internal tension or disturbances? Can violations similar to those in conflicts covered by Art. 3 common to the Conventions not occur during internal disturbances? If Art. 3 common to the Conventions is inapplicable in such circumstances, should the threshold required for its application be lowered?
- b. What law protects individuals caught up in such situations? Is international human rights law always adequate? Does it not provide rights from which States may not derogate? Is this alone sufficient?
- c. Would the adoption of an instrument such as the Turku Declaration [See **Document No. 55**, UN, Minimum Humanitarian Standards] fill this gap in protection? If it was a valid instrument binding on India, would it change the legal situation in the present case?

3.
 - a. Does IHL, like Indian law and Art. 9(5) of the International Covenant on Civil and Political Rights, provide for compensation to victims of IHL violations? Under what circumstances? By whom? (HR, Art. 3; GC I-IV, Arts 51/52/131/148 respectively; P I, Art. 91)
 - b. Is compensation an appropriate remedy for the wrongful taking of life as the Court states: “an infringement of a fundamental right?” How is an “appropriate and just” amount assessed?

Case No. 272, Civil War in Nepal**I. Chronology of the conflict**

[Source: P.J.C. Schimmelpenninck van der Oije, "International Humanitarian Law from a Field Perspective – Case Study: Nepal," *YIHL*, Vol. 9: issue 395, pp. 394-417, (2006), © TMC Asser Press, The Hague, and the contributors, published by Cambridge University Press, reproduced with permission; footnotes omitted]

[...]

THE CHRONOLOGICAL CONTEXT OF THE ARMED CONFLICT IN NEPAL

The year 2006 was an important one in Nepalese history. The warring parties signed a peace agreement after a decade of bloody conflict. [...]

The roots of the conflict can be found in the geographical, political, social and economic reality of Nepal. Some of the causes of the outbreak of hostilities, therefore, can be traced back over centuries. A more recent process that influenced the present-day situation was that of the 'Panchayat' (meaning 'Assembly'), or non-party system (1960-1990). [...] According to King Mahendra, the first attempt at parliamentary democracy (1951-1960) had not brought the country the desired stability and development. He therefore dissolved Parliament in 1960 and declared all political parties illegal. Many political parties went underground and some of their leaders, including politicians from Communist-oriented parties, spent many years in prison or in exile in India.

[...]

By 1988, however, [...] [r]ebellion against the system grew and it collapsed under pressure from a strong popular uprising in April 1990.

Many researchers have argued that the new political order set up after April 1990, when democracy was first installed in Nepal, failed to include all sections of Nepali society. Some groups felt that they remained outside mainstream politics and the reach of development programmes. The gap between urban and rural areas and between rich and poor continued to widen. The revolt by the Communist Party of Nepal (the Maoists) (hereinafter CPN-M), which meant the start of a civil war, was the outcome of a political struggle for a new democratic order. [...]

Fighting first occurred on 13 February 1996. On that day, the CPN-M launched a 'people's war' from the mid-western region of Nepal. It was a reaction to the failed attempts by the National Congress-dominated government to establish a democracy and meet the demands of the CPN-M. The aim of the armed struggle was to overthrow the existing regime, to establish a democratic republic and to transform its economy and society. [...]

In the years to follow, the Maoists intensified their attacks throughout the country. In 1999 the CPN-M formally announced the formation of their People's Liberation Army (hereinafter PLA). The police in their turn allegedly engaged in operations using

excessive force [...], arrested arbitrarily and was linked to an increasing number of 'disappearances' from 1998 onwards. [...]

After the breakdown of peace negotiations with the CPN-M, a State of Emergency was declared on 26 November 2001. The Nepalese government, for the first time since the start of the conflict, deployed the Royal Nepalese Army (RNA) to fight against the Maoists. [...]

Government forces and Maoists clashed frequently, especially in western areas of the country. The far-west and far-east districts saw an unprecedented number of attacks on government buildings and acts of retaliation in areas not previously affected. Throughout 2005 the CPN-M regularly called general strikes [...], targeting all those who refused to comply. On 3 September 2005 the CPN-M unilaterally declared a three-month cease-fire, extending it by another month soon after. During this period it signed a 12-point understanding with an alliance of seven political parties, which included a call for the election of a constituent assembly under international supervision. The CPN-M and the political parties agreed to work towards ending what they called an autocratic monarchy, to accept the outcome of multiparty elections and thus to boycott the forthcoming elections in 2006. The palace did not acknowledge the cease-fire and refused to discuss it. The parties responded by organising protests in the capital and in the districts.

On 2 January 2006 the CPN-M ended its ceasefire and soon afterwards fighting between the Maoists and security forces spread to almost all 75 districts of Nepal. [...] Maoists increasingly attacked urban areas and sought refuge among civilians, while security forces were reported to be using helicopters to drop mortar shells in civilian areas. [...]

Following the failed elections, a broadly based opposition movement instigated street protests by hundreds of thousands of Nepalese throughout the country on 4 April 2006. The royal government used force. A total of 18 people were killed and some 4,000 injured. After 19 days of widespread public demonstrations, protests and strikes, King Gyanendra announced, on 21 April, that he had relinquished executive power and invited the opposition to form a government. On 24 April the House of Representatives was reinstated. It removed the King as commander-in-chief, but allowed the monarch to retain his ceremonial authority. At the beginning of May, the CPN-M and the government declared a cease-fire. They signed a Code of Conduct on 26 May.

In November 2006, the government and the CPN-M signed a comprehensive agreement to implement a peace process, establish a constituent assembly, redraft the country's constitution, and establish an interim government. The (no longer Royal) Nepali army and the CPN-M agreed to an arms management pact under which each side would hand in its weapons and withdraw most troops to barracks under UN supervision – the mandate of the United Nations Mission in Nepal (UNMIN) started on 23 January 2007. The parties also promised to avoid recruiting anyone younger than 18 years of age for military purposes. The government released hundreds of detainees held under the Public Security Act and the TADO.¹ The strict limitations of freedom of speech and association were removed. Maoist cadres began to operate openly in

¹ The Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) was part of the emergency measures promulgated by the Government in November 2001. (Authors' note)

former government-held areas such as Kathmandu and accepted other political parties to operate in areas under their control. Human rights and IHL violations decreased and casualties caused by armed clashes reduced to almost zero. [...]

THE WARRING PARTIES AND INTERNATIONAL HUMANITARIAN LAW

[...]

Applicability of international humanitarian law

In 1964 Nepal ratified the four Geneva Conventions of 1949, applicable to international armed conflict. In addition, Nepal is a party to several other IHL related conventions. The Nepali Treaty Act of 1991 stipulates the prevalence of international treaties to which Nepal is a party if any conflict exists between domestic and international law.

To date, Nepal has not signed the two Additional Protocols of 1977, the second of which regulates the application of IHL in non-international armed conflict. It can be argued that the conflict in Nepal was a classical example of a non-international armed conflict; a political group decided to take up arms and to fight the established authorities. In such cases Article 3 common to all four Geneva Conventions applies.

Next to this rudimentary set of rules, rules of customary international humanitarian law were also applicable in the context of the conflict in Nepal. Nepal has yet to become a party to the Statute of the International Criminal Court. During the armed conflict, Nepal was a signatory to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. [...]

II. Attack against the Sharada Higher Secondary School

[Source: Kedar Prasad Poudyal, "The Role of National Human Rights Institutions in Armed Conflict Situations: With Special Reference to NHRC-Nepal", Research Paper, The Danish Institute for Human Rights (2006), pp. 87-88, available at <http://www.humanrights.dk>. Footnotes omitted]

[...]

Killing of school children: a case of disproportionate use of force by the Army

This is another serious case taken up by the [National Human Rights] Commission [of Nepal] [hereinafter referred to as NHRC] whereby at least 4 school children were killed and many were wounded in an indiscriminate firing. The incident took place on 13 October 2003, at Sharada Higher Secondary School in Mudhvara Village Development Committee (VDC)-1 of Doti District, in the Far Western Region. It was at day time, when the students were having their second classes of the day. Meanwhile, a group of armed Maoists came there and forced the teachers and the students to stop everything and ordered to get ready for a cultural program. Hardly had the cultural program started the security forces also reached there and started to shoot the Maoists. Maoists, as they were not prepared at all, could not retaliate from their side. In the shootout, six Maoists were killed and 4 students also were killed and five students were injured. It was a severe negligence from the Maoists' side despite the repeated request from

the teachers not to hold any such programs, as the army was on patrol in the nearby village, the Maoists had assured that it was their responsibility to save the children and the teachers. The NHRC investigation team found that there was a serious violation of humanitarian law both from the side of the Maoists and the security forces.

Initially, the NHRC had asked the army to clarify under which law the army was mobilized that day and whether there was any appropriate legal order to carry out the search operation. But the army never replied. It meant that the army was not following any legal process, which was required to go for a search operation. It was also clear that there was no firing from the side of the Maoists when the army circled them. It was also revealed that, compared to the force of the army, Maoists were not many in number and that it was a cultural group and they were having very limited arms with them. As such, after giving them warning, security forces could easily verify and arrest them as it was day time. But the forces started firing indiscriminately even towards the students despite their pleas of not being Maoists.

It was a clear case of disproportionate use of force, and security forces had also failed to clarify the process they should have fulfilled before the shootout for example by giving warning.

It was also a violation of humanitarian law by the Maoists as despite the requests not to perform cultural program, putting the children and the teachers in jeopardy the Maoists performed a cultural program and that led to such an incident

The Commission wrote to the government to take action against those who were involved in the incident and provide financial compensation to the victims and their family. It also warned the Maoists not to repeat such incidents.

[...]

[Source: National Human Rights Commission – Nepal, Annual Report 2004, pp. 33-34, available at http://www.nhrcnepal.org/publication/doc/reports/Annual_Report_English_2004.pdf]

Annual Report 2004

[...]

S. No.: 4

Date of decision: 18 November 2003

Meeting No.: 59

Decision No.: 3

Details of the decision

A lot of important information was elicited from the documents collected by the probe team deputed to Nepalgunj for investigating into the incident of Sharada Higher Secondary School at Mudbhara, Doti district of 13 October 2003. [...]

The investigation offers a quite clear picture. When the people reportedly identified as Maoist were engaged in a cultural show, security forces launched an offensive, killing 10 at the site, of which 6 were Maoists and four school students. Another five students were also injured in the shooting. All the collected information shows that the people – purportedly Maoists – forcefully organised the cultural programme in the school despite having the knowledge that military operation at the site was very much likely as there were security forces stationed in the proximity of the school. Through the means of terror, they had prohibited the students and teachers from leaving the school and coerced and forced them to gather at the programme, and brought back even those who had already [gone] away from the site.

The organising of the programme contravenes the widely welcomed idea of declaring schools the Zone of Peace and treating the schools free from violence and armed conflict. It has only resulted in such a devastating incident in the school. Hence, it has established the Maoists as seriously responsible for the incident as their move contravened the international humanitarian laws enshrined in the Common Article 3 of the Geneva Conventions.

On the other hand, the security forces also were to blame for not abiding by the laws and other legal procedures related to security operation. [...] The Royal Nepal Army furnished no reply to the inquiry as to what legal provisions was the operation launched under. Therefore, it was clear that the security forces failed to observe even minimum precaution and forbearance and opened fire indiscriminately at the mass of the cultural programme, despite the repeated humble plea of the students after declaring their identity. The army men even gave no chance for surrendering, to the so-called Maoists. As a result, six Maoists and four innocent school students were killed, and another five students severely injured.

Hence, in view of the existing laws vis-à-vis facts relating to the incident, the security forces' operation is clearly seen as gross negligence. It has not only violated the existing laws of land, international humanitarian laws, and human rights, but also resulted in what has been described as crime in Nepalese laws.

DISCUSSION

1. a. Is there an armed conflict between the Nepalese government and the Maoists? If yes, what is the nature of the armed conflict?
b. Does IHL apply to the attack on the Sharada Higher Secondary School?
2. Would IHL have been violated by the mere takeover of the school by the Maoists? Because the Maoists were armed? Would IHL apply if the Maoists had not been armed? Do you agree that the performance of the cultural programme by the Maoists, knowing that it would put the children and teachers at risk, was a violation of IHL? Was it a violation of IHL because the Maoists used a school? Do you agree with the National Human Rights Commission (NHRC) that it “contravened the international humanitarian laws enshrined in the Common Article 3 of the Geneva Conventions”? (CIHL, Rule 22)
3. a. Under IHL, were the Maoists in the school legitimate targets? May anyone belonging to the Communist Party of Nepal (Maoist) be targeted? Did they become legitimate targets because

they were engaged in a cultural programme? Because they were armed? Because they took over the school and prevented the students and teachers from leaving?

- b. Under IHL, if they were legitimate targets for one of the reasons mentioned in question 3a., should the government forces have tried to arrest them before targeting them? Should they have given the Maoists a possibility to surrender, as argued by the NHRC? Should they have warned them before attacking them? Could they have attacked them even if the Maoists had not resisted, but had tried to flee?
 - c. Did the killing of the Maoists violate the proportionality principle under IHL?
 - d. Are your answers to questions a., b. and c. the same under HRL as under IHL? If not, which law prevails?
4. a. Was the killing and injuring of the schoolchildren and teachers a violation of IHL? Must you make a distinction between the schoolchildren and the teachers in this respect? Were they targeted?
- b. Did the killing and injuring of the schoolchildren and teachers violate the proportionality principle under IHL? What should the government security forces have done instead? Do you agree that the attack was indiscriminate?
 - c. Under IHL, do you agree that there was an obligation for the government security forces to give a warning before opening fire?
 - d. Are your answers to questions a., b. and c. the same under HRL as under IHL? If not, which law prevails?

Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines

[Source: NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, available at <http://ndfp.net/>]

NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977**5 July 1996**

In accordance with Article 96, paragraph 3 of Protocol I, we, the National Democratic Front of the Philippines, hereby address ourselves to the Federal Council of the Swiss Government as official depository of the Geneva Conventions of 1949 and the 1977 Protocol I additional thereto.

We are the political authority representing the Filipino people and organized political forces that are waging an armed revolutionary struggle for national liberation and democracy, in the exercise of the right of self-determination within the purview of Article 1, paragraph 4, of Protocol I against the persistent factors and elements of colonial domination and against national oppression, including chauvinism and racism, victimizing the entire Filipino nation and particular minorities in the Philippines.

Our revolutionary armed struggle is the continuation of the Philippine Revolution of 1896 against Spanish colonialism and subsequently against US imperialism. We are waging a people's war for national liberation and democracy against the semicolonial and semifeudal ruling system. The Government of the Republic of the Philippines (GRP), our current adversary in the armed conflict, continues to suppress the sovereign will of the Filipino people in order to perpetuate the interests of the foreign and domestic oppressors and exploiters, despite the US grant of nominal independence to the Philippines on July 4, 1946.

The persistent foreign domination and national oppression are carried out through the GRP as a puppet government in the service of the United States government, which controls and uses it by means of US strategic planning, command, personnel (including military advisors, trainers, intelligence and psychological warfare personnel and basic personnel for rapid deployment forces), supplies, extraterritorial access to the entire Philippines and other forms of US military intervention and extraterritorial privileges and by means of unequal treaties and agreements perpetuating in essence the factors of US colonial domination over the Philippine economy, politics, security and culture.

Since the beginning of the civil war, the GRP has in one essential respect maintained the character of the armed conflict as an internationalized internal conflict through subservience to US domination and GRP dependence on US military and other forms of intervention and assistance in the armed conflict. The civil war between the GRP and the NDFP involves the struggle for self-determination and the people's war for national liberation and comes within the purview of Article I, paragraph 4 of Protocol I and within the international customary law pertaining to armed conflicts.

[...]

[...] [The] revolutionary forces have been engaged in a civil war for a protracted period of time since March 29, 1969 against the Government of the Republic of the Philippines (GRP), a High Contracting Party to the Geneva Conventions and Protocol II. The great intensity of the civil war has been made manifest by the GRP's brutal use of the regular forces of the Armed Forces of the Philippines (AFP), the imposition of martial rule on the people from 1972 to 1986, the great magnitude of US military involvement in the form of military funds, materiel and personnel, and the continuing brutal campaigns of suppression under a policy of total war against the aforesaid revolutionary people and forces.

[...]

The people and forces represented by the NDFP have withstood the brutal military campaigns of suppression carried out by the enemy and have gained strength in the process. They have gained the status of belligerency by virtue of their just revolutionary armed struggle and hard work in building the organs of political power.

The aforesaid people and forces have established and developed a political organization that has sufficient governmental character. This political organization has sufficient control over a substantial area, population and resources in the Philippine archipelago. If said political organization were left to itself, it has the capability of reasonable and effectively discharging the duties of a state. In fact, it has established organs of political power which comprise the people's democratic government and which administers the people's civil, political, social, economic and cultural life in significant portions of fourteen (14) regions, more than 500 municipalities and more than 60 provinces of the Philippines.

It has deployed the New People's Army in accordance with the civilized rules of warfare and has informed and trained it accordingly. Even before this declaration, it has complied with the rules of war under international law. It has consciously followed international humanitarian law, like Common Article 3 of the Geneva Conventions and Protocol II. It has declared accession to Protocol II since 15 August 1991 [...] and is now resolved to assume in good faith rights and responsibilities under the Geneva Conventions and Protocol I. The instruments of international humanitarian law must apply on the armed conflict between the GRP and the NDFP for the protection of the civilian population and combatants hors de combat because the NDFP has proven itself as a belligerent force and does not accept as applicable the GRP constitution and laws inasmuch as the GRP does not accept as applicable to itself the constitution and laws of the revolutionary movement.

In their ongoing peace negotiations, the GRP and the NDFP have acknowledged by mutual agreement since 25 June 1996 that the prolonged armed conflict in the Philippines necessitates the application of the principles of human rights and principles of international humanitarian law. [...]

Being a party to the armed conflict, civil war or war of national liberation and authorized by the revolutionary people and forces to represent them in diplomatic

and other international relations and in the ongoing peace negotiations with the GRP, we the National Democratic Front of the Philippines hereby solemnly declare in good faith to undertake to apply the Geneva Conventions and Protocol I to the armed conflict in accordance with Article 96, paragraph 3 in relation to Article 1, paragraph 4 of Protocol I.

The NDFP is rightfully and dutifully cognizant that this declaration, upon receipt by the Federal Council of the Swiss Government, shall have in relation to the armed conflict with the GRP the following effects:

1. the Geneva Conventions and Protocol I are brought into force for the NDFP as a Party to the conflict with immediate effect;
2. the NDFP assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Geneva Conventions and Protocol I; and
3. the Geneva Conventions and this Protocol are equally binding upon all Parties to the conflict.

By virtue of this unilateral declaration of the NDFP, duly deposited with the Swiss Federal Council, the GRP is bound as before by the Geneva Conventions and henceforth by Protocol I in accordance with Article 96, paragraph 3(c) of Protocol I.

With the NDFP invoking and exercising the people's right of self-determination, both the GRP and the NDFP are likewise bound by international customary law pertaining to humanitarian principles, norms and rules in armed conflicts.

The NDFP undertakes to respect the provisions of the four Geneva Conventions of 1949 and Protocol I of 1977, regarding the conduct of hostilities and the protection of the civilian population and the combatants hors de combat in the armed conflict with the GRP and to regard its obligations under the aforesaid instruments of international humanitarian law as having the force of law among its forces and in the areas under its control.

The NDFP and the forces it herein represents accept the principle of command responsibility for the system of discipline to ensure respect for the rules of international humanitarian law and punish those who break them.

The NDFP regards as legitimate targets of military attack the units, personnel and facilities belonging to the following:

1. The Armed Forces of the Philippines
2. The Philippine National Police
3. The paramilitary forces; and
4. The intelligence personnel of the foregoing.

Civil servants of the GRP are not subject to military attack, unless in specific cases they belong to any of the four abovestated categories.

The NDFP will treat any captured personnel of the military, police and paramilitary forces of the GRP as prisoners of war and demands that the GRP likewise treat as prisoners of war any captured personnel of the NPA and other forces represented herein by the NDFP.

The NDFP forthwith disseminates this declaration and the rules of the Geneva Conventions and Protocol I to its forces and asks for the assistance of the ICRC with regards to suitable materials. The NDFP will welcome any offer of services from the ICRC.

The NDFP calls upon High Contracting Parties to the Geneva Conventions and Protocol I to ensure that the GRP and the NDFP respect their obligations.

The NDFP hereby requests the Federal Council of the Swiss Government to circulate copies of this declaration to all parties to the Geneva Conventions and the Protocols additional thereto and to all organizations interested in the respect of human rights and international humanitarian law.

[...]

This declaration is forthwith transmitted to the Federal Council of the Swiss Government as official depositary of the Geneva Conventions and the Protocols additional thereto and likewise to the International Committee of the Red Cross as official guardian thereof.

Done on 05 July in the year 1996.

[...]

DISCUSSION

1. a. What is the nature of the armed conflict between the Government of the Republic of the Philippines (GRP) and the National Democratic Front of the Philippines (NDFP)? Does the involvement of the United States in the conflict change its nature?
- b. What is an internationalized internal armed conflict? Do you agree with the NDFP that the conflict is an internationalized internal one because of US involvement? Are internationalized internal armed conflicts a category of armed conflict recognized by IHL?
- c. When does Art. 1(4) of Protocol I apply? How do you determine whether an armed conflict is one where a people is fighting colonial domination, an alien regime or a racist regime?
2. a. On what rule does the NDFP base the declaration? Are other possibilities available for non-State armed groups willing to comply with the rules of IHL? (GC I-IV, Art. 3; P I, Art. 96(3))
- b. What are the advantages of applying the rules on international armed conflicts instead of the rules on non-international armed conflicts? Is it more advantageous for the NDFP to apply Protocol I instead of Protocol II? Does Protocol I offer more protection?
- c. Can any armed group declare that it is fighting colonial domination, an alien regime or a racist regime? Does an armed group need to fulfil conditions similar to those mentioned in Art. 1(1) of Protocol II in order for Art. 1(4) to apply? Does an armed group need to fulfil such conditions in order for Art. 96(3) of Protocol I to apply? (*See Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the*

Charter of the United Nations, General Assembly Resolution 2625 (XXV), October 24, 1970 [available at <http://un.org>])

3. a. Can the NDFP invoke Art. 96(3) of Protocol I? Even though the Philippines is not a party to Protocol I? Does a State have to ratify a treaty for that treaty to apply? Or can the fact that “the GRP and the NDFP have acknowledged by mutual agreement [...] the application of the [...] principles of international humanitarian law” be used as a basis for Protocol I’s application?
- b. Can the NDFP apply Protocol I unilaterally if the GRP is not bound by it? If Protocol I is not applicable, what law applies? Is Protocol II applicable to the situation?
- c. Can the fact that the NDFP invokes Art. 96(3) of Protocol I cause the GRP to be bound by Protocol I as well, even though it has not ratified it? Does it automatically mean that the NDFP is also bound by the Geneva Conventions?
4. What is belligerency? Why does the NDFP say that it has acquired belligerent status? How can a non-State armed group acquire belligerent status? What is the difference with Art. 96(3) of Protocol I?
5. If the NDFP declaration was valid and the Geneva Conventions and Protocol I applied, what territory, under Convention IV, would the GRP or NDFP be able to claim as their own and what territory would be occupied by them?

Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea (1980-2005)

[**N.B.:** This case study was written by Thomas de Saint Maurice in view of its publication in the 2001 French edition of this book. It is based exclusively on documents available to the public, such as press releases, reports by agencies or United Nations documents.]



[Country names and borders on this map are intended to facilitate reference and have no political significance.]

OUTLINE OF THE CASE STUDY

1. Multiple actors

A. Internal Actors

1. The situation in Sierra Leone
2. The situation in Liberia
3. The situation in Guinea

B. External Actors

1. Intervention by private armed forces: the example of *Executive Outcomes* mercenaries
2. Intervention by a regional force: ECOMOG
3. UN intervention: UNAMSIL
 - a. The mandate
 - b. The concept of operations
4. Intervention by foreign forces: the United Kingdom.

2. Violations of International Humanitarian Law

- A. Violations of International Humanitarian Law by the parties to the conflict in Sierra Leone.
- B. Violations of International Humanitarian Law by ECOMOG
- C. Analysis of the humanitarian situation in Sierra Leone
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Abbreviations:

ECOWAS: Economic Community of West African States
ECOMOG: Economic Community of West African States (ECOWAS) Monitoring Group

Sierra Leone:

CDF: Civil Defence Forces (Kamajors)
NPCR: National Provisional Ruling Council
RUF: Revolutionary United Front
SLA: Sierra Leone Army
UNAMSIL: UN Observer Mission in Sierra Leone

Liberia:

AFL: Armed Forces of Liberia
LPC: Liberia Peace Council
NPFL: National Patriotic Front of Liberation
ULIMO: United Liberation Movement of Liberia (later called LURD: Liberians United for Reconciliation and Democracy)

Guinea:

RFDG: Rally of the Democratic Forces of Guinea

1. Multiple actors

A. Internal actors

1) The situation in Sierra Leone

[Source: PEREZ Andres, "UN peacekeepers for rival gangsters. Sierra Leone's diamond wars," in *Le Monde diplomatique*, June 2000, footnotes omitted; available on <http://www.monde-diplomatique.fr>]

UN PEACEKEEPS FOR RIVAL GANGSTERS

Sierra Leone's diamond wars

It was a short-lived peace: signed last July between the Freetown government and the RUF, it broke down in early May when 300 blue berets were taken captive by the rebels. The arrest of the RUF's leader Foday Sankoh by British troops on 10 May did not bring a halt to the fighting. The background to the civil war is a no-holds-barred fight between the international mining companies for control of Sierra Leone's diamonds.

That a criminal economy can eat away at the heart of states and whole nations is nothing new. But recent events in Sierra Leone have shown that it can also divert to its own advantage an entire peace-keeping operation run by the United Nations and supported by the main foreign powers. The UN Observer Mission in Sierra Leone (UNAMSIL) – the largest UN peace-keeping mission in the world with its 9,000 men – was supposed to bring an end to a ghastly, 10-year-long civil war [...]. [In November 2001, it was composed of 16 600 men.]

We must be clear about who is involved. Barbaric, drug-crazed and dragooned by the warlords as they may be, armed and desperate young men could not have brought UNAMSIL to its knees all on their own. The UN has been ensnared by something different, something newer and more insidious: by a struggle between two rival groups supported by businessmen intent on gaining control of mineral wealth. By refusing to declare an embargo on diamonds from Sierra Leone, or indeed the economic exclusion zone that many experts have been calling for, the Security Council and UN Secretary General have left the field wide open for a mafia-like conflict in which their soldiers have become pawns in the game.

On one side, the rebel Revolutionary United Front (RUF), the true masters of the territory, controls one half of the country and, over the other half, spreads an insecurity that renders impossible any heavy mining activity of the kind the small, "junior" companies would like to start up. Its base lies in the zone of military and commercial influence wielded by Charles Taylor, today the president of Liberia (dubbed Taylorland). Monrovia, his base, is where a large proportion of the smuggled Sierra Leone diamonds are traded, channelling some \$200m a year "linked with the markets in arms, drugs and money-laundering in Africa" and elsewhere. [...]

Facing the RUF are the "legitimist" forces around the president, Ahmed Tejan Kabbah. His government includes the powerful deputy minister for defence and head of the Kamajor militia, Samuel Hinga Norman, and Johnny Paul Koroma, an earlier coup leader and torturer, with his militia. [...]

It has been the brutal clash between these two alliances that scuppered any hope of peace and changed the nature of a UN mission, after fanning for 10 long years the flames of a war whose only victims have been civilians, and especially children. And it is because what is at stake is real and sizeable – over a billion dollars'-worth of stones sold in the jewellers' shops each year, the world's second biggest field of rutile, and bauxite deposits that could have an effect on world prices – that Britain, the old colonial power, is coming forward and deploying its military strength to back up the government of Sierra Leone without having to hide behind the smoke-screen of the *Sandline International* mercenaries as it did before. [...]

"The Kalashnikov lifestyle helps our business", sing the child-soldiers of the RUF. [...]

As these children saw it, the blue berets with their UN badges were no different from the mercenary *Gurkha Security Guards* hired by private companies in 1994, or the men of *Executive Outcomes* (1996), or of *Sandline International* (1997), or the *Lifeguards* they had been holding at bay since 1998. And besides, BBC radio had told them last December that the Indian battalions of the blue berets included *Gurkhas* who were to operate in the diamond-mining areas. It is even known that last March UN high-ups met the leaders of a number of private armies (including *Executive Outcomes*, *Sandline International* and *Israel's Levdan*), to look at ways of working together. [...]

2) The situation in Liberia

[Source: STEAD David, "Troubled past of Africa's first republic", *BBC News Online*, August 12, 1999, available on <http://news.bbc.co.uk>]

Troubled past of Africa's first republic

For much of the last 20 years Liberia has been one of the most unstable countries in Africa.

Plagued since the early 1980s by coup attempts and later by civil conflict its economic assets were squandered and rival ethnic fighters outdid each other in brutal savagery. [...]

At the root of Liberia's political problems have been the conflicts between the descendents of American freed slaves settled during the 19th Century and the indigenous ethnic groups. [...]

The wide disparity between the wealthy coastal elites and the rest of the population created civil disunity sparking a military coup led by a member of the Krahn ethnic group, Master Sergeant Samuel Doe in 1980. [...]

On Christmas Eve, 1989, Charles Taylor and his National Patriotic Front of Liberia (NPFL) began a rebel assault from the north-eastern province of Nimba – reaching Monrovia by September 1990. [...]

Three armed groups competed for Monrovia – the NPFL, a breakaway group led by Prince Yormie Johnson and the Armed Forces of Liberia (AFL), remnants of Doe's army.

It was Prince Johnson's forces which captured Doe, and savagely hacked him to death.

From 1990 onwards there was an escalation of war in Liberia, with new rebel groups establishing powerbases throughout the country.

An African peace-keeping force – ECOMOG – of mainly Nigerian soldiers secured Monrovia [...] but rebel groups continued to control wide swathes of land outside the capital. [...]

Continued efforts at establishing peace and re-uniting the country failed and a new rebel movement, the United Liberation Movement of Liberia (ULIMO) emerged to challenge the NPFL.

ULIMO, which invaded from Sierra Leone, succeeded in wresting large areas of Lofa and Cape Mount counties in western Liberia from Taylor's forces.

The movement later split into two: ULIMO-J, led by Roosevelt Johnson, which was mainly Krahn and ULIMO-K, led by Alhaji Kromah, which was principally Mandingo.

By 1993 another armed faction had emerged – the Liberia Peace Council (LPC) – which battled the NPFL in south-eastern Liberia. [...]

The breakthrough came with a peace agreement signed at Abuja in Nigeria in August 1995 and the subsequent deployment of ECOMOG troops throughout Liberia. [...]

After many last minute hitches on 19 July 1997 Liberia finally went to the polls – with Charles Taylor securing an outright victory.

Shortly after his inauguration, President Taylor accused ULIMO-K of re-assembling in Sierra Leone with the aim of destabilising his government. [...]

3) The situation in Guinea

[Source: *The Forces involved in the fighting in Guinea*, Agence France Presse, February 14, 2001.]

The Forces involved in the fighting in Guinea

CONAKRY, Feb 14 (AFP) – Southern Guinea has been rocked since September by fierce fighting between government troops and rebel groups operating out of neighbouring Sierra Leone and Liberia. More than 1,000 people have been killed and hundreds of thousands of refugees put to flight.

The United Nations has warned that it currently faces its worst humanitarian crisis in the troubled region. Also implicated in the fighting are Guinean dissidents.

Following is a list of groups, movements and factions regarded as "enemies" of Guinea and branded by Conakry as being part of a "rebel coalition":

- The revolutionary United Front (RUF), [...] based in the north and east of Sierra Leone. [...]
- ULIMO, the Liberian United Liberation Movement for Democracy. Founded at the beginning of 1991, the group was one of the principle rivals of Charles Taylor's National Patriotic Front of Liberia (NPFL), which started the Liberian

civil war in December 1989. In 1994, one of ULIMO's leaders, Roosevelt Johnson, broke away and founded ULIMO-J, comprising members of the Krahn ethnic group. [...] Since coming to power, Taylor has regularly accused ULIMO faction ULIMO-K of having bases in southern Guinea and, with the support of Conakry, of launching raids into northern Liberia.

- ULIMO-K, [...]. Mercenaries [of the mandingue ethnic group] trained by warlord Alaji Kromah [...].
- RFDG, the ally of Democratic forces of Guinea, an external movement opposed to the Guinean government. [...]

In its fight against these groups, the Guinean army is supported by:

- The "Volunteers", Guinean civilians who have been recruited *en masse* by the authorities to "repulse the invaders", and who are organised as self-defence militia equipped with shotguns, spears, bows and arrows and other traditional weapons of war.
- Kamajors, Sierra Leone's militant traditional hunters [...] one of the most faithful supporters of the [...] Sierra Leone President Ahmad Tejan Kabbah and among the most dreaded enemies of the RUF. [...] According to sources in Conakry, there are currently about one thousand Kamajor fighters in Guinea.

B. External actors

1) Intervention by private armed forces: the example of *Executive Outcomes* mercenaries

[Source: United Nations, E/CN.4/1996/27, 17 January 1996; available on <http://www.unhchr.ch>]

COMMISSION ON HUMAN RIGHTS THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission resolution 1995/5 and Economic and Council resolution 1995/254 [...]

C. Sierra Leone

62. Sierra Leone is in the grip of an internal armed conflict which broke out in March 1991 when an opposition group known as the Revolutionary United Front (RUF) was formed as an armed resistance movement and launched an invasion from neighbouring Liberia with a view to occupying part of the southern and eastern regions of the country. The conflict did not come to an end when, in 1992, a military-nationalist movement calling itself the National Provisional Ruling Council

(NPRC), headed by Captain Valentine Strasser, seized power in a coup, suspended the 1991 Constitution and declared a state of emergency. [...]

63. In the course of the internal armed conflict, both the NPRC and the RUF rebel forces, led by Foday Sankoh, have committed serious violations of and disregarded, basic provisions of international humanitarian law. [...] The civilian victims of this conflict are estimated to number in the thousands.
64. There is clear evidence of mercenary involvement in this internal armed conflict. [...] [T]he NPRC has strengthened its military capability by hiring mercenaries supplied by *Executive Outcomes*, a private company officially registered in Pretoria as a security company, but in this case said to have been paid in cash and, in particular, in the form of mining concessions, for supplying specially trained mercenaries and weapons. According to information made available to the Special Rapporteur, *Executive Outcomes* is involved in the recruitment, contracting and training of the mercenaries and the planning of their operations. It uses them in a variety of situations where, in return for payment, it has carried out all kinds of illegal acts. *Executive Outcomes* is reported to have provided Sierra Leone with about 500 mercenaries from various countries, usually paying them between US\$ 15,000 and US\$ 18,000 per month, depending on their qualifications and experience, in addition to providing them with generous life-insurance cover and weapons.
65. [...] According to the sources consulted, *Executive Outcomes* is receiving about US\$ 30 million and mining [...]. In recruiting mercenaries, *Executive Outcomes* is said to work through a network of security companies operating in various countries, soldiers of fortune and intelligence circles. Its work in Sierra Leone is said to involve the following activities: training of officers and other ranks; reconnaissance and aerial photography; strategic planning; training in the use of new military equipment; advising on arms purchases; devising psychological campaigns aimed at creating panic among the civilian population and discrediting the leaders of the RUF, etc. According to the source consulted, all these activities are supervised by executives of the company. [...]
66. [...] In any event, this would appear to be yet another instance of an internal armed conflict in which the involvement of mercenaries prolongs and adds to the cruelty of that conflict, while at the same time undermining the exercise of the right to self-determination of the people of the country involved.

2) Intervention by a regional force: ECOMOG

[Source: PEYRO LLOPIS Ana, "La Sierra Leone ou le renouveau des opérations de paix," in *Actualité et Droit international*, Paris, February 2001, footnotes omitted. Original in French, unofficial translation.]

SIERRA LEONE OR RENEWED PEACE OPERATIONS

[...] The conflict in Sierra Leone dates back to March 1991 when the RUF launched an offensive against the government headed by Joseph Momoh. That government was toppled in April 1992 – not by the RUF, but by its own officials led by Valentine Strasser.

He proclaimed himself head of the new government, which was, in turn, overthrown in January 1996 by one of its members, Brigadier Julius Maada Bio. He organized elections which were won in March 1996 by Ahmad Tejan Kabbah. He, too, was removed from power on 25 May 1997 by a coalition comprising a sector of the Sierra Leone army and the RUF and led by Major Johnny Paul Koroma. Mr Kabbah was again the “effective” head of the Sierra Leone government from March 1998, following intervention by the Economic Community of West African States (ECOWAS) and ECOMOG (ECOWAS Monitoring Group or ECOWAS Military Observer Group). [...]

I. A regional peace operation with variable geometry [...]

A. ECOMOG’s implementation of the United Nations embargo

Initially, pursuant to Chapter VIII of the Charter of the United Nations, the Security Council authorized ECOWAS to ensure the implementation of the embargo on the supply of arms and petroleum products stipulated in Resolution 1132 of 8 October 1997. Even if the Council did not quote it explicitly, this was, more precisely, a matter of implementing Article 53 of the Charter, which requires enforcement action taken under regional arrangements or by regional agencies to be authorized by the Security Council. The Charter thus subjects regional agencies to the authority of the Security Council. In order to implement the embargo stipulated by the Security Council, ECOWAS sent the first ECOMOG contingents to Sierra Leone. [...]

B. ECOMOG: a regional peace force

[...] From its initial role as the body responsible for monitoring compliance with the embargo, ECOMOG became a regional peacekeeping force whose activities came within the scope of the peaceful settlement of disputes pursuant to Chapter VI and Article 52 of the Charter. However, it soon resorted to using force – without Security Council authorization. Was that [...] a breach of international law?

Following the breakdown of the peace agreement signed in Conakry on 23 October 1997 between Major Koroma, who was then in power, and ECOWAS, the latter decided to strengthen ECOMOG with new contingents, which entered Sierra Leone territory in February 1998. The peace agreement had provided for ECOMOG to be present in the country to supervise compliance with the ceasefire, to deal with the disarmament, demobilization and reintegration of combatants, and to monitor humanitarian assistance. That step was taken without any Security Council authorization whatsoever. [...]

In accordance with a bilateral defence agreement signed with President Kabbah, troops from Nigeria had already been in Sierra Leone before that date and had tried to topple the new Koroma government the day after the *coup d’État* in May 1997. The Nigerian troops soon began to act in the name of ECOMOG. Although it is accurate to say that, as from February 1998, a regional peacekeeping operation was deployed in Sierra Leone, during the period extending from the *coup d’État* of May 1997 to February 1998, the status of the ECOMOG and Nigerian forces in Sierra Leone was very controversial. President Kabbah said that he had asked Nigeria to intervene by virtue of the bilateral defence agreement with that country whereas Nigeria maintained

that “it had launched its offensive under the ECOMOG banner”. However, ECOMOG, which the Security Council had authorized solely to monitor the embargo, had never been given such a mandate. In fact, ECOMOG, which was set up in 1991 to intervene in Liberia, had always been an instrument of Nigerian foreign policy. [...]

In its Resolution 1162 of 17 April 1998, the Security Council commended “ECOWAS and ECOMOG on the important role they [were] playing in Sierra Leone in support of ... the restoration of peace and security”. In similar terms, it commended ECOMOG on 20 August 1999 for the “outstanding contribution that it [had] made to the restoration of security and stability in Sierra Leone, the protection of civilians and the promotion of a peaceful settlement of the conflict”. The Security Council thus avoided confronting the issue of ECOMOG’s true nature: it was easier to consider it a classic force concerned with the peaceful settlement of disputes, where the basic principle governing relations between the universal organisation and the regional organisations is coordination (Article 52 of the Charter), than to make it subordinate to the Security Council (Article 53 of the Charter).

Once President Kabbah’s government had been reinstated as a result of ECOMOG’s operations, the Security Council decided to deploy “a United Nations military liaison group and security advisers” which was to be coordinated with the Sierra Leone government and ECOMOG. The United Nations thus acknowledged the essential role of ECOWAS and ECOMOG. However, in July 1998 the Security Council decided to set up its own peacekeeping operation.

3) UN intervention: UNAMSIL

a) The mandate

[Source: UNAMSIL mandate, United Nations, available on <http://www.un.org>]

According to Security Council resolution 1270 (1999) of 22 October 1999, UNAMSIL has the following mandate:

- To cooperate with the Government of Sierra Leone and the other parties to the Peace Agreement in the implementation of the Agreement
- To assist the Government of Sierra Leone in the implementation of the disarmament, demobilization and reintegration plan
- To that end, to establish a presence at key locations throughout the territory of Sierra Leone, including at disarmament/reception centres and demobilization centres
- To ensure the security and freedom of movement of United Nations personnel
- To monitor adherence to the ceasefire in accordance with the ceasefire agreement of 18 May 1999 [...] through the structures provided for therein
- To encourage the parties to create confidence-building mechanisms and support their functioning

- To facilitate the delivery of humanitarian assistance [...]

**According to Security Council resolution 1289 (2000) of 7 February 2000
(under Chapter VII of the Charter of the United Nations),
the mandate has been revised to include the following tasks:**

- To provide security at key locations and Government buildings, in particular in Freetown, important intersections and major airports, including Lungi airport
- To facilitate the free flow of people, goods and humanitarian assistance along specified thoroughfares
- To provide security in and at all sites of the disarmament, demobilization and reintegration programme
- To coordinate with and assist, the Sierra Leone law enforcement authorities in the discharge of their responsibilities
- To guard weapons, ammunition and other military equipment collected from ex-combatants and to assist in their subsequent disposal or destruction

The Council authorized UNAMSIL to take the necessary action to fulfil those additional tasks, and affirmed that, in the discharge of its mandate, UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence, taking into account the responsibilities of the Government of Sierra Leone.

b) The concept of operations

[Source: United Nations, S/2001/228, Ninth report of the Secretary-General on the United Nations Mission in Sierra Leone, 14 March 2001; available on <http://www.un.org>]

[...]

VI. Concept of Operations

57. UNAMSIL has revised its concept of operations, [...] to take into account the ABUJA Ceasefire Agreement, [10 November 2000] the changes in the Mission's military structure and the circumstances on the ground. [...]
58. The main objectives of UNAMSIL in Sierra Leone remain to assist the efforts of the Government of Sierra Leone to extend its authority, restore law and order and stabilize the situation progressively throughout the entire country, and to assist in the promotion of a political process which should lead to a renewed disarmament, demobilization and reintegration programme and the holding, in due course, of free and fair elections.
59. The Mission's updated concept of operations integrates military and civilian aspects and envisages the deployment, in successive phases, into RUF-controlled areas of UNAMSIL troops, United Nations civil affairs, civilian police and human

rights personnel, representatives of humanitarian agencies, and governmental personnel and assets to establish and consolidate State authority and basic services in these areas. [...]

60. In its movement and deployment forward, UNAMSIL will continue to project the necessary military strength and determination to deter any attempt to use force against United Nations and its mandate in Sierra Leone. The mission's rules of engagement allow it to respond robustly to any attack or threat of attack, including, if necessary, in a pre-emptive manner. [...]

4) Intervention by foreign forces: the United Kingdom

[Source: Rémy Ourdan, "La Grande-Bretagne mène en Sierra Leone sa plus vaste opération militaire depuis les Malouines", in *Le Monde*, 25 May 2000. Original in French, unofficial translation.]

The United Kingdom in Sierra Leone - its largest military operation since the Falklands

[...] The British military operation in Sierra Leone has now taken Her Majesty's soldiers beyond the scope of their official mission, which was to evacuate European Union and Commonwealth citizens. [...] The fact that a sense of security has been restored in the capital of Sierra Leone is clearly due to "Operation Palliser" having been more than an airlift to Dakar. The operation has now become the hub of an outright political and military counter-attack against the Revolutionary United Front (RUF) rebels.

The 800 British soldiers first secured Lungi airport and the Aberdeen peninsula, the location of the Mammy Yoko heliport and United Nations headquarters, but from the moment they arrived, the impression they conveyed was that of being set to defend Freetown against rebel offensives. Patrols were extended to every part of the capital and military "advisers" seconded to the Sierra Leone army (SLA) ensured that pro-government forces were deployed in such a way as to best defend the city.

Contracted "advisers"

An attack by some 40 rebels 15 kilometres outside of Lungi then thrust the paratroopers into a new phase of their military operation. They retaliated in an act of self-defence but, according to a military source, they also pursued their attackers. Helicopters flew over and lit up the retreating RUF combatants, allowing them to be picked out easily by the paratroopers as they made their way along the road. British soldiers allegedly killed about 15 rebels that night.

Another aspect of British intervention is the assistance rendered, on the one hand, by army instructors to the Sierra Leone forces and, on the other, by the paratrooper battalion to the United Nations forces. [...] The pro-government coalition, made up of soldiers loyal to President Ahmad Tejan Kabbah, traditional Kamajor hunters led by Sam Hinga Norman and former rebels headed by Johnny Paul Koroma, is at the forefront of the battle. The fighters have obviously been supplied with automatic rifles, mortars and munitions by the United Kingdom. Within the SLA hierarchy, British officers are quietly seconding their Sierra Leone colleagues. [...]

Once the battle is over, the United Nations forces go back to the positions that they abandoned after Blue Helmets were taken captive and the RUF rebels advanced. Once again British officers ensure that the men are deployed smoothly, give advice on how to set up more effective observation posts and supply communication equipment.

The naturally secret operations of the SAS (Special Air Service) commandos should not be overlooked. There are said to be 120 of these elite British army combatants deployed beyond the front lines in Sierra Leone, deep in the heavily forested and diamond-producing regions under RUF control. [...]

DISCUSSION

1. How would you qualify the fighting in Sierra Leone between:
 - the Sierra Leone government army and the RUF rebels?
 - the Kamajors and the RUF?
 - UNAMSIL soldiers and the RUF?
 - the mercenaries and the RUF?
 - ECOMOG soldiers and the RUF?
 - the British army and the RUF?
2. Should the conflict be divided into different parts depending on the nature of the armed groups? Even at the risk of having different qualifications depending on the actors? What would be the consequences, under IHL, of qualifying the same conflict as international in some respects and non-international in other respects? Is it possible (and desirable) for people to benefit from a specific status if they are in the hands of one party to the conflict but not if they are in the hands of a different party?
3. In each of the situations enumerated in question 1, what would be the status of possible detainees? What about UNAMSIL members in the hands of the RUF? Is hostage-taking a violation of IHL? Is this valid for combatants taken as “hostages”? If the members of two different groups are held (for example) by the RUF, can they have different statuses? (GC I-IV, Art. 3; GC III, Art. 4; ICC Statute, Art. 8; See **Case No. 23**, The International Criminal Court)
4. How would you qualify the conflict in Liberia between:
 - the government forces (of Samuel Doe) and the NPFL?
 - the government forces and those of Prince Johnson?
 - the NPFL as the new government and the other armed groups (ULIMO, LPC)?
 - Liberian rebel groups or factions fighting between themselves?
5. What if the fighting takes place in part or entirely outside Liberian territory (in Guinea, for example)?
6. Can ULIMO be held responsible for acts committed by Doe’s governmental army, since it was created by former members of the army loyal to Doe? Can Charles Taylor’s government be held responsible for acts committed by the NPFL as a rebel group? [See **Case No. 53**, International Law Commission, Articles on State Responsibility [Part A., Art. 10(1)]]
7. How would you qualify the fighting in Guinea between:
 - the government forces and mutineers?
 - the government forces and Guinean rebels of the RFDG?

- the government forces and foreign rebels (RUF, ULIMO)?
 - Sierra Leone's Kamajors and the mutineers or members of the RFDG?
 - the Guinean "volunteers" and the mutineers, the RFDG or foreign rebels?
8. How would you qualify fighting involving the governmental forces of Liberia, Sierra Leone or Guinea outside their territory:
- if their attacks are aimed at rebel forces of the country where the fighting takes place, for example between the Guinean government and the RUF on the territory of Sierra Leone?
 - if their attacks are aimed at rebel forces of the attacking forces' country that are based on foreign territory, for example attacks by the Liberian government on ULIMO in Guinea?
9. What is the position of mercenaries in IHL? In the IHL of non-international armed conflicts? Is the use of mercenaries authorized or not under international law (for a State, the United Nations, rebel forces)? What would be their status if they were captured? Are they bound by the rules of IHL? Are the staff of private security agencies hired, for example, to protect mining operations, mercenaries? If they use armed force to fulfil their mission? In terms of criminal and international responsibility, who can be held responsible for acts committed by mercenaries: the State and members of the government that used the mercenaries, such as Sierra Leone and the United Kingdom, the leaders of companies employing mercenaries, the mining companies who used the mercenaries? [See OAU Convention of 1977, United Nations Convention of 1989, available on <http://www.icrc.org/ihl>, and **Case No. 20**, The Issue of Mercenaries; P I, Art. 47]
10. The head of the Kamajor militia, Samuel Hinga Norman, is the Deputy Minister of Defence in Sierra Leone. How could this affect IHL (qualification of the conflict, applicable law, State responsibility, etc.)?
11. Are ECOMOG forces bound by IHL? As Nigerian soldiers make up the bulk of the force, can ECOMOG be equated with the Nigerian army? What would be the consequences of doing so? If the Security Council authorized armed intervention by ECOMOG, what would be the consequences in terms of the application of IHL and responsibility?
12. Are UN forces, in this case UNAMSIL, bound by IHL? Discuss the provisions of IHL that are specific to UN forces. [See **Case No. 22**, Convention on the Safety of UN Personnel; ICC Statute, Art. 8; See **Case No. 23**, The International Criminal Court, and **Document No. 57**, UN, Guidelines for UN Forces]
13. What would be the status of members of the British Special Air Service (SAS) under IHL? What would be the legal consequences of fighting between the SAS and the RUF? In case of capture? Could the SAS members be qualified as spies? What rules of IHL are applicable to spies? Are they applicable if the conflict is qualified as non-international? (GC IV, Art. 5; P I, Art. 46)

2. Violations of International Humanitarian Law

A. Violations of International Humanitarian Law by the parties to the conflict in Sierra Leone

[Source: Sierra Leone, Annual Report 2001, Amnesty International; available on <http://www.amnesty.org>]

[...]

Abuses by rebel forces

In early 2000 human rights abuses against civilians – abduction, rape, looting and destruction of villages – by rebel forces occurred almost daily in Northern Province, [...]. From May deliberate and arbitrary killings, mutilation, rape, abduction and forced labour and recruitment increased. Aid workers were attacked and forced to withdraw from rebel-held areas.

[...] [R]efugees forced to return from Guinea were attacked and pressured to join RUF forces in Kambia District.

A group of renegade soldiers known as the West Side Boys terrorized civilians through killings, rape, torture, abduction and ambushes along major roads in the Occra Hills area east of Freetown until September, when their leader was captured and many surrendered or were arrested.

Deliberate and arbitrary killings

Large numbers of civilians were killed by rebel forces from May, particularly in areas around Port Loko, Lunsar, Makeni and Magburaka.

On 8 May RUF members killed about 20 people and injured dozens of others when they fired on some 30,000 people protesting outside Foday Sankoh's residence in Freetown against RUF attacks on UNAMSIL. [...]

In early September rebel forces attacked Guinean villages close to the Sierra Leone border, killing Sierra Leonean refugees.

Torture, including mutilations and rape

Many civilians had limbs deliberately amputated; others had the letters RUF carved into their flesh. Abduction of girls and women, rape and sexual slavery were systematic and widespread. Most victims had contracted sexually transmitted diseases and many became pregnant. [...]

Civilians near Mongeri who escaped from six months' captivity in October had been used as forced labour and repeatedly beaten and threatened with death; women had been repeatedly raped. [...]

Human rights violations by government forces

Members of the CDF and the Sierra Leone Army were responsible for summary executions, arbitrary detention and torture of captured or suspected rebels and recruitment and use of child combatants. The CDF, operating in Eastern and Southern Provinces, became increasingly undisciplined and usurped police authority. Civilians were also arbitrarily detained at CDF headquarters, including in Bo, Koribundu and Kenema. Ill-treatment and extortion of money and property at checkpoints were common and several incidents of rape, previously rare, were reported. [...]

A detainee captured by the CDF in May and held in Bo lost an ear and suffered cuts to his back after being beaten with a bayonet; others reported being stripped and beaten with sticks until they bled.

In September, two men were killed and a third injured when they resisted recruitment by the CDF. [...]

Civilian casualties from aerial attacks

In May and June, attacks by government forces from a helicopter gunship on suspected rebel positions in Northern Province resulted in up to 30 civilian deaths and many other casualties. Attacks often appeared to be indiscriminate and undertaken without adequate measures to safeguard civilians. Although warning leaflets were dropped in Makeni and Magburaka, attacks followed shortly afterwards. Civilians fleeing Makeni, however, said that they were forced out of their homes by rebel forces as the gunship flew overhead. At least 14 civilians were killed in Makeni and at least six were killed in an early afternoon attack on the market in Magburaka.

Child combatants

The resumption of hostilities in May halted demobilization of child combatants, leaving several thousand still to be released by rebel forces, and resulted in further recruitment.

RUF forces continued to abduct and forcibly recruit children in Northern Province. Recruitment of children by the CDF also continued in Southern Province, [...]. In May about 25 per cent of combatants fighting with government forces near Masiaka were observed to be under 18, some as young as seven. The government reiterated that 18 was the minimum age for recruitment and instructed the acting Chief of Defence Staff to ensure demobilization of all those under the age of 18. [...]

B. Violations of International Humanitarian Law by ECOMOG

[Source: Francis Kpatinde, "Les 'casques blancs' aussi ...," in *Jeune Afrique*, 26 February 1999. Original in French, unofficial translation.]

"White Helmets" too

Civilians are treated little better by ECOMOG soldiers than by Revolutionary United Front (RUF) rebels. [...] Since the beginning of the year, ECOMOG members have repeatedly attacked, raped, beaten and summarily executed civilians alleged to be rebels or rebel sympathizers. This was disclosed in an unpublished United Nations report presented by the Secretary-General, Kofi Annan, to a closed meeting of the Security Council on 11 February. Although human rights violations by ECOMOG and the civil defence forces [...] have not matched the scale of the RUF's campaign of terror, they are nonetheless, as the text underlines, "totally unacceptable." The report came from the United Nations Observer Mission in Sierra Leone [UNOMSIL, which was succeeded by UNAMSIL in October 1999], which was sent by the Security Council to Sierra Leone in June 1998 [...]. The United Nations observers, who collected eyewitness accounts from around 100 people in Freetown, also report ECOMOG's mishandling of civilians at checkpoints. People suspected of rebel allegiance – including women and children – are stripped naked in public and sometimes whipped. Several witnesses said that they saw Nigerian soldiers execute three people after cursory questioning. Similarly, an eight-year-old boy spotted holding a gun that he had picked up off the ground was shot down on the spot. Witnesses also claimed that ECOMOG had shot women and children without any kind of trial and, on 12 January, killed around 20 patients at Connaught Hospital in Freetown. The same report claims that [...] Nigerian soldiers indiscriminately shelled working-class districts, deliberately opened fire on civilians being used by the rebels as human shields and mistreated humanitarian staff – notably from the Red Cross – who were trying to assist people. The Nigerian General Timothy Shelpidi, who is in charge of the West African contingent of 15,000 men, most of whom are Nigerians, initially denied the facts before admitting, on 17 February, that around 100 of his men had been placed in custody pending questioning in connection with atrocities committed against the civilian population. [...] Since RUF combatants infiltrated Freetown in January, humanitarian organizations have reported witnessing several cases of what were clearly "punitive raids" organized by ECOMOG soldiers and carried out under the indifferent gaze or even with the approval of their superior officers. [...] When things are relatively calm, the soldiers of the West African force – comprising contingents from Nigeria, Ghana and Guinea – hold the civilian population to ransom. When hostilities begin, they behave like a gang of ruffians.

C. Analysis of the humanitarian situation in Sierra Leone

[Source: PRATT David, *Sierra Leone: Danger and Opportunity in a Regional Conflict. Report to Canada's Minister of Foreign Affairs*, July 27 2001.]

[...]

The Humanitarian Situation

The general humanitarian situation in Sierra Leone is serious and likely to get worse before it gets better. Officially, the humanitarian community is dealing with a caseload of over 400,000 IDPs, but this represents only a small proportion of the total. Estimates of IDPs living on their own or with host families run as high as two million, almost half the population. [...] The caseload for humanitarian agencies has risen since the fighting in Guinea. As of September 2000, an estimated 57,000 Sierra Leonean refugees have returned to the country, although not to their areas of origin. The actual numbers may be much higher.

The organized camps and host communities in which IDPs live are crowded and unsanitary. Morbidity and mortality rates are high, shelter and all forms of infrastructure are abysmal, food rations are inadequate and many people are now in their tenth year of exile from their homes. [...] UN agencies and NGOs work with the most rudimentary budgets to provide food, shelter, emergency health services, child protection, tracing assistance and other services.

People desperately want to go home, and as new areas are declared "safe", this will begin to present new problems. Once an area is declared safe, it is intended that IDPs will be resettled and their food allowance will stop. [...]

In the immediate future, therefore, the demand for food assistance will remain high regardless of weather [*sic*] people return home or not. If they do, shelter will be one of the most serious problems with an estimated 80 per cent of housing damaged or destroyed in rebel-controlled areas. The Office for the Coordination of Humanitarian Affairs (OCHA) estimates that out of 439,000 farming households nationwide, 331,200 are vulnerable and require emergency agricultural assistance.

One of the biggest short-term requirements will be assistance for the building or rebuilding of health infrastructure. Health services are poor or non-existent in large parts of the country and even hospitals in major towns outside rebel-held areas are seriously under-equipped. [...]

Progress in the peace process may give the impression that the humanitarian situation is easing. With the onset of the rainy season and the possible return of more than 100,000 refugees from Guinea, however, the situation is likely to become much worse through 2001. In fact the refugee situation in Guinea remains precarious. Cote d'Ivoire has also been affected. In mid-June 2001, some 2,000 new Liberian refugees arrived at Danane near the Liberian border. [...]

D. Violations of International Humanitarian Law in Liberia

[Source: *Liberia: Killings, torture and rape continue in Lofa County*, Amnesty International, London, 1 August 2001; AI Index: AFR 34/008/2001; available on <http://www.amnesty.org>]

Liberia: Killings, torture and rape continue in Lofa County

Introduction

Widespread and gross abuses against unarmed civilians, including women and children, continue unabated in Lofa County, the northern region of Liberia bordering Guinea and Sierra Leone. There has been armed conflict in the area since renewed incursions by armed opposition groups into Lofa County from Guinea in July 2000. Hundreds of civilians have been victims of killings, arbitrary detention, torture and rape and the number of civilians fleeing fighting – estimated to be tens of thousands – has now reached an unprecedented level.

Testimonies and reports gathered by Amnesty International suggest that since late April 2001, government security forces, especially the Anti-Terrorist Unit (ATU), a special military unit [...], have extrajudicially executed, arbitrarily detained or tortured – including by the rape of women and girls – more than 200 civilians suspected of supporting armed opposition groups. Civilians fleeing Lofa County have often been prevented from moving to safer areas by the security forces, on suspicion that dissidents were among them.

Armed opposition combatants, reportedly based in Guinea and belonging to the Liberians United for Reconciliation and Democracy (LURD), have also been responsible for abuses in recent months. They have reportedly carried out summary executions, torture and rape of civilians suspected of collaborating with the Liberian security forces. [...]

E. Violations of International Humanitarian Law in Guinea

[Source: in *Fraternité Matin*, Abidjan, 2 October 2000. Original in French, unofficial translation.]

Guinea: 70 die in series of armed attacks on Liberian and Sierra Leonean borders

A police source in Conakry has reported that almost 70 people were killed in two “rebel” attacks carried out on Friday and Saturday in south-west and south-east Guinea. According to the police, some 60 people were killed in one “rebel” attack in N’delenou, a village near Macenta (south-east Guinea) near the Liberian border, in the night from Friday to Saturday. And according to information from a spokesman for the President of the Republic of Guinea, about 10 people were killed in an attack on Farmoreya [...] (in south-west Guinea) close to the Sierra Leone border on Saturday. The fighting in Farmoreya was “particularly vicious”, the spokesman said, adding that the Guinean army was immediately dispatched to the area and succeeded in “restoring order” in the course of the afternoon. “Calm now reigns”, he said. “But the attackers, who came

from Sierra Leone, devastated the sub-prefecture, lighting many fires.” [...] Most of the victims were civilians, the spokesman said, but at least three members of the Guinean armed forces were also reported to have been killed and several others wounded. [...]

DISCUSSION

1. Are the abuses listed in these documents banned by IHL? Are they also criminalized? Can we talk about crimes against humanity? About genocide? Are the facts described criminalized in the same way in the law of international armed conflicts and that of non-international armed conflicts? Is this distinction of importance for the qualification of crimes against humanity and genocide?
2. Are these bans and/or this criminal liability part of customary law or treaty-based law?
3. In this instance, do the government's aerial attacks violate IHL? What measures should be taken before launching an attack? Is dropping pamphlets sufficient? Can the rebels be held (partially) accountable? What does IHL say about “human shields”? (GC IV, Art. 28; P I, Arts 51, 57 and 58; ICC Statute, Art. 8; See **Case No. 23**, The International Criminal Court)
4. What does IHL say about “child soldiers”? What is the age limit for recruitment into the armed forces? Are there any specific provisions in IHL that protect all children? Is there a ban on killing a child even if it is carrying weapons? And if the child is part of an armed group and openly carrying weapons? (P I, Art. 77; P II, Art. 4; See 1989 Convention on the Rights of the Child and **Document No. 24**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict; ILO Convention No. 182, available on <http://www.ilo.org>; ICC Statute, Art. 8)
5. Are the abuses inflicted on Red Cross humanitarian personnel banned/criminalized? Does Red Cross personnel benefit from additional protection in comparison to other humanitarian workers? (GC I-IV, Arts 9/9/9/10 respectively; GC III, Art. 122; GC IV, Art. 142; P I, Arts 8, 17, 18, 38, 71 and 81; P II, Arts 9, 12 and 18)
6. What is the difference between the “internally displaced” and refugees? Are they protected by IHL? Are the camps of internally displaced persons and refugees specifically protected? What if they shelter members of armed groups? Do the internally displaced and refugees have a specific right to humanitarian aid? What obligations do the parties to the conflict have in regard to them? Can civilians be prevented from fleeing the conflict? Can they be forced to flee? (GC IV, Arts 44 and 48; P I, Arts 58 and 73; P II, Art. 17)
7. Is the destruction of a sub-prefecture by Sierra Leonean rebels banned/criminalized by IHL? Is the sub-prefecture a military objective? What are the criteria defining a military objective? Is the definition applicable in non-international armed conflicts? Is this latter qualification possible even though borders were crossed in this case? (P I, Art. 52)

3. Towards repression and reconciliation

A. Statute of the Special Court for Sierra Leone

[Source: United Nations, S/2000/915, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000; available on <http://www.un.org>]

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter “the Special Court”) shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2: Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- (h) Persecution on political, racial, ethnic or religious grounds;
- (i) Other inhumane acts.

Article 3: Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

- (a) Violence to 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;

- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.

Article 4: Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5: Crimes under Sierra Leonean law [...]

Article 6: Individual criminal responsibility

1. 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 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires. [...]

Article 7: Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.
2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter “a juvenile offender”) shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.
3. In a trial of a juvenile offender, the Special Court shall:
 - (a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;
 - (b) Constitute a “Juvenile Chamber” composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;
 - (c) Order the separation of his or her trial, if jointly accused with adults;
 - (d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender’s parent or legal guardian;
 - (e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile’s identity, or the conduct of in camera proceedings;
 - (f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8: Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9: *Non bis in idem*

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.
2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:
 - (a) The act for which he or she was tried was characterized as an ordinary crime; or
 - (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution. [...]

B. Eleventh report of the Secretary General on the United Nations Mission in Sierra Leone

[Source: United Nations, S/2001/857, *Eleventh report of the Secretary-General on the United Nations Mission in Sierra Leone*, 7 September 2001; available on <http://www.un.org>]

[...]

Truth and Reconciliation Commission

44. UNAMSIL continued to engage the RUF leadership on the issue of the Truth and Reconciliation Commission. A sensitization campaign in the Northern Province was launched at Makeni on 2 August 2001. In general, RUF appears receptive to the Truth and Reconciliation Commission. Nevertheless, they express concern over the independence of the Commission and the relationship between it and the Special Court.
45. On 1 August 2001, the United Nations High Commissioner for Human Rights addressed a letter to potential donors with a preliminary budget and information on the Truth and Reconciliation Commission. According to the initial estimates, the first year of operation of the Commission would cost approximately \$10 million. Currently, the Office of the High Commissioner is working with UNAMSIL to revise the preliminary budget prior to the formal launching of a special appeal by the High Commissioner. The High Commissioner is also considering the establishment of an interim secretariat for the Truth and Reconciliation Commission, which will initially

function under the auspices of UNAMSIL. In the meantime, the selection process of international commissioners has made progress. The High Commissioner will soon forward her recommendations to the selection panel. Regarding the national commissioners, the Advisory Committee to the Special Representative of the Secretary-General met recently and submitted a shortlist of nominees for his consideration.

Special Court

46. Following the exchange of communications between the Secretary-General and the Security Council (S/2001/693 and S/2001/722), in which the Council concurred with the recommendation to commence the operation of the Special Court, the Secretariat, on 23 July 2001, sent a letter to the countries that had made pledges for the first year of operation of the Special Court, and requested that they deposit their contributions with the United Nations within 30 days. Of a total amount pledged of \$15,492,500, only a third had been received by the end of the 30-day period.
47. When sufficient contributions have been received to permit the operation of the Trust Fund, the Secretariat will dispatch a planning mission to Sierra Leone to discuss with the Government the practical arrangements for the establishment of the Special Court. [...]
48. The Revolutionary United Front has indicated that, while it will not stand in the way of the Court's establishment, it expects that the Court will be impartial and that it will try all those who have been accused of atrocities during the period in question, not only members of RUF. The Government, for its part, has continued to express its full support for the Court. However, on 20 August the Government sent a letter to the Legal Counsel of the United Nations in which it requested that the temporal jurisdiction of the Court be extended to cover the period since March 1991, when the conflict started. The draft statute and the draft agreement had provided that the temporal jurisdiction would begin on 30 November 1996.

C. Balancing peace and justice in Sierra Leone

[Source: PARLEVLIET Michelle, "Truth Commissions in Africa: the Non-case of Namibia and the Emerging Case of Sierra Leone," in *International Law Forum*, vol. 2, No. 2, 2000; footnotes omitted.]

Balancing peace and justice in Sierra Leone

[...] [T]he Lomé Peace Agreement in July 1999 [...] granted free and absolute pardon and reprieve from prosecution to the leader of the RUF, Foday Sankoh. [...] It also provided for the establishment of a Truth and Reconciliation Commission (TRC) to address impunity, break the cycle of violence, establish what happened and provide a forum for those affected and involved to tell their stories. [...] [T]he amnesty provision has been widely criticised. Even the UN seemed [...] embarrassed about it: when signing the Agreement, Francis Okelo, the Secretary-General's Special Representative

for Sierra Leone, added a disclaimer that the UN did not consider the amnesty to be applicable to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. [...]

The Office of the United Nations High Commissioner for Human Rights (UNOHCHR) has played a pivotal role [...]. It is the first time that the UNHCHR has been so closely involved in setting up a truth commission. [...] The office [of the High Commissioner Mary Robinson] assisted in preparing the legislation for the Commission. [...]

In February [2000], the Parliament of Sierra Leone adopted the *Truth and Reconciliation Commission Act*. [...] The objectives of the Commission [are]: “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict; to address impunity; to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered” The period under investigation is from the beginning of the war in March 1991 to the signing of the Lomé Agreement. [...]

It is the first time that a truth commission mandate explicitly refers to “violations of international humanitarian law”. This was probably done to ensure that acts by state actors as well as non-state actors fall within the mandate of the Commission. [...]

It [...] remains to be seen whether the TRC will be able to draw in perpetrators to any large extent. No immediate incentive exists for them to participate in the process given the blanket amnesty already granted. [...]

D. The amnesty clause in the Lomé peace agreement

[Source: United Nations, S/2000/915, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000; available on <http://www.un.org>]

[...]

1. *The amnesty clause in the Lomé Peace Agreement*
22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.
23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement (“absolute and free pardon”) shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

“An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.” [...]

DISCUSSION

1. What are the differences between the Special Court for Sierra Leone, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court?
2. Is the Special Court's lack of jurisdiction over crimes committed before 30 September 1996 acceptable? Does Article 1 of its Statute put an end to all possibility of prosecuting serious violations committed before this date? Will the International Criminal Court be able to try the suspected perpetrators of these crimes? Is there a statute of limitations for breaches of IHL? [See UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, available on <http://www.icrc.org/ihl>; ICC Statute, Arts 11 and 29; See **Case No. 23**, The International Criminal Court]
3. Art. 2 of the Special Court's Statute, on crimes against humanity, uses the words “widespread or systematic attack”, but the French version uses “attaque généralisée et systématique”. Art. 7 of the ICC Statute uses the words “widespread or systematic attack”. Does this difference change the provision's scope? Is one version preferable to the other?
4. Is Art. 4(c) of the Statute designed for children who willingly took up weapons? Is the voluntary enrolment of children under the age of 15 legal? What does Art. 3 of the Optional Protocol to the Convention on the Rights of the Child say about this [See **Document No. 24**, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict]?
5. Is the Special Court competent to judge foreign forces (Liberian, Nigerian or others) who committed violations on the territory of Sierra Leone? Does it have jurisdiction to prosecute crimes committed, for example, by the RUF in Guinea?
6. If Foday Sankoh (deceased in July 2003) had to appear before the court, would he have been able to invoke the amnesty afforded to him in the 1999 Lomé Agreement? Is an amnesty acceptable in IHL? (P II, Art. 6)
7. Is it not contradictory to have both the Truth and Reconciliation Commission and the Special Court? How could the two interact? How do you decide who should appear before the Special Court and who should be heard by the Commission?
8. What differences are there between the “violations of IHL” mentioned in the Truth and Reconciliation Commission Act and the “war crimes” or the “grave breaches of IHL” that are excluded from the amnesty?

Case No. 275, Sierra Leone, Special Court Ruling on Immunity for Taylor

[Source: Special Court for Sierra Leone, *Prosecutor v. Charles Taylor Decision on Immunity from Jurisdiction*, 31 May 2004, available on Decision <http://www.sc-sl.org>]

**SPECIAL COURT FOR SIERRA LEONE
IN THE APPEALS CHAMBER**

**Before: Justice Emmanuel Ayoola, Presiding
Justice George Gelaga King
Justice Renate Winter**

**Registrar: Robin Vincent
Date: 31 May 2004**

PROSECUTOR Against CHARLES GHANKAY TAYLOR

Case Number SCSL-2003-01-I

DECISION ON IMMUNITY FROM JURISDICTION [...]

I. INTRODUCTION: PROCEDURAL AND FACTUAL HISTORY

1. This is an application by Mr. Charles Taylor, the former President of the Republic of Liberia, to quash his Indictment and to set aside the warrant for his arrest on the grounds that he is immune from any exercise of the jurisdiction of this court. The Indictment and arrest warrant were approved by Judge Bankole Thompson on 7 March 2003, when Mr. Taylor was Head of State of Liberia. At the request of the Prosecutor on 4 June 2003, they were transmitted to the appropriate authorities in Ghana, where Mr Taylor was visiting, but proved ineffective to secure his apprehension. [...]
3. Mr. Taylor was elected President of the state of Liberia in 1997. [...]
4. Mr Taylor remained Head of State until August 2003, his tenure of office covering most of the period over which the Special Court has temporal jurisdiction, pursuant to its mandate to try those primarily responsible for the war crimes and crimes against humanity that were committed in Sierra Leone since 30 November 1996.
5. The Indictment against Mr. Taylor contains seventeen counts. It accuses him of the commission of crimes against humanity and grave breaches of the Geneva Conventions, with intent “to obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the state”. It is alleged that he “provided financial support, military training, personnel, arms, ammunition and other support and encouragement” to rebel factions throughout the armed conflict in Sierra Leone. The counts variously accuse him of responsibility for “terrorizing the civilian population and ordering

collective punishment”, sexual and physical violence against civilians, use of child soldiers, abductions and force labour, widespread looting and burning of civilian property, and attacks on and abductions of UNAMSIL peacekeepers and humanitarian assistance workers. In short, the prosecution maintains that from an early stage and acting in a private rather than an official capacity he resourced and directed rebel forces, encouraging them in campaigns of terror, torture and mass murder, in order to enrich himself from a share in the diamond mines that were captured by the rebel forces.

II. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

6. The Applicant argues first that:

- a) Citing the judgment of the International Court of Justice (“ICJ”) in the case between the *Democratic Republic of Congo v Belgium* (“*Yerodia case*”, [See Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium]) incumbent Head of State at the time of his indictment, Charles Taylor enjoyed immunity from criminal prosecution;
- b) Exceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter (“UN Charter”);
- c) The Special Court does not have Chapter VII powers, therefore judicial orders from the Special Court have the quality of judicial orders from a national court;
- d) The indictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution. [...]

7. The Applicant also puts forward a second argument that:

- a) Citing the *Lotus case* [Available on http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_10/30_Lotus_Arret.pdf] the principle of sovereign equality prohibits one state from exercising its authority on the territory of another.
- b) Exceptionally, a state may prosecute acts committed on the territory of another state by a foreigner but only where the perpetrator is present on the territory of the prosecuting state.
- c) The Special Court’s attempt to serve the Indictment and arrest warrant on Charles Taylor in Ghana was a violation of the principle of sovereign equality.

8. The Applicant seeks :

- a) Orders quashing the Indictment, arrest warrant and all consequential orders.
- b) Interim relief restraining the service of the Indictment and arrest warrant on Charles Taylor.

B. Prosecution Response

9. The Prosecution submits in relation to the first argument of the Defence that: [...]
- d) The *Yerodia* case concerns the immunities of an incumbent Head of State from the jurisdiction of the courts of another state.
 - e) Customary international law permits international criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law.
 - f) The lack of Chapter VII powers does not affect the Special Court's jurisdiction over Heads of State. The International Criminal Court ("ICC"), which does not have Chapter VII powers, explicitly denies immunity to Heads of State for international crimes.
10. In response to the Applicant's second argument, the Prosecution asserts that:
- a) Charles Taylor has been indicted in accordance with Article 1 (1) of the Special Court Statute, for crimes committed in the territory of Sierra Leone and not the territory of another state.
 - b) The transmission of documents to Ghanaian authorities could not violate the sovereignty of Ghana. [...]

I. Submissions of the Amici Curiae**(i) Professor Philippe Sands**

17. [...] He concludes as follows:
- a) In respect of international courts, international practice and academic commentary supports the view that jurisdiction may be exercised over a serving Head of State in respect of international crimes. Particular reference may be had to the *Pinochet* cases [See House of Lords, available on <http://www.publication.parliament.uk>] and the *Yerodia* case.
 - b) In respect of national courts a serving Head of State is entitled to immunity even in respect of international crimes
 - c) The lawfulness of issuing an arrest warrant depends on the Court's powers and attributes and the legal basis upon which it was established. The Special Court is not part of the judiciary of Sierra Leone and is not a national court. Rather, it is an international court established by treaty with a competence and jurisdiction that is similar to the ICTY, ICTR and ICC, and it has the characteristics associated with classical international organisations.
 - d) There is nothing in the Special Court Agreement or Statute to prevent the Court from seeking to exercise jurisdiction over offences committed on the territory of Sierra Leone by the Head of State of Liberia.

- e) The Special Court did not violate the sovereignty of Ghana by transmitting the arrest warrant for Taylor but Ghana was not obliged to give effect to such a warrant.
- f) A former Head of State is not entitled to claim immunity *ratione materiae* before an international criminal court in respect of international crimes.

(ii) Professor Diane Orentlicher

18. [...]

- a) In the *Yerodia* case, the ICJ distinguished the law applicable in the case of an attempt by a national court to prosecute the foreign minister of another state, from the rule embodied in the statutes of international criminal tribunals. For the purposes of the distinction between prosecutions before national and international criminal courts recognised by the ICJ and other authorities, the Special Court is an international court and may exercise jurisdiction over incumbent and former heads of state in accordance with its statute.
- b) A distinction must be drawn between immunity *ratione personae* (procedural immunity) which attached to the status of certain incumbent officials and operates as a procedural bar to the exercise of jurisdiction over them by the courts of another state, and immunity *ratione materiae* (substantive immunity) which operates to shield from the scrutiny of domestic courts the official conduct of foreign state officials. Although substantive immunities shield the official conduct of heads of state after such persons cease to hold office, this type of immunity is not available in respect of the crimes for which Taylor has been indicted.

(iii) African Bar Association

19. The *amicus* brief of the African Bar Association raises a number of issues, the third of which, dealing with the question of the validity of the Indictment against Taylor, is relevant to this Preliminary Motion. Making reference to the case of United States of America v. Noriega [See Case No. 158, United States, United States v. Noriega], the *Pinochet* case, the *Milosevic* case [See [http:// www.un.org/icty](http://www.un.org/icty)], the 1993 World Conference of Human Rights and the Rome Statute of the ICC [See Case No. 23, The International Criminal Court]. The African Bar Association submits that Taylor enjoys no immunity for international crimes alleged to have been committed by him in Sierra Leone.

HEREBY DECIDES AS FOLLOWS:

III. CONSIDERATION OF THE MOTION

20. At the time of his indictment (7 March 2003) and of its communication to the authorities in Ghana (4 June 2003) and of this application to annul it (23 July 2003), Mr Taylor was an incumbent Head of State. As such, he claims entitlement to the benefit of any immunity asserted by that state against exercise of the jurisdiction

of this Court. These bare facts raise the issue of law that we are called upon to decide, namely whether it was lawful for the Special Court to issue an indictment and to circulate an arrest warrant in respect of a serving Head of State. [...]

V. THE LEGAL BASIS OF THE SPECIAL COURT FOR SIERRA LEONE

35. The Special Court is established by the Agreement between the United Nations and Sierra Leone which was entered into pursuant to Resolution 1315 (2000) [See <http://www.un.org>] of the Security Council for the sole purpose of prosecuting persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone. [...]

VI. IS THE SPECIAL COURT AN INTERNATIONAL CRIMINAL TRIBUNAL?

37. Although the Special Court was established by treaty, unlike the ICTY and the ICTR which were each established by resolution of the Security Council in its exercise of powers by virtue of Chapter VII of the UN Charter, it was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone. Article 39 empowers the Security Council to determine the existence of any threat to the peace. In Resolution 1315, the Security Council reiterated that the situation in Sierra Leone continued to constitute a threat to international peace and security in the region.
38. Much issue had been made of the absence of Chapter VII powers in the Special Court. A proper understanding of those powers shows that the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court. It is manifest from the first sentence of Article 41, read disjunctively, that (i) The Security Council is empowered to “decide what measures not involving the use of armed force are to be employed to give effect to its decision;” an (ii) it may (at its discretion) call upon the members of the United Nations to apply such measures. The decisions referred to are decisions pursuant to Article 39. Where the Security Council decides to establish a court as a measure to maintain or restore international peace and security it may or may not, at the same time, contemporaneously, call upon the members of the United Nations to lend their cooperation to such court as a matter of obligation. Its decision to do so in furtherance of Article 41, or Article 48, should subsequent events make that course prudent may be made subsequently to establishment of the court. It is to be observed that in carrying out its duties [...] under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the

Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.

39. By reaffirming in the preamble to Resolution 1315 "that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations that the *international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law*", it has been made clear that the Special Court was established to fulfil an international mandate and is part of the machinery of international justice.
40. We reaffirm, as we decided in the Constitutionality Decision that the Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone. This conclusion disposes of the basis of the submissions of counsel for the Applicant on the nature of the Special Court.
41. For the reasons that have been given, it is not difficult to accept and gratefully adopt the conclusions reached by Professor Sands who assisted [*sic*] the court as *amicus curiae* as follows:
 - a) The Special Court is not part of the judiciary of Sierra Leone and is not a national court.
 - b) The Special Court is established by treaty and has the characteristics associated with classical international organisations (including legal personality; the capacity to enter into agreements with other international persons governed by international law; privileges and immunities; and an autonomous will distinct from that of its members).
 - c) The competence and jurisdiction *ratione materiae* and *ratione personae* are broadly similar to that of ICTY and the ICTR and the ICC, including in relation to the provisions confirming the absence of entitlement of any person to claim of immunity.
 - d) Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State.
42. We come to the conclusion that the Special Court is an international criminal court. The constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable.

VII. THE SPECIAL COURT AND JURISDICTIONAL IMMUNITY [...]

44. Article 6(2) of the Statute provides as follows:

The official position of any accused persons, whether as Head of State or Government or as responsible Government official, shall not relieve such a person of criminal responsibility nor mitigate punishment.

45. Article 6(2) is substantially in the same terms as Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR. Article 27(2) of the Statute of the International Criminal Court (ICC) [See Case No. 23, The International Criminal Court [Part A., Art. 27]] which entered into force on 1 July 2002 provides that:
46. A forerunner of Article 6(2) of the Statute and of similar provisions in the Statutes of the ICTY, ICTR and ICC is Article 7 of the Charter of the International Military Tribunal (“the Nuremberg Charter”) which provides that:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

47. The General Assembly by resolution 177(II) directed the International Law Commission to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal”. The International Law Commission proceeded in carrying out the directive on the footing that the General Assembly had already affirmed the principles recognized in the Nuremberg Charter and in the Judgment of the Tribunal and that what it was required to do was merely to formulate them. On that basis it formulated a provision from Article 7 of the Nuremberg Charter, Principle III as follows:

The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law.

As long ago as 12 December 1950 when the General Assembly accepted this formulation of the principle of international law by the International Law Commission, that principle became firmly established. [...]

50. More recently in the *Yerodia* case [See Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium], the International Court of Justice upheld immunities in national courts even in respect of war crimes and crimes against humanity relying on customary international law. That court, after carefully examining “state practice, including national legislation and those few decisions of national higher courts such as the House of Lords or the French Court of Cassation”, stated that it “has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign affairs, where they are suspected of having committed war crimes or crimes against humanity”. It held:

although various international conventions on the prevention and punishment of certain serious crimes impose on states obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign state, even where those courts exercise such a jurisdiction under these conventions.

But in regard to criminal proceedings before “certain international criminal courts”, it held:

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts*, where they have jurisdiction. Examples include the International Criminal tribunal for the former Yugoslavia and the International Criminal tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s statute expressly provides, in Article 27, paragraph 2, that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such person.”

51. A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from international community. Another reason is as put by Professor Orentlicher in her *amicus* brief that:

states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.

52. Be that as it may, the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. We accept the view expressed by Lord Slynn of Hadley that

“there is ... no doubt that states have been moving towards the recognition of some crimes as those which should not be covered by claims of state or Head of State or other official or diplomatic immunity when charges are brought before international tribunals.” [footnote 45: See *R v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet*, House of Lords, 25 November 1998 [Available on <http://www.publications.parliament.uk>]

53. In this result the Appeals Chamber finds that Article 6(2) of the Statute is not in conflict with any peremptory norm of general international law and its provisions must be given effect by this court. We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone. [...]
57. Finally, the Applicant contended that the issue of the arrest warrant and its transmission to Ghana was an infringement of the sovereignty of Ghana. That issue should properly be raised by Ghana rather than the Applicant and the forum which Ghana has for raising the issue, if it so decides, is not the Special Court which

is a court of criminal proceedings against individuals. It must be observed that a warrant of arrest transmitted by one country to another is not self-executing. It still requires the co-operation and authority of the receiving state for it to be executed. Other than a situation in which the receiving state has an obligation under Chapter VII of the United Nations Charter or a treaty obligation to execute the warrant, the receiving authority has no obligation to do so. That state asserts its sovereignty by refusing to execute it. [...]

VIII. DISPOSITION

60. For the reasons we have given this Motion must be dismissed.

Done at Freetown this thirty-first day of May 2004

Justice Ayoola

Justice King

Justice Winger

Presiding

DISCUSSION

1. What are the differences between the Special Court for Sierra Leone, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court? Do you consider that the Special Court for Sierra Leone is an international court?
2.
 - a. If the Special Court for Sierra Leone were considered as a national court, would it be impossible for it to prosecute an incumbent head of state? Why? What about a former head of state? And if this head of state were found on the territory of Sierra Leone?
 - b. Do you believe it is enough to allow only international courts, lawfully established by the international community, to prosecute persons who have personal immunity for war crimes and crimes against humanity? Or do you think that national courts should also have the right to exercise their universal jurisdiction, even against a head of state? What would be the inconveniences of such a right?
3.
 - a. Does the obligation to prosecute for grave breaches of IHL also exist with regard to persons who have personal immunity, such as a head of state? Does this obligation concern only international tribunals? (GC I-IV, Arts 49/50/129/146 respectively)
 - b. Is there a contradiction between the obligation to prosecute and the personal immunities provided by international law? If there is a contradiction between two rules, which one prevails? The rule which belongs to *jus cogens*? Which of the two above-mentioned rules, if any, belongs to *jus cogens*? (GC I-IV, Art. 1; GC I-IV, Arts 49/50/129/146 respectively; GC I-IV, Arts 51/52/131/148 respectively)
4. Are the Ghanaian authorities obliged to execute an arrest warrant issued by an international court such as the Special Court for Sierra Leone? If not, what could oblige Ghana to execute that arrest warrant? A Security Council resolution? What if an arrest warrant is issued by the International Criminal Court? An *ad hoc* tribunal such as the International Criminal Tribunal for Rwanda? A national court? Does IHL imply an obligation to execute an arrest warrant against a person

prosecuted for war crimes? To extradite such a person? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 88)

**Case No. 276, Sierra Leone, Special Court Ruling
on the Recruitment of Children**

[Source: Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction*, 31 May 2004, available on <http://www.sc-sl.org>]

SPECIAL COURT FOR SIERRA LEONE

PROSECUTOR Against SAM HINGA NORMAN

**DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION
(CHILD RECRUITMENT)**

[...]

THE APPEALS CHAMBER of the Special Court for Sierra Leone (“the Special Court”);
SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, filed on 26 June 2003 (“Preliminary Motion”) on behalf of Sam Hinga Norman (“Accused”); [...]

I. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Defence raises the following points in its submissions:
 - a) The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute (as charged in Count 8 of the Indictment) prohibiting the recruitment of children under 15 “into armed forces or groups or using them to participate actively in hostilities” since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.
 - b) Consequently, Article 4(c) of the Special Court Statute violates the principle of *nullum crimen sine lege*.
 - c) While Protocol II Additional to the Geneva Conventions of 1977 and the Convention of the Rights of the Child of 1990 may have created an obligation on the part of States to refrain from recruiting child soldiers, these instruments did not criminalize such activity.
 - d) The 1998 Rome Statute of the International Criminal Court criminalizes child recruitment but it does not codify customary international law.

The Defence applies for a declaration that the Court lacks jurisdiction to try the Accused on Count 8 of the Indictment against him.

B. Prosecution Response

2. The Prosecution submits as follows:

- a) The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of international humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.
- b) The ICC Statute codified existing customary international law.
- c) In any case, individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability in accordance with the Tadic case [See Case No. 211, ICTY, The Prosecutor v. Tadic]
- d) The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.

C. Defence Reply

3. The Defence submits in its Reply that if the Special Court accepts the Prosecution proposition that the prohibition on the recruitment of child soldiers has acquired the status of a crime under international law, the Court must pinpoint the moment at which this recruitment became a crime in order to determine over which acts the Court has jurisdiction. Furthermore, the Defence argues, a prohibition under international law does not necessarily entail criminal responsibility.

D. Prosecution Additional Submissions

4. The Prosecution argues further that:

- a) In international law, unlike in a national legal system, there is no Parliament with legislative power with respect to the world as a whole. Thus, there will never be a statute declaring conduct to be criminal under customary law as from a specified date. Criminal liability for child recruitment is a culmination of numerous factors which must all be considered together.
- b) As regards the principle of *nullum crimen sine lege*, the fact that an Accused could not foresee the creation of an international criminal tribunal is of no consequence, as long as it was foreseeable to them that the underlying acts were punishable. The possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.
- c) Alternatively, individual criminal responsibility for child recruitment had become established by 30 April 1997, the date on which the “Capetown Principles” were adopted by the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in

Africa, which provides that “those responsible for illegally recruiting children should be brought to justice”.

- d) Alternatively, individual criminal responsibility for child recruitment had become established by 29 June 1998, the date on which the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.
- e) Alternatively, individual criminal responsibility for child recruitment had become established by 17 July 1998 when the ICC Statute was adopted. [...]

F. Submissions of the *Amici Curiae*

University of Toronto International Human Rights Clinic and interested Human Rights Organisations

6. The University of Toronto International Human Rights Law Clinic sets out its arguments as follows:
 - a) In invoking the principle *nullum crimen sine lege*, the Defence assumes a clear distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating this principle. This premise is false and the jurisprudence supports the ability to prosecute serious violations of international humanitarian law. [...]
 - c) Since child recruitment can attract prosecution by violating laws against, for example, kidnapping, it is overly formalistic to characterise regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalizing it.
 - d) International resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrate acceptance of the prohibition as binding.
 - e) International humanitarian law permits the prosecution of individuals for the commission of serious violations of the laws of war, irrespective of whether or not they are expressly criminalized, and this is confirmed in international jurisprudence, state practice, and academic opinion.
 - f) The prohibition on recruitment of children is contained in the “Fundamental Guarantees” of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia (“ICTY”) and Rwanda (“ICTR”) provide compelling evidence that the violation was a pre-existing crime under customary international law.
 - g) The principle of *nullum crimen sine lege* is meant to protect the innocent who in good faith believed their acts were lawful. The Accused could not reasonably have believed that his acts were lawful at the time they were committed and so cannot rely on *nullum crimen sine lege* in his defence.

UNICEF

7. UNICEF presents its submissions along the following lines:

- a) By 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence and this was the view of the Security Council when the language of Article 4(c) of the Statute was proposed. While the first draft of the Special Court Statute referred to “abduction and forced recruitment of children under the age of fifteen”, the language in the final version was found by the members of the Security Council to conform to the statement of the law existing in 1996 as currently accepted by the international community. [...]
- h) The prohibition of child recruitment which was included in the two Additional Protocols and the CRC has developed into a criminal offence. The ICTY Statute provides, and its jurisprudence confirms, that breaches of Additional Protocol I *[sic]* lead to criminal sanctions and the ICTR status recognised that criminal liability attaches to serious violations of Additional Protocol II. The Trial Chamber in the ICTR case of *Akayesu* *[See Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A.]]* confirmed the view that in 1994 “serious violations” of the fundamental guarantees contained within Additional Protocol II to the Geneva Conventions were subject to criminal liability and child recruitment shares the same character as the violations listed therein. [...]

HEREBY DECIDES:

II. DISCUSSION

8. Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including:

- c. Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities (“child recruitment”).

The original proposal put forward in the Secretary-General’s Report on the establishment of the Special Court referred to the crime of “abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities”, reflecting some uncertainty as to the customary international law nature of the crime of conscripting or enlisting children as defined in the Rome Statute of the International Criminal Court and mirrored in the Special Court Statute. The wording was modified following a proposal by the President of the Security Council to ensure that Article 4(c) conformed “to the statement of the law existing in 1996 and as currently accepted by the international community”. The question raised by the Preliminary Motion is whether the crime as defined in Article 4(c) of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused.

9. To answer the question before this Court, the first two sources of international law under Article 38(1) of the Statute of the International Court of Justice (“ICJ”) have to be scrutinized:
 - 1) international conventions, whether general or particular, establishing rules especially recognized by the contesting states
 - 2) international custom, as evidence of a general practice accepted as law [...]

A. International Conventions

10. Given that the Defence does not dispute the fact that international humanitarian law is violated by the recruitment of children, it is not necessary to elaborate on this point in great detail. Nevertheless, the key words of the relevant international documents will be highlighted in order to set the stage for the analysis required by the issues raised in the Preliminary Motion. It should, in particular, be noted that Sierra Leone was already a State Party to the 1949 Geneva Conventions and the two Additional Protocols of 1977 prior to 1996.

1) Fourth Geneva Convention of 1949

11. This Convention was ratified by Sierra Leone in 1965. As of 30 November 1996, 187 States were parties to the Geneva Conventions. The pertinent provisions of the Conventions are as follows: [See Arts 14, 24 and 51, available on <http://www.icrc.org/ihl>] [...]

2) Additional Protocols I and II of 1977

12. Both Additional Protocols were ratified by Sierra Leone in 1986. Attention should be drawn to the following provisions of Additional Protocol I: [See Arts 77(2), (3) and (4) available on <http://www.icrc.org/ihl>]
13. 137 States were parties to Additional Protocol II as of 30 November 1996. Sierra Leone ratified Additional Protocol II on 21 October 1986. The key provision is Article 4 entitled “fundamental guarantees” which provide in relevant part: [See Art. 4(3)(c) available on <http://www.icrc.org/ihl>] [...]

3) Convention on the Rights of the Child of 1989

14. The Convention entered into force on 2 September 1990 and was on the same day ratified by the Government of Sierra Leone. In 1996, all but six states existing at the time had ratified the Convention. The CRC recognizes the protection of children in international humanitarian law and also requires States Parties to ensure respect for these rules by taking appropriate and feasible measures.
15. On feasible measures:

Article 38

[See *supra* Chapter 8.II.2.c. special protection of children, **Quotation**]

16. On general obligations of States

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

B. Customary International Law

17. Prior to November 1996, the prohibition on child recruitment had also crystallized as customary international law. The formation of custom requires both state practice and a sense of pre-existing obligation (*opinio iuris*). "An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinion [*sic*] *iuris*, is just habit."
18. As regards state practice, the list of states having legislation concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15. Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognized as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in *Prosecutor v Tadic* that "it does not matter whether the 'serious violations' has [*sic*] occurred within the context of an international or an internal armed conflict". This means that children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place.
19. Furthermore, as already mentioned, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became international customary law almost at the time of the entry into force of the Convention.
20. The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.
21. **The African Charter on the Rights and Welfare of the Child**, adopted the same year as the CRC came into force, reiterates with almost the same wording the prohibition of child recruitment:

Article 22(2): Armed Conflicts

2. States Parties to the present Charter shall take necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.
22. As stated in the Toronto Amicus Brief, and indicated in the 1996 Machel Report, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws. It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are “responsible for the conduct of their members” and may be “held so responsible by opposing parties or by the outside world”. Therefore all parties to the conflict in Sierra Leone were bound by the prohibition of child recruitment that exists in international humanitarian law.
23. Furthermore, it should be mentioned that since the mid-1980s, states as well as non-state identities started to commit themselves to preventing the use of child soldiers and to ending the use of already recruited soldiers.
24. The central question which must now be considered is whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments.

C. *Nullum Crimen Sine Lege, Nullum Crimen Sine Poena*

25. It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered. In the ICTY case of *Prosecutor v Hadzihasanovic*, it was observed that “In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The Emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.” In other words it must be “foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable”. As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?
26. In the ICTY case of *Prosecutor v. Tadic*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out thus:

The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute];

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

1. International Humanitarian Law

27. With respect to points i) and ii), it follows from the discussion above, where the requirements have been addressed exhaustively, that in this regard the test is satisfied.

2. Rule Protecting Important Values

28. Regarding point iii), all the conventions listed above deal with the protection of children and it has been shown that this is one of the fundamental guarantees articulated in Additional Protocol II. The Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled “Humane Treatment” and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction. “All the fundamental guarantees share a similar character. In recognising [*sic*] them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict.” Common Article 3 requires humane treatment and specifically addresses humiliating and degrading treatment. This includes the treatment of child soldiers in the course of their recruitment. Article 3(2) specifies further that the parties “should further endeavour to bring into force [...] all or part of the other provisions of the present convention”, thus including the specific protection for children under the Geneva Conventions as stated above. [...]

3. Individual Criminal Responsibility

30. Regarding point iv), the Defence refers to the Secretary-General’s statement that “while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.” The ICTY Appeals Chamber upheld the legality of prosecuting violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols in the *Tadic* case in 1995. [...]
32. In 1998 the Rome Statute for the International Criminal Court was adopted. It entered into force on 1 July 2002. Article 8 includes the crime of child recruitment

in international armed conflict [footnote 50: Article 8(2)(b)(xxvi) [See **Case No. 23**, The International Criminal Court]] and internal armed conflict [...] [footnote 51: Article 8(2)(e)(vii).]

34. Building on the principles set out in the earlier Conventions, the 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, provided:

Article 1

Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term “child” shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term “the worst forms of child labour” comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, **including forced or compulsory recruitment of children for use in armed conflict.**

It is clear that by the time Article 2 of this Convention was formulated, the debate had moved on from the question whether the recruitment of children under the age of 15 was prohibited or indeed criminalized, and the focus had shifted to the net [*sic*] step in the development of international law, namely the raising of the standard to include all children under the age of 18. This led finally to the wording of Article 4 of the Optional Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

35. The CRC Optional Protocol II was signed on 25 May 2000 and came into force on 12 February 2002. It has 115 signatories and has been ratified by 70 states. The relevant Article for our purposes is Article 4 which states:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons **under the age of 18 years.**
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary **to prohibit and criminalize such practices.** [...]

38. A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the *individual criminal responsibility* of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law. As Judge Meron in his capacity as professor has pointed out, “it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is not accompanying provision for the establishment of the jurisdiction of particular courts or scale of penalties”.

39. The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes. The fact that the ICTY and ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996. [...]
44. By 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating back to 1902, and a further 15 states that do not have specific legislation did not show any indication of using child soldiers. The list of states in the 2001 Child Soldiers Global Report clearly shows that states with quite different legal systems – civil law, common law, Islamic law – share the same view on the topic.
45. It is sufficient to mention a few examples of national legislation criminalizing child recruitment prior to 1996 in order to further demonstrate that the *nullum crimen* principle is upheld. [...]
46. More specifically in relation to the principle *nullum crimen sine poena*, before 1996 three different approaches by states to the issue of punishment of child recruitment under national law can be distinguished.
47. First, as already described, certain states from a [sic] various legal systems have criminalized the recruitment of children under 15 in their national legislation. Second, the vast majority of states lay down the prohibition of child recruitment in military law. [...]
49. When considering the formation of customary international law, “the number of states taking part in a practice is a more important criterion [...] than the duration of the practice.” It should further be noted that “the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule.
50. Customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystallized. One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the age of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as

persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.

51. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996. The fact that child recruitment still occurs and is thus illegally practised does not detract from the validity of the customary norm. It cannot be said that there is a contrary practice with a corresponding opinion [*sic*] *iuris* as states consider themselves to be under a legal obligation not to practise child recruitment.

4. Good Faith

52. The rejection of the use of child soldiers by the international community was widespread by 1994. In addition, by the time of the 1996 Graça Machel Report, it was no longer possible to claim to be acting in good faith while recruiting child soldiers contrary to the suggestion of the Defence during the oral Hearing). Specifically **concerning Sierra Leone, the Government acknowledged in its 1996 Report to the Committee of the Rights of the Child** that there was no minimum age for conscripting into armed forces “except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army.” This shows that the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.
53. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.

III. DISPOSITION

54. For all the above-mentioned reasons the Preliminary Motion is dismissed. [...]

DISSENTING OPINION OF JUSTICE ROBERTSON [...]

Discussion

33. So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the

existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law. It is worth emphasizing that we are here concerned with a jurisdiction which is very special, by virtue of its power to override the sovereign rights of states to decide whether to prosecute their own nationals. Elevation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protections as international law would normally afford, such as diplomatic or head of state immunity. For that reason, international criminal law is reserved for the very worst abuses of power – for crimes which are “against humanity” because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted. That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international criminal law. Such crimes are limited to the breaches of the Geneva Convention which violate Common Article 3, and to other specified conduct which has been comprehensively and clearly identified as an international law crime: treaties or State practice or other methods of demonstrating the consensus of the international community that they are so destructive of the dignity of humankind that individuals accused of committing them must be put on trial, if necessary in international courts.

34. For a specific offence – here, the non-forcible enlistment for military service of under fifteen volunteers – to be exhibited in the chamber of horrors that displays international law crimes, there must, as I have argued above, be proof of general agreement among states to impose individual responsibility, at least for those bearing the greatest responsibility for such recruitment. There must be general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea* – i.e. a guilty intent to commit the crime. The existence of the crime must be a fact that is reasonably accessible. I do not find these conditions satisfied, as at November 1996, in the source material provided by the Prosecutor or the *amici*. Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and the African Charter are, even when taken together, insufficient. What they demonstrate is a growing predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting. What they do not prove is that there was a universal or at least general consensus that individual responsibility had already been imposed in international law. [...]
35. Indeed, it was from about this time that the work of Graça Machel (who first reported on this subject to the United Nations in 1996) and the notable campaigning by NGOs led by UNICEF, Amnesty International, Human Rights Watch and No Peace Without Justice, took wing. What they were campaigning for, of course, was the introduction into international criminal law of a crime of child enlistment – and their campaign would not have been necessary in the years that followed 1996 if that crime had already crystallized in the arsenal of international criminal law.

36. The first point at which that can be said to have happened was 17th July 1998, the conclusion of the five week diplomatic conference in Rome which established the Statute of the International Criminal Court. [...]
38. The Rome Statute was a landmark in international criminal law – so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict. The Statute as a whole was approved by 122 states. True, 27 states abstained and 7 voted against it, but the conference records do not reveal that any abstention or opposition was based on or even referred to this particular provision relating to child recruitment. In the course of discussions, a few states – the US in particular – took the position that “it did not reflect customary international law and was more a human rights provision than a criminal provision.” That, in my view, was correct – until the Rome Treaty itself, the rule against child recruitment was a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17 July 1998. [...]
40. I do not think, for all the above reasons, that it is possible to fix the crystallization point of the crime of child enlistment at any earlier stage, although I do recognize the force of the argument that July 1998 was the beginning and not the end of this process, which concluded four years later when sufficient ratifications (that of sixty states) were received to bring the Rome Treaty into force. Nonetheless, state practice immediately after July 1998 demonstrates that the Rome treaty was accepted by states as a turning point in the criminalization of child recruitment. [...]
41. In other words, there was no common state practice of explicitly criminalizing child recruitment prior to the Rome Treaty, and it was in the process of ratification of that Treaty that many states introduced municipal laws to reflect it. [...]

Conclusion

45. The above analysis convinces me that it would breach the *nullem crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be “on the cards” for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate – certainly no previous development will suffice. [...]
46. There are many countries today where young adolescents are trained with live ammunition to defend the nation or the nation’s leader. What the international crime most seriously targets is the use of children to “actively participate” in hostilities – putting at risk the lives of those who have scarcely begun to lead them. “Conscription” connotes the use of some compulsion, and although

“enlistment” may not need the press gang or the hype of the recruiting officer, it must nevertheless involve knowledge that those enlisted are in fact under fifteen and that they may be trained for or thrown into front-line combat rather than used for service tasks away from the combat zones. There may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack, but the scope of any such defence must be left to the Trial Chamber to determine, if so requested.

47. I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgments in this Court today. The modern campaign against child soldiers is often attributed to the behaviour of Holden Roberto in Angola, who recognized how much it demoralizes an enemy village to have its chief headman executed by a child. More recently, we have had allegations about children being indoctrinated to become suicide bombers – surely the worst example of child soldier initiation. By the judgments today, we declare that international criminal law can deal with these abhorrent actions. But so far as this applicant is concerned, I would grant a declaration to the effect that he must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.

Done at Freetown this thirty-first day of May 2004.

Justice Robertson

DISCUSSION

1. a. How are children protected by IHL? (GC IV, Arts 14, 17, 23-24, 38, 50, 76, 82, 89, 94 and 132; P I, Arts 70 and 77-78; P II, Art. 4 (3))
- b. What does the IHL of international and non-international armed conflicts say specifically about recruitment and participation in hostilities? (P I, Art. 77(2)(3); P II, Art. 4(3)(c)(d); ICC Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii))
2. a. Is the prohibition on recruiting children under 15 into armed forces or using them to participate actively in hostilities, as mentioned in Art. 4(c) of the Statute, a customary rule of international law? What does the ICRC study on customary IHL say about this rule? [See **Case No. 43**, ICRC, Customary International Humanitarian Law [Rules 136 and 137]]
- b. What kind of practice does the Court refer to in concluding that the recruitment of children under 15 is prohibited by customary international law? Can customary IHL be derived from abstract acts by States such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both? What if the actual behaviour of the belligerents is incompatible with their statements? With the statements of other States?
- c. Would it have been possible to include this crime in the Statute of the Special Court if it were not of a customary nature? If Sierra Leone were not bound by the said rule?
- d. Do you agree with the Defence when it says that the Rome Statute of the ICC does not codify customary international law? Is it important in this specific case, taking into account that the

government of Sierra Leone signed (1998) and ratified (2000) the Statute? Did this Statute codify existing customary international law or was it only the starting point for new customary rules (as stated by Justice Robertson with regard to the very rule concerned in this case)?

3. a. What do you think of Justice Robertson's dissenting opinion which states that the criminalization of the recruitment and direct participation in hostilities of children under 15 was not part of customary international law before the adoption of the Rome Statute in July 1998?
- b. Does the Court consider that customary international law criminalized, at the time in question, the recruitment of children under 15? If yes, on what kind of practice does the Court base its conclusion?
- c. Do you agree with the University of Toronto's (and with the Court's own) statement that serious violations of the laws of war do not need to be expressly criminalized in order to be prosecuted?
- d. Do you think it is possible to raise the *nullum crimen sine lege* argument in the case of a person who committed an act knowing that it was a violation of IHL, but presuming that it was not explicitly criminalized? What are the objective and definition of the principle of *nullum crimen sine lege*?

Case No. 277, Sierra Leone, Special Court Ruling in the AFRC Case

I. Trial Chamber II

[Source: Special Court for Sierra Leone, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Trial Chamber II, Judgement, 20 June 2007, available on <http://www.sc-sl.org>, footnote omitted]

**SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER II**

[...]

Date: 20 June 2007

Case No.: SCSL-04-16-T

PROSECUTOR

Against

**Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU**

JUDGEMENT

[...]

I. INTRODUCTION

[...]

D. Summary of the Charges

[...]

16. The crimes underlying the 14 counts of the Indictment are alleged to have taken place in various locations throughout the territory of Sierra Leone within the time period from 25 May 1997 to January 2000.
17. The Accused are charged with acts of terrorism, collective punishment and conscripting or enlisting child soldiers throughout the entire territory of Sierra Leone at all times relevant to the Indictment.

[...]

II. ALLEGED DEFECTS IN THE FORM OF THE INDICTMENT

[...]

3. Objections Relating to Joint Criminal Enterprise ("JCE")

[...]

(a) Submissions of the Parties

57. The Kamara Defence submits that the common purpose to "take any actions to gain and exercise political power and control over the territory of Sierra Leone,"

as such does not amount to a specific crime and is thus too broad to prove the existence of a JCE. The Kamara Defence submits in particular that the Prosecution must “establish the existence of a common plan, design, or purpose *specifically* aimed at committing a criminal act within the [Special Court’s] jurisdiction” and show that an accused “joined with others in a plan aimed at achieving an end that constitutes a crime within the indictment.” By contrast, the Prosecution submits that “[w]hile the aim of defeating the enemy and regaining control of territory is not in itself a criminal aim, if the plan *involves* the commission of crimes against civilians in order to achieve that aim, liability may be invoked under the doctrine of JCE.” The Prosecution further addressed this issue in the closing arguments stating that “if the common purpose was to regain control of the country by any means possible, including the commission of crimes, then although the ultimate aim may not have been a crime within the jurisdiction of the Court, the common purpose involved the commission of crimes.”

[...]

(c) *Deliberations*

[...]

67. [...] [T]he common purpose alleged [...], that is, to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas is not a criminal purpose recognised by the Statute. The common purpose pleaded in the Indictment does not contain a crime under the Special Court’s jurisdiction. A common purpose “to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone” is not an international crime [...].

[...]

70. The principle of the JCE doctrine is to hold an individual accountable for all his actions that fall within, or are a foreseeable consequence of entering into, a criminal agreement. The rationale behind this principle is that a person should not engage in activity that is criminal or foreseeably criminal. Gaining and exercising political power is, however, not inherently a criminal activity.

[...]

IX. APPLICABLE LAW

[...]

C. Law on the Charges

1. Count 1: Acts of Terrorism (Article 3(d) of the Statute)

660. The Prosecution alleges that the Accused committed [...] crimes [...] “as part of a campaign to terrorise the civilian population of the Republic of Sierra Leone, and [which] did terrorise that population.” Count 1 thus charges the Accused with acts of terrorism, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(d) of the Statute.

661. Article 3(d) of the Statute, which is the verbatim reproduction of Article 4(2)(d) of Additional Protocol II, prohibits acts of terrorism. The latter provision is tied to Article 13(2) of Additional Protocol II, which provides that “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

[...]

664. In the wake of the Second World War, Article 33 of Geneva Convention IV was adopted. It provides that “all measures of intimidation or of terrorism are prohibited.” As Article 33 is applicable only to persons in the hands of a party to the conflict, it was subsequently complemented by Article 51 (2) of Additional Protocol I and Articles 4(2)(d) and 13(2) of Additional Protocol II, to include acts of terrorism committed against the civilian population in international and internal armed conflict, respectively.

[...]

670. The Kanu Defence argues that the crime of acts of terrorism does not encompass acts or threats of violence targeted at protected *property* but only protected persons. While the Trial Chamber agrees that it is not the property as such which forms the object of protection from acts of terrorism, the destruction of people’s homes or means of livelihood and, in turn, their means of survival, will operate to instil fear and terror. The attacks on, or destruction of, property thus plays an important role in defining the contours of this crime. What places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population. The acts or threats of violence committed in furtherance of such a purpose are innumerable and may well encompass attacks on property through which the perpetrators intend to terrorise the population.

[...]

2. Count 2: Collective Punishments (Article 3(b) of the Statute)

672. The Indictment alleges that the Accused committed the crimes [...] “to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF [Armed Forces Revolutionary Council/Revolutionary United Front].” Count 2 thus charges the Accused with collective punishments, a violation of Common Article 3 and of Additional Protocol II, punishable under Article 3(b) of the Statute.

673. Article 3(b) of the Statute, which is based on Article 4(2)(b) of Additional Protocol II, prohibits collective punishments. The notion of ‘collective punishments’ goes back to Article 50 of the 1899 Hague Regulations, according to which “[n]o general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.” [...]

674. Upon the inception of the Special Court, the United Nations Secretary General ("Secretary General") declared that "[v]iolations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognised as customarily entailing the individual criminal responsibility of the accused."

[...]

678. The prohibition of collective punishments in international humanitarian law is based on one of the most basic tenets of criminal law, the principle of individual responsibility. This principle affirms that responsibility is personal in nature and that no one may be punished for an act he or she has not personally committed.

679. Article 3 of the Statute is a reproduction of Article 4(2) of Additional Protocol II (which includes 'collective punishments' – Article 4(2)(b) – among its fundamental guarantees). Article 4(2)(b) of Additional Protocol II is based on Article 33 of the Fourth Geneva Convention, which provides that: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Thus punishments imposed upon protected persons who are not individually responsible for the act which forms the object of the punishment are absolutely prohibited.

680. The first element mentioned above concerns punishments which are not based on individual responsibility but which are inflicted upon persons by wrongfully ascribing collective guilt to them. Such punishments are imposed upon persons for acts which they may or may not have committed. In other words, the punishments are imposed indiscriminately without establishing individual responsibility through some semblance of due process and without any real attempt to identify the perpetrators, if any. It is in this context that the first element is understood to mean: "A punishment imposed upon protected persons for acts that they have not committed." The Trial Chamber therefore rejects the submission of the Kanu Defence that the Prosecution is obliged to prove that the victims of the punishment did not actually commit the acts for which they were punished.

681. The Trial Chamber further notes that this crime covers an extensive range of possible 'punishments'. The ICRC Commentary of Article 75.2(d) of Additional Protocol I advocates an extensive interpretation of the crime of collective punishments, to include not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.

[...]

II. Appeals Chamber

[Source: Special Court for Sierra Leone, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Appeals Chamber, Judgement, 22 February 2008, available on <http://www.sc-sl.org>, footnote omitted]

SPECIAL COURT FOR SIERRA LEONE APPEALS CHAMBER

Date: 22 February 2008
Case No.: SCSL-2004-16-A

PROSECUTOR
Against
Alex Tamba BRIMA
Brima Bazzy KAMARA
Santigie Borbor KANU

JUDGEMENT

[...]

III. COMMON GROUNDS OF APPEAL RELATING TO THE INDICTMENT

[...]

C. Prosecution's Fourth Ground of Appeal and Kanu's Tenth Ground of Appeal: Joint Criminal Enterprise

[...]

2. Submission of the Parties

[...]

70. [...] The Prosecution argues that the Trial Chamber erred in treating the "ultimate objective of the joint criminal enterprise as the alleged common criminal purpose itself, and in finding that the Indictment therefore did not plead a joint criminal enterprise that was inherently criminal." In particular, it submits that the Indictment as a whole alleges a common plan to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court, in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.
71. [...] Kanu submits that "gaining and exercising control over the population of Sierra Leone" is not a crime under international law and that with respect to JCE, an indictment must allege a common purpose which is a crime under international law. [...]

3. Discussion

[...]

75. The *actus reus* for all forms of joint criminal enterprise liability consists of the following three elements:
- (i) a plurality of persons;
 - (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
 - (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.
76. The question for determination in this appeal pertains to the requisite nature of the common plan, design or purpose. It can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan.
77. In *Kvočka et al.* the ICTY Appeals Chamber was of the opinion that “the common design that united the accused was the creation of a Serbian state within the former Yugoslavia, and that they worked to achieve this goal by participating in the persecution of Muslims and Croats.” Whereas creation of a Serbian State within the former Yugoslavia is not a crime within the Statute of the ICTY, the means to achieve the goal, such as persecution, constitute crimes within that statute.

[...]

79. Furthermore, the Appeals Chamber notes that the Rome Statute of the International Criminal Court (“Rome Statute” and “ICC,” respectively) does not require that the joint criminal enterprise has a common purpose that *amounts to* a crime within the ICC’s jurisdiction. Indeed, the Rome Statute departs altogether from the use of the phrase “amounts to” and instead requires that the “criminal activity or criminal purpose ... involves the commission of a crime within the jurisdiction of the Court.” [...]
80. In view of the foregoing, the Appeals Chamber concludes that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective.
81. Turning to the present Indictment, in order to determine whether the Prosecution properly pleaded a joint criminal enterprise, the Indictment should be read as a whole. In particular, the most relevant paragraphs of the Indictment to the pleading of JCE are paragraphs 33-35, which state:

- "33. The AFRC, including **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, and the RUF [...] shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. [...]
34. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.
35. **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, by their acts or omissions, are individually criminally responsible pursuant to Article 6(1) of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Indictment, [...] which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated."
82. The ultimate objective alleged in paragraph 33 of the Indictment, namely: to "take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas," may not of itself amount to a crime within the Statute of the Special Court, nonetheless, paragraph 33 of the Indictment read together with paragraphs 34 and 35 demonstrates the Prosecution's allegation that the parties to the common enterprise shared a common plan and design to achieve the objective by conduct constituting crimes within the Statute.
83. Paragraph 33 of the Indictment states that the plan was to "take any actions necessary" to gain territorial control and political power. Paragraph 34 of the Indictment states that the actions "included": controlling the population of Sierra Leone; using members of the population to support the JCE; and specifically enumerated crimes such as "unlawful killings, abductions, forced labour, physical and sexual violence." Paragraph 35 of the Indictment also indicates that crimes "referred to in Articles 2, 3, and 4 of the Statute . . . were within [the] joint criminal enterprise," or that those crimes were a reasonably foreseeable consequence of the JCE.
84. The Appeals Chamber holds that the common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. [...]

DISCUSSION

I. Joint Criminal Enterprise

(*Trial Chamber II, paras 57-70; Appeals Chamber, paras 70-84*)

1. What does the Trial Chamber consider as the common purpose of the Joint Criminal Enterprise (JCE)? Is it an international crime? What does the Appeals Chamber consider as the common purpose of the JCE? Is it an international crime? Why do the conclusions of the two Chambers differ?
2.
 - a. Assuming that the common purpose of a JCE may involve merely the commission of crimes, what should be prosecuted by the Court? Can the common purpose itself be prosecuted as such? Is it possible to prosecute an act not covered by the Special Court's Statute, insofar as its performance involved the commission of crimes?
 - b. Do you agree with the Appeals Chamber that "the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective"? What does "contemplated" mean in the present case? Would it be possible to prosecute non-criminal acts because the persons involved in the JCE thought about committing crimes?
3.
 - a. Does the fact that crimes were a "foreseeable consequence" of the common purpose render an enterprise criminal *per se*? Does the enterprise to seize power become an international crime *per se* if criminal acts are committed in the process? Would you agree that the act of waging war may then become an international crime because war often involves the commission of crimes? Can the Special Court prosecute acts that are part of *jus ad bellum*?
 - b. Is the commission of war crimes a foreseeable consequence of waging an aggressive war? Of a State using its right to self-defence? Of starting an armed conflict not of an international character?
 - c. What are the risks and advantages of a broad concept of joint criminal enterprise for IHL and international criminal law?

II. Terror and collective punishment

(*Trial Chamber II, paras 660-670*)

4.
 - a. What does IHL say about acts of terrorism? Are they prohibited in all armed conflicts? Do you agree that Art. 3 common to the Conventions prohibits acts of terrorism (*para. 660*)? (GC IV, Art. 33; P II, Art. 4(2)(d); CIHL, Rule 2)
 - b. (*Para. 664*) What is prohibited by the articles mentioned by the Special Court (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2))? Are "acts of terrorism" and "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" the same? Are all acts the primary purpose of which is to terrorize the population acts of terrorism? (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2); CIHL, Rule 2)
5. Under IHL, are acts of terrorism prohibited only when they target the civilian population? What about acts and threats of violence directed against military objectives the primary purpose of which is to spread terror among the civilian population? (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2); CIHL, Rule 2)
6. Do acts meant to terrorize the population actually have to have that effect in order to be prohibited?

(Trial Chamber II, paras 672-681)

7. What does IHL say about collective punishment? Is it prohibited in all armed conflicts? Do you agree that Art. 3 common to the Conventions prohibits collective punishment (*para. 672*)? (HR, Art. 50; GC IV, Art. 33; P I, Art. 75(2)(d); P II, Art. 4(2)(b); CIHL, Rule 103)
8.
 - a. (*Paras 678 and 680*) What is the rationale behind the prohibition of collective punishment? Why does collective punishment violate the principle of individual responsibility? When does a sanction against a group of persons become collective punishment prohibited by IHL?
 - b. (*Para. 680*) Do you agree with the Trial Chamber that it does not matter whether the persons punished have actually committed the acts? Will a sanction still amount to collective punishment if it is afterwards proved that the persons sanctioned had committed the acts for which they were punished?
9. (*Para. 681*) Is collective punishment prohibited only when it takes the form of an unlawful sanction, such as destruction or confiscation of property? Or is it also prohibited when it takes the form of a normal judicial sanction? Are all measures affecting the civilian population collectively (such as curfews, restrictions of movement, security measures) prohibited if they affect not just those who have committed an unlawful act? If they are implemented in reaction to an unlawful act? If not, how do you differentiate between prohibited collective punishment and legitimate security measures?
10. Is collective punishment prohibited only when directed against protected persons? Is it prohibited when directed against the civilian population in general? When directed against prisoners of war? (HR, Art. 50; GC III, Art. 87; GC IV, Art. 33; P I, Art. 75(2)(d); P II, Art. 4(2)(b); CIHL, Rule 103)

Case No. 278, Angola, Famine as a Weapon

[Source: AYAD Christophe, "L'arme de la famine en Angola," in *Libération*, Paris, 28 June 2002. Original in French, unofficial translation.]

**The weapon of famine in Angola
Three million Angolans need aid and 600,000 are at risk**

By the beginning of June, the mortality rate in Chiteta camp was 2.3 deaths per day for a population of 10,000. The "emergency threshold" is one death per day per 10,000. The fighting may have stopped, but the war continues. Angolans are dying by the thousand every day. It is not "merely" a famine that is decimating the Angolan population – the war continues. The World Food Programme has estimated that three million Angolans are in need of aid; and 600,000 of them are at immediate risk of falling short, according to an estimate by *Médecins sans frontières* (MSF). But this is not the result of the two years of severe drought that has plagued southern Africa as a whole. The Angolan government has been using famine as its preferred weapon in its long final assault on the rebels of Jonas Savimbi's UNITA movement.

Scorched earth

Determined to cut UNITA's supply lines, the Angolan armed forces have had no compunction about razing entire villages and forcing the inhabitants to gather in closely guarded "camps". This scorched earth policy has been aimed at preventing UNITA from recruiting men and generally exploiting the population. Forced to leave their gutted homes and wrenched from their land, these peasant farmers faced autumn and then the winter with help from no one. In Bunjei, south of Huambo – Savimbi's former stronghold – up to 14,000 people have been assembled in the immediate vicinity of the military camp. The camp itself is protected by mines and supplied with food and beer. But just next door the displaced are dying like flies: 15 deaths per day, the majority due to malnutrition. A measles epidemic is decimating the weakest. The mortality and severe malnutrition rates are close to those recorded in Southern Sudan during the terrible famine in 1998, with a quarter of the children weighing less than 70% of normal. In Chipindo, 4,000 out of a total population of 18,000 have died since last September.

It was not until Savimbi was killed in combat on 22 February and the peace agreement was signed on 4 April that the army finally relaxed its stranglehold on the camp. The bravest set out on foot for the north, where they had heard that Western NGOs were distributing food. That was when *Médecins sans frontières* began to see "refugees from the interior" arrive on the point of collapse.

According to their accounts, the homes of over 90% of them had been burnt down. After several refusals, the French NGO was finally allowed to conduct an exploratory mission, in the course of which it "discovered" the Bunjei camp.

The weakest of the children are now being cared for in Bunjei, where the camp's population has increased to 20,000 and the mortality rate has stabilized. But there are scores of other Bunjeis along an imaginary line drawn from Lobito to Luena, running west to east following the line of the 2001-2002 government offensive. These territories are known as "grey areas". Since total war resumed in 1998, 80% of Angola's territory has been closed to any form of humanitarian aid, access being prohibited by both the government and the UNITA rebels. There doubtless remain as yet undiscovered pockets of famine, far from the main roads, which are the only negotiable routes owing to the 12 million mines planted throughout the country – one per inhabitant. [...]

DISCUSSION

1. a. Can starvation be considered a weapon? Is it "merely" an inevitable consequence of war? How can a famine resulting from climate conditions be distinguished from one intentionally induced by a party to a conflict? If such a party "organizes" the starvation of a population, does it thereby commit a war crime? A crime against humanity? What about in a non-international armed conflict? Is it conceivable that starvation used as a method of warfare could be outlawed in international armed conflicts but not in internal conflicts? (P I, Art. 54; P II, Art. 14; ICC Statute, Art. 8(2)(b)(xxv); See **Case No. 23**, The International Criminal Court)
- b. Even if starvation as a method of warfare cannot be made an offence, are actions resulting in famine a violation of IHL? Is it a war crime to "raze entire villages," to force people to assemble in camps, to burn down houses? Is it a crime against humanity? Under what conditions? And in the context of a non-international armed conflict? (P I, Art. 52; ICC Statute, Art. 8(2)(a)(iv), (b) (ii) and (xiii) and (e)(xii))
2. Can a party to a conflict deny humanitarian organizations access to victims of war, in particular those suffering the effects of famine, without violating IHL? If so, under what conditions? Can it deny the ICRC access to the victims? Can it deny other humanitarian organizations access? What about in a non-international armed conflict? (GC IV, Arts 23, 55 and 59-63; P I, Arts 69-70 and 81; P II, Art. 18(2))
3. Is the use of anti-personnel mines prohibited by IHL? Even in a non-international armed conflict? [See **Document No. 16**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention), and **Document No. 17**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction]

Case No. 279, Germany, Government Reply on Chechnya

[Source: German Bundestag, Document 13/718, 13th legislative period, March 9, 1995; original in German, unofficial translation.]

REPLY
by the Federal Government to the written question
submitted by the Parliamentary Social Democratic Party -
Document 13/437 -
The Federal Government's position on Russian action
in the Chechen conflict

[The reply was issued on behalf of the Federal Government in a letter of the Federal Ministry of Foreign Affairs dated March 2, 1995.]

The document also sets out – in small type – the text of the questions.] [...]

In the debate on Chechnya in the German Bundestag the Federal Government left many important questions unanswered. Its position before and after that debate has given rise to doubts as to whether the Federal Government has done everything within its power, and is continuing to do everything possible, to bring about an end to the use of force and to the violations of international law and human rights in Chechnya.

Preliminary remarks

The Federal Government rejects as unfounded the claim made in the written question [...]

[...]

However, the declaration made by Federal Foreign Minister Dr Klaus Kinkel on January 19, 1995 when issuing a government policy statement on the Chechen conflict, namely that "We cannot compel the Russian government to take a specific course of action, we can only try to persuade it", remains valid. [...]

6. Is the Federal Government of the opinion that Russian action in Chechnya violates Article 48 of Protocol I additional to the Geneva Conventions of 1949?

Under the terms of Article 1, para. 3, of the Protocol additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), taken in conjunction with the provisions of Article 2 common to the Geneva Conventions, Protocol I applies only to international armed conflicts arising between the contracting parties thereto. Therefore, it cannot apply to an internal conflict within the borders of a contracting State. However, the Federal Government has repeatedly reminded Russia of the latter's duty to abide by its obligations under Protocol II additional to the 1949 Geneva Conventions, which provides for the protection of victims of non-international armed conflicts and thus applies to the conflict in Chechnya.

DISCUSSION

1. How would you qualify the conflict in Chechnya? Under which provision of Protocol I could it be qualified as an international armed conflict? (P I, Art. 1(4))
2. Does the law of non-international armed conflicts contain a rule similar to that of Art. 48 of Protocol I? (P II, Part IV)
3. Was respect for IHL in the conflict in Chechnya an internal affair of the Russian Federation? On what grounds did Germany ask the Russian Federation to respect IHL in Chechnya? Did those grounds apply IHL to the fullest possible extent in this situation?

Case No. 280, Russian Federation, Chechnya, Operation Samashki

[Source: Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7-8, 1995*, Moscow, 1996; footnotes omitted.]

1. PREFACE

This report is devoted to the events connected with an operation by Russian Federation [RF] Ministry of Internal Affairs divisions in the village of Samashki on April 7-8. [1995] According to Anatoly Aleksandrovich Antonov, Deputy Commander of MVD [Ministry of Internal Affairs (*Ministerstvo Vnutrennykh Del*)] forces in Chechnya, it was “the first completely independent military operation by MVD troops”. The operation and its consequences received wide attention in Russia and abroad.

On December 9, 1994, the President of the Russian Federation issued the Decree on Measures to Stop the Operation of Illegal Armed Formations in the Territory of the Chechen Republic and in the Ossetian-Ingush Conflict Zone. The decree instructed the RF government to “use all means available to guarantee state security, lawfulness, rights and freedoms of citizens, the guarding of public order, the fight against crime, the disarming of all illegal armed formations”.

On December 11, 1994, Ministry of Defence and MVD units began to enter the territory of Chechnya. Chechen armed formations resisted federal forces, and an undeclared war was under way in the Northern Caucasus.

The authors of this report consider the wide-scale military activities that followed this decree a non-international armed conflict, whose victims must be protected by strict observance of Article 3 common to the Geneva Conventions of August 12, 1949 and Protocol II additional to them. In accordance with these instruments, parties to the conflict are obliged to respect these and other laws and customary law on the conduct of war. [...]

OM [Observer Mission] members visited Samashki in May and August and received additional testimony necessary for the preparation of this report. [...]

2. BRIEF NOTES ON THE GEOGRAPHY AND DEMOGRAPHY OF SAMASHKI

[...]

When the Chechen-Ingush Autonomous Soviet Socialist Republic was split in 1992, the village of Sernovodsk, located 9.5 kilometers to the west of Samashki, went to Ingushetia and Samashki became a border village within the Chechen Republic. [...]

The pre-war population of Samashki counted about 14,600 people. With the commencement of military activities, Samashki began to receive displaced people from Grozny and villages that either became conflict zones or were shelled and bombed. In addition, beginning in February 1995, some refugees left Samashki. The village’s elders estimated that toward the beginning of April approximately

4,500-5,000 people remained in the village; according to the village administration, this figure was between 5,000-6,000. [...]

3. THE SITUATION IN SAMASHKI FROM DECEMBER 1994 TO APRIL 1995

While Russian troops were sent to Chechnya with the proclaimed goal of “restoring constitutional order and disarming illegal formations” in the republic, Russian military planning concentrated first and foremost on controlling Grozny, the capital of Chechnya. To this end, the command tried not to divert great force on bringing “constitutional order” to other parts of the republic, and troop deployments along the borders created “neither peace nor war” zones.

For a certain period, one such zone was western Chechnya (Achkoi-Martan, the district center, and the villages of Samashki, Assinovskaya, Melkhi-Yurt, Novyi Sharoi, and Zakan-Yurt along the border with Ingushetia, where tens of thousands of refugees from Grozny had amassed. [...]

On December 12, columns of federal troops were shelled in the village of Assinovskaya, and in the village of Novyi Sharoi a crowd of residents from nearby villages blocked the road. Further troop movements would inevitably have led first, to firing on unarmed residents, which at the time soldiers and officers were not prepared to do, and second, to skirmishes with partisan fighter units, which every village had. These units were armed with automatics, machine guns and grenade launchers. Self-defense units based in the area south of the village of Bamut had armored vehicles.

Federal forces were consequently reinforced along this conditional border area near the villages of Samashki, Davydenko, Novyi Sharoi, Achkoi-Martan, and Bamut. On December 17, federal forces had Samashki semi-surrounded, but the divisions left the village soon thereafter. An MVD checkpoint (Post No. 13) was established about four to five kilometers from Samashki, on the road to Sernovodsk. [...]

[...] By maintaining a humanitarian corridor connecting a number of villages in Chechnya with the outside world, the command of federal forces in Chechnya was, of course, complying with humanitarian law. But in numerous incidents, the MVD also detained Chechen men for one reason or another at Post No. 13, subjected them to mistreatment, beatings, and torture before sending them off to the filtration camp at Mozdok. [...]

On January 18, an astoundingly senseless incident took place. According to a report by G. Zhavoronkov, a correspondent for *Obshchaya Gazeta*, and P. Marchenko, his partner, they travelled left with a column of Ingush Republic EMERCOM [Ministry for Emergency Situations] cars transporting food to Grozny. Both sides to the conflict would allow columns of this sort, travelling under white flags, to pass through checkpoints unimpeded. About 11:30 a.m. the column went through the MVD checkpoint between Sernovodsk and Samashki.

As the column was entering Samashki, however, a Russian APC caught up with it, drove up its middle, and rode along with it to the edge of the village under EMERCOM cover. Shooting began immediately. Fortunately, no one in the EMERCOM vehicles was

injured, as some of the cars in the column were able to speed away from the battle, and others took cover in ditches along the road. [...]

On January 30, a column of Russian armored vehicles and trucks attempted to drive through Samashki. Different sources described this incident in different ways. Newspapers reported:

“The elders went out on the road and asked them not to drive the column through the village in order to avoid provoking a clash with villagers. The column nonetheless moved forward, and began to shoot villagers. Chechens returned fire, which resulted in the deaths of at least three Russian servicemen, and took several APCs and military vehicles out of action seventeen people were injured. The military then led the column away from the village”.

“On Monday evening [January 30] in the village of Samashki, located on the border with Ingushetiya, Dudayev forces attacked a column of armored vehicles carrying marines from the Pacific Fleet. At least three people were killed and nine wounded”.

According to one of Samashki’s village elders, on January 30 Chechen armed groups attacked military vehicles that had got lost and entered the northern end of the village. Three soldiers were killed, and the wounded were taken prisoner and then taken to a hospital. The elders reported that the wounded were drunk. According to much testimony, during the clash fighters seized a vehicle that had satellite equipment. [...]

On February 2, a mine exploded [...] during a funeral, killing Samashki residents. [...] *Moskovsky Komsomolets* reporter A. Kolpakov was a witness to this incident. The reporter described the consequences of the shelling.

“There was an unexpected, silent strike one hundred meters from us and a minute later a human cry cut through the air. We ran toward the cry. A square yard. On the ground – three people killed, smeared in blood; a wounded man sits near the wall, his head thrown back; on his forehead, swollen beyond belief, blood. Nearby there were women and children, crying, wiping their tears across their faces. It seemed as though the mine fell directly on the funeral: that morning the same kind of mine killed a woman and a fourteen-year-old girl. Our side clearly has one target ...” [...]

From the end of February to the beginning of March, when Dudayev forces were driven from Grozny, Russian forces in the western part of Chechnya began more actively to disarm villages, driving out rebels. Checkpoints were set up along roads between villages, and villages were shelled, involving, for the most part, MVD forces. At the same time, negotiations were held with the elders on the withdrawal of rebel fighter units from the villages [...]

On February 24, a group of Samashki residents and the head of the village administration went to the checkpoint, where they drafted an agreement with Russian Col. Nikolai Nikolaevich, which was given to villagers for discussion. Women and young people wavered. [...]

Meanwhile, the NTV news program *Segodnya* ("Today") reported on March 11 that fighters had not left the village and that "up to 400 Dudayev fighters remained in Samashki. They are threatening the leaders of the local government with physical revenge for having favored a peaceful resolution of the conflict". The next day the same television program reported, citing the Russian military, that there were 200 armed Dudayev supporters in the village. [...]

Samashki residents were in a difficult position. On the one hand, the Russian military, as a consequence of negotiations held on March 23-25, got the military train through Samashki. Had that not occurred, another Russian general participating in negotiations threatened to use force and bloodshed. On the other hand, Dudayev fighters who turned up through the forest demanded villagers not to allow the train to pass through Samashki. Pro-Dudayev snipers wounded two soldiers, and previously, in mid-March, two railroad bridges were blown up on the railway lines between Sernovodsk and Samashki. [...]

Participants in the "March for Peace" who passed through Samashki on March 26 saw helicopters shooting from rocket launchers in the area [...] above the village. When the marchers reached the entry to the village, local residents asked them whether there were any surgeons among them, as two hours earlier the village had undergone an air strike, seriously injuring four people and damaging four homes. Several marchers examined the houses that had been damaged in the air attack. Many armed people were indeed in the village (armed with automatics, and sniper rifles), some dressed in civilian clothes, others in camouflage. In a conversation with D.A. Salokhina, one of the marchers, the people said they were local residents.

According to L. Abdulkhajiev, head of the village administration, the colonel who commanded the Russian checkpoint near the village of Samashki demanded village representative to turn in their firearms. Notably, the agreement reached earlier did not require residents to turn in firearms. [...]

4. THE ULTIMATUM OF APRIL 6 – NEGOTIATIONS – MVD DIVISIONS OPERATIONS UP TO THE ARRIVAL ENTRY OF TROOPS

[...]

In a telephone conversation with OM monitors, Ingush Vice-President Boris Nikolaevich Agapov said that according to reports he had received, MVD command intended to detain the male population of Samashki for "filtration". Agapov promised to maintain contact with the command in Mozdok in order to facilitate the departure of women, children and the elderly from Samashki. [...]

According to village leaders, the final deadline for the ultimatum – 4:00 p.m., left them too little time to notify the entire village population or to allow them to gather their things and leave the village. Until that time, many people did not believe threats that troops would in fact enter the village and hence did not want to leave their homes. [...]

Mine shelling of the village began about fifteen to twenty-five minutes before the end of the ultimatum deadline, resulting in casualties among residents leaving the village. (See below, "The Death of Samashki Residents").

When the shelling began, a bus filled with residents from nearby homes on Ulitsa Sharipova did not have enough time to leave the loading point.

5. SHOOTING AT VILLAGE ELDERS AND ALLEGED FIRING BY DUDAYEV FIGHTERS ON SAMASHKI'S CIVILIANS

On the evening of April 7, both Channel One news and Segodnya, the NTV news program, reported, citing Interfax, that Dudayev fighters in Samashki shot the village elders, who had called on the rebels to leave the village and who wanted to allow Russian troops to pass through. Interfax in turn cited "well-informed sources in the Russian military in Mozdok". NTV also reported that "according to Interfax sources, surviving elders requested the federal forces leadership to help them evacuate civilians from the Samashki area". [...]

Interviews with a number of refugees from Samashki, including members of the village elders, led OM monitors to conclude that reports about the shooting of the village elders were false. Indeed, according to reports by village elders and the Samashki village mullah, on April 7, when a group of elders, together with the mullah (eight people in all), returned to the village after negotiations with the Russian command, the two cars they were riding in were shot at by small arms fire. While there were bullet holes in the cars, fortunately no one was injured, with the exception of elder Ajalil Salikhov, whose finger was slightly wounded. The shots were fired from Russian troop positions.

According to L. Abdulkhajiev, head of the village administration, and his deputy, M. Borshigov, both had seen firing from Russian positions located in the Sunzha hills on the cars transporting the elders to Samashki from the checkpoint.

When M. Borshigov returned to the checkpoint the next day he asked the general who was there (who did not give his name), "What did you shoot at the elders for? The answer he received was, "what do you expect? There's a war going on!"

On April 11, Samashki village leaders signed a statement in Sernovodsk denying the false reports about having been shot by rebel fighters. The elders' side of the story and their statement were presented at a Memorial Human Rights Center press conference on April 13 on the events in Samashki. After this, there were no further statements or comments by leaders of Russian forces concerning the alleged shooting of village elders.

During the parliamentary commission hearings on May 29, it was acknowledged that such reports were untrue. However the commission did not find it necessary to investigate how these reports began and were circulated, despite a request by Sergei Kovalev to this effect. Hence, the command of federal troops in Chechnya quite clearly and intentionally lied. Why was this done?

The authors of this report lack the information necessary to judge whether the shooting at the vehicle transporting the village elders was an accident or an intentional provocation. However, there can be no doubt that disinformation about how Dudayev fighters shot the elders was spread intentionally in order to justify to the public those actions taken by MVD divisions at that time in the village. [...]

8. THE "MOP-UP" OPERATION

The "mop-up" operation in Samashki was part of a pattern federal forces used more widely in Chechnya. It was during the mop-up operation that the majority of villagers were killed and homes destroyed. [...]

In the remaining parts of the village, soldiers also went into homes again in the evening and late at night on April 7 and checked for rebel fighters. According to witnesses, however, the main part of the "mop-up" in Samashki began between 8:00 and 10:00 a.m. on April 8. [...]

For the most part, soldiers ran house-to-house checks at night. Once they were assured that there were no fighters in a given home, soldiers did not harm civilians. However by that time some people had already been detained and some civilians had been murdered. [...]

Abdurakhman Chindigaev, forty-three years of age (a resident of 46 Ulitsa Sharipova) and Salavdi Umanov, an elderly man (a resident of 41 Ulitsa Sharipova), both reported that they spent the evening of April 7 at 45 Ulitsa Sharipova. Also with them were seventy-one-year-old Musaid Isaev, and forty-seven-year-old Nasruddin Bazuev. They chose to stay there because the house had strong concrete walls and a drop-ceiling, and was thus capable of withstanding artillery fire. As federal troops approached their area, all four men hid in the pantry on the first floor of the house. When soldiers entered the courtyard, they threw a grenade into a space that adjoined the pantry. Mr. Umakhanov described the events that followed.

"A minute later, maybe even earlier they open the door. "Anyone here alive?" There are, we go out [*into the courtyard*]. There were four of them. "Lie down, you bastards! Lie down, you bastards!" We lie down. They rifle through our cloths [*sic*]. Then one of them starts screaming from behind, and someone says to me, "Anyone left here?" I say, "No". The guy screaming from behind shouts, "Take hostages". Then they take me back there. There's no one there. We go outside. "In the ditch, bastards! In the ditch bastards! They chase us down there [*to the ditch in the garage for auto repair*]. The car is there, like it always was. Nasruddin crawled in first. Right there he was standing, face to the wall. Yeah, yeah, the far wall. The both of us are standing here. I say "They're going to make them kill us here". So I started to pray. Those soldiers were standing around. Musa says, "Guys, don't shoot. Someone has to feed the cows... Don't shoot". Isaev went down the third step. Two soldiers had their automatics to his back and pushed him. He didn't even get to the bottom of the steps. In a flash they fired a round at him. We just got to the bottom, and just bent down, and then another round".

Afterwards the soldiers left the yard, leaving Isaev dead and Bazuev and Umakhanov wounded (Bazuev died the following day). Red Cross doctors treated Umakhanov's wounds in Samashki. [...]

It is not entirely clear who carried out the "mop-up" operation on April 8. The majority of villagers claimed that for the most part they were not the conscripts (men of about

eighteen to twenty) who had entered the village first, but rather soldiers who were from about twenty-five to thirty-five years old, and who appeared to be “kontraktniki”, or soldiers hired on contract. Some victims, however, testified that their homes were burned on the morning of April 8 by the same men who had entered the village on April 7. For example, Magomed Labazanov, an elderly man who lived at 117 Ulitsa Kooperativnaya, told Memorial that on the night of April 7, Russian troops entered the basement of his house, where he had been hiding along with other elderly people and women and children. They threw a preemptory grenade into the courtyard, but when they heard people screaming, they did not throw grenades into the basement. The commander of the group, a captain, allowed them to stay in the basement, and the soldiers spent the night in the yard. In the morning the same soldiers – who were conscripts, judging by their age – started to set the house on fire. The house where Mr. Labazanov’s son, Aslambek, lived – 111 Kooperativnaya – was also burned. But when a soldier approached Mr. Labazanov’s house (where Mr Labazanov himself was hiding in the cellar), holding a gasoline can, another soldier would not let him proceed, saying, “There are old people and women in the cellar there. Get back”.

The hearings held on May 29 by the Parliamentary Commission on Investigating the Causes and Circumstances of the Emergence of the Crisis in the Chechen Republic became an important source of information for this report. It was only at the hearings that the report’s authors were able to hear the accounts of those who had directly participated in the operation in Samashki, since hostility toward the OM on the part of the command of federal troops made it impossible to meet with them.

Soldiers and OMON [Special Task Militia Units (*Otryad Militsii Osobogo Naznacheniya*)] troops described their actions on April 8 as simply leaving a village that was almost entirely intact. They claimed that no homes were burned and no civilians killed. Moreover, they claimed that they had seen practically no civilians and had nothing to do with them. [...]

If the Samashki events were to be recreated according only to these testimonies (and indeed the Parliamentary Commission accepted such a version), then the military operations there were extraordinarily bizarre. After fighting to capture the village, in the morning the troops inexplicably left the village under fire. The majority of destruction done to the village somehow occurred later.

One Internal Troops soldier claimed that they did not enter homes, but this contradicts an answer to a question provided by a Moscow region OMON:

Question to Moscow region OMON: “You searched houses in order to guarantee a safe retreat ? Did you enter any houses?”

Answer: “Yes”

Question: “And who went into the homes? Did OMON take care of security or did conscripts?”

Answer: We did it together. By morning everyone understood that we were leaving, it seemed pretty quiet, calm, but that sleepless night and all the tension took its toll on us”.

No one from the Parliamentary Commission bothered to ask how the troops managed to run a check on houses without having anything to do with civilians, an obvious question.

It should not be ruled out that the majority of those soldiers who had been involved in the operation in Samashki and who spoke at the Commission hearings did not actually carry out the “mop-up” operation, and simply did not know all the facts concerning what happened in the village. [...]

S. Yusupov also told of how he saw the bodies of six people who had been killed, the corpses lying on the street, including two elderly men and one woman. (See below, “The Death of Samashki Villagers”). When OM representatives visited Mr. Yusupov’s home, they saw a house that had been destroyed by fire; only the brick walls remained intact. No marks from fighting could be found on the walls and fences of this house or on houses nearby. There were traces of a grenade (“limonchik”) explosion in the cellar.

Interviews with Samashki residents suggest that soldiers threw grenades into residential areas during the “mop-up” operation without a second thought. Keyapa Mamaeva, who lives at 52 Ulitsa Zavodskaya (near the intersection with Ulitsa Kooperativnaya) reported that at 7:30 a.m. on April 8, she and her relatives (husband, son and father-in-law) looked out the window and saw servicemen looting the house next door, taking away cows, a television, and other items. They loaded the stolen property onto a KAMAZ truck and an APC. One of the soldiers apparently saw Mrs. Mamaeva’s face in the window, and then ran towards the window and threw a grenade at it. Mrs. Mamaeva and her relatives managed immediately to get out of the room and no one was hurt. The authors of this report examined the area where these events took place, and thus believe Mrs Mamedova’s story to be reliable.

Many villagers believe that soldiers who committed a number of crimes were under the influence of narcotics. To prove this, they showed journalists, Duma deputies, and OM members who were visiting Samashki disposable needles that were lying around in large numbers on the village streets after federal forces left. [...]

In attempting to judge whether soldiers were abusing promedol, it is worth noting first, the extremely low level of discipline among many federal force units in Chechnya, and second, widespread drunkenness among soldiers. In April, OM members, A. Blinushov and A. Guryanov, personally overheard MVD staff at Post No. 13 talking about how after their shift they would “shoot up some promedol”. [...]

9. THE DEATH OF SAMASHKI’S VILLAGERS

9.2 An analysis of Information Gathered on the Deaths of Villagers

9.2.1. Statistical Data

The list of names of people who were killed as a result of the MVD operation in Samashki on April 7-8 includes 13 women and 90 men.

The deceased break down by age as follows:

Eighteen years and younger – six boys and one girl;
Nineteen to forty-five years – forty-five men and six women;
Forty-six to sixty years – nineteen men and four women;
Sixty-one years and older – twenty men and two women. [...]

9.2.2. *Circumstances Surrounding the Death of Samashki Villagers*

[...]

What is clear is that all individuals on the list either were killed during the course of the April 7-8 events, or died later from the wounds they received those two days.

The overwhelming majority of witnesses emphasized that their loved ones, relatives or fellow villagers who died were neither rebel fighters nor self-defense fighters, nor did they offer resistance to Russian troops. In addition, we learned that four villagers died in battle, which may also explain the deaths of ten other people.

Deaths resulting from artillery and mine shelling

Those who died first were victims of mine-launcher and artillery shelling on April 7, which began at 3:40 or 3:45 p.m., about fifteen to twenty minutes before the end of the cease-fire that the military had declared in order to allow civilians to leave the village. [...]

[...] And Taus Ibishev (No. 40) died several days later in the Sleptsovsk hospital, and was again wounded on April 10 during evacuation, when a tractor transporting wounded people out of the village was hit from Russian military had finally granted permission to take out the wounded, who had spent three days in Samashki without necessary medical care.

Deaths from strafing of streets from APCs

APCs and tanks that drove through Samashki and sprayed machine-gun and automatic rifle fire caused yet more deaths. [...]

Firearms shot from tanks and APCs were thus responsible for the deaths of five Samashki residents.

Sniper-related deaths

Witnesses reported seven sniper-related deaths among Samashki residents; six were killed or fatally wounded on the second day of the operation (April 8) while in their yards or on the streets near their homes. [...]

Execution-style shootings in homes and yards

The most common cause of death among men was execution-style shooting when they were taken into custody, as a rule immediately after troops would enter a house or yard, but also after they were first beaten. In all, thirty men were killed in this manner. [...]

Deaths caused by grenades that were exploded in cellars, yards, and other inhabited areas

According to reports of many witnesses, Russian troops intentionally threw grenades into cellars and courtyards, knowing or at least supposing that people were inside. In the majority of such cases, people reportedly were wounded. [...]

Additional casualties that occurred on the eve of the operation

Our list includes three such cases. Earlier we described the death of Nasruddin Bazuev, which occurred in his niece's home. The evening before, on April 7, troops forced him along with three other men (two of whom were elderly) to leave the house where they were hiding from the shooting (45 Ulitsa Sharipova), forced them to crawl into a space in the garage for automobile repair, and opened fire on them. Bazuev received a few bullet wounds during the incident. After troops left the house, his wife, daughter and niece took the wounded man first to his home, and then to his niece's home. The next day troops came to the house, ignored the daughters plea to spare the wounded man, and killed them both. [...]

The burning of corpses

We received many reports from witnesses that Russian troops intentionally burned the bodies of the deceased, either by throwing the bodies into burning houses or by pouring gasoline on them and setting them on fire. In one instance, flame launchers were reportedly used to burn corpses. [...]

The following individuals were unable to escape from a burning house, and apparently were burned alive: Yuki Gaitukaeva (No. 30), Madu Rasuev and Kesirt Rasueva; Doga Tsatishaev's body was burned in a house as well. In this case, troops had poured gasoline around the house and set it on fire. When Abi Akhmetov (No. 16) and Vladimir Belov (No. 23) came out of a house – with their hands up – troops shot them immediately. [...]

9.3 The Official Version of Villagers' Deaths

By April 8, ITAR-TASS had already reported that "during the battle" [in *Samashki*] more than 130 pro-Dudayev fighters were killed. The mass media repeated this information the next day, citing Russian command. On April 11, an MVD representative who had been on the government's commission on Chechnya, told NTV reporters that according to official information, 120 pro-Dudayev fighters were killed in the village, and that civilians had left the village before the storming began. The next day, the MVD public relations department reported that 130 pro-Dudayev fighters were killed in Samashki.

The MVD top brass thus recognized that more than one hundred Chechens were killed, but wrote them all off as fighters.

Moreover, according to information privy to the Parliamentary Commission, an entry in the log of military activities kept by combined MVD units reports that losses among pro-Dudayev fighters totalled about sixty.

In contrast to what we outlined above, on May 12, Gen. Kulikov, in response to a question by T. V. Slotnikova (a Duma Deputy) reported that “no one made a list of dead fighters in illegal armed formations” in Samashki.

MVD Internal Troops and OMON who participated in the operation and spoke at the parliamentary commission hearings stated with certainty that no one serving in their divisions killed any civilians. Moreover, they all, with the exception of one conscript [...], claimed that they saw no civilians at all, and denied that there had been any “mop-up” operation in the village.

At the end of July 1995, a part of the members of the Parliamentary Commission prepared their conclusions on the part of the entire Commission, which included a small section on Samashki. The report considered the estimate of ninety-six deaths among villagers doubtful and unjustifiably high (This was the number on Memorial’s preliminary list at the time); no serious arguments were made to support this conclusion. For their part, the Commission members did not conduct any evaluation of the number of civilians killed in Samashki. Moreover, the Conclusion’s authors wrote “Moreover, one must exclude all men from the list. People holding automatics or grenade launchers cannot be considered civilians”. The same deputies intentionally wrote off the entire male population of Samashki as combatants. [...]

ICRC representatives evaluated the general number of deaths in the village and the large proportion of civilians among them. The ICRC gave a series of interviews on the topic in which they protested violations of common laws of warfare by MVD soldiers, i.e. “indiscriminate attacks” during military operations. [...]

10. THE ICRC, OTHER HUMANITARIAN ORGANIZATIONS, AND DOCTORS DENIED ACCESS TO SAMASHKI

Over the course of several days the ICRC (which was based in Nazran) attempted to drive to the village, but Russian troops did not allow them to pass. The military required written permission to visit the village, signed by Gen. Kulikov. Yet the ICRC has the right freely to chose any location it wishes to visit, and the Russian military’s refusal, which referred to the unsafe conditions for the ICRC’s visit, is unfounded. On April 10, after a series of appeals to Russian authorities, the ICRC mission in Ingushetia informed the public that their representatives were not allowed to visit Samashki.

The same day ITAR-TASS reported that an EMERCOM convoy from Ingushetia with volunteer doctors was stopped at the checkpoint near Samashki and not allowed to pass through to the village.

Médecins Sans Frontières representatives were also not allowed through during that time. [...]

On April 10, at 1:00 p.m., ICRC representatives brought a letter of permission from Gen. Kulikov, but the military still denied them entry to Samashki, claiming they had different orders from Mozdok.

ICRC cars were allowed to enter Samashki only after 4:00 p.m. that day, but the military continued to impede doctors and ICRC representatives from visiting the village. [...]

11. INJURIES AMONG VILLAGERS

Samashki villagers were wounded as a result of the April 7-8 operation. However, since the village was blockaded, they were unable to receive timely, qualified medical treatment. There were no surgeons in the village, and one female therapist tried to help as many wounded as possible.

[...]

13. LOOTING OF SAMASHKI VILLAGERS

Among the 221 appeals sent to Commission Chairman S. Govoruhkin, sixty contain reports that soldiers looted homes and frequently set the remaining property on fire. At the open hearings on May 29, every soldier and OMON who testified vigorously denied that such incidents could possibly have taken place. [...]

14. THE DETENTION AND “FILTERING” OF SAMASHKI RESIDENTS

[...]

According to the testimony of those who were brought to Mozdok, men from Samashki were forced to run a gauntlet in which they were hit with night sticks and rifle butts. Cells were overcrowded. There was inadequate food and water. The men were given water only one to one and a half days after their arrival at the filtration camp. They were beaten during interrogations, and were demanded either to confess to being fighters or name those who were. They were asked, “Who started shooting first?”

From April 11-13, ICRC representatives visited the filtration camp. Military personnel threatened the men before the visit, warning them not to complain: “They’ll leave, but you’ll be staying here”. [...]

Some of those detained in Samashki were taken from the “camp” to a temporary detention point near Assinovskaya.

It was here that, according to victims testimony, beatings and torture were widely practiced (including electric shock). [...]

The majority of Samashki villagers who were taken to the filtration point in Assinovskaya were not sent to further filtration points, but were driven to the Sunzha hills, where they were released. When these people were released they were given nothing to certify that they were detained. Hence all detentions that took place in “filtration” were not counted in official statistics on detentions. [...]

15. INVESTIGATION OF THE SAMASHKI EVENTS BY RUSSIAN GOVERNMENT AGENCIES

A number of members of the Temporary Observer Commission for Citizens' Constitutional Rights and Freedoms, under the chairmanship of Minister of Justice Valentin Kovalyev, were in Samashki throughout April. A Commission session held on April 27 examined the material they gathered. The results of the session were reported to the press and public: "People who took part in the hearings came to the conclusion that reports concerning the use of air strikes and heavy artillery during the operation to take the village were inaccurate. In addition, the Commission is in possession of a large number of written statements, testimony, and complaints about arson, pillage and deaths. These acts were carried out by people in black masks or with black bands tied around the head, and were dressed in non-standard uniforms. Materials on these incidents have been sent to the office of the General Procurator in order to open a criminal investigation". [...]

DISCUSSION

1.
 - a. Should the conflict be qualified as a non-international armed conflict because it takes place in the Russian Federation? What criteria need to be met for the conflict to be qualified as non-international? Is Art. 3 common to the Conventions the only one to apply? Has the threshold of applicability of Protocol II been reached in the Republic of Chechnya?
 - b. Presuming Protocol II applies, which obligations must both parties fulfil regarding the conduct of hostilities? (P II, Preamble) Regarding the civilian population? (P II, Part IV)
2. If the IHL of international armed conflicts applies, do the rebel forces in Chechnya fall within the definition of Art. 44 of Protocol I (and thus enjoy combatant status)?
3.
 - a. Which provisions of IHL did the federal troops apply when they maintained "a humanitarian corridor connecting a number of villages"? (*Section 3*)
 - b. Were there any violations of IHL during the "senseless incident of January 18"? (*Section 3*) During the event of 30 January? Of 2 February? Of 26 March?
 - c. Concerning the "filtration operation of April 6", if the IHL of international armed conflicts is applied, can a belligerent in a village where civilians and combatants are intermingled separate out all the men and ask all other civilians to leave? Can the village be attacked after the deadline for civilians to leave has expired?
4. The federal troops are alleged to have carried out "*mop-up*" operations during which civilians were systematically ill-treated or killed. Do such operations contravene the provisions of IHL regarding humane treatment and protection of the civilian population? (P II, Arts 4, 5, 7, 8, 13 and 17)
5.
 - a. Could the federal troops justify such an operation on the grounds that rebel fighters were among the civilian population? Which of the categories of death listed in Section 9.2.2. were clearly results of violations of IHL? Which were not? For which categories would you need additional information to answer this question?
 - b. Furthermore, the report states that villagers were detained in a "*filtration camp*" and subjected to physical beatings and torture. If true, does this behaviour on the part of the federal troops violate IHL and, more specifically, Protocol II? (P II, Art. 5)

6. In the light of what happened in Samashki, the ICRC took the initiative to visit the village. Does the ICRC have the right to take such an initiative? Does it have the right to enter the village? Were the ICRC's public statements about the fact that it was denied access to Samashki compatible with its policy of confidentiality? (GC I-IV, Art. 3)
7. What do you think were the main reasons for violations of IHL in Operation Samashki? What could the belligerents have done to avoid those violations?

Case No. 281, Russia, Constitutionality of Decrees on Chechnya

[Source: *Human Rights Journal*, vol. 17 (3-6), 1996, pp. 133-138; the authentic text is published in *Rossijskaia Gazeta* of August 11, 1995, p. 3 (judgement), pp. 4-7 (separate opinions).]

CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION, MOSCOW
Presidential Decrees and Federal Government's Resolution
on the Situation in Chechnya

JUDGEMENT OF JULY 31, 1995

"In the name of the Russian Federation regarding the examination of the constitutionality of the Decree of the President of the Russian Federation of November 30, 1994, No. 2137 on Measures to Restore Constitutional Legality and Law and Order on the Territory of the Chechen Republic; the Decree of the President of the Russian Federation of December 9, 1994, No. 2166 on Measures to Stop the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict; the Resolution of the Government of the Russian Federation of December 9, 1994, No. 1360 on Ensuring State Security and Territorial Integrity of the Russian Federation, Rule of Law, the Rights and Freedoms of Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent Areas of the Northern Caucasus; Decree of the President of the Russian Federation of November 2, 1993, No. 1833 on the Main Provisions of the Military Doctrine of the Russian Federation.

The Constitutional Court of the Russian Federation [...] has considered in open session the case on examining the Constitutionality of the Decrees. [...]

The grounds for considering the case, under part 1 of Article 36 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation were an interpellation of a group of deputies of the State Duma of the Federal Assembly of the Russian Federation to check the constitutionality of the Decree [...] on the Main Provisions of the Military Doctrine of the Russian Federation in the part concerning the use of the armed forces of the Russian Federation in resolving internal conflicts [...], the interpellation of the Federation Council of the Federal Assembly of the Russian Federation to check the constitutionality of the Decrees [...] No. 2137 and [...] No. 2166, as well as the Resolution of the Government of the Russian Federation [...] No 1360, as well as the interpellation of a group of deputies of the Federation Council of the Federal Assembly of the Russian Federation of the same content.

[...] These interpellations, [...] were merged into a single proceeding. [...]

[T]he Constitutional Court of the Russian Federation found:

1. The Federation Council of the Federal Assembly of the Russian Federation [...] insists that the challenged decrees [...] and the resolution of the Government [...] formed a single system of normative legal acts and resulted in an unlawful use of the Armed Forces of the Russian Federation since their use on the territory of the

Russian Federation as well as the other measures and actions stipulated [...] are legally possible only within the framework of the regime of a state of emergency or a state of martial law. It is stressed in the interpellation that these measures resulted in unlawful restrictions and mass-scale violations of the constitutional rights and freedoms of Russian citizens. [...]

2. In 1991-1994 an extraordinary situation arose on the territory of the Chechen Republic which is a subject of the Russian Federation. The validity of the Constitution of the Russian Federation and federal laws was denied, the system of legitimate bodies of power had been destroyed, regular unlawful armed formations were created, armed with the latest weaponry, and widespread violations of the rights and freedoms of citizens took place. [...]

This extraordinary situation is historically stemming from the fact that in the period of Stalin's repressions the Chechen people had been deported and the consequences of that deportation had not been properly rectified. The State power first in the USSR and then in Russia has been unable to correctly assess the legitimate bitter feelings among the Chechens, the developments in the Republic and their motive forces. The federal bodies of power of the Russian Federation relaxed their law enforcement activities in the Chechen Republic, failed to ensure the protection of the State ammunition dumps on its territory and for several years exhibited passivity in addressing the problems with that Republic as a subject of the Russian Federation. [...]

The constitutional goal of preserving the integrity of the Russian State accords with the universally recognised international legal principles concerning the right of nations to self-determination. It follows the Declaration of the principles of international law pertaining to friendly relations and co-operation between States in accordance with the Charter of the United Nations, adopted on October 24, 1970, that the exercise of the right to self-determination "should not be construed as sanctioning or encouraging any acts leading to the dismemberment or complete disruption of territorial integrity or political unity of sovereign independent States acting pursuant to the principle of equality and self-determination of nation".

Mindful of this, the federal authorities, the President, the Government and the Federal Assembly made repeated attempts to overcome the crisis in the Chechen Republic. However, they did not lead to a peaceful political solution.

The Decrees [...] prescribed the use of measures of State coercion to ensure the State security and territorial integrity of the Russian Federation, disarmament of illegal armed formations on the territory of the Chechen Republic.

Under part 2 of Article 3 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation does not consider the political opportuneness of the decisions made or the appropriateness of the actions earned out on their basis. [...]

5. In accordance with the principle of a law governed State, fixed in the Constitution of the Russian Federation, the bodies of power in their activities are bound both

by internal and international law. The universally recognised principles and norms of international law and international treaties are, under Article 15, part 4 of the Constitution of the Russian Federation a component part of the legal system and must be observed in good faith, including by being taken into account in internal legislation.

The Supreme Soviet of the USSR in ratifying, on 29 September 1989 [...] Protocol II [...] directed the Council of Ministers of the USSR to prepare and submit to the Supreme Soviet proposals on making corresponding amendments in the legislation. However, that direction was not followed. Nevertheless, the provisions of this additional protocol on human treatment of all the persons who were not directly involved or have ceased to take part in hostilities, on the wounded, the sick, on the protection of civilians, of the facilities required for the survival of the civilian population, the installations and structures containing dangerous forces, on the protection of cultural values and places of worship are binding on both parties to the armed conflict.

At the same time improper consideration of these provisions in internal legislation has been one of the reasons of non-compliance with the rules of the above-mentioned additional protocol whereby the use of force must be commensurate with the goals and every effort must be made to avoid causing damage to civilians and their property. [...]

6. [...] International treaties in which the Russian Federation participates also proceed from the possibility of using armed forces to defend the national unity and territorial integrity of the State. According to Article 15 part IV of the Russian Constitution they are a constituent part of its legal system. Taking into account the possibility of such situations, the international community formulates in [...] Protocol II [...] rules on the protection of victims of non-international armed conflicts. [...]
7. [...] The main provisions of the Russian Federation's military doctrine contain no normative precepts. For this reason, the Presidential Decree [...] whereby they were adopted, also lacks normative content. Therefore, these documents do not fall within the category of legal acts that can be verified by the Constitutional Court of the Russian Federation [...]
8. [...] On the other hand, the stipulations of part V paragraph 1, point 3 of the resolution "On the expulsion out of the Chechen Republic of persons who pose a threat to public security and to the personal security of citizens, who do not live on the territory of the said Republic", cannot be regarded as being tantamount to what has been established by point 22, Article 11 of the Law of the Russian Federation on the Militia as the right of the militia to keep citizens away from certain localities, facilities, to oblige them to stay there or to leave these localities and facilities with the aim of protecting the health, lives and property of citizens, conducting search and investigation measures. [...]

On the basis of the outlined and proceeding from part I of Article 71, Articles 72 and 87 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation, the Constitutional Court of the Russian Federation: [...]

- (3) It shall be recognised that the provisions on evicting persons posing threats to public safety and to the personal safety of citizens out of the territory of the Chechen Republic, contained in Resolution No. 1360 of the Government of the Russian Federation of December 9, 1994, "On Ensuring State Security and Territorial Integrity of the Russian Federation, Rule of Law, the Rights and Freedoms of the Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent of the Northern Caucasus", part V of paragraph 1, clause 3, and also on depriving journalists working in the armed conflict zone of their accreditation, paragraph 2 of clause 6, do not conform to the Constitution of the Russian Federation [...]
- (4) Under Article 68 and paragraph 1, part 1 of Article 43 of the Federal Constitutional law on the Constitutional Court of the Russian Federation, hearings on the case with regard to the examination of the constitutionality of Decree No. 1833 of the President of the Russian Federation of November 2, 1993, on the main provisions of the military doctrine of the Russian Federation, and also with regard to the examination of the constitutionality of the main provisions of the military doctrine of the Russian Federation, shall be closed.
- (5) The examination of the practical actions of the parties in the course of the armed conflict from the point of view of compliance with [...] Protocol II in accordance with Article 125 of the Constitution of the Russian Federation, and parts I, II and III of Article 3 of the Federal Constitutional Law on the Constitutional Court, may not be a subject for consideration by the Constitutional Court of the Russian Federation and ought to be performed by other competent organs. In accordance with Articles 52 and 53 of the Constitution of the Russian Federation and the International Covenant on Civil and Political Rights, part III of Article 2, victims of any violations, crimes and abuses of power shall be granted efficient remedies in law and compensation of damages caused.
- (6) The Federal Assembly of the Russian Federation shall settle the legislation on the use of the armed forces of the Russian Federation, as well as on the regulation of other conflicts and issues arising out of extraordinary situations, including those falling under [...] Protocol II. [...]

DISCUSSION

1. How does the Court qualify the conflict in Chechnya? Under what conditions could the conflict be qualified as international?
2. Is Protocol II applicable to the situation? Does the Court apply it? Why not? Are international treaties not directly applicable in the Russian Federation? Does the Court consider that the rules of Protocol II are not self-executing and therefore need national legislation before they can be invoked before

the Court? Why should a State enact implementing legislation even for the self-executing norms of a directly applicable treaty?

3. Does the resolution “[o]n the expulsion out of the Chechen Republic of persons who pose a threat to public security” violate Protocol II? Does Art. 11(22) of the Law of the Russian Federation on the militia violate it? (P II, Art. 17)

Case No. 282, ECHR, Isayeva v. Russia

[Source: Case of Isayeva v. Russia, European Court of Human Rights, Application no. 57950/00, Judgement, Strasbourg, 24 February 2005; footnotes omitted; available on <http://www.echr.coe.int/Eng/Judgments.htm>]

**CASE OF ISAYEVA v. RUSSIA
(Application no. 57950/00)****JUDGMENT****STRASBOURG
24 February 2005**

In the case of Isayeva v. Russia,

The European Court of Human Rights (Former First Section), sitting as a Chamber [...]

Having deliberated in private on 14 October 2004 and 27 January 2005, Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 57950/00) against the Russian Federation lodged with the Court under [...] the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Zara Adamovna Isayeva ("the applicant"), on 27 April 2000. [...]
3. The applicant alleged that she was a victim of indiscriminate bombing by the Russian military of her native village of Katyr-Yurt on 4 February 2000. As a result of the bombing, the applicant's son and three nieces were killed. She alleged a violation of Articles 2 [right to life] and 13 [effective remedy before a national authority] of the Convention. [...]

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE [...]****A. The facts [...]****1. The attack on Katyr-Yurt**

12. In autumn 1999 Russian federal military forces launched operations in Chechnya. In December 1999 rebel fighters ("boyeviki") were blocked by the advancing federal forces in Grozny, where fierce fighting took place.
13. The applicant submits that at the end of January 2000 a special operation was planned and executed by the federal military commanders in order to entice the rebel forces from Grozny. Within that plan, the fighters were led to believe that a safe exit would be possible out of Grozny towards the mountains in the south of the republic. Money was paid by the fighters to the military for information

about the exit and for the safe passage. Late at night on 29 January 2000 the fighters left the besieged city and moved south. They were allowed to leave the city. However, once they had left the city they were caught in minefields and the artillery and air force bombarded them along the route. [...]

15. A significant group of Chechen fighters – ranging from several hundred to four thousand persons – entered the village of Katyr-Yurt early on the morning of 4 February 2000. According to the applicant, the arrival of the fighters in the village was totally unexpected and the villagers were not warned in advance of the ensuing fighting or about safe exit routes.
16. The applicant submitted that the population of Katyr-Yurt at the relevant time was about 25,000 persons, including local residents and internally displaced persons (IDPs) from elsewhere in Chechnya. She also submitted that their village had been declared a “safe zone”, which attracted people fleeing from fighting taking place in other districts of Chechnya.
17. The applicant submitted that the bombing started suddenly in the early hours of 4 February 2000. The applicant and her family hid in the cellar of their house. When the shelling subsided at about 3 p.m. the applicant and her family went outside and saw that other residents of the village were packing their belongings and leaving, because the military had apparently granted safe passage to the village’s residents. The applicant and her family, together with their neighbours, entered a Gazel minibus and drove along Ordzhonikidze road, heading out of the village. While they were on the road, the planes reappeared, descended and bombed cars on the road. This occurred at about 3.30 p.m.
18. The applicant’s son, Zelimkhan Isayev (aged 23) was hit by shrapnel and died within a few minutes. Three other persons in the vehicle were also wounded. During the same attack the applicant’s three nieces were killed: Zarema Batayeva (aged 15), Kheda Batayeva (aged 13) and Marem (also spelled Maryem) Batayeva (aged 6). The applicant also submitted that her nephew, Zaur Batayev, was wounded on that day and became handicapped as a result. [...]
19. The applicant submitted that the bombardment was indiscriminate and that the military used heavy and indiscriminate weapons, such as heavy aviation bombs and multiple rocket launchers. In total, the applicant submits that over 150 people were killed in the village during the bombing, many of whom were displaced persons from elsewhere in Chechnya. [...]
23. According to the Government, at the beginning of February 2000 a large group of Chechen fighters, headed by the field commander Gelayev and numbering over 1,000 persons forced their way south after leaving Grozny. On the night of 4 February 2000 they captured Katyr-Yurt. The fighters were well-trained and equipped with various large-calibre firearms, grenade- and mine-launchers, snipers’ guns and armoured vehicles. Some of the population of Katyr-Yurt had already left by that time, whilst others were hiding in their houses. The fighters seized stone and brick houses in the village and converted them into fortified defence points. The fighters used the population of Katyr-Yurt as a human shield. [...]

25. The federal troops gave the fighters an opportunity to surrender, which they rejected. A safe passage was offered to the residents of Katyr-Yurt. In order to convey the information about safe exit routes, the military authorities informed the head of the village administration. They also used a mobile broadcasting station which entered the village and a Mi-8 helicopter equipped with loudspeakers. In order to ensure order amongst the civilians leaving the village, two roadblocks were established at the exits from the village. However, the fighters prevented many people from leaving the village.
26. Once the residents had left, the federal forces called on the air force and the artillery to strike at the village. The designation of targets was based on incoming intelligence information. The military operation lasted until 6 February 2000. The Government submitted that some residents remained in Katyr-Yurt because the fighters did not allow them to leave. This led to significant civilian casualties – 46 civilians were killed, [...].
27. According to the Government's observations on the admissibility of the complaint, 53 federal servicemen were killed and over 200 were wounded during the assault on Katyr-Yurt. The Government also submitted that, as a result of the military operation, over 180 fighters were killed and over 240 injured. No information about combatant casualties on either side was contained in their observations on the merits. The criminal investigation file reviewed by the Court similarly contains no information on non-civilian casualties.
28. The events at the beginning of February 2000 were reported in the Russian and international media and in NGO reports. Some of the reports spoke of serious civilian casualties in Katyr-Yurt and other villages during the military operation at the end of January – beginning of February 2000.

2. The investigation of the attack [...]

30. On 24 August 2002 the military prosecutor of military unit no. 20102 replied to the NGO Memorial's enquiry about a criminal investigation. The letter stated that a prosecutor's review had been conducted following the publication on 21 February 2000 in the Novaya Gazeta newspaper of article entitled "167 Civilians Dead in Chechen Village of Katyr-Yurt". The review established that between 3 and 7 February 2000 a special military operation aimed at the destruction of illegal armed groups had taken place in Katyr-Yurt. The Western Alignment of the army and the interior troops had performed the operation according to a previously prepared plan: the village had been blocked and civilians had been allowed to leave through a corridor. The command corps of the operation had assisted the villagers to leave the village and to remove their possessions. Once the commanders were certain that the civilians had left the village, missiles had been deployed against Katyr-Yurt. Other means had also been employed to destroy the fighters. No civilians had been harmed as a result of the operation, as confirmed by the commandant of the security area of the Urus-Martan district. On the basis of the above, on 1 April 2000 the prosecutors refused to

open an investigation into the alleged deaths of civilians due to the absence of *corpus delicti*. The criminal investigation file reviewed by the Court contained no reference to this set of proceedings. [...]

32. In their further submissions the Government informed the Court that on 16 September 2000 a local prosecutor's office in Katyr-Yurt, acting on complaints from individuals, had opened criminal case no. 14/00/0003-01 to investigate the deaths of several persons from a rocket strike in the vicinity of the village. The case concerned the attack on the Gazel minibus on 4 February 2000, as a result of which three civilians died and two others were wounded. In December 2000 the case file was forwarded to the office of the military prosecutor in military unit no. 20102. Later in 2001 the case-file was transferred for investigation to the military prosecutor of the Northern Caucasus Military Circuit in Rostov-on-Don.
33. The investigation confirmed the fact of the bombing of the village and the attack on the Gazel minivan, which led to the deaths of the applicant's son and three nieces and the wounding of her relatives. It identified and questioned several dozen witnesses and other victims of the assault on the village. The investigation identified 46 civilians who had died as a result of the strikes and 53 who had been wounded. In relation to this, several dozen persons were granted victim status and recognized as civil plaintiffs. The investigators also questioned military officers of various ranks, including the commanders of the operation, about the details of the operation and the use of combat weapons. The servicemen who were questioned as witnesses gave evidence about the details of the operation's planning and conduct. No charges were brought (see Part B below for a description of the documents in the investigation file).
34. The investigation also checked whether the victims had been among the insurgents or if members of the unlawful armed groups had been implicated in the killings.
35. On 13 March 2002 the investigation was closed due to a lack of *corpus delicti*. [...]

e) Identification and questioning of other victims [...]

59. Roza D. testified that their house on the edge of the village was bombed on the morning of 4 February 2000. The first explosion occurred in her courtyard and wounded her two year old son, who died of his wounds early in the morning on 6 February. She remained in a cellar until 6 February, when she, with some other people, attempted to leave for Valerik. However, the roadblock was closed and the soldiers told them that they had an order from General Shamanov not to let anyone out. They remained in the cellar of an unfinished house on the edge of the village, near the exit to Valerik, for one more day, and on 8 February she returned home. [...]

g) Statement by Major-General Shamanov

66. On 8 October 2001 the investigation questioned Major-General Vladimir Shamanov, who at the material time had headed the operations centre (OC) of

the Western Zone Alignment in Chechnya, which had included the Achkhoy-Martan district [...].

69. On the morning of the day on which the operation started (Mr Shamanov could not recall the exact date) the fighters had attacked the federal forces. They were well-equipped and armed with automatic weapons, grenade-launchers and fire-launchers, and used trucks armoured with metal sheets. He stated:

“Realising that the identity check in the village could not be conducted by conventional means without entailing heavy losses among the contingent, Nedobitko, absolutely correctly from a military point of view, decided to employ army aviation and ground attack air forces, artillery and mine-launchers against the fortified positions of the fighters entrenched in the village. Failure to employ these firm and drastic measures in respect of the fighters would have entailed unreasonably high losses among the federal forces in conducting the special operation and a failure to accomplish the operative task in the present case. All this would have demonstrated impotence on the part of the federal authorities, would have called into question the successful completion of the counter-terrorist operation and the reinstatement of constitutional order in Chechnya. Failure to accomplish these tasks would threaten the security of the Russian Federation. Besides, our indecisiveness would have attracted new supporters to the illegal armed groups, who had adopted a wait-and-see attitude at the relevant time. This would have indefinitely extended the duration of the counter-terrorist operation and would have entailed further losses among the federal forces and even higher civilian casualties.”

70. He stated that the fire-power employed had been directed at the fighters’ positions “on the edges of the village and in its centre, near the mosque”. Civilians were allowed to leave the village. The fighters were offered surrender, with a guarantee of personal safety, which they refused. They thus used the villagers as a human shield, entailing high civilian casualties.
71. In his opinion, the population of Katyr-Yurt should have prevented the fighters’ entry into the village. Had they done so, as had happened earlier in the village of Shalazhi, there would have been no need to conduct such a “severe mopping-up operation” and to deploy aviation and artillery, and thus the unfortunate civilian losses could have been avoided. The losses among fighters, in his estimation, were about 150 persons. The rest escaped from the village at night, under cover of thick fog.
72. He was asked what measures were taken to ensure maximum security of the civilians during the operation in Katyr-Yurt. In response, Mr Shamanov responded that Nedobitko used a Mi-8 helicopter equipped with loud-speakers to inform civilians about the safe exit routes he had established. [...]

h) Statement by Major-General Nedobitko [...]

74. [...]

“From Shamanov I learnt that a large group of fighters, having escaped from Lermontov-Yurt, had entered Katyr-Yurt. Shamanov ordered me to conduct a special operation in Katyr-Yurt in order to detect and destroy the fighters.

I drew up a plan of the special operation, which defined units of isolation, units of search, rules of fire in case of enemy fire, positions of ... roadblocks... Two roadblocks were envisaged – one at the exit towards Achkhoy-Martan, another – towards Valerik. ... The involvement of aviation was foreseen should the situation deteriorate. The artillery actions were planned ... in advance in order to target the possible bandit groups' retreat routes and the lines of arrival of reserves to assist the besieged groups. The artillery were only to be involved in the event of enemy fire against the search groups.

This plan was drawn up the night before the operation. On the evening of the same day Shamanov called me to the command headquarters of the Western Zone to discuss the details of the operation. We foresaw the presence of refugees and fighters, and planned to check documents. Early in the morning on the following day I was returning to our position with two APCs. On the eastern side of the village, towards Valerik, there had been an exchange of fire. An Ural truck was on fire, three dead bodies lay on the ground and there were a few wounded. These were OMON [special police force units] from Udmurtia. We were also attacked from the village.

We descended and fired back. Then, under cover of the APCs, we moved south toward our command point. I immediately informed Shamanov about the deterioration in the situation. He authorised me to conduct the special operation in accordance with my plan.

Colonel R., commander of ... regiment, informed me that he had met with the head of administration of Katyr-Yurt, who stated that there were no fighters in the village, just a small 'stray' group who had had a skirmish with OMON forces. I did not know the number of fighters in the village, so I ordered that the search be carried out by previously determined groups of special forces from the interior troops, without artillery or aviation support. If there were few fighters, they could be destroyed by the search groups. If their number was substantial, they could be destroyed by tanks shooting directly at specific points, i.e. by pinpoint attacks. And if it was a very big bandit grouping, then it would be impossible to avoid the use of artillery and aviation, because otherwise the personnel losses would be too high.

The search groups moved out ... they were attacked... and I ordered them to retreat. One group could not withdraw... Realising that the use of artillery and aviation could not be avoided, I ordered colonel R. to organise evacuation of the civilians from the village, which he did through the head of the village administration. For that purpose colonel R. used a vehicle equipped with loudspeakers, through which he was able to inform the population of the houses on the edge of the village about the need to leave. The civilians were leaving the village through the pre-established roadblocks." [...]

i) *Testimony by servicemen in the ground forces* [...]

84. Servicemen from the special forces of the Samara interior troops gave evidence about their participation in the Katyr-Yurt operation. One of two testimonies was disclosed by the Government. Serviceman B. testified that his unit was on mission in Chechnya in January – March 2000. On some date at the beginning of February they were deployed to Katyr-Yurt. Their unit was attacked near the river. He understood that civilians had been given three days to leave the village. From their positions they could clearly distinguish fighters from civilians, based on the presence of firearms and beards. [...]

j) Testimony by servicemen from the air force, helicopters and tank battalion

87. Two pilots from the army air force were questioned in relation to the attack on Katyr-Yurt. They were identified by the Government as pilot no. 1 and pilot no. 2. Both pilots stated that their unit took part in the bombardment of Katyr-Yurt on 4 February 2000. The mission sortie was between 12 and 2 p.m. on two SU-25 planes, each carrying six FAB-250 bombs. They dropped the bombs from a height of about 600 metres. The weather conditions were quite bad, and normally in such conditions they would not fly, but on that day the ground troops were in serious need of support. The targeting was done by a ground air controller who was positioned at the operation centre near the village. He indicated the targets and later reported to them that the bombing had been successful. In response to the question of whether they had seen any civilians or civilian vehicles in the streets of the village, the pilots either responded that the visibility was so bad – because of clouds and the smoke from burning houses – that they could not see anything, or that they did not see civilians or civilian transport. [...]
90. When asked if he was aware of a plan to evacuate civilians, the air-controller responded that on the first day of his arrival Nedobitko mentioned that his initial plan had been to offer the fighters a chance to surrender or for the civilians to leave, but once the OMON forces had been attacked he had called in fighter jets.
91. Several helicopter pilots were questioned. They testified about taking part in the Katyr-Yurt operation. They employed non-guided missiles against the area targets indicated to them by forward air-controllers. They did not see any civilians or civilian vehicles in the village, only fighters who attacked them with machine-guns. [...]

k) Other documents from the military [...]

94. The military aerodrome submitted information to the effect that the horizontal fragment dispersion of a high explosion aviation bomb FAB-250 was 1,170 metres.

l) Military experts' report

95. On 26 November 2001 the investigator requested an expert opinion from the Combined Armed Services Military Academy in Moscow. Six questions were posed to the experts, who were given access to the investigation file. The questions concerned the accuracy of planning and conducting of the operation, the kind of documents and orders that should have been issued and the question of compliance of the operation in Katyr-Yurt with internal military rules. The experts were also asked to evaluate the propriety of Major- General Nedobitko's decision to deploy aviation and artillery against the fighters' positions; another question was to evaluate whether all necessary measures had been taken by the command corps of the OC of the Western Zone Alignment to minimize civilian victims in Katyr-Yurt.
96. On 11 February 2002 six of the Academy's professors, with military ranks from lieutenant-colonel to major-general, produced their report. They had had access to

military documents, such as the operational orders of the United Group Alignment, of the OC of the Western Zone Alignment, log-books etc. They also used six legal acts as a basis for their report, the titles of which were not disclosed to the Court. The report found as a fact that the decision to employ aviation and artillery was taken by Major-General Nedobitko after the forces under his command had been attacked when they tried to enter the village. Aviation and artillery fire power was involved from 8.30 a.m. on 4 February until 6 February 2000.

97. The expert report concluded that the actions of the officers of the internal troops involved in the special operation to eliminate illegal armed groups in Katyr-Yurt on 4-6 February 2000 were in conformity with the Army Field Manual and the Internal Troops Field Manual. Analysis of the operative and tactical situation, as well as a videotape reviewed, permitted the experts to conclude that the decision to involve aviation and artillery had been a correct and well founded one. This conclusion was further reinforced by reference to article 19 of the Army Field Manual, which states: "The commanding officer's resolve to defeat the enemy should be firm and should be accomplished without hesitation. Shame on the commander who, fearing responsibility, fails to act and does not involve all forces, measures and possibilities for achieving victory in a battle".
98. As to minimising civilian losses, the report concluded that certain measures were taken to that effect: the commanding officers organised and carried out an exodus of the population from the village, and chose a localised method of fire. The administration and the population of the village were informed about the need to leave the area of the operation and the necessary time was provided for this. A roadblock was established at the village's western exit, equipped with a filtration point and manned by servicemen from the Ministry of the Interior and the Federal Security Service, located away from the area of the combat operations. The report further suggested that the losses could have been further minimised if additional time had been allocated for the civilians' departure. However, that same time could have been used by the fighters to prepare more thoroughly for defence of the village, which could have entailed additional losses among federal forces. Finally, the experts reported that it was not possible to reach any definite conclusions about what had prevented the village's entire population from leaving safely, but that it was probably the fighters. [...]

2. Additional witness statements submitted by the applicant [...]

110. The applicant submitted five additional testimonies by witnesses and victims about the attack on Katyr-Yurt. Witness A. testified that by the beginning of February 2000 the village was under the firm control of the federal forces and that there were about eight to ten thousand IDPs, because people thought there would be no fighting in Katyr-Yurt. There were military roadblocks around the village and a commandatura in its centre. The aviation strike at 9 a.m. on 4 February 2000 was totally unexpected. The witness tried to leave the village between 4 and 5 p.m. on 4 February, but the car he was travelling in was shot at from a helicopter and he and his relatives were wounded. He escaped on 5

February, having lost two relatives. On the road he saw many dead people and burnt cars. The road was covered with debris from destroyed houses. The road towards Achkhoy-Martan was filled with people trying to leave, and the soldiers would not allow anyone through, even the wounded. The witness received no assistance from the State. He stated that when he went to the head of the village administration to report the deaths of his relatives he saw a list with the names of 272 civilians who had been killed. Witnesses B., C. and D. gave evidence about heavy bombing on 4 and 5 February 2000, which involved aviation, helicopters, artillery and Grad multiple missile-launchers. They also testified about General Shamanov's arrival at the roadblock, when he allegedly ordered the soldiers not to let people out of the village. They cited his orders to "filter out" all men, but these orders were not enforced by the interior troops. [...]

II. RELEVANT DOMESTIC LAW AND PRACTICE

a) *The Constitutional provisions*

116. Article 20 of the Constitution of the Russian Federation protects the right to life.
117. Article 46 of the Constitution guarantees the protection of rights and liberties in a court of law by providing that the decisions and actions of any public authority may be appealed to a court of law. Section 3 of the same Article guarantees the right to apply to international bodies for the protection of human rights once domestic legal remedies have been exhausted.
118. Articles 52 and 53 provide that the rights of victims of crime and abuse of power shall be protected by law. They are guaranteed access to the courts and compensation by the State for damage caused by the unlawful actions of a public authority.
119. Article 55 (3) provides for the restriction of rights and liberties by federal law, but only to the extent required for the protection of the fundamental principles of the constitutional system, morality, health, rights and lawful interests of other persons, the defence of the country and the security of the state.
120. Article 56 of the Constitution provides that a state of emergency may be declared in accordance with federal law. Certain rights, including the right to life and freedom from torture, may not be restricted.

b) *The Law on Defence*

121. Section 25 of the Law on Defence of 1996 [...] provides that "supervision of adherence to the law and investigations of crimes committed in the Armed Forces of the Russian Federation, other Forces, military formations and authorities shall be exercised by the General Prosecutor of the Russian Federation and subordinate prosecutors. Civil and criminal cases in the Armed Forces of the Russian Federation, other forces, military formations and authorities shall be examined by the courts in accordance with the legislation of the Russian Federation."

c) The Law on the Suppression of Terrorism

122. The 1998 Law on the Suppression of Terrorism [...] provides as follows:

"Section 3. Basic Concepts

For the purposes of the present Federal Law the following basic concepts shall be applied:

... 'suppression of terrorism' shall refer to activities aimed at the prevention, detection, suppression and minimisation of the consequences of terrorist activities;

'counter-terrorist operation' shall refer to special activities aimed at the prevention of terrorist acts, ensuring the security of individuals, neutralising terrorists and minimising the consequences of terrorist acts;

'zone of a counter-terrorist operation' shall refer to an individual land or water surface, means of transport, building, structure or premises with adjacent territory where a counter-terrorist operation is conducted; ...

Section 13. Legal regime in the zone of an anti-terrorist operation

- 1) In the zone of an anti-terrorist operation, the persons conducting the operation shall be entitled:
- 2) to check the identity documents of private persons and officials and, where they have no identity documents, to detain them for identification;
- 3) to detain persons who have committed or are committing offences or other acts in defiance of the lawful demands of persons engaged in an anti-terrorist operation, including acts of unauthorised entry or attempted entry to the zone of the anti-terrorist operation, and to convey such persons to the local bodies of the Ministry of the Interior of the Russian Federation;
- 4) to enter private residential or other premises ... and means of transport while suppressing a terrorist act or pursuing persons suspected of committing such an act, when a delay may jeopardise human life or health;
- 5) to search persons, their belongings and vehicles entering or exiting the zone of an anti-terrorist operation, including with the use of technical means; ...

Section 21. Exemption from liability for damage

In accordance with and within the limits established by the legislation, damage may be caused to the life, health and property of terrorists, as well as to other legally-protected interests, in the course of conducting an anti-terrorist operation. However, servicemen, experts and other persons engaged in the suppression of terrorism shall be exempted from liability for such damage, in accordance with the legislation of the Russian Federation." [...]

f) *Situation in the Chechen Republic*

133. No state of emergency or martial law has been declared in Chechnya. No federal law has been enacted to restrict the rights of the population of the area. No derogation under Article 15 of the Convention has been made. [...]

THE LAW [...]**A. *The alleged failure to protect life*****1. *Arguments of the parties*****a) *The applicant***

163. The applicant submitted that the way in which the military operation in Katyr-Yurt had been planned, controlled and executed constituted a violation of Article 2. She submitted that the use of force which resulted in the death of her son and nieces and the wounding of herself and her relatives was neither absolutely necessary nor strictly proportionate.
164. The applicant stated that the commanders of the Russian federal forces must have been aware of the route taken by the rebel forces out of Grozny and could have reasonably expected their arrival at Katyr-Yurt, and either prevented it or warned the civilian population. Moreover, there is evidence to suggest that they had knowingly and intentionally organised a passage for the rebels which drew them into villages, including Katyr-Yurt, where they were attacked.
165. Once the rebels were in the village, the military used indiscriminate weapons such as "Grad" multiple missile-launchers, FAB-250 and FAB-500 heavy aviation bombs with a destruction radius exceeding 1,000 metres and "Buratino" thermobaric, or vacuum, bombs. In the applicant's view, the latter are prohibited by international law on conventional weapons. These weapons cannot be regarded as discriminate, nor as appropriate for the declared aim of "identity checks". No safe passage was provided for the civilians. Civilians who left the village did so under fire and were detained at the roadblock. As to the military advantage gained by the operation, the applicant referred to the absence of any specific data to that effect in the investigation file. It was not disputed that most of the rebels, together with their commanders, had escaped the village despite the heavy bombardment. There was no exact information about the number or descriptions of the fighters killed or captured during the operation, a description or list of weapons seized etc.
166. The applicant submitted that the military experts based their conclusion about the appropriateness of the attack on legal acts which permitted or even incited the use of indiscriminate weapons, such as Article 19 of the Army Field Manual, which ordered commanding officers to make use of any available weapons in order to achieve victory.

167. The applicant also referred to the third party submissions made in the cases of *Isayeva v. Russia*, *Yusupova v. Russia* and *Bazayeva v. Russia* (nos. 57947/00, 57948/00 and 57949/00) [available on www.echr.coe.int/], in which Rights International, a USA-based NGO, summarised for the Court the relevant rules of international humanitarian law governing the use of force during attacks on mixed combatant/civilian targets during a non-international armed conflict.
168. The applicant pointed to the Government's failure to produce all the documents contained in the case-file related to the investigation of the attack. In her opinion, this should lead the Court to draw inferences as to the well-foundedness of her allegations.

b) The Government

169. The Government did not dispute the fact of the attack or the fact that the applicant's son and her three nieces had been killed and that the applicant and her other relatives had been wounded.
170. The Government argued that the attack and its consequences were legitimate under Article 2 para. 2 (a), i.e. they had resulted from the use of force absolutely necessary in the circumstances for protection of a person from unlawful violence. The use of lethal force was necessary and proportionate to suppress the active resistance of the illegal armed groups, whose actions were a real threat to the life and health of the servicemen and civilians, as well as to the general interests of society and the state. This threat could not have been eliminated by other means and the actions by the operation's command corps had been proportionate. The combat weapons were specifically directed against previously-designated targets.
171. The Government further submitted that the applicant and other civilians were properly informed about the ensuing assault and the need to leave the village, for which purpose the military used a helicopter and a mobile broadcasting station equipped with loudspeakers. Military checkpoints were placed at the two exits from Katyr-Yurt. However, the federal forces' attempts to organise a safe exit for the population were sabotaged by the actions of the fighters, who prevented the residents from leaving and provoked fire from the federal forces, using them as a "human shield". The documents of the criminal investigation file demonstrated, in the Government's opinion, that the majority of the civilian casualties had been sustained at the initial stage of the special operation, i.e. on 4 February 2000, and in the centre of the village, where the most severe fighting between the federal troops and the insurgents occurred.

2. The Court's evaluation [...]

b) Application in the present case [...]

181. Accepting that the use of force may have been justified in the present case, it goes without saying that a balance must be achieved between the aim pursued

and the means employed to achieve it. The Court will now consider whether the actions in the present case were no more than absolutely necessary for achieving the declared purpose. [...]

182. At the outset it has to be stated that the Court's ability to make an assessment of how the operation was planned and executed is hampered by the lack of information before it. The Government did not disclose most of the documents related to the military action. No plan of the operation, no copies of orders, records, log-book entries or evaluation of the results of the military operation have been submitted and, in particular, no information has been submitted to explain what was done to assess and prevent possible harm to civilians in Katyr-Yurt in the event of deployment of heavy combat weapons. [...]
184. The applicant submits that the military must have known in advance about the very real possibility of the arrival of a large group of fighters in Katyr-Yurt, and further submits that they even incited such an arrival. The Court notes a substantial amount of evidence which seems to suggest that the fighters' arrival was not so unexpected for the military that they had no time to take measures to protect the villagers from being caught up in the conflict. [...]
186. In contrast, the applicant and other villagers questioned stated that they had felt safe from fighting due to the substantial military presence in the district, roadblocks around the village and the apparent proclamation of the village as a "safety zone". An OMON detachment was stationed directly in Katyr-Yurt. The villagers' statements describe the arrival of fighters and the ensuing attack as something unexpected and not foreseen (see paras 15, 59, 110 above).
187. The Court has been given no evidence to indicate that anything was done to ensure that information about these events was conveyed to the population before 4 February 2000, either directly or through the head of administration. However, the fact that the fighters could have reasonably been expected, or even incited, to enter Katyr-Yurt clearly exposed its population to all kinds of dangers. Given the availability of the above information, the relevant authorities should have foreseen these dangers and, if they could not have prevented the fighters' entry into the village, it was at least open to them to warn the residents in advance. The head of the village administration, whose role in communicating between the military and the residents of the village appears to have been perceived as a key one, was questioned only once and no questions were put to him about the circumstances of the fighters' arrival or about the organisation of a safe exit for residents.
188. Taking into account the above elements and the reviewed documents, the Court concludes that the military operation in Katyr-Yurt was not spontaneous. The operation, aimed at either disarmament or destruction of the fighters, was planned some time in advance. [...]
190. Once the fighters' presence and significant number had become apparent to the authorities, the operation's commanders proceeded with the variant of the plan which involved a bomb and missile strike at Katyr-Yurt. Between 8 and 9

a.m. on 4 February 2000 Major-General Nedobitko called in fighter jets, without specifying what load they should carry. The planes, apparently by default, carried heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres. According to the servicemen's statements, bombs and other non-guided heavy combat weapons were used against targets both in the centre and on the edges of the village [...].

191. The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention [...]. The operation in question therefore has to be judged against a normal legal background. Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.
192. During the investigation, the commanders of the operation submitted that a safe passage had been declared for the population of Katyr-Yurt; that the population has been properly informed of the exit through the head of administration and by means of a mobile broadcasting station and a helicopter equipped with loudspeakers; and that two roadblocks were opened in order to facilitate departure.
193. The documents reviewed by the Court confirm that a measure of information about a safe passage had [...] been conveyed to the villagers. Several servicemen gave evidence about the steps taken, although these submissions are not entirely consistent. One resident confirmed having seen a helicopter equipped with loudspeakers in the morning of 4 February 2000, although she could not make out the words because of the fighting around [...]. The applicant and numerous other witnesses stated that they had learnt, mostly from their neighbours, that the military would permit civilians to exit through a humanitarian corridor. Although no document submitted by the military and reviewed by the Court indicated the timing of this pronouncement, the villagers indicated the timing at about 3 p.m. on 4 February 2000. It thus appears that the declaration of the corridor became known to the residents only after several hours of bombardment by the military using heavy and indiscriminate weapons, which had already put the residents' lives at great risk. [...]
195. Once the information about the corridor had spread, the villagers started to leave, taking advantage of a lull in the bombardments. The presence of civilians and civilian cars on the road leading to Achkhoy-Martan in the afternoon of 4 February 2000 must have been fairly substantial. One of the witnesses submitted that many cars were lined up in Ordzhonikidze Street when they were leaving.

The applicant stated that their neighbours were leaving with them at the same time [...]. Colonel R. stated that on the first day of bombing the villagers left Katyr-Yurt *en masse* by the road to Achkhoy- Martan [...]. The soldiers manning the roadblock leading to Achkhoy-Martan must have seen people escaping from the fighting. This must have been known to the commanders of the operation and should have led them to ensure the safety of the passage. [...]

199. The applicant submitted that the existing domestic legal framework in itself failed to ensure proper protection of civilian lives. She made reference to the only disclosed legal act on which the conclusions of the military experts based their report, namely, the Army Field Manual. The Court agrees with the applicant that the Government's failure to invoke the provisions of any domestic legislation governing the use of force by the army or security forces in situations such as the present one, whilst not in itself sufficient to decide on a violation of the State's positive obligation to protect the right to life, is, in the circumstances of the present case, also directly relevant to the Court's considerations with regard to the proportionality of the response to the attack [...].
200. To sum up, accepting that the operation in Katyr-Yurt on 4-7 February 2000 was pursuing a legitimate aim, the Court does not accept that it was planned and executed with the requisite care for the lives of the civilian population. [...]

DISCUSSION

1. a. Does the Court apply IHL? Could it do so under the European Convention of Human Rights (ECHR)?
b. If the Court had applied IHL, would it have made the same balancing test as it did in paras 181-199 of the judgment?
2. How would you qualify the fighting between the Chechen fighters and the Russian federal forces in February 2000? Does the Court classify the conflict? When the Court writes in para. 191 that the weapons were used "outside wartime", does this mean that there was no armed conflict in Chechnya?
3. Is Article 19 of the Army Field Manual referred to in paras 97 and 166 (and considered by the Court in para. 199 to be an insufficient legal framework) contrary to IHL? Sufficient under IHL?

[N.B.: From here on, when rules applicable to international armed conflicts are referred to, please discuss whether and why they may also apply in a non- international armed conflict.]

4. If the village had been declared a "safe zone", as claimed by the appellant, should it have been granted special protection under IHL? Did the arrival of the Chechen fighters change this? (See by analogy, GC IV , Arts 14 and 15; P I, Art. 60; See also **Case No. 43**, ICRC, Customary International Humanitarian Law [See Rules 35 and 36])
5. a. Was the plan described in para. 13 compatible with IHL? If the Russian federal forces had "knowingly and intentionally organised a passage for the rebels which drew them into villages", is this a violation of IHL?
b. Under IHL, should government armed forces have informed the local population earlier about the possible arrival of rebel fighters (as the Court decided in para. 187, under the ECHR)? (See

by analogy, P I, Art. 57; *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rule 20])

6. a. Did the rebel fighters violate IHL by entering the village? By intermingling with the civilian population? By using civilians as shields? By hindering civilians from leaving the village? (*See* by analogy, GC IV, Arts 28, 35 and 48; P I, Arts 51(7) and 58; *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rules 22-24])
- b. Under IHL, should the population have prevented the fighters from entering the village? Had they the right, as civilians, to prevent fighters from entering the village?
7. Were the methods used to inform the population of the “safe passage” (by notifying the head of the village administration and using a helicopter equipped with loudspeakers) sufficient? Was it lawful to attack the village indiscriminately (para. 26: “the federal forces called on the air force and the artillery to strike at the village”) after such “free passage” was granted? Even if some civilians actually had not left? Even if some civilians had not left of their own free will? Is General Nedobitko correct in holding that “if it was a very big bandit grouping, then it would be impossible to avoid the use of artillery and aviation, because otherwise the personnel losses would be too high” (para. 74)? (*See* by analogy, P I, Arts 51(4), (5), (7) and (8); *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rules 15-21])
8. a. If there was an evacuation of the civilians through the “safe passage” as claimed by Major-General Nedobitko (para. 74), would the attack on the civilian vehicles trying to leave in this way be a violation of IHL? What about attacks on civilians trying to leave differently? What if there was no “safe passage”? (*See* GC I-IV, Art. 3; P II, Arts 4(1) and 13; by analogy, P I, Art. 51(2) *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rule 1])
- b. If General Shamanov did order that no one should pass the roadblocks during the attack, was it a violation of IHL?
9. Under IHL, would the government forces have had to establish and keep the records mentioned in para. 182? Would such records be useful to implement the proportionality rule and the obligation of an attacker to take precautionary measures? (*See* by analogy, P I, Art. 57; *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rules 15-18])
10. What do you think of the choice of weapons? What are the relevant rules of IHL? Do they appear to have been respected? Under IHL, should General Nedobitko have specified what munitions the air force should have used? (P II, Art. 13; by analogy, P I, Arts 35, 51(4) and 57; *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rules 15, 17, 70 and 71])
11. What do you think of the Russian investigation of the attack, and the conclusions drawn? Did Russia have an obligation to investigate the allegations and punish those responsible for crimes? Assuming that it did, did this investigation fulfil that obligation? (*See* by analogy, GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; P I, Art. 85(1); *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rules 156 and 158])
12. Is the exemption from liability of servicemen conducting anti-terrorist operations compatible with IHL? (*See* by analogy, HR, Art. 3; P I, Art. 91; *See also* **Case No. 43**, ICRC, Customary International Humanitarian Law [*See* Rule 150])

Case No. 283, ECHR, Khatsiyeva v. Russia

[Source: European Court of Human Rights, *Case of Khatsiyeva and others v. Russia*, Application no. 5108/02, Judgement, 17 January 2008, available at www.echr.coe.int. Footnotes omitted]

CASE OF KHATSIYEVA AND OTHERS v. RUSSIA

(Application no. 5108/02)

[...]

JUDGMENT

STRASBOURG

17 January 2008

FINAL

07/07/2008

In the case of Khatsiyeva and Others v. Russia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber [...]

Having deliberated in private on 11 December 2007,

Delivers the following judgment, which was adopted on the last mentioned date:

PROCEDURE

1. The case originated in an application (no. 5108/02) against the Russian Federation, lodged with the Court under [...] the [European] Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by seven Russian nationals, [...] on 25 September 2001.

[...]

3. The applicants complained, in particular, of the death of their relatives in an attack by State agents [...].

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. [...] The applicants live in the village of Arshty in the Sunzhenskiy District of the Republic of Ingushetia. This district borders on the Chechen Republic. [...]

A. The facts

[...]

1. *Attack of 6 August 2000*

11. The facts surrounding the death of the applicants' two relatives are disputed by the parties.

(a) The applicants' version

12. The applicants did not witness the events described below and the following account is based on eyewitness statements submitted by them.
13. In August 2000 the residents of Arshty were cutting grass. The work was done collectively by all villagers in small groups of five to six people.
14. On 6 August 2000 about a hundred people divided into small groups were working in the surrounding hills. One of the groups was formed by Khalid Khatsiyev, Kazbek Akiyev, their cousin Ilyas Akiyev, and three men who had come to Arshty as internally displaced persons from Chechnya – Baymurza Aldiyev, Aslambek Imagamayev, and Aslambek Dishniyev.
15. Aslambek Imagamayev stated that while working they had seen several helicopters bombing a forest area near the village of Bamut in Chechnya, about ten kilometres away from them.
16. Around 1.00 or 1.30 p.m. the group in which the applicants' relatives were working had decided to go home for lunch, when two military helicopters appeared from the direction of Bamut and started circling low above the field. Aslambek Imagamayev identified them as MI-24s. One of the helicopters fired a burst from an aircraft machine-gun at a spot situated 40-50 metres from the men. They were scared and, throwing down their scythes, ran to a white Niva car and drove down the hill in the direction of Arshty. Baymurza Aldiyev and Aslambek Imagamayev claimed that the helicopters had flown away but then reappeared and the men saw them right above the car, hovering at low altitude. They stopped the vehicle and ran for cover in different directions.
17. The helicopters launched non-guided missiles and strafed the Niva car with aircraft machine-guns with the result that its back tyres were flattened. They then chased the men. One of the helicopters fired a missile at the place where Khalid Khatsiyev and Kazbek Akiyev were hiding. They were both killed and Ilias Akiyev, who was nearby, was wounded by shrapnel in his leg.
18. Aslambek Imagamayev stated that he had run through the forest to tell the villagers what had happened. He stated that he had heard the helicopters shooting for some time. Baymurza Aldiyev testified that he had run towards the river and had hidden there in a bush. He estimated that the attack on the Niva car had continued for about an hour and a half. After the helicopters had left, he returned to the vehicle and found the bodies of Khalid Khatsiyev and Kazbek Akiyev about fifty metres away from the car.

[...]

(b) The Government's version

21. According to the Government, since the beginning of the counter-terrorist operation within the territory of the Chechen Republic, the civil and military authorities had taken all necessary steps to secure the safety of civilians residing in the North Caucasus. The residents of the Republic of Ingushetia had been notified, through the television and press, of the risk of being at the administrative border with Chechnya as well as of the actions they should perform when in the area of a counter-terrorist operation so as to indicate that they did not belong to illegal armed groups. In particular, once they had established "visual contact" with representatives of the federal forces, residents were supposed to stop moving, mark themselves with a piece of white cloth and wait for the arrival of a group of servicemen for an identity check.
22. On 6 August 2000 the authorities carried out a special operation aimed at searching for the base camp, eight kilometres to the south of the village of Arshty, of a group of around 250 illegal fighters, who were to be detained. The operation was planned and commanded by senior officers of the Western Group of the United Group Alignment [...]. The Government refused to indicate the names of those officers or provide details of the operation, stating that disclosure of the information might be harmful to the State's national security interests. According to them, "in the materials of the preliminary investigation file there was no information" as to whether the residents of Arshty had been warned in advance about the operation in question, or whether the military personnel involved had been instructed to avoid civilian casualties.
23. During the operation, a federal transport MI-8 helicopter was hit by fire from members of illegal armed groups in the vicinity of the village of Arshty and crashed to the ground. Orders were given to evacuate the crew and servicemen on board the helicopter from the site of the crash. The Government alleged, with reference to the findings of the Chief Military Prosecutor's Office, that servicemen who had arrived to evacuate those injured also came under fire from illegal fighters. The airspace above the area of the rescue operation was patrolled in shifts by a pair of military MI-24 helicopters.
24. At about 1 p.m., while patrolling over the area situated four kilometres to the west of Arshty and four kilometres from the site of the crash of the MI-8 helicopter, the pilots of the MI-24 helicopters saw a Niva car and a group of at least five men with light machine-guns. In the Government's submission, the pilots observed the men through a target control system of tenfold magnification, from a distance of two kilometres and at an altitude of 100-150 metres.
25. According to the Government, the pilots reported this to the command centre and having received the respective order fired warning shots at a spot situated fifty metres away from the car and the people. The men immediately got into the car and started driving away, instead of staying where they were and waiting for the arrival of ground troops for an identity check. The pilots again reported to their superiors, received the respective order and fired warning shots for the

second time, but the car continued moving. In order to prevent the Niva car with unidentified armed men inside from driving further without authorisation in the close vicinity of the zone of the rescue operation, the pilots, pursuant to their superiors' order, fired at the car with the result that Khalid Khatsiyev and Kazbek Akiyev were killed and Ilias Akiyev was wounded.

26. The Government also submitted that "there was no information in the materials of the preliminary investigation file" as to whether the attacked men had used the firearms against the pilots, and that "according to its technical description, a light machine-gun [was] ineffective for hitting a target at a distance of over one kilometre".

2. *Official investigation*

27. According to the Government, after the rescue operation in respect of the crashed MI-8 helicopter had been completed, the servicemen had inspected the area near the crash site and found a Niva car as well as hand grenades, spent cartridges from light machine-guns and a bloodstained ammunition belt near the car.

28. In the evening of 6 August 2000 several officials from the prosecutor's office of the Sunzhenskiy District ([...] "the Sunzhenskiy Prosecutor's Office") and the prosecutor's office of the Republic of Ingushetia ([...] "the Republican Prosecutor's Office") arrived at the scene of the incident. They also brought a forensic expert from the city of Nalchik, in the Republic of Kabardino-Balkaria. The officials questioned the witnesses to the attack, inspected the scene of the incident and collected pieces of shrapnel and damaged scythes. No firearms or ammunition were found at the scene of the incident. The officials also examined the bodies and noted the wounds caused by shrapnel and by large-calibre guns.

[...]

THE LAW

[...]

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

115. The applicants complained of the killing of their relatives and of the domestic authorities' failure to carry out an effective investigation in this connection. They relied on Article 2 of the Convention, which provides as follows:

- "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;

- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Alleged failure to protect the right to life

[...]

2. The Court's assessment

129. [...] The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which may result in the deprivation of life must be no more than "absolutely necessary" for the achievement of one of the purposes set out in Article 2 § 2 (a), (b) and (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of State agents who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination [...].
130. In the present case, it is common ground between the parties that Khalid Khatsiyev and Kazbek Akiyev were killed by State agents as a result of the intentional use of lethal force against them. The State's responsibility is therefore engaged.
131. The Court must next ascertain whether the force used against the applicants' relatives by the federal servicemen could be said to have been absolutely necessary and therefore strictly proportionate to the achievement of one of the aims set out in paragraph 2 of Article 2.
132. The Court observes that it is in dispute between the parties whether the six men who came under attack, including the applicants' two relatives, had been armed with firearms at the moment of the attack. The applicants insisted that it had been obvious that the six men had been unarmed civilians cutting grass, whilst the Government advanced controversial arguments on the issue. On the one hand, the Government seemed ready to admit that the applicants' relatives had been unarmed local residents, but insisted that they had been attacked because of their own negligence, since they had failed to mark themselves as civilians. On the other hand, the Government also stated that the six men, who had been detected by the military pilots in the field close to the site where a federal helicopter had been hit, had been armed with light machine-guns and therefore could have belonged to a group of illegal fighters.

133. In the absence of any evidence [...], the Court retains certain doubts as to whether the group of six men, including Khalid Khatsiyev and Kazbek Akiyev, were armed when they were attacked, given in particular that no firearms had ever been found on the scene of the incident [...]. No evidence has been produced that the victims fired at the helicopter or otherwise endangered the lives of the pilots. In any event, it does not consider it necessary to establish the facts in this respect for the following reasons.
134. The Court is aware of the difficult situation at the material time in the neighbouring region, the Chechen Republic, which called for exceptional measures on the part of the State to suppress the illegal armed insurgency [...]. With this in mind, and assuming that the federal pilots honestly believed that the applicants' two relatives and the other four men had machine-guns, when they spotted them, the Court nevertheless does not consider that this fact, by itself, can justify the use of lethal force against them and that a number of circumstances surrounding the incident should be taken into account.
135. The Court notes first of all that a substantial body of evidence in its possession consistently suggests that the pilots did not take the decision to destroy the vehicle with the people of their own motion, but acted pursuant to their superiors' order which was binding on them [...]. The Court must therefore ascertain whether when taking that decision the commanding officers exercised the necessary degree of caution and appropriate care to be expected from law-enforcement personnel in a democratic society [...] for the purposes of Article 2 of the Convention, and in particular, whether the instructions they gave to the pilots, rendering inevitable the use of lethal force, adequately took into consideration the right to life of the applicants' two relatives.
136. The materials in the Court's possession reveal that the pilots reported to the command centre that they could see a group of at least five men with light machine-guns standing near a Niva vehicle. The command centre replied that the identity of those men would be established and then 15 minutes later ordered that the car and people be destroyed, this order having been confirmed upon the pilots' request. It does not appear from the submitted documents, and was not alleged by the Government, that the pilots provided the command centre with any details regarding the men other than those mentioned above. Moreover, it does not appear, and was not alleged by the Government, that the officers from the command centre sought any further details to enable them adequately to assess the situation and take an appropriate decision. In particular, the pilots were not asked to provide any information as to visibility in the area, the distance between the site of the crash of the federal helicopter and the allegedly armed group, whether the area was populated, whether the pilots had or could have come under an armed attack, whether the men found by the pilots had tried to escape and whether the situation required any urgent measures to be taken by the pilots, or any other details. It is furthermore highly doubtful that the authorities in command established the identity of the applicants' two relatives and the other men before giving the order to destroy them, given the very tight

period that elapsed between the pilots' first report and the order. Indeed, there is nothing in the submitted materials to suggest that they did or even attempted to do so.

137. The Court considers that all these circumstances suggest a lack of appropriate care by the authorities in assessing the situation reported by the pilots and giving them an order to attack the six men, including Khalid Khatsiyev and Kazbek Akiyev, who were killed as a result.
138. Having regard to the above, the Court is not persuaded that the killing of Khalid Khatsiyev and Kazbek Akiyev, even assuming that they were armed, constituted a use of force which was no more than absolutely necessary in pursuit of the aims provided for in Article 2 § 2 (a) and (b) of the Convention.
139. Moreover, assuming that the group of six men, including the applicants' relatives, were unarmed when attacked by the State agents, as alleged by the applicants, the Court notes at the outset the Government's argument that the applicants' relatives were deprived of their lives because of their own negligence, and notably as a result of their failure to comply with instructions concerning personal safety in an area where State agents were conducting a counter-terrorist operation. Leaving open the question whether a State could be justified under Article 2 § 2 of the Convention in using lethal force against civilians for mere failure to comply with official safety instructions in an area of an armed conflict, the Court cannot in any event perceive any justification for the use of lethal force in the circumstances of the present case, given that the authorities had never warned the residents of Arshty about the operation of 6 August 2000 [...] and that it is highly doubtful that the residents of the Republic of Ingushetia, and in particular the inhabitants of Arshty, were ever apprised of the conduct required when confronted with federal servicemen [...].
140. There has accordingly been a violation of Article 2 of the Convention in this connection.

DISCUSSION

1. a. (*Paras 21 and 134*) Does the Court qualify the situation? Was an armed conflict in progress at the time of the events described above? [See **Case No. 280**, Russian Federation, Chechnya, Operation Samashki] Assuming that there is an armed conflict in the neighbouring Chechen region, are the said events related to the conflict? Is IHL applicable to the situation? If yes, which provisions apply? If the case was to be decided under IHL, would it matter whether the conflict is or is not of an international character?
- b. Does the Court directly apply IHL? Could it have done so? Should it have done so? Would the conclusion have been different? Does the Court refer to principles of IHL?
2. (*Paras 132-138*)
 - a. Does the Court qualify the status of the applicants' relatives?
 - b. Under IHL, considering the lack of precise information on their identity, was it lawful for the government forces to shoot at them?

- c. Does the Court consider it as important whether the victims were armed, or were members of an armed group, or had fired at the helicopter? Would that matter under IHL?
 - d. Under the IHL of international armed conflicts, if the relatives had been combatants, would it have been lawful to target them without any further precautions? Independently of whether the relatives were armed and whether they actually attacked government forces at the moment when the relatives were targeted?
 - e. Under the IHL of non-international armed conflicts, if the victims had been armed, as the government argues, could they have been directly targeted without any further precautions? If they were members of an armed group? If they had a fighting function within an armed group? Only if the victims actually attacked government forces at the moment when they were targeted? (P II, Art. 13(3); CIHL, Rules 1 and 6) [See **Document No. 51**, Interpretive Guidance on the Notion of Direct Participation in Hostilities]
 - f. Is your answer to questions 2c. and 2d. the same under HRL as under IHL? If not, which law prevails? Why?
3. a. (*Paras 21 and 139*) May a party to a conflict request civilians to mark themselves as such? May it request civilians to perform certain actions so as to be distinguished from armed groups? If a person does not comply with the instructions given, may the forces of that party consider him or her as a legitimate target? What are the dangers of such methods of differentiation? (P I, Art. 57(2)(c); P II, Art. 13; CIHL, Rule 20)
 - b. (*Paras 21 and 139*) Does the fact that the civilian population has been given orders as to actions to perform when encountering federal forces relieve the latter of the obligation to verify that their target is a legitimate one? May the persons who do not follow those orders and therefore fail to prove that they are civilians be automatically considered as members of armed groups who may be directly shot at? (P II, Art. 13; P I, Arts 51 and 57; CIHL, Rules 1, 15-16, 19)
4. (*Para. 129*) Is the requirement, under HRL, that force shall be “strictly proportionate to the achievement of the permitted aims” similar to the proportionality principle set out in Article 51(5)(b) of P I? Under IHL, must expected casualties among combatants and other fighters be considered when assessing the proportionality of an attack? Are they taken into account, under HRL, when assessing whether the use of force was strictly proportionate to the achievement of the permitted aims? (P I, Art. 51(5)(b); CIHL, Rule 14)
5. a. (*Paras 135-138*) Why does the Court conclude that the principle that “the use of force shall not be more than is absolutely necessary” had been violated by Russia? Under IHL, does an attack become unlawful when all the necessary precautionary measures have not been taken? (P I, Art. 57; CIHL, Rules 15-21)
 - b. Under IHL, does an attack become unlawful because the attacker did not verify whether the target was a legitimate one?
6. If the Court had also applied IHL, what would have been different in its decision? Would it then have been necessary to establish whether the victims were armed? Whether they were members of an armed group?

Case No. 284, The Netherlands, Public Prosecutor v. Folkerts

[Source: Lauterpacht, E (ed.), *International Law Reports*, Cambridge, Grotius Publication Limited, vol. 74, 1987, pp. 695-698; footnotes omitted.]

PUBLIC PROSECUTOR v. FOLKERTS

**The Netherlands, District Court of Utrecht
December 20, 1977**

SUMMARY

The facts: On September 22, 1977 the accused, a West German national, was approached by the police at the premises of a car-hire firm in Utrecht. Shots were exchanged, and two policemen were wounded, one of whom died from his injuries shortly afterwards. The accused was charged with murder, attempted murder and the unlawful possession of weapons.

Held: The accused was found guilty on all charges and was sentenced to a term of imprisonment of twenty years. [...]

The following is the text of the relevant part of the judgment of the Court:

... The accused's counsel has claimed that the Court has no jurisdiction to hear the case. He based his view on the following proposition: the accused is a member of the Rote Armee Faction ("Red Army Faction"). The Faction is engaged in a class war, not only with its homeland, the German Federal Republic, but with any State in the world in which such a class war is going on.

Therefore, he contends that members of the Red Army Faction enjoy the protection of the four Geneva Conventions of August 12, 1949, having regard to the Additional Protocol to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

Such a claim must fail on the ground that Protocol I, as appears from the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, was not opened for signature by the States participating in the Conference, which included the Netherlands, until December 12, 1977 and, as appears from Article 95, was to enter into force "six months after two instruments of ratification or accession have been deposited", whilst "for each party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such party of its instrument of ratification or accession". Thus it is clear that this Protocol had not, and actually could not, have entered into force on September 22, 1977, nor is it valid as yet.

The District court additionally made the following observations:

The Protocol additional to the Geneva Conventions of August 12, 1949 will be applicable to the situations referred to in Article 2. This Article is common to the four Conventions and provides, in paragraph (1):

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The above Protocol provides for the following extension (Article 1, paragraph 4):

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Thus the Protocol brings members of liberation movements under the protection of the Geneva Conventions to the extent that such movements act in the exercise of their right of self-determination and are fighting against "colonial domination and alien occupation and against racist regimes".

The Red Army Faction, according to its objectives as set out by Folkerts' counsel, in no way fulfils these conditions. Nor has it in any way been proved or even been made to appear likely that, at the time of his arrest in Utrecht on September 22, 1977, the accused was involved in a struggle against the Netherlands State within the meaning of the above Protocol.

Folkerts' counsel also argued that his client should be discharged from prosecution because the offences with which he is charged are not criminal offences within the meaning of the law of war. This argument must fail on the same grounds.

On the basis of these established facts, the accused is liable to punishment. [...]

The accused and his counsel went in great detail into the political background which they said had led to his acts which, if they could not be regarded as formal acts of war, in any case should be regarded... (at least that is how the Court understands the plea) as acts of resistance, which make Folkerts' conduct understandable and possibly even justifiable.

The Court dismisses this plea categorically, irrespective of the question of whether or not the Red Army Faction's objections to the policies of the USA and the FRG contain a core of truth.

It is totally unacceptable in democratic countries such as those just mentioned, and also in the Netherlands, for individuals who disagree with their country's policy, for that reason to resort to acts of violence such as those which took place here. Such acts attack the most fundamental principles of the constitutional State.

The Court is not concerned with any offences which the accused may possibly have committed abroad. His acts in the present case, however, cannot and may not ever be justified or extenuated on the basis of membership of the Red Army Faction, as contended by his counsel...

[Report: 9 Netherlands Yearbook of International Law (1978), p. 348 (English translation).]

DISCUSSION

1. When did the Conventions and Protocols enter into force? When are they applicable to a given case? Could they apply to events that took place even before they entered into force? (GC I-IV, Arts 58/57/138/153 respectively; P I, Art. 95)
2. Do you agree with the Court that this situation does not constitute an international armed conflict to which Protocol I applies? (P I, Art. 1(4))
3.
 - a. What are the twofold requirements for the applicability of Art. 1(4) of Protocol I?
 - b. What does the right of self-determination mean? Who is entitled to exercise the right of self-determination? (UN Charter, Art. 1(2); Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), October 24, 1970 [available at <http://www.un.org/>]):
 - a) all peoples have the right freely to determine their political status;
 - b) every State has the duty to respect this right and to promote its realization;
 - c) every State has the duty to refrain from any forcible action which deprives peoples of this right;
 - d) in their actions against, and resistance to, such forcible action, peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter;
 - e) under the Charter, the territory of a colony or other non-self-governing territory has a status separate and distinct from that of the State administering it.)
 - c. Is the Red Army Faction a group entitled to exercise the right of self-determination? If not, is it possible for the twofold requirements of Art. 1(4) of Protocol I to apply here? Or is the list set out in Art. 1(4) perhaps not exhaustive?
 - d. Supposing that the accused represented the German people or the working class in its right of self-determination, would Protocol I have been applicable?
 - e. Supposing the accused was genuinely fighting for a group's self-determination, could one consequently argue that there was an armed conflict such that Protocol I would apply?
4. If the accused had been a combatant in an international armed conflict, would the Netherlands have had jurisdiction over this case? Would Protocol I have barred the Netherlands from punishing him for those acts? (GC III, Arts 82 and 85; P I, Arts 43 and 44)

Case No. 285, UN, The Situation Concerning Western Sahara

[Source: UN Doc. S/25170 (January 26, 1993)]

**THE SITUATION CONCERNING WESTERN SAHARA
Report by the Secretary-General**

[...]

III. THE SITUATION IN MISSION AREA

[...]

24. On October 16, 1992, municipal elections were held in Morocco and in the Territory of Western Sahara. [...]
25. Subsequently, in various communications addressed to me, my Special Representative and the Force Commander of MINURSO, the Frente POLISARIO reported grave incidents allegedly involving violence and arrests throughout the Territory. While confirming the occurrence of public demonstrations in the Territory related to the electoral campaign, Morocco denied these allegations. It is pertinent to recall that while MINURSO's current military mandate is strictly limited to the monitoring and verification of the cease-fire, MINURSO, as a United Nations mission, could not be a silent witness to conduct that might infringe the human rights of the civilian population. Hence MINURSO patrols were alerted to possible unrest. Their reports did not corroborate the allegations made by the Frente POLISARIO. [...]

DISCUSSION

1. What is MINURSO's mandate? Why could MINURSO, as a UN mission, not "be a silent witness to conduct that might infringe the human rights of the civilian population" (*para. 25*)? Because the UN has an obligation to ensure respect for those rights? Or because the member States constituting MINURSO have that obligation?
2. Is MINURSO only concerned with human rights violations and not IHL, although similar acts constitute IHL violations as well? Could the term "human rights" mentioned in the Report by the Secretary-General and other UN documents be understood as "human rights in armed conflict" and thus as referring to IHL? If so, does such a statement indicate that the UN, which is not party to the Conventions, is under an obligation to enforce IHL? And is also bound by IHL? Would such an obligation be directly binding on the UN itself, or via the member States constituting MINURSO because they are party to the Conventions?
3. Does *para. 25* of this Report describe an obligation that is always binding on UN forces? Is it an unwritten obligation in every UN mandate? Did it occur, for example, in the conflict in the former Yugoslavia? [See **Case No. 203**, Case Study, Armed Conflicts in the former Yugoslavia, particularly paras 14 and 20] Does *para. 25* clearly state the extent of the obligations and mandatory actions of UN forces? Does such a statement not require further clarification? Is it possible for UN forces,

considering their resources and their expanding role throughout the world, to be one of the most effective tools for implementing IHL? Why or why not?

Case No. 286, The Conflict in Western Sahara**A. Human Rights Watch Report, October 1995**

[Source: Human Rights Watch Report, *Keeping it Secret. The United Nations Operation in the Western Sahara*, October 1995 Vol. 7 No. 7, available on <http://www.hrw.org/reports/1995/Wsahara.htm>. To facilitate reading, the chapter "History of the Conflict" has been moved to the beginning of the document.]

Keeping it secret**The United Nations operation in the Western Sahara [...]****HISTORY OF THE CONFLICT**

The Western Sahara, or former Spanish Sahara, is an expanse of desert measuring over 260,000 square kilometers, bordered by Morocco, Algeria and Mauritania. The territory, which traditionally had a tribal, nomadic population, was under Spanish occupation from 1904 until 1975. Following the second world war, the rise of nationalist sentiment had a destabilizing effect on the European colonial powers. The United Nations eventually responded to the growing demands for self-determination by adopting a resolution on decolonization in 1960. [footnote 19: United Nations General Assembly, "Declaration on the Granting of Independence to Colonial Countries and Peoples," (New York: United Nations, 1960), A/15/1514 [available on <http://www.ohchr.org>.] [...] However, Spain did not take any action towards organization of a referendum and, on May 10, 1973, the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro, known as the Polisario Front, was formed to fight for Sahrawi independence from Spain. After two years of guerrilla warfare, Spain agreed to undertake a U.N.-sponsored referendum, scheduled to be held in the territory in 1975. In preparation for the process, Spain conducted a census in 1974 of the population present in the territory.

In the meantime, Morocco had put forth its own claims to sovereignty over the Western Sahara. [...] On December 13, 1974, the United Nations General Assembly asked the International Court of Justice (ICJ) to provide an advisory opinion on whether the Western Sahara was, at the time of colonization by Spain, a *terra nullius* (no man's land) and, if not, what the legal ties were between this territory and the Kingdom of Morocco and Mauritania. The court's opinion, issued on October 16, 1975, found that there was no evidence "of any tie of territorial sovereignty" between the Western Sahara and either Morocco or Mauritania, but that there were "indications of a legal tie of allegiance between the [Moroccan] sultan and some, although only some, of the tribes in the territory." In addition, the court found "the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity ... and the territory of the Western Sahara." However, the court concluded that it "has not found legal ties of such a nature as might affect the application of [General Assembly] resolution 1514 (XV) in the decolonization of the Western Sahara and, in particular, of the principle of self-determination...."

Despite the ICJ's support for the principle of self-determination, King Hassan II of Morocco chose to interpret the opinion as an affirmation of Morocco's claims to the territory. Thus, King Hassan launched what has come to be known as the "Green March," during which an estimated 350,000 Moroccan citizens marched across the border into the Western Sahara; at the same time, the government began to build up its troops on the territory. The United Nations Security Council and General Assembly passed resolutions denouncing the Green March and calling for the withdrawal of all the participants in the march. [footnote 23: United Nations Security Council, "Situation Concerning Western Sahara," (New York: United Nations, 1975), S/RES/380 [available on <http://www.un.org>]. and United Nations General Assembly, "Question of Spanish Sahara," (New York: United Nations, 1995), A/30/3458. [available on <http://www.arso.org/06-4-0.htm>]] However, on October 31, 1975, additional Moroccan forces entered the Western Sahara and armed conflict broke out between the Polisario Front and the Moroccan Royal Armed Forces. [...]

On November 14, 1975, Spain, Morocco and Mauritania concluded the secret "Madrid Accords," pursuant to which Spain agreed to cede administrative control of the territory to Morocco and Mauritania upon the official expiration of its mandate over the Western Sahara on February 27, 1976. The day after the Spanish withdrawal, Polisario proclaimed an independent Western Saharan state: the Sahrawi Arab Democratic Republic (SADR), with Polisario as its political wing. [...]

The military conflict between Polisario, Morocco and Mauritania continued until July 10, 1978, when the Mauritanian government was overthrown in a military coup. Polisario immediately declared a cease-fire and on August 5, 1979, signed a peace treaty with Mauritania, ending the latter's involvement in the conflict. Soon thereafter, however, Morocco occupied most of the Western Saharan territory relinquished by Mauritania, and the armed struggle between Morocco and Polisario continued. From 1980 until 1987, Morocco constructed a series of long defensive sand walls (the "berm"), which were heavily mined and fortified with barbed wire, observation posts and sophisticated early warning systems. At the same time, these walls served to enclose all of the major population centers of the Western Sahara and the territory's rich phosphate deposits.

Beginning in 1979, the Organization of African Unity (OAU) sought a resolution of the Western Sahara conflict and called for a cease-fire and a referendum to provide the right of self-determination. However, when the Sahrawi Arab Democratic Republic was admitted to the OAU in 1984, Morocco withdrew from the organization. [footnote 26: To date, no country has recognized Moroccan sovereignty over the Western Sahara. The SADR, for its part, has diplomatic relations with seventy-six countries, primarily from Africa, Latin America and Asia. Human Rights Watch interview with Boukhari Ahmed, Polisario representative to the United Nations, September 19, 1995.] [...] In September 1988, following the adoption of a series of resolutions related to the conflict, the U.N. proposed a settlement plan (the "Settlement Plan") for the region, which provided for a cease-fire, the organization and conducting of a referendum, the repatriation of refugees and the exchange of prisoners of war. Both parties eventually accepted the Settlement Plan and a cease-fire formally took effect in September 1991, with Morocco controlling the vast majority of the territory and Polisario controlling a sliver along the eastern and southern borders. [...]

SUMMARY

[...] Human Rights Watch has determined that Morocco, which is the stronger of the two parties both militarily and diplomatically, has regularly engaged in conduct that has obstructed and compromised the fairness of the referendum process. In addition, a lack of U.N. control over the process has seriously jeopardized its fairness. The U.N. has already been present in the Western Sahara for four years without being able to exercise the “sole and exclusive responsibility” over the referendum that it was to have assumed under the Settlement Plan. The Settlement Plan contemplated a “transitional period,” which was supposed to start immediately after the cease-fire took effect in September 1991. The transitional period included, among other provisions, a timetable for the reduction of Moroccan troops in the territory, the exchange of prisoners of war by the parties and repatriation of refugees. [...] [footnote 3: United Nations Security Council, “The Situation Concerning Western Sahara: Report of the Secretary-General,” (New York: United Nations Publications, 1990), S/21360, [available on <http://www.arso.org/06-6-0.htm>] paras 47 and 71.] [...]

Opportunities for independent outsiders to observe and analyze the identification process are strictly limited. [...] MINURSO [United Nations Mission for the organization of a referendum in Western Sahara] staff members, including military observers, are subjected to constant surveillance by Morocco. This, and internal pressure from MINURSO, made them reluctant, even frightened, to speak to our organization, except on the explicit condition of anonymity. [...] Moroccan authorities’ harassment of Human Rights Watch, as well as their strict surveillance of its activities, impeded the organization’s ability to conduct a thorough investigation of human rights abuses in the Moroccan-controlled Western Sahara. [...]

CREATING FACTS ON THE GROUND

Both Morocco and Polisario have formally agreed to accept the results of the referendum. Nevertheless, pending the referendum, Morocco seems to be entrenching itself more firmly in the Western Sahara with each passing day, taking steps that have dramatically altered the demography and other aspects of the territory. [...]

Morocco, which was estimated to have [deployed] over 120,000 troops in its Saharan military campaign, [accrued] military expenditures amounting to about \$250 million a year for the period 1976 to 1986 alone.

The Moroccan government, which is in administrative control of most of the Western Sahara, has also carried out a variety of infrastructure projects, ranging from construction of roads, ports and administration buildings to the supplying of water, and provided social services, including housing, schools and hospitals.

Civilian expenditures in the four provinces of the Western Sahara totalled about US\$2.5 billion between 1976 and 1989, or about \$180 million a year.... Most of the total was allocated to Laayoune province, where nearly two-thirds of the population lives. The primary objective of these expenditures was to win the hearts and minds of the resident Sahrawi population. Over the longer term, the Moroccan government hopes to recoup its investment from profits from Saharan fisheries and phosphates.

MINURSO personnel also point to lucrative financial incentives provided to Moroccans who move to the Western Sahara, including tax-free salaries and subsidized food. These incentives succeeded in increasing the population of the Western Sahara from the 74,000 figure of the 1974 Spanish census to 162,000 in 1981, according to a Moroccan census. [...]

The most visible examples of Moroccan attempts to populate the region with its supporters are the "tent cities" that were created near the major Western Saharan cities in September and October of 1991. These encampments house 40,000 people who were transported to the Western Sahara in order to vote in the referendum. According to Moroccan authorities, these individuals are of Sahrawi origin, but had left the territory for a variety of reasons. [...]

Shortly after the population transfer in 1991, Johannes Manz, the secretary-general's special representative for the Western Sahara resigned his post, informing the secretary-general that:

Concerning the non-military violations, the movement of unidentified persons into the Territory, the so-called 'Second Green March,' constitutes, in my view, a breach of the spirit, if not the letter of the peace plan. [...]

In fact, the population transfer clearly violated the letter of the Settlement Plan, specifically paragraphs 72 and 73, which only permit Western Saharans resident outside of the territory to return to the Western Sahara after their eligibility to vote has been established by the Identification Commission. [footnote 120: U.N. Doc. S/21360 [available on <http://www.arso.org/06-6-0.htm>], paras 72 and 73.] [...]

It is commonly alleged that the tent people are not Sahrawi at all but were brought in, and are being kept in the region, by force, in order to increase Moroccan votes in the referendum. Human Rights Watch was unable to investigate this issue, since our representative was detained by Moroccan security forces when she attempted to enter a tent city in Laayoune. Indeed, the area is strictly off limits to foreigners, except during visits conducted in the presence of government authorities. Jarat Chopra, who visited the region as part of an American bi-partisan delegation visiting the region in July 1993, remarked:

The rows of white tents bear black symbols of the Moroccan royal family. This is not a spontaneous movement of people but appears an orchestrated effort... [...]

Following a trip to the region in 1992, Chopra testified before the U.S. Senate Foreign Relations Committee that, "If any [of the inhabitants of the tent cities] have come to vote and keep the Sahara Moroccan there is no evidence that they will stay. These are temporary camps, not settlements, where civilians can do nothing but wait. One year later, many are trying to leave but are threatened with arrest if they do."

OTHER HUMAN RIGHTS ISSUES RELATED TO THE WESTERN SAHARA CONFLICT

Freedom of Expression and Assembly in the Moroccan-Controlled Western Sahara [...]

Hundreds of cases of individuals who reportedly “disappeared” up to two decades ago also remain unresolved. In June 1991, the Moroccan government released over two hundred individuals, most of whom “disappeared” because they or their family members had challenged the government’s claims to the Western Sahara. [footnote 130:

However, a July 8, 1994 general amnesty, pursuant to which 424 Moroccan political prisoners were released, explicitly excluded those who had advocated independence for the Western Sahara.] The victims were usually held

in secret detention centers and subjected to torture, some for almost two decades. [...]

[footnote 131: Amnesty International, “Breaking the Wall of Silence: The Disappeared in Morocco.”]

Based on testimony from family members and from the former “disappeared,” AFAPREDESA [Association of Families of Prisoners and Disappeared Sahrawis] reports that at least 526 Sahrawis are still “disappeared” and may be detained in Morocco or in the Moroccan-controlled Western Sahara.

The Refugee Camps in Tindouf

The armed conflict in the Western Sahara caused the displacement of tens of thousands of Sahrawis to the eastern border of the territory. In January 1976, the Moroccan bombardment of camps that had been set up outside the Western Saharan cities caused thousands of casualties and forced tens of thousands of Sahrawi to flee once again, this time taking refuge in southwestern Algeria. Twenty years later, [the camps] are home to 165,000 refugees [...].

Prisoners-of-War Camps

Over 2,400 prisoners of war (POWs), both Moroccan and Sahrawi, captured in the course of the armed conflict, have been held in difficult conditions for up to twenty years. Morocco states that it holds only seventy-two POWs [...]. [footnote 146: Human Rights

Watch takes no position on whether the armed conflict between Morocco and the Polisario Front was of an internal or an international character, as defined in the Geneva Conventions of August 12, 1949. However, we refer to the combatants captured during the armed conflict as “prisoners of war,” in order to be consistent with the terminology used in the United Nations Settlement Plan for the Western Sahara, as well as by the secretary-general and the Security Council.] Polisario refutes this figure, asserting that Morocco actually holds 200 -300 prisoners.

The International Committee of the Red Cross (ICRC) registered eighteen Polisario prisoners held by Morocco in April 1978 but, following that visit, Morocco denied access to the ICRC until May 1993. Since that date, the ICRC has made four additional visits to Sahrawi prisoners in the southern Moroccan city of Agadir; to date, it has registered a total of seventy-two prisoners. Polisario permitted the ICRC access to Moroccan prisoners it was holding during the first two years of the conflict. Then, from 1976 until 1984, Polisario suspended ICRC visits, presumably in protest of continued denial of access to the ICRC by Morocco. Since 1984, the ICRC has attempted to make regular visits to the Moroccan prisoners held by the Polisario. [...]

Some [Moroccan prisoners] complained about their physical treatment at the hands of prison guards, while others emphasized that this had improved since 1986 or 1987. [...] Indeed, conditions in the camps appear to have fluctuated over the past twenty years, in accordance with the political tide, and the most marked improvement seems to have occurred since 1987.

Everyone complained about medical problems, particularly the lack of medication. [...]

It is compulsory for prisoners to work outside of the camps, in Polisario-administered locations, doing work ranging from construction to mechanics to tailoring. They are not paid for their labor, in violation of international standards. [footnote 151: Article 62 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War requires that "prisoners of war be paid a fair working rate." [...] It should also be noted that, due to its lack of monetary resources, Polisario does not pay Sahrawi refugees either [...]] The climatic conditions in which the prisoners work, as well as their long working hours, also fall short of international standards. [...] [footnote 153: See, e.g., Articles 51 and 53 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War which, even if were not binding, would serve as a guideline for detention conditions.] Since 1993, [...], prisoners have been able to send and receive messages, mail and even packages on a regular basis, principally through the ICRC. [...]

Released Prisoners of War

Perhaps most tragic, however, is the plight of 184 elderly, ill and disabled Moroccan POWs who were released by Polisario for humanitarian reasons on May 8, 1989, prior to the signing of the Settlement Plan. In an astonishing move, Morocco has refused to take these prisoners back because it believes that this act would constitute a recognition of Polisario and be exploited by Polisario for public relations purposes. Instead, Morocco has insisted that it will not take back any prisoners until all POWs are released. This violates the right to enter one's country, guaranteed in Article 12 of the International Covenant on Civil and Political Rights, ratified by Morocco on August 3, 1979. [...]

[T]he ICRC has been involved in this issue from the outset and has made countless demarches to the Moroccan government, but to no avail. [...]

B. The Issue of the "Disappeared"

[Source: Amnesty International, Day of the "Disappeared" – families still await truth and justice; AI INDEX: MDE 29/003/2002, 30 August 2002 Press release 148/02; available on <http://www.amnesty.org/>]

Morocco/Western Sahara: Day of the "Disappeared" – families still await truth and justice

**AI INDEX: MDE 29/003/2002
30 August 2002**

As the world observes the Day of the "Disappeared" 2002 today, Amnesty International is calling on the Moroccan authorities to finally end the suffering of hundreds of

Moroccans and Sahrawis still awaiting news of relatives who “disappeared” at the hands of the Moroccan security services in previous decades.

“If my relative is dead, I want to receive the body or remains for burial and begin the grieving process that would allow me to come to terms with the loss. If my loved one is alive, I want the chance to see him for what little time he may have left.” Amnesty International has heard the same message from dozens of families of the “disappeared” in Morocco/Western Sahara, from Morocco’s economic capital, Casablanca, to the desert town of Smara in Western Sahara.

“It is cruel and inhuman that a woman whose husband was arrested in front of her during the 1960s or 1970s should still be trying to obtain an answer from the authorities on whether he continues to be held in secret detention or was tortured to death,” the organization said, adding *“It is high time those answers were given.”*

Amnesty International has publicly welcomed the series of positive initiatives undertaken by the Moroccan authorities in recent years to improve the human rights situation, including the establishment by King Mohamed VI in July 2000 of an arbitration commission to decide on compensation for material and psychological damage suffered by victims of “disappearance” and their families. Compensation has so far been awarded in several hundred cases. *“However, there can be no substitute for truth and justice,”* Amnesty International said.

On this day, Amnesty International adds its voice to those families of “disappeared” and calls on the Moroccan authorities to conduct prompt, thorough, independent and impartial investigations into each individual case of “disappearance” and to bring those responsible to justice.

Background

The issue of “disappearances” has marked the history of Morocco/Western Sahara in the past four decades and remains one of the most painful unresolved human rights problems. More than a thousand people, the majority of them Sahrawis, “disappeared” between the mid-1960s and the early 1990s at the hands of Moroccan security services.

Several hundred Sahrawis and Moroccans were released in the 1980s and 1990s after spending up to 18 years completely cut off from the world in secret detention centres. Dozens more “disappeared” are reported to have died in secret detention. However, the fate of hundreds of others remains unknown. [...]

C. The Issue of Prisoners of War

[Source: ICRC Press Release, 03/10, 26 February 2003; available on <http://www.icrc.org>.]

Morocco/Western Sahara: 100 Moroccan prisoners repatriated

Geneva (ICRC) – On 26 February, the International Committee of the Red Cross (ICRC) repatriated 100 Moroccan prisoners released by the Polisario Front. Accompanied

by an ICRC team, the prisoners left Tindouf, Algeria, aboard an aircraft chartered by the organization and were handed over to the Moroccan authorities at the Inezgane military base, near Agadir. Before the operation, ICRC delegates had interviewed the prisoners individually to make sure that they were being repatriated of their own free will. All the prisoners were allowed to take their personal effects with them.

The ICRC welcomes the release of the prisoners, most of whom are elderly and sick. The organization nevertheless remains concerned about the plight of the 1,160 Moroccans still being held captive and reiterates its call for their release, in conformity with the provisions of international humanitarian law. The matter is all the more pressing given the age and poor health of the remaining prisoners, some of whom have been deprived of their freedom for more than 20 years. On 7 July 2002, 101 Moroccan prisoners were released under ICRC auspices.

ICRC delegates visit prisoners held by the Polisario Front twice a year. Their most recent visit took place in December 2002. The delegates provide the prisoners with medical aid in particular and enable them to exchange news with their families by means of Red Cross messages.

[N.B.: In August 2005, the Polisario had released all the Moroccan prisoners in its custody. See ICRC Press Release 05/44, 18 August 2005, online: <http://www.icrc.org>.]

DISCUSSION

1. a. How do you categorize the conflict between Morocco and the Polisario Front? Is it a non-international or an international armed conflict? Because the Polisario Front, which is fighting for the independence of the Saharawi Arab Democratic Republic (SADR), is supported by Algeria? Because the SADR is internationally recognized as a State by some 50 countries and is a member State of the African Union? Or because the Polisario Front is a national liberation movement fighting for the right of self-determination of the Saharawi people? Does the fact that Western Sahara is considered by the UN to be a “non-self-governing territory” affect the conflict’s classification? Does the fact that Morocco is not party to Protocol I affect the conflict’s classification? (GC I-IV, Art. 2; P I, Art. 1(4))
- b. As a ceasefire has been in effect since 1991, can the situation still be categorized as an armed conflict? If not, is IHL applicable? When does the applicability of IHL begin and end? What provisions of IHL remain applicable? All provisions protecting those detained in connection with the conflict? All provisions protecting the population of an occupied territory? (GC I-IV, Art. 2(2); GC III, Art. 5(1); GC IV, Art. 6; P I, Arts 1(4) and 3)
2. Is Western Sahara an occupied territory? (HR, Art. 42) Is Western Sahara “under *de facto* control of enemy forces”? Which provisions of Convention IV cease to be applicable “one year after the general close of military operations” and which provisions are applicable throughout the period of occupation? (GC IV, Art. 6(3)) Does Protocol I have a broader scope inasmuch as it ceases to be applicable “on the termination of the occupation”? (P I, Art. 3(b)) From what moment is it determined that there is no longer an “occupation” – from “the liberation of the territory or [...] its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination”? (Commentary, P I, Art. 3(b), <http://www.icrc.org/ihl>) What if the referendum on self-determination, which the UN has been attempting to organize for 15 years, never

takes place? What would the consequences be, in terms of IHL, of the various possible outcomes of this conflict?

3. a. Which of the applicable provisions of IHL are in your opinion being violated by the parties to the conflict? Those concerning occupied territory? Those concerning protected persons? Protected civilians? Prisoners of war? (GC I-IV, Art. 3; GC III, Arts 109, 110 and 118; GC IV, Arts 31, 32, 33(1), 33(3), 49(6), 52(2), 53, 71(1), 76 and 143; P I, Arts 32, 33 and 75) Are these violations war crimes? (GC III, Art. 130; GC IV, Art. 147; P I, Art. 85)
- b. Does Morocco's transfer of part of its own civilian population into Saharawi territory constitute a violation of IHL? (GC IV, Art. 49(6)) A war crime? Do torture and arbitrary arrest and sentencing constitute violations of IHL? War crimes? Only if committed against Saharawis, or equally if committed against any civilian? Do the practice of enforced disappearance and the failure to provide information on missing persons constitute violations of IHL? War crimes? (GC IV, Art. 147; P I, Art. 85; See also ICC Statute, Art. 7(2)(i) for a definition of "enforced disappearance"; See **Case No. 23**, The International Criminal Court) Did the Polisario's failure to release the Moroccan prisoners of war it was holding constitute a violation of IHL? A war crime? Did exacting compulsory labour from them constitute a violation of IHL? A war crime? (GC III, Arts 62 and 130; P I, Art. 85(4)(b))

Case No. 287, United States, United States v. Marilyn Buck

[Source: United States District Court for the Southern District of New York, 690 F.Supp. 1291 (1988); footnotes omitted.]

UNITED STATES OF AMERICA, v. MARILYN BUCK, Defendant

UNITED STATES OF AMERICA v. MUTULU SHAKUR, Defendant

Nos. SSS 82 Cr. 312-CSH; 84 Cr. 220-CSH

July 6, 1988

[...]

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge

Defendant Mutuku Shakur moves to dismiss indictment SSS 82 Cr. 312 (CSH). He contends that the acts charges in the indictment are political acts which are not properly the subject of criminal prosecution. He further contends that under applicable treaties and international law he is a prisoner of war, and thus immune from prosecution for the acts charged in the indictment. Defendant Marilyn Buck joins the motion “as it applies to the conspiracy [charges in indictment 84 Cr.220 (CSG) and as it applies to, in particular, the breakout of Joanne Chesimard, also known as Assata Shakur.” Trial Tr. At 10,178, March 22, 1988.

I.

When he was arraigned on the indictment in 1985, Shakur appealed orally to the “Geneva Conventions” and a “prisoner of war” status.

Thereafter, and on several occasions, Shakur’s counsel stated an intention to move to dismiss the indictment under international law. [...]

II.

Defendants motions rest on their perception of the political situation faced by Americans of African ancestry and of the role of the Republic of New Afrika (“RNA”) in responding to that situation. In brief, defendants view the RNA as a sovereign nation engaged in a war of liberation against the colonial forces of the United States government. The Fifth Circuit summarized that premise in a case involving a member of the Provisional Government of the Republic of New Afrika:

The RNA claims that it is an independent foreign nation composed of “citizens” descended from Africans who were at one time slaves in this country. It contends that the African slaves in America were converted into a free community by, successively, the Confiscation Acts of 1861 and 1862, the Emancipation Proclamation of January 1863, and the Thirteenth Amendment to the Constitution of the United States. It further insists that the citizenship

of the slaves, upon being freed, reverted to that of their ancestors at the time they were brought to America. That means to the RNA that they resumed African citizenship and owed no allegiance to this country. The RNA contends that it, and not the United States, is sovereign over Mississippi, Louisiana, Alabama, Georgia, and South Carolina, because those are lands “upon which the Africans had lived in the majority traditionally and which they had worked and developed. It says that it has asserted sovereignty over those lands ever since the “blacks occupying it took up arms against the authority of the United States and thus asserted their New African nation’s claim to the land, and, briefly, to independence” when President Andrew Johnson issued proclamations in 1865-1866 giving that land back to its former owners. The RNA says that its sovereignty over the lands in the five named states has never ceased, add that the United States has merely operated there without right or authority. It claims that its efforts to regain that land have intensified since the “formal revival and organization” of the New African Government by proclamation on March 31, 1968.

United States v. James, 528 F.2d 999, 1005 (5th Cir.1976), *rehearing denied* 532 F.2d 1054, *cert. denied* 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976).

In support of their view of the sovereign status of the RNA, defendants have submitted an affidavit of counsel detailing some of the history of African peoples in North America, with particular emphasis on incidents of resistance to slavery and incidents of former slaves establishing self-governing communities throughout the southeastern United States. Defendants conclude from this history that people of African descent are and have been engaged in a struggle to assert their right to self determination. They see local, state and federal law enforcement agencies as their opponents in the struggle. [...]

IV.

Defendants also contend they are entitled, under international law including treaties of the United States, to treatment as prisoners of war.

Defendants argument begins with the assertion that the New Afrikan Nation, which as noted under Point II they define as all people of African ancestry living in the United States, shares with all other peoples of the world the right to self- determination. They contend that:

As is the case with every colonial experience, the New Afrikan Nation as a colony has no independent economic structure. The vast majority of the population of New Afrika, however, has at all points in history been contained within the same imperialist economic structure, and has shared the misfortune of suffering discriminatory treatment within it. Indeed it is appropriate to say in the case of New Afrika, as in the case of most colonies, that New Afrikans as a National population are an underclass frozen at the bottom of the American economy.

Memorandum in Support at 22. Defendants argue that as a colonized people engaged in a struggle for self-determination, New Afrikans are entitled to judicial recognition of the war-like nature of their struggle. They assert:

The New Afrikan Liberation Struggle is acknowledged and respected in many parts of the world, especially in nations that were former colonies of European powers, but the American government has never afforded this Movement the international rights and protections it so justly deserves.

We believe that the struggle waged by New Afrikan/Black people against racial oppression in American [*sic*] incorporates all the elements of warfare, that the petitioner [Shakur] has demonstrated his resistance to that oppression in the war, and that he should be accorded prisoner of war status while held in the custody of the United States Government.

Reply memorandum at 5

In short, on this branch of their motion defendants do not seek to extend by analogy to the case at bar principles derived from a separate body of law. On the contrary, they appeal directly to principles of international law. [...]

- [3] The sources of international law enforceable in the federal courts are treaties ratified by the United States; executive or legislative acts declaring the principle sought to be enforced; the decision of an appellate court binding upon the trial court; and, in the absence of any of these, a more amorphous but nonetheless well-recognized body of authority. The “law of nations”, the Supreme Court said in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820), “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” [...]

[...] The defendants at bar, claiming a prisoner-of-war status exempting them from prosecution under these indictments, rely primarily upon two sources of international law. The first is the Geneva Convention Relative to the Protection of Prisoners of War of August 12, 1949 (6 U.S.T. 3316, T.I.A.S. No. 3364), which the United States has ratified. Second, defendants rely upon principles articulated in the first of two Protocols to the Geneva Conventions of 1949 which, in 1977, the Swiss government opened for signatures. [...]

Protocol I deals with international armed conflicts. Consistent with their view that “the Provisional Government of the Republic of New Africa in legal, political, and international affairs” represents New Afrikans struggling for independence, brief in support at 6, defendants lay particular emphasis upon Protocol I. Protocol II deals with internal armed conflicts, generally referred to as civil wars. The President of the United States, recommended ratification of Protocol II to the Senate, but recommended against ratification of Protocol I.

I consider the Geneva Convention and Protocol I separately.

- [4] As to the Convention, defendants observe that Article 2 provides that the Convention “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, *even if the*

state of war is not recognized by one of them". (emphasis added). From that disclaimer, defendants pass on to Article 4, which defines "prisoners of war" in part as follows:

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

The United States responds with the argument that Article 4 of the Convention cannot apply to these defendants since the case at bar does not involve armed conflict "between two or more of the High Contracting Parties," as defined in Article 2. In other words, although the Convention applies even if a state of war is not recognized by one of such Parties, nonetheless the conflict must be between two or more High Contracting Parties. However the Provisional Government of the Republic of New Afrika may be characterized, the United States continues, it is not a High Contracting Party to the Geneva Conventions. Accordingly, the government concludes, the only applicable provisions of the Convention are found in Article 3, applicable to internal armed conflicts "not of an international character", whose provisions do not include references to prisoners of war.

In my view, the United States is correct in arguing for the non-applicability of Article 4 of the Convention to the Republic of New Afrika, or to these defendants. But even if that were not so, it is entirely clear that these defendants would not fall within Article 4, upon which they initially relied. Article 4 (A) (2) requires that to qualify as prisoners of war, members of "organized resistance movements" must fulfill the conditions of command by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. The defendants at bar and their associates cannot pretend to have fulfilled those conditions. For comparable reasons, Article 4 (3)'s reference to members of "regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power", also relied upon by defendants, does not apply to the circumstances of this case.

I come then to Protocol I of 1977.

- [5] The Conference which resulted in the Protocols was convened largely to address concerns of new nations that the laws of war did not reflect the reality of modern warfare, particularly in the context of wars of national liberation. It was approached “with caution and concern” by the United States delegation.

[We] had seen in other contexts the risk that conferences of one hundred or more countries would be dominated by a majority of developing countries, a majority of which all too often seems to be led by radical states bearing grudges against the wealthy countries in general and against the United States in particular. These concerns were, in fact, justified as shown by the political debates during the first two sessions.... Consistent with these concerns, we approached the Conference as more of a hazard than an opportunity. (Report of the United States Delegation to the Conference, Fourth Session, at 28-29, quoted in the governments’ memorandum in Response at 4-5.)

Defendants rely on Protocol I’s treatment of Combatant and Prisoner-of-War Status as support for the present claim. See Articles 43-47, Protocol I. The United States Ambassador to the Conference, George H. Aldrich, has termed Protocol I’s approach to the problem of prisoner of war status as comprehensive and novel. Aldrich, *Guerilla Combatants and Prisoner of War Status*, 31 Am.Univ.L.Rev. 871, 874 (1982).

The novel and comprehensive approach undertaken by Protocol I is rooted in its definition of the armed forces of a Party to a conflict, which are expansively defined as “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.” (Article 43, quoted in Aldrich, *supra*, at 874 n. 2.)

Under this approach, the key issue for determining whether a person is a member of armed forces entitled to prisoner-of-war status is a factual issue, i.e. the existence of a command link from a Party to the conflict to the alleged prisoner of war, rather than a political issue, i.e. recognition by the adverse Party. Article 45 places the burden of proof on this issue squarely on the detaining power, which provides:

A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war... if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf. (Quoted in Aldrich, *supra*, at 875.)

Defendants argue that Protocol I, and its expanded entitlement to prisoner of war status, form a part of that international law which the federal courts are bound to apply. [...]

That passage is particularly applicable to the case at bar because “(o)ne of the main reasons for convening the diplomatic Conference was the view of many Third World countries that the strict international standards on what constitutes an international armed conflict should be broadened to include so-called wars of national liberation. This view was not shared by the United States and its major allies.” Government brief in opposition at 9. That basic division among the nations is precisely the sort of ideological division which prompted the Supreme Court in *Sabbatino* to reverse the lower courts for undertaking to apply “international law” to the rights and obligations of the parties.

Although the United States delegation originally endorsed Protocol I, the matter was studied further, and in the event President Reagan recommended against its ratification. In the President’s view, Protocol I “politicizes humanitarian law and purports to eliminate the traditional distinction between international and non-international conflicts in a harmful manner”; grants combatant status to irregular forces in certain circumstances even [sic] if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war”; and is “not acceptable as a new norm of international law.” Government brief in opposition at 10. As noted, the Senate has not ratified Protocol I.

The United States argues at bar that the President’s decision not to recommend ratification of Protocol I constitutes a “controlling executive act.” Brief in Opposition at 14. From that premise, the United States argues that under *The Pacquette Habana, supra*, this court cannot look to international law, since *The Pacquette Habana* “stands for the proposition that customary international law applies only where there is no treaty or controlling executive, legislative or judicial action and where it becomes necessary to resort to customary law to determine the applicable law.” *Id.* at 13.

I am not prepared to carry that submission to its logical conclusion. One can conceive of the executive branch of government taking a “controlling act” which flies in the face of the law of all civilized nations. I am reluctant to conclude that an independent judiciary would be powerless to enforce an otherwise universally accepted rule of international law, lest it be compared with the compliant Nazi judges in Hitler Germany. But the question arises only in the presence of “a settled rule of international law” by “the general assent of civilized nations”; the *Pacquette Habana, supra*, 175 U.S. at 694, 20 S.Ct. at 297; and that degree of uniformity is difficult to demonstrate, as Judge Kaufman made clear in *Filartiga* [...]. After an exhaustive review of conventions, treaties, and legal writings, the Court of Appeals concluded in *Filartiga* that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.” 630 F.2d at 878. [...]

However, one source indicates that as of October, 1980 the Protocol was formally accepted by only 15 nations. See *Aldrich, New Life for the Laws of War*, 75 Am. J. Int’l.L. 764 (1981) (Botswana, Cyprus, El Salvador, Ecuador, Ghana, Jordan, Libya, Niger, Sweden, Tunisia, Yugoslavia, Mauritania, Gabon, the Bahamas and Finland.)

This apparent slight acceptance of the text of Protocol I is itself evidence that its terms lack the general assent of international law. In addition, defendants refer me to no instance where Protocol I's definition of prisoner-of-war status was actually enforced, and I have found no such instance in my own research. The only reported case in this country rejects the claim. *United States v. Morales*, 464 F. supp. 325 (E.D.N.Y. 1979). This lack of utilization indicates that the prisoner of war definition in Protocol I has not achieved that level of "custom and usage" necessary to elevate its principles to the status of international law.

- [6] It follows that the present defendants are not asking an independent judiciary to make universally accepted international law a part of domestic law, notwithstanding the opposition of an intransigent and tyrannical executive. Rather, on an issue which has divided and continues to divide the nations of the world, defendants ask this Court to ignore the President's decision to recommend rejection of Protocol I, and to act as if the Senate had ratified the Protocol, whereas in fact it has not. The judiciary lacks authority thus to intervene in issues committed by the Constitution to coordinate political departments.[...]

[...]

For the foregoing reasons, the defendants' effort to avoid the charges contained in these indictments lacks foundation in international or domestic law. Their motions are accordingly denied in their entirety.

It is SO ORDERED.

DISCUSSION

1. Does the decision of the Court imply that if the United States had been a party to Protocol I, the defendants would have had POW status? Under Protocol I, what conditions other than fighting for the self-determination of a people must a person meet to be granted POW status? Is the existence of a command link to a party to the conflict really the key issue under Protocol I? (P I, Arts 1(4), 43 and 44)
2. In spite of the US refusal to ratify Protocol I, could the Federal Court acknowledge the applicability of some its provisions? Under what conditions?
3. Upon what provisions could the defendant have construed his case in order to gain POW status? Would his case be sustainable in the national court of your country?
4. Is the defendant's argument that the movement to which he belongs, New Afrikan Nations, shares the right of self-determination sustainable? What provisions does he invoke by making this type of statement? What criteria does a movement of national liberation have to meet in order to qualify as such?
5. Do you accept the defendant's argument that New Afrikan Nations is waging war against the United States and that he should therefore be recognized as a combatant?
6. The defendant argued that the provisions relating to prisoners of war in Protocol I form part of the corpus of international law the federal courts are bound to apply. What does this mean? Does he imply that these provisions are customary international law and hence applicable regardless of whether the United States has ratified the Protocol?

7. Do you agree with the judge's reasoning that there is no uniform custom in relation to the provisions of POW status in Protocol I?
8. Bearing in mind that the judge handed down the decision in 1988, would you say that since then the provisions regarding POW status in Protocol I have become emerging or even established customary law? Today, could the defendant therefore have POW status?
9. If the defendant had POW status, would he therefore necessarily be immune from prosecution? For acts of violence? For conspiracy? For conspiracy in a prisoner's escape?

Case No. 288, United States, The September 11 2001 Attacks

[N.B.: On 11 September 2001, members of the al Qaeda terrorist network orchestrated the most devastating terrorist attack in the history of the United States when they hijacked US domestic flights and plunged four commercial airliners into the World Trade Center in New York City, the Pentagon near Washington D.C., and an open field in rural Pennsylvania. Approximately 3,000 civilians were killed that day and the US and world economy was severely damaged.]

A. The Day the Free World entered a New War

[Source: JACOT Martine, "Le jour où le monde libre est entré dans une nouvelle guerre," in *Le Monde*, 12 September 2001. Original in French, unofficial translation.]

The day the Free World entered a new war

"What emerges from foreign editorials is that the political face of the world has changed since the attacks perpetrated against New York's nerve centre on Tuesday, 11 September. The date is regarded as marking a new era, an era in which international terrorism has become a weapon of global warfare capable of striking anywhere. Fear too seems to have spread across the planet live on TV and the internet. The entire free world is now at war, many claim. Editorial writers are divided into several camps, however. The most bellicose among them feel that if responsibility for these attacks is claimed abroad they constitute acts of war which must be responded to with force; the more numerous 'pacifists' voices argue that they should be dealt with through the criminal justice system and not by means of the indiscriminate and unjust violence of retaliation. Which voice will be heeded?" [...]

IN THE EUROPEAN PRESS**Süddeutsche Zeitung: "America at war"**

"America has been at war since the morning of Tuesday, 11 September. This series of attacks poses a threat to United States sovereignty not seen since Pearl Harbor [...] Not even in their blackest scenarios have terrorism experts and security specialists ever imagined such treachery or destructive power. Nor did they conceive of such precision, such determination, or such desire to kill. [...] Nowhere in the annals of terrorism can one find an event combining such brutality and such symbolism in one diabolical stroke. New York's World Trade Center was America's flagship, emblematic of its economic and cultural power – a national symbol. The Pentagon in Washington is the nerve centre of military power and the concrete symbol of an invincible nation [...] certain that it could never be attacked from the outside." [...]

Frankfurter Allgemeine Zeitung: "Right in the heart"

"[...] It is not yet known who is behind these attacks. However, one thing is certain: terrorism has become a weapon of war in the twenty-first century." [...]

The Times (London): “The day that changed the modern world”

“The United States, its allies and the civilised world are at war today against an enemy which, while undeclared, is as well organised and as ruthless as any that a modern state has confronted. [...] The American dream itself was the target of yesterday’s co-ordinated and deadly terrorist attacks on the most potent symbols of Western political, commercial and military power. But it was more than that; it was an attack on civilised liberal society, designed to force all countries that could conceivably be targets to become, in self-defence, high security states. Very few events, however dramatic, change the political landscape. This will.” [...]

B. United States: ICRC condemns Attacks

[Source: ICRC, Press Release, 01/30, 11 September 2001, available on <http://www.icrc.org>]

Geneva (ICRC) – The International Committee of the Red Cross (ICRC) is appalled by the devastating attacks that have been perpetrated in the United States today. It expresses its heartfelt sympathy to the victims and their families at this tragic time.

The ICRC condemns in the strongest terms these acts, which have targeted people in the course of their daily lives, spreading terror and inflicting grief among the population. Such attacks negate the most basic principles of humanity.

DISCUSSION

1. a. Were the terrorist acts carried out on 11 September 2001 on the territory of the United States acts of war? Was the United States involved in an armed conflict against those who carried out these acts? Were they acts that triggered an armed conflict? From this viewpoint, is IHL applicable to these acts? Are these acts not covered by other branches of international law? Which ones? Or by domestic criminal law? Can a terrorist act constitute an armed conflict only when it causes a very large number of civilian victims, as was the case for the acts committed on 11 September (over 3,000 deaths)? Did the act of terrorism carried out against the World Trade Center in New York on 26 February 1993, which resulted in six deaths and injuries to approximately 1,000 persons, constitute an armed conflict?
- b. Can the questions in point 1.a. be answered without knowing who the perpetrators of the acts were? What would your answers be if the perpetrators were *de facto* or *de jure* agents of a State? Of a terrorist group? Of a terrorist group supported by a State? Of a terrorist group finding itself under the effective control of a State? Under the overall control of a State? Of a terrorist group supported by a government not recognized internationally? Does the fact that these acts were launched on US soil influence your answer? Does it matter whether the authorities harbouring this terrorist group were or were not aware that it was going to carry out such acts?
- c. Is IHL applicable to any conflict between the United States and a terrorist group, if the latter is not acting on behalf of a State? What is the definition of armed conflict? Of international armed conflict? Of non-international armed conflict? Are the acts of terrorism of 11 September covered by the law of non-international armed conflicts? And the fight of the United States against the terrorist groups?

2.
 - a. Is terrorism a matter for IHL? If these acts are considered to have been committed “in time of war”, were they violations of IHL? War crimes? What does IHL have to say about terrorism? (GC IV, Art. 33(1); P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2))
 - b. If these acts are considered to have been committed “in time of peace”, were they crimes against humanity? What are the elements of a crime against humanity? (ICC Statute, Art. 7; *See Case No. 23*, The International Criminal Court)
3.
 - a. To what extent can the United States react to these terrorist acts? Did these acts entail the applicability of Art. 51 of the UN Charter on self-defence? What happens when the perpetrators are not the agents of a State? If the State harbouring the perpetrators of these acts has been identified, can the United States pursue the perpetrators by intervening militarily in that State, on grounds of the right of self-defence? Even if the State did not have overall control over the perpetrators? What happens if the members of the organization that planned and implemented these acts are scattered throughout a large number of States all over the planet?
 - b. How would you characterize the conflict if the United States used armed force to destroy terrorist bases or camps or to kill members of a terrorist organization on the territory of a State that gave its consent to such a military intervention? If the State in question did not give its consent?
 - c. Can it be held that since 11 September 2001 the United States has been involved in a “fight against terrorism” constituting a single armed conflict within the meaning of IHL? Or rather has it been involved in a series of armed conflicts taking place wherever US forces intervene militarily? What are the consequences in terms of applicability of IHL to the various actions taken in connection with the “fight against terrorism”? Is it not rather the case that, when there are no armed hostilities, the “fight against terrorism” is a vast international police operation to which domestic and international criminal law – not IHL – are applicable?
 - d. Do all the persons arrested and detained in connection with the “fight against terrorism” belong to one of the categories of detainees provided for under IHL? Could they be prisoners of war? Protected civilians? Only if they were arrested in the context of an international armed conflict? (GC III, Art. 4; GC IV, Arts 2 and 4)
4. Could the act of terrorism committed against the Pentagon, near Washington, D.C., be lawful within the meaning of IHL, inasmuch as the building could be considered a military objective? Would this act be unlawful under IHL inasmuch as it was committed by means of a civilian airliner? Inasmuch as the attackers were disguised as civilians? Inasmuch as a large number of civilians were victims of the attack? Would it be an act of perfidy under IHL? (P I, Art. 37(1)(c))

Case No. 289, United States, Public Curiosity

[Source: United States Court of Appeals for the Second Circuit, *American Civil Liberties Union v. Department of Defense*, No. 06-3140-cv, September 22, 2008, available at <http://www.ca2.uscourts.gov/decisions>. Footnotes omitted]

[...]

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

[...]

(Decided: September 22, 2008)

[...]

AMERICAN CIVIL LIBERTIES UNION, [*et al.*] [...]
Plaintiffs-Appellees,
against
DEPARTMENT OF DEFENSE, [*et al.*] [...]
Defendants-Appellants,

[...]

The United States Department of Defense and Department of the Army appeal from orders of the United States District Court for the Southern District of New York directing them to release 21 photographs depicting abusive treatment of detainees by United States soldiers in Iraq and Afghanistan. Appellants claim that the photographs are exempt from disclosure under the Freedom of Information Act.

Affirmed

[...]

JOHN GLEESON, *United States District Judge*:

The United States Department of Defense and Department of the Army (referred to here as “the defendants”) appeal from orders of the United States District Court for the Southern District of New York [...] directing them to release 21 photographs pursuant to the Freedom of Information Act (“FOIA” or “the Act”), [...] (2006). The photographs depict abusive treatment of detainees by United States soldiers in Iraq and Afghanistan.

On appeal, the defendants contend that the exemption in § 552(b)(7)(F) for law enforcement records that could reasonably be expected to endanger “any individual” applies here because the release of the disputed photographs will endanger United States troops, other Coalition forces, and civilians in Iraq and Afghanistan. They further claim that, notwithstanding the redactions ordered by the district court of 20 of the 21 photographs, disclosure will result in unwarranted invasions of the personal privacy of the detainees they depict, justifying nondisclosure under § 552(b)(6) and (7)(C).

We hold that FOIA exemption 7(F) does not apply to this case. We further hold that the redactions ordered by the district court render the privacy exemptions unavailable to the defendants. Accordingly, we affirm.

BACKGROUND

On October 7, 2003, the plaintiffs filed joint requests with the defendants and various other agencies pursuant to FOIA [...], seeking records related to the treatment and death of prisoners held in United States custody abroad after September 11, 2001, and records related to the practice of “rendering” those prisoners to countries known to use torture. On June 2, 2004, having received no records in response to the requests, the plaintiffs filed the complaint in this case, alleging that the agencies had failed to comply with the law.

On August 16, 2004, to facilitate the search for relevant records, the plaintiffs provided a list of records they claimed were responsive to the FOIA requests. Among the records listed were 87 photographs and other images of detainees at detention facilities in Iraq and Afghanistan, including Abu Ghraib prison. The images from Abu Ghraib (the “Abu Ghraib photos”) depicted United States soldiers engaging in abuse of many detainees. The soldiers forced detainees, often unclothed, to pose in dehumanizing, sexually suggestive ways.

The defendants initially invoked only FOIA exemptions 6 and 7(C) as their ground for withholding the Abu Ghraib photos. Those provisions authorize withholding where disclosure would constitute an “unwarranted invasion of personal privacy.” [...] The defendants contended in their motion for summary judgment that these personal privacy exemptions warranted the withholding of the Abu Ghraib photos in order to protect the privacy interests of the detainees depicted in them. The plaintiffs argued in their cross-motion that redactions could eliminate any unwarranted invasions of privacy.

[...]

On September 29, 2005 the district court rejected the defendants’ arguments and ordered the disclosure of the Abu Ghraib photos. [...] (the “Abu Ghraib order”). It determined that redaction of “all identifying characteristics of the persons in the photographs” would prevent an invasion of privacy interests. [...] To the extent that an invasion of privacy might occur in spite of the redactions, the court found that such an invasion would not be “unwarranted” since the public interest involved “far outweighs any speculative invasion of personal privacy.”

[...]

The defendants appealed the Abu Ghraib order, but in March 2006, while the appeal was pending, many of the Abu Ghraib photos were published on the internet by a third party. The appeal was thereafter withdrawn.

After the appeal was withdrawn, the plaintiffs sought clarification regarding other detainee abuse images, and the defendants confirmed that they were withholding an additional 29 images, again based on exemptions 6, 7(C) and 7(F). Whereas the Abu

Ghraib photos were taken at that one location, the 29 photographs were taken in at least seven different locations in Afghanistan and Iraq, and involved a greater number of detainees and U.S. military personnel. And while many of the Abu Ghraib photos depicted unclothed detainees forced to pose in degrading and sexually explicit ways, the detainees in the 29 photographs were clothed and generally not forced to pose. The photographs were part of seven investigative files of the Army's Criminal Investigations Command ("Army CID"), and were provided to Army CID in connection with allegations of mistreatment of detainees. In three of the investigations, Army CID found probable cause to believe detainee abuse had occurred related to the photographs at issue here. Soldiers under scrutiny in two of the investigations have been punished under the Uniform Code of Military Justice.

On April 10, 2006, the district court established an expedited procedure for determining whether the 29 images could properly be withheld. By orders dated June 9, 2006 and June 21, 2006, the district court ordered the release of 21 of the disputed photos, all but one in redacted form. [...]

The defendants' appeal of the June 2006 orders is now before us. [...] We refer here to the 21 photographs in dispute as the "Army photos."

DISCUSSION

[...]

C. FOIA Exemptions 6 and 7(C)

FOIA exemptions 6 and 7(C) protect against disclosure that implicates personal privacy interests. The government may withhold records in "personnel and medical files and similar files" only when their release "would constitute a clearly unwarranted invasion of personal privacy." [...]

[...]

1. *The Detainees' Privacy Interest*

[...]

The district court also rejected arguments that release of the photographs would conflict with the Geneva Conventions' requirement that detaining powers protect any prisoner of war against insults and "public curiosity." [...] Instead, the court found that redaction is adequate to protect the detainees' identities and to preserve their honor. [...]

[...] The defendants emphasize that [...] (c) the Geneva Conventions obligate a detaining power to respect the dignity of detainees and avoid exposing them to "public curiosity," [...]. For these reasons, the defendants assert that the release of images that could lead to the identification of the detainees by themselves or others presents an invasion of the detainees' privacy.

[...]

2. *The Geneva Conventions*

The defendants argue that the Geneva Conventions, which protect prisoners of war and detained civilians “against insults and public curiosity,” serve as further basis for a finding that FOIA’s privacy provisions apply to prevent release of the Army photos. The Third Geneva Convention, covering lawful belligerents, provides that “prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” [...] [GC III, Art. 13]. The Fourth Geneva Convention, covering civilians, states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

[...] [GC IV, Art. 27]. Both of these treaties were designed to prevent the abuse of prisoners. Neither treaty is intended to curb those who seek information about prisoner abuse in an effort to help deter it.

However, government officials have concluded that release of photographs like the ones in this case would clash with the Geneva Conventions by subjecting the detainees depicted in the photos to public curiosity. [...] (“[R]elease of [the Abu Ghraib] photographs, even with obscured faces and genitals, would be inconsistent with the obligation of the United States to treat the individuals depicted humanely and would pose a great risk of subjecting these individuals to public insult and curiosity.”); (release of the Army photos will subject detainees to public curiosity because “[e]ven if the identities of the subjects of the photographs are never established . . . each individual beneficiary of these treaty protections will undoubtedly suffer the personal humiliation and indignity accordant with the knowledge that these photographs have been placed in the public domain”).)

The defendants do not claim that the Geneva Conventions constitute specific statutory authorization to withhold these photographs under FOIA’s exemption 3, [...] but rather that FOIA should be read to be consistent with the Geneva Conventions [...]. The defendants’ current litigation position, however, is not at all consistent with the executive branch’s prior interpretations of the Geneva Conventions.

As an initial matter, the government does not currently interpret the Geneva Conventions to prohibit dissemination of photographs or videos of detainees when those detainees are not identifiable. [...] (“[T]he Department of Defense interprets the [Third Geneva Convention] to protect POWs from being filmed or photographed in such a manner that viewers would be able to recognize the prisoner. Photos and videos depicting POWs with their faces covered or their identities otherwise disguised [do] not, in the view of the Department of Defense, violate GPW art. 13.”). However, the defendants note that the government’s current practice does not allow dissemination of photographs of detainees being abused, even if they are not identifiable. [...] The defendants argue that a photograph of abuse is so humiliating that its dissemination always opens the detainee to “public curiosity,” even if the detainee cannot be

identified. But this was not always the government's interpretation of the Geneva Conventions.

Prior to this litigation, the United States has not consistently considered dissemination of photographic documentation of detainee mistreatment to violate the public curiosity provisions of the Geneva Conventions, at least not when the detainee is unidentifiable and the dissemination is not itself intended to humiliate. The 1929 Geneva Conventions, in force during World War II, provided prisoners of war the same protection from "public curiosity" that the Third and Fourth Geneva Conventions offer to prisoners of war and civilians. [...] ("[Prisoners of war] must at all times be humanely treated, and protected, particularly against acts of violence, insults and public curiosity.") [...] At the end of the war, the United States government widely disseminated photographs of prisoners in Japanese and German prison and concentration camps. [...] These photographs of emaciated prisoners, corpses, and remains of prisoners depicted detainees in states of powerlessness and subjugation similar to those endured by the detainees depicted in the photographs at issue here. Yet the United States championed the use and dissemination of such photographs to hold perpetrators accountable.

The government responds that the individuals in the World War II photographs were not in the military custody of the United States, and thus the United States was under no duty to protect them from public curiosity. Therefore, the argument continues, there is no inconsistency between the United States' actions in publicizing photographs documenting German and Japanese detainee abuse and its current position that publicizing photographs documenting its own abuse of detainees would violate the Geneva Conventions. On this clever interpretation, the United States at the end of World War II was properly facilitating "public curiosity," but Nazi Germany and Imperial Japan were obligated by the 1929 Geneva Conventions to defeat those efforts to document their violation of the 1929 Geneva Conventions. We are not persuaded. The far more sensible interpretation of the United States' position is that the United States did not at that time consider documentation of Geneva Convention violations in order to hold the perpetrators accountable to constitute "public curiosity," even when the documentation included photographs of detainees subject to mistreatment.

Further, the defendants' contention that documentation of detainee abuse constitutes public curiosity is impossible to square with the United States' role as the lead prosecuting party of Imperial Japanese General Sadao Araki and others before the International Military Tribunal for the Far East ("IMTFF"). In that case, the IMTFF found the Japanese government's censorship of photographs depicting mistreatment of prisoners of war to be evidence of the government's complicity in war crimes, including violations of the 1929 Geneva Conventions. [...] The United States' leading role in that prosecution would have been odd, to say the least, if the United States at the time took the position that the dissemination of photographs showing prisoners of war subject to mistreatment was itself a war crime.

In light of this contrary past practice, we do not defer to the government's current litigation position concerning the meaning of the "public curiosity" provisions of the Third and Fourth Geneva Conventions. [...] We hold that Article 13 of the Third

Geneva Convention and Article 27 of the Fourth Geneva Convention do not prohibit dissemination of images of detainees being abused when the images are redacted so as to protect the identities of the detainees, at least in situations where, as here, the purpose of the dissemination is not itself to humiliate the detainees. [...] This construction is consistent with the past practice of the United States. It is also the construction publicly adopted by the International Committee for the Red Cross ("ICRC"), which has "had a significant influence on the interpretation of Article 13," [...] (noting that ICRC spokesperson stated that photographs of detainee abuse could be released if faces and identifying features are obscured).

More importantly, this construction is consistent with the purpose of furthering humane treatment of captives, which animates Article 13 of the Third Geneva Convention and Article 27 of the Fourth Geneva Convention. [...] Release of the photographs is likely to further the purposes of the Geneva Conventions by deterring future abuse of prisoners. To the extent the public may be "curious" about the Army photos, it is not in a way that the text of the Conventions prohibits; curiosity about "enemy prisoners being subjected to mistreatment through the streets," [...], is different in kind from the type of concern the plaintiffs seek to inspire. [...] Heightened public awareness of events depicted in the Army photos – some of which appear to violate the Geneva Conventions – would serve to vindicate the purposes of the Geneva Conventions without endangering the lives or honor of detainees whose identities are protected.

As the Third and Fourth Geneva Conventions do not prohibit disclosure of photographs of detainee abuse when, as here, the photographs are redacted and the disclosure is not itself intended as an act of humiliation, no need arises to alter the standard analysis under FOIA's exemption 6 and 7(C) in order to construe that statute to be consistent with those conventions. Therefore, the defendants' expressed desire to comply with the Geneva Conventions does not elevate the privacy interests in withholding the redacted Army photos above a de minimis level.

CONCLUSION

As stated above, the defendants have failed to identify an individual who could reasonably be expected to be endangered within the meaning of exemption 7(F). The district court's redactions are sufficient to render inapplicable exemptions 6 and 7(C), even in light of the Third and Fourth Geneva Conventions. Accordingly, we affirm.

DISCUSSION

1. Does the US government consider that persons arrested in Iraq, or in Afghanistan, in the "war on terror" are protected by Geneva Conventions III or IV? In this case? In other cases [See **Case No. 261** United States, Status and Treatment of Detainees Held in Guantánamo Naval Base]
2. a. Do you agree with the Court of Appeal that Article 13 of GC III and Article 27 of GC IV do not provide for a total prohibition on releasing photographs depicting prisoners of war? According to you, how should the said provisions be understood? What was the purpose of the drafters of the Conventions when they inserted such provisions?

- b. Does it make a difference with regard to the aforementioned prohibition whether the prisoners were ill-treated or treated in conformity with IHL?
 - c. Why would photographs of prisoners being ill-treated in violation of IHL promote respect for IHL and deter future abuse?
3. Would it be acceptable to release photographs of identifiable POWs if the purpose of doing so was to prove that the prisoners were still alive and were being well treated?
4. In your opinion, does the conclusion of the Court of Appeal imply that it would be contrary to the prohibition on exposing POWs to public curiosity to release their names? Would the release of statements made by POWs be contrary to that prohibition? May they be published if the POW agrees? (GC III, Art.7.)

**Case No. 290, Georgia/Russia, Human Rights Watch's Report
on the Conflict in South Ossetia**

[Source: Human Rights Watch, "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia," Report, 2009; available online at www.hrw.org. Footnotes omitted.]

[N.B.: This case refers to the same facts as **Case No. 291**, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia, but does not cover the same legal issues.]

Human Rights Watch**Up In Flames**

January 23, 2009

[...]

Overview

[...]

- [1] South Ossetia is a breakaway region of Georgia that shares a border and has very close ties with Russia. The armed conflict, in the making since spring 2008, started August 7 with Georgia's military assault in South Ossetia and Russia's military response the following day, and lasted until a ceasefire on August 15, with Georgian forces in retreat and Russian forces occupying South Ossetia and, temporarily, undisputed parts of Georgia [footnote: The term 'undisputed' is used to refer to any part of Georgia, except South Ossetia and Abkazia, both areas which are subject to dispute over their sovereignty and have made bids for independence].

[...]

- [2] By August 16, President Saakashvili and his Russian counterpart President Dmitry Medvedev had signed a six-point ceasefire agreement brokered by French President Nicolas Sarkozy in his capacity as leading the French European Union presidency. The ceasefire agreement called for cessation of hostilities and the withdrawal of all forces to their pre-August 6 positions, while allowing Russian peacekeeping forces to implement additional security measures until an international monitoring mechanism would be in place.

[...]

PART 1: BACKGROUND**1.1 Background on South Ossetia**

- [3] South Ossetia is located along Georgia's northern frontier in the Caucasus Mountains, bordering North Ossetia, a republic of the Russian Federation. The region is surrounded to the south, east, and west by undisputed Georgian territories. Prior to the August 2008 conflict, South Ossetia's population consisted of ethnic Ossetians and Georgians and numbered some 70,000 people, 20 to

30 percent of whom were ethnic Georgians. South Ossetia's capital, Tskhinvali, had a population of about 30,000. A number of villages in South Ossetia were overwhelmingly populated by ethnic Georgians [...]. With a handful of exceptions in the west of South Ossetia, villages inhabited mainly or exclusively by ethnic Georgians were administered by Tbilisi, while Tskhinvali and Ossetian-inhabited villages were under the administration of the *de facto* South Ossetian authorities.

[...]

- [4] The first conflict in South Ossetia culminated in the region's *de facto* secession from Georgia in 1992. On June 24, 1992, in the Russian city of Sochi, Russian and Georgian leaders Boris Yeltsin and Eduard Shevardnadze signed an agreement that brought about a ceasefire. The Sochi Agreement established the Joint Control Commission (JCC), a body for negotiations composed of Georgian, Russian, North Ossetian, and South Ossetian representatives, and the Joint Peacekeeping Forces (JPKFs), a trilateral peacekeeping force with Georgian, Russian, and Ossetian units. These units operated under a joint command, the JPKF commander being nominated by the Russian Ministry of Defence and appointed by the JCC. Battalion commanders were directly appointed by each side. Although the JPKF were meant as a joint force, in reality they were three separate battalions, deployed in different locations and more loyal to their respective sides than to the JPKF commander.

[...]

The Lead-up to the August 2008 War

- [5] In the months preceding the August war, tensions in South Ossetia steadily escalated as Georgian and South Ossetian forces engaged in violent attacks and mutual recriminations. [...]
- [6] Toward the end of July, violent skirmishes between Georgian and South Ossetian forces became more frequent.

[...]

The Fighting and Immediate Political Aftermath

- [7] Late in the evening of August 7, Georgian forces initiated massive shelling of Tskhinvali and surrounding villages in an attack that is widely considered the start of the war. [...]
- [8] Throughout the night between August 7 and 8, Georgian forces shelled Tskhinvali, using, among other weapons, BM-21 "Grad," a multiple rocket launcher system capable of firing 40 rockets in 20 seconds. Attacks intensified overnight and into the morning of August 8 as Georgian ground forces moved toward Tskhinvali. Around 8 a.m. Georgian ground forces entered Tskhinvali and street fighting erupted between Georgian forces and groups of South Ossetian forces, mainly

militia, who tried to stop the Georgian offensive. In the course of the day, several villages in South Ossetia fell under Georgian forces' control.

- [9] During the day on August 8, regular Russian ground forces moved through the Roki tunnel toward Tskhinvali while Russian artillery and aircraft subjected Georgian ground forces in Tskhinvali and other places to heavy shelling and bombardment. Georgian forces bombed and shelled Russian military targets as Russian forces moved toward Tskhinvali. By the evening of August 8, Russian authorities declared that units of the 58th Army were deployed in the outskirts of Tskhinvali and that their artillery and combat tanks had suppressed Georgian firing positions in Tskhinvali. At the same time, Georgia's President Saakashvili declared that Georgian forces completely controlled Tskhinvali and other locations.
- [10] Russian aircraft also attacked several targets in undisputed Georgian territory beginning on August 8. Starting from around 9:30 a.m. on August 8, Russian aircraft attacked targets in several villages in the Gori district, Gori city, and, in the afternoon, Georgian military airports near Tbilisi.
- [11] Over the next two days, Russian forces continued to move into South Ossetia, eventually numbering by some estimates 10,000 troops with significant artillery force. Georgian armed forces persisted with attempts to take Tskhinvali, twice being forced back by heavy Russian fire and fire from South Ossetian forces, including volunteer militias. Early in the morning of August 10, Georgian Defense Minister Davit Kezerashvili ordered his troops to withdraw from Tskhinvali and fall back to Gori city.
- [12] Even though the Russian Ministry of Defense announced that Russian forces had ended all combat operations at 3 p.m. on August 12 and that all units had received an order to remain in their positions, Russian armed forces crossed the South Ossetian administrative border on August 12 and moved toward Gori city. The exact time when Russian forces occupied Gori city is disputed. The Russian authorities admitted that they were removing military hardware and ammunition from a depot in the vicinity of Gori on August 13, but denied that there were any tanks in the city itself. Russian tanks blocked roads into Gori city on August 14. By August 15, Russian troops had advanced past Gori city as far as the village of Igoeti, 45 kilometers west of Tbilisi. In a separate operation from the west, moving through Abkhazia, Russian forces occupied the strategically important cities of Poti, Zugdidi, and Senaki in western Georgia, establishing checkpoints and roadblocks there.

[...]

1.2 International Legal Framework

[...]

International Humanitarian Law Governing Hostilities

[...]

- [13] Under international humanitarian law, the hostilities that occurred between Russia and Georgia constitute an international armed conflict – a conflict between two states. The law applicable to international armed conflict includes treaty law, primarily the four Geneva Conventions of 1949 and its First Additional Protocol of 1977 – Protocol I – and the Hague Regulations of 1907 regulating the means and methods of warfare, as well as the rules of customary international humanitarian law [See Case No. 43, ICRC, Customary International Humanitarian Law]. Both Georgia and Russia are parties to the 1949 Geneva Conventions and Protocol I.
- [14] Since South Ossetia is recognized as part of Georgia, fighting between the non-state South Ossetian forces and militia and Georgian forces falls under the laws applicable to non-international (internal) armed conflict. Internal armed conflicts are governed by article 3 common to the four Geneva Conventions of 1949 (Common Article 3), the Second Additional Protocol of 1977 to the Geneva Conventions (Protocol II, to which Georgia is a party), as well as customary international humanitarian law.
- [15] Customary humanitarian law as it relates to the fundamental principles concerning conduct of hostilities is now recognized as largely the same whether it is applied to an international or a non-international armed conflict.
- [...]

Law on Occupation and Effective Control

- [16] Under international humanitarian law territory is considered “occupied” when it is under the control or authority of foreign armed forces, whether partially or entirely, without the consent of the domestic government. This is a factual determination, and the reasons or motives that lead to the occupation or are the basis for continued occupation are irrelevant. Even should the foreign armed forces meet no armed resistance and there is no fighting, once territory comes under their effective control the laws on occupation become applicable.
- [17] International humanitarian law on occupation applies to Russia as an occupying power wherever Russian forces exercised effective control over an area of Georgian territory, including in South Ossetia or Abkhazia, without the consent or agreement of the Georgian government. Russia also assumed the role of an occupying power in the Kareli and Gori districts of undisputed Georgian territory until the Russian withdrawal from these areas on October 10, 2008, because Russian presence prevented the Georgian authorities’ full and free exercise of sovereignty in these regions.
- [...]

PART 2: VIOLATIONS BY GEORGIAN FORCES

[...]

2.2 Indiscriminate Shelling of Tskhinvali and Outlying Villages

[...]

- [18] [...] Tskhinvali was heavily shelled during daytime hours on August 8. Shelling resumed at a smaller scale on August 9, when Georgian forces were targeting Russian troops who by then had moved into Tskhinvali and other areas of South Ossetia.

[...]

Tskhinvali

- [19] [...] Georgian authorities later claimed that their military was targeting mostly administrative buildings in these areas. The shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, stores, and numerous apartment buildings and private houses. Such objects are presumed to be civilian objects and as such are protected from targeting under international law; but as described below, at least some of these buildings were used as defense positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets.

[...]

Grad rocket attacks on Tskhinvali and outlying villages

[...]

- [20] Several villages to the west and east of Tskhinvali were also subjected to Grad shelling and heavy artillery fire by the Georgian forces.
- [21] In the village of Khetagurovo – especially in its southern part, close to the Georgian artillery positions – Human Rights Watch saw many houses completely destroyed or significantly damaged by the shelling. For example, one house on Alanskaia Street on the southern outskirts of the village was hit by four Grad rockets and three mortar shells, and the neighboring house was hit by five mortar shells. Human Rights Watch saw the fragments of the rockets and the shell craters in the yards.

[...]

- [22] According to Georgian authorities, and one Ossetian interviewee we spoke with, Ossetian forces had firing positions in Khetagurovo. While these firing positions were legitimate targets, given the indiscriminate nature of Grad rockets, using them to hit such targets in an area populated by civilians may constitute an indiscriminate attack. Although the Ossetian forces bear responsibility for endangering civilians by locating military objectives near or among populated areas, Georgia is not relieved from its obligation to take into account the risk to civilians when it attacks the targets.

[...]

- [23] [...] [W]arring parties have a responsibility where possible to give advance warning of an attack that might affect civilians.
- [24] No such warning was given by the Georgian side. On the contrary, before the shelling started on the night of August 7-8, President Saakashvili said in a televised statement that "Georgia has unilaterally ceased fire in the current fighting with separatist rebels in the region of South Ossetia" and that his government would engage in direct negotiations to end the conflict.
- [25] A number of witnesses told Human Rights Watch that this announcement influenced their decision to stay in the city, which put them at greater risk.

The positioning of Ossetian combatants

- [26] The Georgian authorities have claimed that the strikes on Tskhinvali and neighboring villages were legitimate as they targeted Ossetian military positions and not at civilians. [...]
- [27] Numerous witnesses interviewed by Human Rights Watch, including members of South Ossetian militias, indicated that South Ossetian forces were not only present in Tskhinvali and neighboring villages, but also actively participating in the fighting, including by launching artillery attacks against Georgian forces. The witnesses also made it clear that South Ossetian forces set up defensive positions or headquarters in civilian infrastructure, thus turning them into legitimate military targets.

[...]

- [28] However it is questionable whether the large-scale shelling carried out by Georgian forces against Tskhinvali and outlying villages could be considered a proportionate attack against Ossetian forces, including volunteer militias present in these areas. In some cases, [...] the very choice of indiscriminate weapons or weapons that cannot be targeted with precision (such as Grad launchers) would make attacks unlawful in populated areas. Even though the presence of the Ossetian forces may have made the area a *prima facie* legitimate target, the Georgian forces were still obliged to calculate whether the risk of harming civilians with the Grad rockets was too high to justify the military advantage sought.
- [29] It is also not clear to Human Rights Watch to what extent the Georgian command had the necessary intelligence to establish the exact location of the South Ossetian forces at any given moment, in part because the forces were very mobile. At the same time, Georgian military command was clearly aware of the presence of civilians in Tskhinvali and other areas subjected to artillery strikes.
- [30] International humanitarian law places clear obligations on warring parties to take all possible steps to minimize harm to civilians and not to attack civilian objects. If any doubt exists as to whether a civilian object is being used for military

purposes, “it shall be presumed not to be so used.” When a legitimate target exists within a building, the attacking party must still make a proportionality assessment, ensuring that the expected value of destroying the military object outweighs the likely impact of the attack on civilians and civilian infrastructure.

2.3 Attacks by Georgian Forces on Civilians Fleeing the Conflict Zone

- [31] Many Ossetian civilians who did not manage to leave South Ossetia before the fighting attempted to flee to North Ossetia on August 8-10. Human Rights Watch received a number of disturbing reports of Georgian attacks on civilian vehicles fleeing the conflict zone, resulting in death and injuries. The cases described below indicate that – in these cases at least – the attacks caused excessive civilian loss and that precautions were not taken to protect civilian life.

[...]

Attacks on civilian cars on the Dzara road

- [32] A number of interviewees told Human Rights Watch that they tried to flee north out of Tskhinvali along the Dzara road, hoping to get to safety in North Ossetia, when they came under Georgian fire.
- [33] Petr Petaev, a resident of Tskhinvali, was trying to flee the city with his wife and son on August 9. A grenade hit Petaev’s car, killing his wife and injuring Petaev and his son. [...]

[...] My wife was killed by the very first shot. My son and I just sat in the car next to her dead body for another half-hour or so. And they just continued shooting! My son got wounded in the head and I was wounded in my leg. Before we reached that place where we got shot at we saw 10 burning cars.

- [34] Another civilian killed during evacuation along the Dzara road was 54-year-old Diana Kodjaeva, who tried to flee Tskhinvali with her neighbors on the night of August 7-8. Kodjaeva’s cousin [...] told Human Rights Watch that the car in which they had been traveling came under heavy fire on the Dzara road and “burnt to ashes.” [...]

- [35] Another interviewee recounted to Human Rights Watch how his brother tried to evacuate his wife and eight-year-old son from Tskhinvali on the night of August 7. He said,

On the detour [Dzara] road, the car came under heavy fire from the Georgian troops. My brother first pushed his wife and son out of the car and they hid in a ditch on the side of the road. He drove further, trying to lead the fire away from his family. Then he jumped out of the car, and managed to crawl back to where he left his wife and child. Georgians continued to fire at the car, and it burnt almost completely. [...]

[...]

Attacks on vehicles and international humanitarian law

[...]

- [36] At least two factors suggest the presence of legitimate military targets. First, starting early on the evening of August 8, Russian forces and armaments were moving south from the Roki tunnel on the Dzara road: In a letter to Human Rights Watch, the Georgian government stated that its forces “fired on armor and other military equipment rolling from the Roki Tunnel along the Dzara Road, not at civilian vehicles.” Second, as one witness recounted to Human Rights Watch, Ossetian forces had an artillery storage facility and firing position on a hill about one kilometer from the Dzara road.
- [37] Both Russian forces moving south on the Dzara road and the Ossetian firing position were legitimate military targets. But in carrying out these attacks Georgian forces had a duty to take precautions to minimize civilian harm and to ensure these attacks conformed to the principle of proportionality.
- [38] The Georgian government has said that “during movement of military columns, particularly during combat, all movement of civilian vehicles was halted. Consequently, there were no civilian vehicles present during [Georgian armed forces] fire against the mouth of the Roki Tunnel and along the Dzara Road.” It appears, however, that Russian columns moving south did not preclude civilian vehicles’ moving north. Indeed, Georgian forces should have been fully aware that in the first days of the conflict the Dzara road was the only way out of Tskhinvali that civilians could use.
- [39] Information collected by Human Rights Watch suggests that many of the cars were driven by South Ossetian militiamen who were trying to get their families, neighbors, and friends out of the conflict zone. A militia fighter is a combatant and a legitimate target when he or she is directly participating in hostilities.
- [40] It is not inconceivable that some of the militia fighters driving civilians to safety were wearing camouflage, were armed, or in other ways appeared to pose a legitimate threat to Georgian forces. But it was the responsibility of the Georgian troops to determine in each case whether the vehicle was a civilian object or not, and if it was believed to be a legitimate military target, whether the anticipated military advantage gained from an attack on such vehicles would outweigh the expected harm to civilians.

2.4 Georgian Forces’ Ground Offensive

- [41] In the early hours of August 8, Georgian ground troops, including tank columns and infantry, entered South Ossetian villages to the west of Tskhinvali and then proceeded into the city. While in some villages and in parts of Tskhinvali South Ossetian militias seemed to put up armed resistance and defend their positions, by the afternoon of August 8, Georgian authorities claimed to have complete control of the city. In Tskhinvali the exchange of fire between Georgian forces and South Ossetian forces supported by the Russian army and air force continued

until August 10, when the Georgian command ordered withdrawal of troops from South Ossetia.

- [42] [...] Armed with automatic weapons, the militias targeted Georgian military vehicles and infantry moving through the city. Numerous witnesses confirmed to Human Rights Watch that virtually all able-bodied males joined the volunteer militias, often after moving their families to safety in North Ossetia.
- [43] Human Rights Watch believes that, particularly during the attempt to take Tskhinvali, on a number of occasions Georgian troops acted with disregard to the protection of civilians by launching attacks where militias were positioned that may have predictably caused excessive civilian loss compared to the anticipated military gain. Some of the Georgian soldiers interviewed by Human Rights Watch confirmed that while they were targeting Ossetian fighters who were shooting at them from apartment buildings, they were fully aware of the presence of civilians in these buildings. [...]
- [44] Human Rights Watch researchers saw multiple apartment buildings in Tskhinvali hit by tank fire. In some cases, it was clear that the tanks and infantry fighting vehicles fired at close range into basements of buildings. [...]
- [...]
- [45] Even when the presence of Ossetian militias meant that apartment buildings could be legitimate targets, it was not apparent from the evidence of the aftermath of the attack that the Georgian military had taken all feasible precautions to minimize the harm to civilians. It is clear, however, that the military tactics they used caused civilian casualties and significant damage to civilian property.
- [46] For example, residents of Tselinnikov Street in Tskhinvali told Human Rights Watch that at around 3:30 p.m. on August 8 a Georgian tank opened fire at their apartment building, after a group of Ossetian militia started withdrawing through the neighborhood. Six tank shells hit the building, destroying five apartments, and killing an elderly man. [...]
- [47] Neighborhood residents told Human Rights Watch that the attack did not result in any casualties among the militia, with whom they were all acquainted.
- [...]

2.5 Georgia's Use of Cluster Munitions

- [48] The Georgian military attacked Russian forces with cluster munitions to stop their forward advance into South Ossetia. [...]
- [49] Human Rights Watch did find that M85 cluster munitions hit nine villages in undisputed Georgian territory, which killed at least four people and injured eight. In addition, unexploded M85s have prevented civilians from tending or harvesting their crops, causing them to lose a source of income and subsistence. Human Rights Watch has concluded that these cluster munitions were fired by Georgian forces. Several factors suggest that Georgian forces did not target

these villages, but rather that the submunitions landed on these villages due to a massive failure of the weapons system. [...]

- [50] Cluster munitions are large, ground-launched or air-dropped weapons that eject, depending on their type, dozens or hundreds of bomblets, or submunitions, and spread them over a large area. Because cluster munitions cannot be directed at specific fighters or weapons, civilian casualties are virtually guaranteed if cluster munitions are used in populated areas. Cluster munitions also threaten civilians after conflict: because many submunitions fail to explode on impact as designed, a cluster munitions strike often leaves a high number of hazardous unexploded submunitions – known as duds – that can easily be set off upon contact.

[...]

Civilian Casualties from M85s

- [51] M85 submunitions are Dual Purpose Improved Conventional Munitions (DPICM) whose purpose is to injure or kill persons and pierce armor. It is an unguided weapon that poses grave danger to civilians in part because of its inaccuracy and wide dispersal pattern. These submunitions are cylinder-shaped; civilians often describe them as resembling batteries or light sockets. [...]

[...]

2.8 Georgian Detentions and Ill-Treatment of Ossetians

- [52] The Georgian military during active combat in South Ossetia detained at least 32 Ossetians. [...]
- [53] Human Rights Watch interviewed five of the 32, whom the Georgian military had detained on August 8 and 9. All five detainees reported having been beaten by Georgian soldiers at the moment of their detention, and receiving poor and inadequate food while in detention.
- [54] The Georgian government maintains that all 32 Ossetians were militia fighters and were detained for their participation in hostilities. Human Rights Watch cannot definitively determine whether the Ossetians detained by the Georgian military were civilians or were participating in hostilities. The Georgian authorities have not presented evidence that all of the Ossetians whom they detained were in fact combatants. At least one case investigated by Human Rights Watch, that of an elderly man who said he was a pacifist on religious grounds, calls into question the Georgian government's blanket determination about those whom its forces detained. One interviewee, however, made no effort to conceal that he was a combatant – he told Human Rights Watch that he was from North Ossetia and traveled to South Ossetia to join the militia forces as a volunteer immediately before the Georgian military attacked Tskhinvali.
- [55] Under the Fourth Geneva Convention, civilians are considered to be protected persons. The Convention requires that "persons taking no active part in the hostilities, ... shall in all circumstances be treated humanely, without any adverse

distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.” During hostilities and occupation, the Fourth Geneva Convention permits the internment or assigned residence of protected persons for “imperative reasons of security.” In the case of detention of civilians on reasonable security grounds, detentions must be carried out in accordance with a regular procedure permissible under international humanitarian law. Those detained have a right to appeal their internment and have their case reviewed every six months. The Fourth Geneva Convention provides detailed regulations for the humane treatment of internees. The International Committee of the Red Cross (ICRC) must be given access to all protected persons, wherever they are, whether or not they are deprived of their liberty.

- [56] Under international humanitarian law Ossetians who were not members of any regular forces, but members of militias or otherwise took up arms against the Georgian military, are not entitled to POW status, but are detained as non-privileged combatants, and should be treated in accordance with the protections guaranteed to civilians under the Fourth Geneva Convention.

[...]

PART 3: VIOLATIONS BY RUSSIAN FORCES

[...]

3.2 Aerial Bombardments, Shelling, and Artillery Attacks

[...]

Attacks in Undisputed Georgian Territory

Gori city

- [57] Gori city is the administrative center for the Gori district. Gori’s military base and Georgian military reservists located in one part of the city became targets of Russian air strikes. Also, [...] in mid-July 2008 Georgia concentrated its entire artillery brigade in Gori city. As a result of the air strikes and advancing Russian and Ossetian forces, civilians began to flee Gori around August 11.

[...]

Attack on School No. 7

- [58] At about 11 a.m. on August 9, Russian aircraft made several strikes on and near School No. 7 in Gori city. According to one eyewitness, Givi Melanashvili, 60, who was at the school when the bombing took place, about one hundred Georgian military reservists were in the yard of the school when it was attacked. To his knowledge none of the reservists was injured. The reservists as combatants were a legitimate target, and it is possible that the school was deemed as being used for military purposes. In such circumstances, it would lose its status as a protected civilian object. In the attack, one strike hit an apartment building next to the

school, killing at least five civilians and wounding at least 18, and another hit a second building adjacent to the school causing damage, but no civilian casualties.

- [59] There were civilians also taking shelter in the school, as Melanashvili, who was looking for temporary shelter in Gori having had fled South Ossetia a day earlier, told Human Rights Watch,

I was told that I could find shelter in School No. 7. My wife and I went there in the morning. I got there around 11 a.m. and saw that there were Georgian reservist forces in the yard. Suddenly a bomb hit the building next to the school. There was a loud explosion and complete chaos. A large part of the building was destroyed. The school building was damaged.

- [60] While the reservists' presence in the school yard rendered it a legitimate target for the Russian forces, questions may be raised as to the proportionality of the attack. Where an object, which is by its nature normally civilian, becomes used for military purposes, it can be attacked, but only by means that will avoid or minimize harm to civilians and damage to civilian objects. All feasible measures should be taken to cancel or suspend an attack if it becomes apparent that the expected civilian casualties would outweigh the importance of the military objective.

Attack on Gori Military Hospital

- [61] By August 12, many of Gori's inhabitants had fled the city. Staff at the Gori Military Hospital remained in the city to take care of the hospital's remaining patients.
- [62] At around 2 a.m. on August 13 a Russian military helicopter fired a rocket toward a group of hospital staff members who were on break in the hospital yard. The rocket hit Giorgi Abramishvili, an emergency room physician in his forties [who] died from head injuries.
- [63] Human Rights Watch researchers saw that the roof of the hospital building is clearly marked with a red cross, the "distinctive emblem" indicating medical personnel or facilities and entitled to specific protection under the Geneva Conventions.
- [64] This attack was a serious violation of international humanitarian law. Hospitals, even military hospitals such as the one in Gori, are not legitimate military targets. The wounded and sick, and medical personnel, even if they are members of the armed forces, are protected persons and attacks directed against them are war crimes.

[...]

3.3 Russia's Use of Cluster Munitions

- [65] [...] Human Rights Watch researchers found that Russian forces used cluster munitions against targets in populated areas in the Gori and Kareli districts just south of the South Ossetian administrative border, killing at least 12 civilians and injuring at least 46 at the time of attack. [...]

- [66] Because cluster munitions cannot be directed at specific fighters or weapons and because cluster duds will likely injure or kill whoever disturbs them, combatant or civilian, using cluster munitions in populated areas, as Russia did, should be presumed to be indiscriminate attack, which is a violation of international humanitarian law.
- [67] The lawfulness of a military strike may also be determined by whether the effects on civilians are excessive in relation to any direct military advantage gained. [...] [A] cluster strike will be an unlawfully disproportionate attack if the expected civilian harm outweighs anticipated military advantage. The expected civilian harm is not limited to immediate civilian losses, but also encompasses casualties over time. There is greatly increased likelihood that the loss will be excessive in relation to the military advantage when taking into account both strike and post-strike civilian harm, especially if an attack occurred in a populated area or an area to which people might return. Based on its field research in the former Yugoslavia, Afghanistan, Iraq, and Lebanon, as well as in Georgia, Human Rights Watch believes that when cluster munitions are used in any type of populated area, there should be a strong, if rebuttable, presumption that the attack is disproportionate.
- [68] Finally, parties to a conflict are under the obligation to take “all feasible precautions in the choice of means and methods” of warfare so as to avoid and in any event minimize “incidental loss of civilian life, injury to civilians and damage to civilian objects.” The indiscriminate nature of cluster munitions makes it impossible for a party using cluster munitions in populated areas to observe this principle.
- [...]

Gori city-Iskander SS-26 missile with submunitions

- [69] On the morning of August 12 several dozen civilians gathered on the main square in Gori city, anticipating food distribution from local officials in the Gori municipal administration building located on the square. A car accident on the square attracted even more civilian onlookers, and a group of journalists had stopped on the square to ask for directions. One victim estimates that there were at least 40 civilians on the square when the cluster munitions attack took place.
- [70] According to Paata Kharabadze, chief doctor of the Gori civilian hospital, six people were killed during the attack. [...] The Gudushauri National Medical Center of Tbilisi admitted 24 civilians from Gori that day, many of them injured in the morning’s attack.
- [71] Victims of the attack described to Human Rights Watch how they saw numerous small explosions within seconds before they fell to the ground. [...]
- [72] The Gori city square is a large open space [...]. On one side of the square is the municipal administration building, and on the other sides are apartment buildings with shops on the ground floor. Even though the main command center for the Georgian military operation in South Ossetia was located in Gori,

all Georgian troops had left the city by the evening of August 11, according to witnesses. All witnesses said that there were no military forces on the square when it was attacked.

- [73] One of those killed in the August 12 cluster munitions strike on Gori's main square was Stan Storimans, a cameraman for the Dutch television station RTL. On August 29 the Dutch Ministry of Foreign Affairs dispatched an investigative commission consisting of military and diplomatic experts to Gori to investigate Storimans's death. The commission writes in its report,

During the on-site investigation, the mission was able to establish that the entire square and several nearby streets had been hit in the same manner. An area of about 300 by 500 metres was struck by small metal bullets [fragments] measuring about 5 mm. It was deduced from the entry holes that the bullets were from multiple explosions, both on the ground and in the air.

- [74] [...] [T]he commission concluded that "the square and surrounding area were hit by about 20 explosions at around 10:45 a.m., and that each explosion scattered a large number of bullets. The explosions can be seen to occur both in the air and on the ground." Based on visual characteristics, the serial numbers found on the missile pieces and the nature of the strike, the commission concluded that Russian forces had hit the square with an Iskander SS-26 missile carrying cluster munitions.

[...]

3.6 Pillaging, Destruction, Violence, and Threats against Civilians

- [75] [...] Ossetian militias would in some cases arrive in villages together with Russian forces, and the latter at the very least provided cover for the burning and looting of homes. While some civilians described the conduct of Russian ground forces as disciplined, Human Rights Watch documented several cases in which Russian forces, together with Ossetian militias, used or threatened violence against civilians or looted and destroyed civilian property. [...] Acts of pillage are prohibited under customary international law and violate article 33 of the Fourth Geneva Convention relating to the protection of civilians in armed conflict. Pillaging is a grave breach of the Geneva Conventions and a war crime. The cases involve villages in South Ossetia and in undisputed Georgian territory.

[...]

3.7 Russia's Responsibility as Occupying Power

- [76] When Russian forces entered Georgia, including South Ossetia and Abkhazia, which are *de jure* parts of Georgia, they did so without the consent or agreement of Georgia. International humanitarian law on occupation therefore applied to Russia as an occupying power as it gained effective control over areas of Georgian territory [...]. Tskhinvali and the rest of South Ossetia must be considered under Russian control from August 10, when Georgian forces officially retreated, through the present. Villages in Gori district fell under Russian control as Russian forces moved through them on August 12. Gori city must be considered under effective

Russian control at least from August 12 or 13 until August 22, when Russian troops pulled back further north toward South Ossetia. Russia's occupation of the area adjacent to South Ossetia ended when its forces withdrew to the South Ossetia administrative border on October 10.

- [77] [...] [O]verall, Russian authorities did not take measures to stop the widespread campaign of destruction and violence against civilians in villages in South Ossetia [...] and in the buffer zone in undisputed Georgian territory. They allowed these areas to become a virtual no-man's land where individuals were able to commit war crimes – to kill, loot, and burn homes – with impunity. [...] Russian forces therefore violated their obligation as an occupying power to “ensure public order and safety” and to provide security to the civilian population in the territory under its control. This is a serious violation of international humanitarian law.
- [78] Russia bore responsibility but took no discernable measures on behalf of protected individuals, including prisoners of war, at least several of whom were executed or tortured, ill-treated, or subjected to degrading treatment by South Ossetian forces, at times with the participation of Russian forces.
- [...]

PART 4. VIOLATIONS BY SOUTH OSSETIAN FORCES

[...]

4.2 Attacks on Georgian Civilians and Their Villages in South Ossetia

Looting and Burning of Villages

Basic chronology

[...]

- [79] Beginning August 10, after Russian ground forces had begun to fully occupy South Ossetia and were moving onward into undisputed Georgian territory, Ossetian forces followed closely behind them and entered the ethnic Georgian villages. Upon entering these villages, Ossetian forces immediately began going into houses, searching for Georgian military personnel, looting property, and burning homes. They also physically attacked many of the remaining residents of these villages, and detained dozens of them. [...] In most cases, Russian forces had moved through the Georgian villages by the time South Ossetian forces arrived. In other cases, Russian forces appeared to give cover to South Ossetian forces while they were committing these offenses.
- [80] By August 11, the attacks intensified and became widespread. Looting and torching of most of these villages continued intermittently through September, and in some through October and November.

Extent and deliberate nature of the destruction as investigated by Human Rights Watch

- [81] [...] Human Rights Watch's observations on the ground [...] have led us to conclude that the South Ossetian forces sought to ethnically cleanse these villages: that is, the destruction of the homes in these villages was deliberate, systematic, and carried out on the basis of the ethnic and imputed political affiliations of the residents of these villages, with the express purpose of forcing those who remained to leave and ensuring that no former residents would return.
- [82] International humanitarian law prohibits collective punishment, acts of reprisal against civilians, pillage, and deliberate destruction of civilian property. Violations of these prohibitions are grave breaches of the Fourth Geneva Convention, or war crimes.
- [83] The interviews and ground observations by Human Rights Watch indicate that these villages were looted and burned by Ossetian militias and common criminals. With a few exceptions of looting and beatings of civilians, Russian forces did not participate directly in the destruction of villages and attacks on civilians but, aside from a brief period in mid-August, did not interfere to stop them [...].

[...]

Position of *de facto* South Ossetian Officials toward Looting and House Burning

- [84] The *de facto* South Ossetian authorities were unrepentant about the destruction of ethnic Georgian villages and took no effective steps to prevent their destruction, protect civilians, and hold perpetrators accountable. [...]

[...]

The Displaced Georgian Population's Right to Return

- [85] As many as 20,000 ethnic Georgians cannot return to their homes in South Ossetia.
- [86] In mid-August 2008 Kokoity said that Ossetian authorities did not intend to let the Georgians return to the destroyed villages. By the end of August 2008, he changed his position and assured the UN High Commissioner for Refugees that the displaced Georgians willing to return to South Ossetia would face no discrimination and have their security fully guaranteed. [...]

4.3 South Ossetian Abuses in Undisputed Georgian Territory

Rape

- [87] Human Rights Watch received numerous reports of rape of ethnic Georgian women during the August 2008 war. The Fourth Geneva Convention obliges parties to a conflict to protect women from "attacks on their honour, especially

rape, and rape is considered an act of “willfully causing great suffering or serious injury to body or health” that is a grave breach of the Geneva Conventions, and a war crime.

- [88] [...] Human Rights Watch was able to document two cases of rape in undisputed areas of Georgia under Russian control. Several factors suggest that the perpetrators were members of South Ossetian forces or militia. In both cases, the perpetrators wore military uniforms and white armbands, usually worn by South Ossetian forces to identify them to the Russian army as friendly forces. In both cases, the perpetrators spoke Ossetian. In one case, the perpetrators handed the victim over to the South Ossetian police in Tskhinvali, who later included her with other detainees in a prisoner exchange with Georgian authorities.

[...]

Abductions

- [89] Human Rights Watch documented many incidents of unlawful detention by Ossetian forces in which the victims were taken into Ossetian police custody [...]; we also received reports of Georgians who were abducted by Ossetians and not handed over to the police. Abductions violate the ban, contained in article 147 of the Fourth Geneva Convention, on unlawful confinement of a protected person and are considered grave breaches, or war crimes.

[...]

4.4. Execution, Illegal Detentions, Ill-Treatment, and Degrading Conditions of Detention by Ossetian Forces, at times with Russian Forces

[...]

- [90] As Russian and Ossetian forces entered Georgian villages in South Ossetia and the Gori district, they detained at least 159 people, primarily ethnic Georgians as well as at least one Ossetian and one ethnic Russian married to an ethnic Georgian. Forty-five of the detained were women. At least 76 were age 60 or older, and at least 17 were age 80 or older. There was one child, a boy, about eight years old. Human Rights Watch interviewed 29 of the detained, all post-release. Many detainees described ill-treatment during detention, during transfer to custody, and in custody. Most detainees were held in the basement of the South Ossetian Ministry of Interior building in Tskhinvali for approximately two weeks in conditions that amounted to degrading treatment. Some of these detainees were forced to work clearing the Tskhinvali streets of decomposing bodies of Georgian soldiers, and debris. At least one man was executed while in Ossetian custody during his transfer to the Ministry of Interior. All of these actions are grave breaches of the Geneva Conventions and amount to war crimes. To the extent that Russia exercised effective control in the territory where these detentions took place, the Russian government is liable for these acts [...].
- [91] In some instances, Russian forces directly participated in the detention of ethnic Georgians, and detainees held in the Ministry of Interior reported being

interrogated by people who introduced themselves as members of Russian forces. [...]

Legal Status of and Protections for Individuals Detained by Ossetian and Russian Forces

[92] All of those detained by Ossetian and Russian forces and interviewed by Human Rights Watch stated that they were civilians not participating in the hostilities and had not taken up arms against Ossetian and Russian forces. Under the Fourth Geneva Convention, which defines the protections afforded to civilians during wartime, civilians are considered to be protected persons. The Convention requires that persons "taking no active part in the hostilities, ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." Grave breaches of the Fourth Geneva Convention, including willful killing, torture and inhuman treatment, and willfully causing great suffering or serious injury to body or health, are war crimes.

[...]

[93] During hostilities and occupation, the Fourth Geneva Convention permits the internment or assigned residence of protected persons such as civilians for "imperative reasons of security." However, unlawful confinement of a protected person is a war crime.

[94] Human Rights Watch has not been presented with evidence that there were reasonable security grounds for the detention of the 159 persons detained by Ossetian and Russian forces. Many of those detained were very elderly, and one was a small child. Most were detained in circumstances that strongly suggest that they were not taking up arms, not participating in hostilities, and not otherwise posing a security threat [...].

[95] If, among the detained, there were Georgians who participated in hostilities against Ossetian or Russian forces, but who were not members of the Georgian military, under international humanitarian law such persons would be considered non-privileged combatants. Georgians who took up arms to defend their lives or property from advancing Ossetian or Russian forces would be considered armed civilians. In both cases, detention of such persons would be considered reasonable on security grounds. Such persons are entitled to the protections guaranteed to civilians under the Fourth Geneva Convention. Detentions must be carried out in accordance with a regular procedure permissible under international humanitarian law. Those detained have a right to appeal their internment and have their case reviewed every six months. The Fourth Geneva Convention provides detailed regulations for the humane treatment of internees. The International Committee of the Red Cross must be given access to all protected persons, wherever they are, whether or not they are deprived of their liberty.

[...]

- [96] Ossetian President Eduard Kokoity has stated that “ethnic Georgians were detained for their personal safety” [...]. While the Geneva Conventions allow for internment in order to provide for the security of civilians, Human Rights Watch has not found evidence that the detentions by Russians and Ossetians had this purpose or were justified on these grounds. The fact that the majority of individuals were detained as Georgian soldiers were retreating and in areas in which Russian and Ossetians exercised effective control suggests that in most cases civilians were not likely to be threatened by armed combat. Furthermore, Russian and Ossetian forces apprehended most individuals in a violent and threatening manner and subjected them to inhuman and degrading treatment and conditions of detention, and forced labor, reflecting no intent on the part of these forces to provide for the personal safety and well-being of those detained.

[...]

Forced labor

- [97] Ossetian forces forced many of the male detainees to work, which included recovering decomposing bodies from the streets of Tskhinvali, digging graves, and burying bodies, as well as clearing the streets of building debris from the hostilities. Two detainees interviewed by Human Rights Watch stated that they volunteered to work on some days in order to be out of the overcrowded cells for a few hours. None of the workers received any compensation for this work. Under the Fourth Geneva Convention, adults (individuals age 18 or older) may be required to work as is necessary to maintain public utilities, and to meet needs of the army and humanitarian needs, such as activities related to feeding, sheltering, clothing, and health care of the civilian population. People must be appropriately compensated for their work, and there can be no obligation to work based on any form of discrimination. Unpaid or abusive forced labor, or work that amounts to partaking in military operations, is strictly prohibited.

[...]

Release of civilian detainees

- [98] Ossetian forces released one group of 61 detainees, including most of the elderly and all of the women, on August 21, in exchange for eight detainees whom the Georgian Ministry of Defense described as militia fighters. Other civilians were released on subsequent days, including a final group of 81 civilians on August 27, who, according to the Georgian Ministry of Defense, were exchanged for four people detained during active fighting and described as “militants,” as well as nine Ossetians previously convicted for crimes and serving sentences in Georgian prisons. While prisoner exchanges are a recognized and legitimate process to facilitate repatriation of prisoners who are in the hands of the enemy, it is prohibited to use the mechanism of prisoner exchanges as a means of effecting population transfer. It is also prohibited to use prisoners as hostages – that would

be to unlawfully detain persons with the intent of using them to compel the enemy to do or abstain from doing something as a condition of their release.

[...]

4.5 Execution, Torture, and Other Degrading Treatment of Georgian Prisoners of War by Ossetian Forces, at times with Russian Forces

- [99] Russian and Ossetian forces detained at least 13 Georgian military servicemen during active fighting. All these detainees were entitled to prisoner of war (POW) status and should have been treated as such. [...] All four Georgian military servicemen were held in informal places of detention, including a dormitory and schools, for several days, and were then transferred to Ossetian police. [...] Georgian soldiers reported that they had been subjected to severe torture and ill-treatment throughout their detention by Ossetian forces. Human Rights Watch documented the execution of three Georgian servicemen while in the custody of Ossetian forces.
- [100] Ossetian forces eventually transferred 13 Georgian prisoners of war to Russian forces, and Russian authorities exchanged them for five Russian prisoners of war on August 19.
- [101] Russian forces had or ought to have had full knowledge that Ossetians detained Georgian servicemen. They apparently participated in the execution of two Georgian soldiers, as well as in interrogations of Georgian POWs in Ossetian custody. Furthermore, the Georgian soldiers were held in Tskhinvali, over which Russia exercised effective control from August 9, and therefore are to be regarded as having fallen into Russia's power. Russia was therefore obligated to afford them POW status and to treat them in conformity with the protections of the Third Geneva Convention, which include absolute prohibitions on ill-treatment and require POWs to be treated humanely and kept in good health. The execution, torture, and ill-treatment of prisoners of war are grave breaches of the Third Geneva Convention and constitute war crimes. [...]

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DISCUSSION

A. Qualification of the conflict and applicable law

Paras [7]-[15]

1. How do you qualify the conflict? How does Human Rights Watch (HRW) qualify it? Do you think that one should regard the situation as encompassing several parallel conflicts which should be analysed separately? In such situations, do you think that one should apply a different body of law for each conflict, even though they occur simultaneously? According to HRW, what law applies? What law is actually cited in the substantive part of its report? (GC I- IV, Art. 2; P I, Art. 1; P II, Art. 1)
2. If you consider the conflicts separately, how do you qualify the fighting between Georgian forces and South Ossetian forces? Between Georgian forces and volunteer militias? Between Georgian forces

and North Ossetian voluntary fighters? Does it matter whether the fighting occurred in disputed or in undisputed Georgian territory? (GC I-IV, Art. 2; P I, Art. 1; P II, Art. 1)

3. How could the IHL of international armed conflicts apply to the fighting between Georgian and South Ossetian forces even if this fighting is classified separately?
4. (*Paras [84] and [92]*)
 - a. Do you agree with HRW that Art. 3 common to the Conventions applies to everyone? Do you think that common Art. 3 also applies during international armed conflicts? [See **Case No. 263**, United States, Hamdan v. Rumsfeld]
 - b. Is a violation of Art. 3 a grave breach of the Geneva Conventions? [See **Case No. 153**, ICJ, Nicaragua v. United States; **Case No. 211**, ICTY, The Prosecutor v. Tadic]
 - c. If the IHL of non-international armed conflicts applies, does it matter for the application of common Art. 3 that the persons detained by Russian and South Ossetian forces had not participated in the hostilities and had not taken up arms against Russian and Ossetian forces?

B. Qualification of the territory

5. (*Paras [16]-[17] and [76]*) What is the test used by HRW to determine which parts of Georgian territory were occupied by Russia? Should one consider South Ossetia as part of Georgia's territory? How do you define occupation? Does HRW give a definition of occupation? (HR, Art. 42)
6. (*Paras [17] and [76]*) Do you agree with HRW that the situation was one of occupation because the Russian Federation did not have the "consent or agreement of Georgia"? Does the mere fact that a State agrees to the presence of foreign troops on its own territory preclude the qualification of the situation as one of occupation? Even though the foreign forces exercise effective control over that part of the territory?
7. (*Paras [1], [3]-[4], [17] and [76]*) Can South Ossetia be considered an occupied territory even though Georgia agreed to the presence of Russian troops in the Sochi agreement and in the August 16 ceasefire?

C. Qualification of the persons

8. Were the Russian peace-keepers in South Ossetia legitimate targets of Georgian attacks? What additional information would you need to answer? [See **Case No. 23**, The International Criminal Court, Part A., The Statute, Arts 8(2)(b)(iii) and 8(2)(e)(iii)]
9. (*Paras [7]-[15] and [42]*) How do you qualify the groups of South Ossetian forces fighting the Georgian forces? According to IHL, under what circumstances would they be entitled to combatant status? Are they allowed to resist the Georgian forces? Is any South Ossetian civilian allowed to resist the Georgian forces? What law applies to South Ossetian civilians taking up arms?
10. How do you qualify the North Ossetian voluntary fighters who joined South Ossetian militias? What law applies to them?
11. (*Paras [52]-[56]*) Do you agree with HRW that Convention IV applies to South Ossetian detainees? Are they protected persons? If one applies the nationality requirement of Art. 4 of Convention IV? If one applies the allegiance criterion of the Tadic case [See **Case No. 211**, ICTY, The Prosecutor v. Tadic]? Is the application of Convention IV consistent with HRW's assertion (para. [14]) that the conflict between Georgian forces and South Ossetian forces was of a non-international character? According to you, what law should apply here? What rules should apply to the South Ossetian detainees mentioned in the report? Are they entitled to all the rights mentioned in para. [55]? Does

it matter for the legality of the treatment of those detainees described in the report whether they were protected by Convention III, Convention IV or Protocol II?

12. a. (*Para. [56]*) Do you agree with HRW that South Ossetian militia fighters are “non-privileged combatants”? What does such a status entail? Is it recognized by IHL? When are members of militias POWs? In what circumstances could the members of the South Ossetian militias be considered POWs? Is this qualification by HRW consistent with its assertion in para. [14] that the conflict between Georgian forces and South Ossetian militias was a non-international armed conflict? According to you, what law applies here? What is the status of the militia fighters detained by Georgian forces? According to which rules should they be treated?
- b. (*Para. [95]*) How does HRW differentiate between “non-privileged combatants” and “armed civilians”? Do those statuses exist in IHL? Is it possible to draw a line between civilians taking up arms to fight and civilians taking up arms to defend their property? Does it depend on what the latter defend their property against? Should they be treated differently if detained?
13. (*Para. [92]*) According to you, what was the status of the Georgian civilians detained by Ossetian and Russian forces? Does it make a difference that the Russian forces were also involved in their detention? Would the status of the Georgian civilians have changed if they had been detained by Ossetian forces only?
14. (*Paras [99]-[101]*) How do you qualify Georgian military servicemen detained by Ossetian forces? How does HRW justify their qualification as POWs? Do you agree? Were they already POWs before their transfer to Russian forces? If they had been detained only by Ossetian forces, would they have been granted POW status only because they were being detained in a territory occupied by Russia?

D. Conduct of hostilities

15. a. (*Paras [20]-[22]*) Was the village of Khetagurovo a military target? Why? If yes, did that turn every house located in the village into a military target? (P I, Arts 51(5)(a) and 52(2))
- b. (*Paras [58]-[60]*) Was School No. 7, which was attacked by Russian forces, a military target? Can such a building become a military target? If yes, in what circumstances? Are there indications that the principle of proportionality was not respected during the attack? (P I, Art. 52; CIHL, Rules 8-10)
- c. (*Paras [39]-[40]*) Were the South Ossetian militiamen driving the cars legitimate targets? If they were only trying to flee or to get their relatives out of the conflict zone? Even if they were wearing uniforms or camouflage? Could the mere fact that they belonged to an armed group fighting against Georgia make them legitimate targets? [See **Case No. 136**, Israel, The Targeted Killings Case] (GC I-IV, Art. 3; P I, Art. 50; P II, Art. 13(3))
- d. (*Paras [61]-[64]*) Was Gori Military Hospital a military target? Does it make a difference whether a hospital is taking care of both civilians and wounded combatants or only of combatants? What protection do hospitals enjoy under IHL? Can they become military targets? If yes, under what conditions? (GC I, Arts 19 and 21; GC IV, Arts 18 and 19; P I, Arts 12 and 13; P II, Art. 11; CIHL, Rule 28)
16. (*Paras [21]-[22]*) Were the attacks on Khetagurovo by the Georgian forces indiscriminate? What constitutes an indiscriminate attack? (P I, Art. 51(4))
17. a. (*Paras [28] and [30]*) Do you agree with HRW that the attacks in Tskhinvali may have been disproportionate? How do you measure proportionality? Should the proportionality test be applied to the overall attack against Tskhinvali or to every single building attacked? (P I, Art. 51(5))

- b. (*Paras [41]-[47]*) Is it necessarily disproportionate to fire at buildings harbouring fighters when the buildings are also sheltering civilians? What are the elements to take into account? Do you think that the attacks by Georgian ground forces against buildings in Tskhinvali were disproportionate? (P I, Art. 51(5))
- 18. a. (*Paras [18]-[25]*) What were Georgia's obligations regarding the precautions to be taken against the effects of attacks in the present case? (P I, Art. 58; CIHL, Rule 23) Is it always possible to avoid locating military targets in populated areas? Is this a strict obligation under IHL?
- b. (*Paras [18]-[25]*) What were the South Ossetian forces' obligations regarding precautions in attack? What kind of warning could have been given? (P I, Art. 57; CIHL, Rules 15-21)
- 19. a. (*Paras [8], [20]-[22] and [28]*) Do you think that Grad rocket launchers are lawful weapons? What rules are they subject to? Is it necessarily prohibited to use them in densely populated areas? (P I, Arts 35, 51(4) and 57(2)(a)(ii); CIHL, Rule 17)
- b. (*Paras [48]-[51] and [65]-[74]*) Were cluster munitions prohibited during the conflict? Under what circumstances may a State use cluster munitions? Do you agree with HRW that the expected civilian harm caused by an attack also encompasses casualties and harm over time (*Para. [67]*)? Why should the use of cluster munitions lead to a presumption that an attack is disproportionate? Should there not rather be a presumption that all feasible precautions in the choice of means and methods have not been taken? (P I, Arts 35, 51(5)(b) and 57(2)(a)(ii); CIHL, Rule 17)
- 20. Which of the attacks mentioned in the report can be qualified as war crimes? Can any of them be qualified as grave breaches? (GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4), 85(3) and (4))

E. Protection of persons

- 21. (*Paras [75] and [79]*) What does IHL say about pillaging and destruction of private property? To whom do the prohibitions apply? Do they apply to South Ossetian forces in the same way as they apply to common criminals or Russian forces? (HR, Arts 28 and 47; GC IV, Art. 33(2); CIHL, Rule 52)
- 22. (*Para. [81]*) Does IHL prohibit ethnic cleansing as such? Which rules of IHL could the South Ossetian forces be said to have violated if HRW's allegations of ethnic cleansing were well-founded?
- 23. (*Paras [82]-[83] and [87]-[89]*) Does Convention IV apply to the acts of pillage committed by South Ossetian militia members? Does it apply if, as HRW asserts, Russian forces did not take part in their commission, but did not try to stop them either? Similarly, does Convention IV apply to the acts of rape and abductions committed by South Ossetian forces and militias? What law should apply to these acts?
- 24. (*Paras [85]-[86]*) What does IHL say about the return of civilians to their homes after the end of hostilities? When should they be allowed to return? (GC IV, Art. 49)
- 25. (*Paras [90]-[98]*)
 - a. When may a State party to a conflict detain civilians? In the present case, do you think that the civilians detained by South Ossetian and Russian forces were lawfully detained? What grounds did the parties invoke to justify the detentions? Do they seem valid? (GC IV, Arts 43 and 78)
 - b. What are the rules governing the conditions of detention of civilians? Regarding the place of detention? Regarding working conditions? (GC IV, Arts 43 and 78)
 - c. Are "prisoner exchanges a recognized and legitimate process to facilitate repatriation" or is there a unilateral obligation to repatriate detainees at the end of active hostilities? What does IHL say about the release of civil internees? When should they have been released? (GC IV, Arts 45(2), 132(2) and 134)

- d. Is the Russian Federation responsible for every incident of ill-treatment of detainees in territories it occupies?
- 26. (*Paras [98]-[101]*) What are the rules governing the conditions of detention of POWs and their treatment during detention? Which rules of IHL seem to have been violated here? Can the Russian Federation allow South Ossetian forces to detain a Georgian POW who fell into Russian hands? (GC III, Arts 12-16 and 22)

F. State responsibility

- 27. a. (*Paras [76]-[78] and [84]*) What are the obligations of an Occupying Power regarding public order? What does the obligation “to ensure (...) public order and safety” mean? (HR, Art. 43)
- b. (*Paras [76]-[78]*) Can the Russian Federation be held accountable for the violations of IHL committed by the South Ossetian forces? Do we have enough information to conclude that the Russian Federation was exercising a level of control over the South Ossetian forces sufficient to engage its responsibility? Can the Russian Federation be held accountable for South Ossetian acts merely on the grounds that it was occupying the territory where the violations occurred and therefore was exercising some control over it?

Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia

[Source: Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I, p. 1-33, available at www.ceiig.ch, footnotes omitted]

[N.B.: This case refers to the same facts as **Case No. 290**, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia, but does not cover the same legal issues.]

**INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA
REPORT**

[...]

- [1] By its decision of 2 December 2008 the Council of the European Union established an Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG). This is the first time in its history that the European Union has decided to intervene actively in a serious armed conflict. It is also the first time that after having reached a ceasefire agreement the European Union set up a Fact-Finding Mission as a political and diplomatic follow-up to the conflict. [...] The present Report is the result of the mandated inquiry.

[...]



Source: Fischer Weltatmanach, Fischer Taschenbuch Verlag, Frankfurt am Main, 2009

Introduction

- [2] On the night of 7 to 8 August 2008, after an extended period of ever-mounting tensions and incidents, heavy fighting erupted in and around the town of Tskhinvali in South Ossetia. The fighting, which soon extended to other parts of Georgia, lasted for five days. In many places throughout the country it caused serious destruction, reaching levels of utter devastation in a number of towns and villages. Human losses were substantial. At the end, the Georgian side claimed losses of 170 servicemen, 14 policemen and 228 civilians killed and 1 747 persons wounded. The Russian side claimed losses of 67 servicemen killed and 283 wounded. The South Ossetians spoke of 365 persons killed, which probably included both servicemen and civilians. Altogether about 850 persons lost their lives, not to mention those who were wounded, who went missing, or the far more than 100 000 civilians who fled their homes. Around 35 000 still have not been able to return to their homes. The fighting did not end the political conflict nor were any of the issues that lay beneath it resolved. Tensions still continue. The political situation after the end of fighting turned out to be no easier and in some respects even more difficult than before.

[...]

The Conflict in Georgia in August 2008

[...]

- [3] On the night of 7 to 8 August 2008, a sustained Georgian artillery attack struck the town of Tskhinvali. Other movements of the Georgian armed forces targeting Tskhinvali and the surrounding areas were under way, and soon the fighting involved Russian, South Ossetian and Abkhaz military units and armed elements. It did not take long, however, before the Georgian advance into South Ossetia was stopped. In a counter-movement, Russian armed forces, covered by air strikes and by elements of its Black Sea fleet, penetrated deep into Georgia [...]. The confrontation developed into a combined inter-state and intra-state conflict, opposing Georgian and Russian forces at one level of confrontation as well as South Ossetians together with Abkhaz fighters and the Georgians at another. [...] After five days of fighting, a ceasefire agreement was negotiated on 12 August 2008 between Russian President Dmitry Medvedev, Georgian President Mikheil Saakashvili and French President Nicolas Sarkozy, the latter acting on behalf of the European Union. An implementation agreement followed on 8 September 2008, again largely due to the persistent efforts of the French President. [...]
- [4] [...] [T]he conflict has deep roots in the history of the region [...].
- [5] [...] [On] 9 April 1991, [...] Georgian independence emerged out of a severe crisis, [following] the downfall of [...] [the Soviet Union]. [...] There was one important legacy from the Soviet era, though: the subdivision of Georgia into three political-territorial entities, including the Autonomous Republic of Abkhazia and the Autonomous Oblast' (district) of South Ossetia. Of course there also remained overall Georgia with its capital city Tbilisi, within its internationally recognised

borders coinciding with the former “Soviet Socialist Republic of Georgia” [...]. During the period of transition to post-Soviet sovereignty the country’s first President, Zviad Gamsakhurdia, then did a lot in terms of nationalism to alienate the two smaller political-territorial entities of Abkhazia and South Ossetia from the Georgian independence project [...]. The fighting that finally broke out between Georgian forces and separatist forces, first in South Ossetia in 1991-1992 and then in Abkhazia 1992-1994 ended with Georgia losing control of large parts of both territories. There was support from Russia for the insurrectionists, yet it seems that the Russian political elite and power structures were divided on the issue and partly involved, and Moscow remained on uneasy terms with Tbilisi at the same time.

- [6] [...] Russian forces undertook peacekeeping responsibilities both in South Ossetia and later in Abkhazia. An agreement concluded in June 1992 in Sochi between the two leaders Eduard Shevardnadze and Boris Yeltsin established the Joint Peacekeeping Forces (JPKF) for South Ossetia, consisting of one battalion of up to 500 servicemen each of the Russian, Georgian and Ossetian sides, to be commanded by a Russian officer. [...]
- [7] At the turn of the millennium it became apparent that the unresolved political status of South Ossetia and Abkhazia had become more difficult to manage and that there was no clear-cut solution in sight. [...]

[Source: Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume II, “International Humanitarian Law and Human Rights Law”, p. 295-438, available at www.ceiig.ch, footnotes omitted]

Chapter 7

International Humanitarian Law and Human Rights Law

[...]

II. Applicable international law

[...]

A. International Humanitarian Law

- [8] [...] Georgia and the Russian Federation are parties to the main IHL treaties, including the four Geneva Conventions of 1949 and the two additional protocols of 1977, together with the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Russian Federation is also a party to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. Furthermore, it is well recognised that the rules contained in this latter instrument have become part of customary international humanitarian law.

[...]

- [9] The question remains whether, when the cease-fire occurred on 12 August 2008, IHL ceased to apply in relation to the August 2008 conflict. While it could be said that it is fairly easy to determine when IHL starts to apply, it seems more difficult to identify the moment when its application ends, mainly owing to the different formulas used in conventional law. Geneva Convention IV, for example, speaks about the “general close of military operations” (Article 6(2)), whereas Additional Protocol II uses the expression “end of the armed conflict” (Article 2(2)). The International Criminal Tribunal for the former Yugoslavia (ICTY), in its decision of 2 October 1995 in the Tadic case, tried to clarify this point by indicating that: “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.” The ICTY thus rejected the factual criteria that signify the cessation of hostilities. This implies that a cease-fire – whether temporary or definitive – or even an armistice cannot be enough to suspend or to limit the application of IHL. Relevant conventional instruments stipulate that a number of provisions continue to apply until the emergence of a factual situation completely independent of the concluding of a peace treaty. Thus, to quote only some examples, the protection provided for people interned as a result of the conflict (in particular, prisoners of war and civilian prisoners) applies until their final release and repatriation or their establishment in the country of their choice.

a) IHL of international and non-international armed conflict

- [10] The hostilities between Georgia and the Russian Federation constitute an international armed conflict between two states as defined by Common Article 2 of the 1949 Geneva Conventions [...]. This was asserted by both the Russian Federation and Georgia. Consequently, IHL applicable to this category of armed conflict is relevant.
- [11] The hostilities between South Ossetia and Abkhazia on the one hand, and Georgia on the other, are governed by the IHL applicable to non-international armed conflict, since both are recognised internationally as being part of Georgia and, at the time of the 2008 conflicts, this was undisputed. The Russian Federation also reached this conclusion. However Georgia seems to classify it overall as an international armed conflict: “in relation to the period from 7 to 12 August 2008, objective evidence shows that there was resort to armed force by the separatists, the Russian Federation and the Republic of Georgia. Therefore, it is beyond doubt that there was an international armed conflict in existence from 7 to 12 August 2008.” This could be the case if one considers that Russia exercises sufficient control over the Abkhaz/South Ossetian forces, as will be discussed later.
- [12] Given the organised and responsible command of South Ossetian and Abkhaz armed forces, as well as the territorial control exercised by the authorities, the criteria set out in Additional Protocol II for its application are met. Common

Article 3 of the Geneva Conventions and Additional Protocol II both apply in the current situation, in addition to relevant customary law.

b) IHL of international armed conflict because of Russia's control over Abkhaz/South Ossetian forces

- [13] An armed conflict between a State and an armed group may be qualified as international if this group, under certain conditions, is under the control of another State, i.e., a second State. Georgia and the Russian Federation hold opposing views on whether the latter exercised control over the Abkhaz and Ossetian forces. [...]

[See **Case No. 153**, ICJ, *Nicaragua v. United States*, **Case No. 211**, ICTY, *The Prosecutor v. Tadic*, Part C., Appeals Chamber, Merits, paras 98-145, and Part D., ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, paras 396-407]

- [14] Georgia and the Russian Federation have two completely opposing views on the question of control. While Georgia claims that the Russian Federation acted through the separatist South Ossetian and Abkhaz forces under its direction and control, the Russian Federation has stated that “the conduct of the South Ossetian and Abkhaz authorities is not conducted by organs of the Russian Federation.” [...]

- [15] The composition of the Abkhaz and South Ossetian forces remains unclear. [...] Various testimonies contain accounts of foreign volunteers such as Chechens operating in the territory of South Ossetia. The presence of 300 volunteers from the Russian Federation was mentioned by the representatives of the Georgian Ministry of Internal Affairs when meeting with the IIFFMCG experts in June 2009. *De facto* authorities from South Ossetia confirmed to the IIFFMCG in June that volunteers had fought with South Ossetian military forces. The regular armed forces of the *de facto* South Ossetian authorities unquestionably constitute “an organised and hierarchically structured group”, while the Abkhaz army is described as being made up of “regular” forces and a “well-trained reservist component” with “a command hierarchy.” On the other hand, the situation may be different for isolated armed groups or individuals who acted on their own during the hostilities. In the former case, “overall control” would need to be established in order to render the armed conflict between Georgia and the Abkhaz and South Ossetian armed forces international.

[...]

- [16] The statements made by the Russian Federation and the *de facto* Abkhaz authorities reject any allegation of overall control. The Russian Federation has declared that “prior to the conflict in August one could only speak of cooperation between the Russian peacekeeping contingent and South Ossetian and Abkhaz military units wherever peacekeeping forces may be present within parameters commonly accepted in similar situations in other countries. These relations were governed by the mandate of the peacekeeping force.” While strong economic, cultural and social ties exist between the Russian Federation and the authorities of Abkhazia, those authorities have stated that, in the course of the operation

in the Kodori Valley, “the Abkhaz army, while remaining in contact with Russian forces acting from Abkhaz territory, operated independently.” Further aspects of the assistance and the military structure and command linking the Russian Federation and those entities would need to be substantiated in order to establish such control. According to Georgia, “the Abkhaz and South Ossetian military formations did not independently control, direct or implement the military operations during either the armed conflict or the occupation periods. Rather, these military formations acted as agents or *de facto* organs of the Respondent State and as such constituted a simple continuation of the Russian Federation’s armed forces.”

- [17] In factual terms, one may have to draw a distinction with regard to the nature of the relationship between Russia and South Ossetia on the one hand, and between Russia and Abkhazia on the other. In the former, ties seem to be stronger. During the meeting between the IFFMCG experts and the representatives of the Ministry of Internal Affairs of Georgia, the representatives stressed the political and economic links between Russia and South Ossetia. They also claimed that Russia exercises control over South Ossetia through various channels ranging from financial help to the presence of Russian officials in key military positions in the South Ossetian forces.
- [18] At this point it is appropriate to underline that although the classification of an armed conflict as international or non-international is important in terms of the responsibilities of the various parties involved, when it comes to the effective protection by IHL of the persons and objects affected by the conflict it does not make much difference. Indeed, it is generally recognised that the same IHL customary law rules generally apply to all types of armed conflicts.

c) IHL of military occupation

- [19] Under IHL, the law of military occupation primarily includes the 1907 Hague Regulations concerning the Laws and Customs of War on Land and Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, as well as some provisions of Additional Protocol I. As Geneva Convention IV does not provide a definition of what constitutes an occupation, it is necessary to rely on the Hague Regulations. A territory is considered “occupied” when it is under the control or authority of the forces of the opposing State, without the consent of the government concerned. More specifically, according to Sassòli and Bouvier, “the rules of IHL on occupied territories apply whenever a territory comes, during an armed conflict, under the control of the enemy of the power previously controlling that territory, as well as in every case of belligerent occupation, even when it does not encounter armed resistance and there is therefore no armed conflict.” In the former case, pursuant to Article 42 of these Regulations, a “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” For the second situation, Geneva Convention IV provides that “the Convention shall also apply to all cases of partial or total occupation of

the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

- [20] As stressed by the ICJ in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, “to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.” [See Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, *Armed Activities on the Territory of the Congo*, para. 173] Ascertaining the existence of a state of occupation is a determination based on facts. The critical question is the degree and extent of the control or authority required in order to conclude that a territory is occupied.
- [21] Two perceptions exist in this regard, which are not mutually exclusive but rather constitute two stages in the application of the law on occupation. These two stages reflect growing control by the occupying power. This means that, for a part of the law of occupation to apply, it is not necessary for the military forces of a given State to administer a territory fully.
- [22] The Commentary on the Geneva Conventions states the following with respect to Article 2(2) of Geneva Convention IV: “the word ‘occupation’ has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. [...] There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.” While this stage does not of course entail a full application of the law of occupation under Geneva Convention IV, the mere fact that some degree of authority is exercised on the civilian population triggers the relevant conventional provisions of the law of occupation on the treatment of persons. In a further stage, the full application of the law on occupation comes into play, when a stronger degree of control is exercised. [...]
- [23] The determination must be made on a case-by-case basis. [...]
- [24] First, [...] Georgia asserted that the territories of South Ossetia and Abkhazia, including the upper Kodori Valley, were occupied by Russian forces. On 23 October, the Parliament of Georgia adopted a law declaring Abkhazia and South Ossetia “occupied territories” and the Russian Federation a “military occupier.” This claim was reiterated [...] In describing the “current occupation” Georgia also stated: “the western part of the former ‘buffer zone’ (the village of Perevi in the Sachkhere District) remains under Russian occupation.” In addition to those territories that are still occupied by Russian forces at the time of writing

this report, according to Georgia the following territories were occupied in the aftermath of the conflict: "In Eastern Georgia South of the conflict zone Russian forces occupied most parts of the Gori District, including the City of Gori; South-west of the conflict zone Russian forces occupied part of the Kareli District; West of the conflict zone Russian forces occupied part of the Sachkhere District; in Western Georgia they occupied the cities of Zugdidi, Senaki and Poti. Following the Russian withdrawal from the City of Gori on 22 August 2008, Russian forces still occupied the northern part of the Gori District right up to the southern administrative boundary of South Ossetia. This territory constituted part of the 'buffer zone' that was created by Russian Forces around the territory of South Ossetia and absorbed territories that used to be under the control of the Georgian central Government. [...]"

- [25] The Russian Federation, on the contrary, holds that it does not at present, nor will it in the future, exercise effective control over South Ossetia or Abkhazia; and that it was not an occupying power. [...] It further explained that "the presence of an armed force in the territory of another state is not always construed as occupation" [...]. According to the Russian Federation, "the determining factor in international law necessary to recognise a military presence as an occupation regime is whether the invading state has established effective control over the territory of the country in question and its population." In its replies to the questionnaire submitted by the IFFMCG, it presented a threefold argument to reject such control. First, "the Russian Armed Forces never replaced the lawful governments of Georgia or South Ossetia." Second, "no regulatory acts mandatory for the local populations have been adopted by them." Finally, "the number of Russian troops stationed in South Ossetia and Abkhazia (3,700 and 3,750 servicemen respectively) does not allow Russia in practice to establish effective control over these territories which total 12 500 sq. kilometers in size. To draw a parallel: effective control over a much smaller territory of Northern Cyprus (3 400 sq. kilometers) requires the presence of 30,000 Turkish troops. During the active phase of the military conflict the maximum size of the Russian contingent in South Ossetia and Abkhazia reached 12,000 personnel. However, all of these forces were engaged in a military operation and not in establishing effective control." It concluded that "based on the foregoing, there are no sufficient grounds for maintaining that the Russian side exercised effective control over the territory of South Ossetia or Georgia during the Georgian-South Ossetian conflict or that an occupation regime was established in the sense contemplated in IHL."

[...]

- [26] If [...] Russia's military intervention cannot be justified under international law, and if neither Abkhazia nor South Ossetia is a recognised independent state, IHL – and in particular the rules concerning the protection of the civilian population (mainly Geneva Convention IV) and occupation – was and may still be applicable. This applies to all the areas where Russian military actions had an impact on protected persons and goods. However, the extent of the control and authority

exercised by Russian forces may differ from one geographical area to another. [...]

- [27] [...] [Moreover, the Russian Federation noted] that while “South Ossetia had and still has its own government and local authorities that exercise effective control in this country, maintain the rule of law and protect human rights, (...) the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where due to the flight of Georgian government authorities an apparent vacuum of police presence ensued.” [...]

III. Main facts and related legal assessment

[...]

- [28] Under IHL, the exact figure of casualties is not relevant in itself and does not entail legal implications. What matters is rather the nature of the victims and the circumstances in which such casualties occurred. [...]

A. Conduct of hostilities

[...]

- [29] While the conventional rules of IHL on the conduct of hostilities were applicable mainly to international armed conflicts, the recent decisions of the international criminal tribunals, as well as the consolidation of the customary nature of IHL rules, demonstrate the exponential development of the applicable customary law in non-international armed conflicts.

[...]

a) Targets attacked

[...]

- [30] A distinction on the conduct of hostilities derived from IHL, the distinction between persons and objects, will be used to structure the analysis of the targets attacked.

(i) Alleged Attacks on Peacekeepers

- [31] Alleged attacks on peacekeepers occurred both prior to the conflict, fuelling the tension between the parties, and during it. [...]

- [32] Under IHL, the protection afforded to peacekeepers is closely linked to the general protection of civilians. As stated in the ICRC Customary Law Study [See Case No. 43, ICRC, Customary International Humanitarian Law], customary IHL prohibits “directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled

to the protection given to civilians and civilian objects under international humanitarian law.” The use of force for strictly self-defence purposes or for the defence, within their peacekeeping mandate, of civilians or civilian objects would not be qualified as participation in hostilities. In this context they could not be regarded as a lawful target as they are not pursuing any military action. It is important to stress that, in both international and non-international armed conflict, the Rome Statute of the ICC regards it as a war crime intentionally to direct attacks against peacekeepers and related installations “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”

- [33] During the conflict, according to Russian peacekeepers, posts manned by Russian and/or Ossetian forces were attacked by Georgian forces. The Russian Federation claims that the peacekeepers were deliberately killed. [...] When meeting with the IIFFMCG’s experts in Moscow in July 2009, the representatives of the Investigative Committee of the General Prosecutor’s Office of Russia indicated that 10 Russian peacekeepers had been killed.

[...]

- [34] HRW [Human Rights Watch] [...] noted that it was unable to corroborate any of the serious allegations of attacks on or by peacekeepers from Russia and Georgia.

- [35] Nor was the IIFFMCG able to corroborate such claims, or the claim that Georgian forces had attacked Russian peacekeepers’ bases, with information from sources other than the sides. Even if these claims were to be confirmed, the lack of more precise information would make the establishment of relevant facts and their legal assessment problematic, as the Mission would find itself with two contradictory assertions. When considering direct attacks against peacekeepers, the conclusion depends on whether or not, at the time of the attacks, the peacekeepers and peacekeeping installations had lost their protection. On the other hand, peacekeepers may have been killed or injured as a result of an indiscriminate attack, not specifically directed against them.

- [36] ***The Mission was unable to establish whether, at the time of the alleged attacks on Russian peacekeepers’ bases, the peacekeepers had lost their protection owing to their participation in the hostilities. The Mission is consequently unable to reach a definite legal conclusion on these facts.***

(ii) Objects

1. Administrative buildings

- [37] In March 2009 the IIFFMCG was shown by the *de facto* South Ossetian authorities several administrative buildings, such as those of the Parliament and the *de facto* Ministry of Foreign Affairs, which they alleged had been hit by Georgian forces. It witnessed the damage caused by these attacks. [...] Human Rights Watch also referred to administrative buildings hit by the Georgian artillery, such as the Ossetian parliament building.

- [38] [...] [T]he Georgian authorities later claimed that their military had targeted mostly administrative buildings in these areas because these buildings were harbouring Ossetian militias. Similarly, in his testimony to the parliamentary commission studying the August war, Zaza Gogava, Chief of Staff of the Georgian Armed Forces, said that “Georgian forces used precision targeting ground weapons only against several administrative buildings, where headquarters of militias were located; these strikes did not cause any destruction of civilian houses.” [...]
- [39] ***The Mission was unable to assess each specific attack on administrative and public buildings in Tskhinvali but notes that, although not in themselves lawful military objectives, such buildings may be turned into a legitimate target if used by combatants.***
- This would, however, not relieve the attacker of certain obligations under IHL (e.g. precautions, proportionality).***

2. Schools

- [40] Under IHL, schools are by nature civilian objects that are immune from attack. Several cases of damage caused to schools in the course of the hostilities call for specific attention. Referring to the shelling of Tskhinvali by Georgian forces, Human Rights Watch noted that “the shells hit and often caused significant damage to multiple civilian objects, including the university, several schools and nursery schools, [...] some of these buildings were used as defence positions or other posts by South Ossetian forces (including volunteer militias), which rendered them legitimate military targets.” For example, witnesses told Human Rights Watch that militias had taken up positions in School No. 12 in the southern part of Tskhinvali, which was seriously damaged by Georgian fire.
- [41] The attack on School No. 7 in Gori on 9 August also exemplifies the need to pay particular attention to the circumstances of an attack. According to Human Rights Watch, relying on one eyewitness: “Russian aircraft made several strikes on and near School No. 7 in Gori city. (...) [A]bout one hundred Georgian military reservists were in the yard of the school when it was attacked. (...) None of the reservists was injured. The reservists as combatants were a legitimate target, and it is possible that the school was deemed as being used for military purposes. In such circumstances, it would lose its status as a protected civilian object. In the attack, one strike hit an apartment building next to the school, killing at least five civilians and wounding at least 18, and another hit a second building adjacent to the school causing damage, but no civilian casualties. There were civilians also taking shelter in the school.” In this regard, following the overview of specific objects that were attacked or hit, in this section an assessment will later be undertaken to determine whether the principle of proportionality was respected and whether precautions had been taken to minimise the death of civilians and damage to civilian buildings.
- [42] ***The Mission has no information indicating that schools not used for military purposes were deliberately attacked.***

3. Hospitals

- [43] Under IHL hospitals, apart from the protection they benefit from as civilian objects, enjoy special protective status.
- [44] Damage caused to hospitals in the course of a conflict does not in itself amount to a direct attack against such an object. While it may be so if the hospitals have lost their protection because they have been “used to commit, outside their humanitarian duties, acts harmful to the enemy,” damage can also be collateral, caused by an attack on a legitimate military target.
- [45] According to Human Rights Watch, one of the civilian objects hit by GRAD rockets in Tskhinvali when the Georgian forces attacked was the South Ossetian Central Republican Hospital (Tskhinvali hospital), the only medical facility in the city that was assisting the wounded, both civilians and combatants, in the first days of the fighting. According to this organisation, the rocket severely damaged treatment rooms on the second and third floors.

[...]

- [46] Human Rights Watch also documented the attack at around 2 a.m. on 13 August by a Russian military helicopter, which fired a rocket towards a group of hospital staff members who were on a break in the hospital yard [of Gori military hospital]. The rocket killed Giorgi Abramishvili, an emergency-room physician. Human Rights Watch reported that its researchers saw that the roof of the hospital building was clearly marked with a red cross. This attack contradicts the claim by the Russian Federation that its forces fired “upon clearly identified targets only” during the conflict and that “all kill fire was monitored.”
- [47] ***While the damage caused to hospitals by GRAD rockets or artillery shelling resulted from the use of inaccurate means of warfare, the helicopter fire at the hospital in Gori seems to indicate a deliberate targeting of this protected object. This may amount to a war crime.***

4. Vehicles

- [48] Under IHL, civilian vehicles are immune from attack owing to their civilian character. In the context of the August 2008 conflict, two circumstances may explain the damage caused to civilian vehicles and may have legal implications for whether such damage could amount to a violation of IHL: either a legitimate military target was in the vicinity of the vehicle when it was damaged, or armed militia fighters were in the vehicle when it was attacked. In this latter case, a militia fighter is a legitimate military target if he or she participates directly in hostilities. This is significant as in the course of the conflict many persons reported that South Ossetian militia fighters stole cars and used them for different purposes. [...]
- [49] Testimonies collected by Human Rights Watch refer to attacks by Georgian forces on civilians fleeing the conflict zone, mainly on the Dzara road. The Georgian authorities stated in a letter to this organisation that their forces “fired on armor and

other military equipment travelling from the Roki Tunnel along the Dzara Road, not at civilian vehicles.” A witness told Human Rights Watch that Ossetian forces had an artillery storage facility and firing position on a hill about one kilometre from the Dzara road. While both Russian forces and Ossetian military equipment constitute legitimate targets, accounts of vehicles being hit by Georgian weaponry raise questions about either the civilian nature of those vehicles or inaccurate targeting or collateral damage or deliberate attacks. According to the Georgian government, the movement of civilian transport vehicles was stopped during the combat. From information it collected, however, Human Rights Watch has suggested that “many cars were driven by South Ossetian militiamen who were trying to get their families, neighbours and friends out of the conflict zone.”

[...]

- [50] There are also cases of aerial attacks on civilian convoys fleeing South Ossetia near Eredvi, more than likely carried out by Russian forces according to Human Rights Watch which interviewed residents who had fled. As stressed by this organisation, there appeared to be no Ossetian or Russian military positions in that area that would have been targeted by the Georgian army.

[...]

- [51] ***The Mission was unable to reach a definite conclusion as to whether the attacks on vehicles by Georgian forces were contrary to IHL. Only deliberate Georgian attacks on civilian vehicles would amount to a war crime.***

Similarly, circumstances surrounding the attacks on civilian convoys fleeing the area of conflict, possibly by Russian planes, are difficult to ascertain. If confirmed, such attacks would amount to a war crime.

[...]

6. Cultural objects, monuments, museums and churches

- [52] The basic principle is to be found in Article 4 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict [See Document No. 10, Conventions on the Protection of Cultural Property], applicable in both international and non-international armed conflict. It states that, as long as cultural property is civilian, under IHL it may not be the object of attack. [...]
- [53] Reports on the conflict in Georgia contain very few allegations of damage caused to cultural monuments, museums or churches. While not systematically put forward, such claims as have been made come from both Georgia and the Russian Federation. According to the latter, “a random examination of historic and cultural monuments conducted on 15-18 August 2008 showed that a number of unique objects had been lost as a result of large-scale heavy-artillery shelling of South Ossetian communities by the Georgian forces. Furthermore, instances of vandalism and the deliberate destruction of cultural monuments and ethnic Ossetian burial sites were attributed to the Georgian military as well.” [...]

- [54] The most significant damage confirmed concerns the Bishop's Palace in Nikozi (10th/11th centuries). [...] It is described by the Georgian authorities as "one of the most important examples from the late medieval period, [and it] was heavily damaged following aerial bombardment on 9th August and a subsequent fire." This is confirmed by the Council of Europe Assessment Mission on the Situation of the Cultural Heritage in the Conflict Zone in Georgia. [...]
- [55] ***Generally, more information is needed in order to assess both the extent of the damage and the facts relating to the circumstances of the military operations. This is critical as the special protection given to cultural property ceases only in cases of imperative military necessity.***

b) Indiscriminate attacks including disproportionate attacks

- [56] Some of the most serious allegations by all sides in the August 2008 conflict relate to indiscriminate attacks and the deliberate targeting of civilians. [...] Allegations in this regard focus *inter alia* on the use of certain types of weapons having indiscriminate effects. [...]
- [57] The IFFMCG deems it necessary first to address the issue of the types of weapons used and the ways in which they were used before proceeding with a general assessment of the question of indiscriminate attacks.

(i) The types of weapons used and the ways in which they were used

- [58] [...] None of the weapons used in the context of this conflict is covered by a specific ban, whether be it conventional or customary. Nevertheless, while none of the weapons used during the August 2008 conflict could be regarded as unlawful *per se* under the general principles of IHL, the way in which these weapons were used raises serious concern in terms of legality. This is significant considering that the weapons in question were used mostly in populated areas. The two types of controversial weapon are the GRAD rockets and cluster bombs.
- [59] As rightly stated by Georgia, "at the time of the international armed conflict between Russia and Georgia in August 2008, Georgia was not party to any of the international legal instruments expressly prohibiting the use of GRAD Multiple Rocket Launching systems or cluster munitions in international armed conflict; neither was there any rule of customary international law, applicable to Georgia, prohibiting the above." This also holds true for Russia.
- [60] Where GRAD rockets are concerned, Georgia, as reported by HRW, stated that [...] "The Armed Forces of Georgia used GRAD rockets only against clear military objectives and not in populated areas." [...]
- [61] [This statement], however, contradict the information gathered by the IFFMCG. According to many reports and accounts from witnesses present in Tskhinvali on the night of 7 August 2008, Georgian artillery started a massive area bombardment of the town. Shortly before midnight the centre of Tskhinvali came under heavy fire and shelling. OSCE observers assessed that this bombardment

originated from MLRS GRAD systems and artillery pieces [...]. Narratives of the first hours following the offensive indicate intense shelling with incoming rounds exploded at intervals of 15 to 20 seconds. Within 50 minutes (8 August, 0.35 a.m.) the OSCE observers counted more than 100 explosions of heavy rounds in the town, approximately half of them in the immediate vicinity of the OSCE field office which was located in a residential area. The OSCE compound was hit several times, and damaged.

- [62] Investigations and interviews carried out by HRW and Amnesty International seem to confirm these facts. Human Rights Watch concluded that Georgian forces fired GRAD rockets using, among other weapons, BM-21 "GRAD," a multiple rocket launcher system capable of firing 40 rockets in 20 seconds, self-propelled artillery, mortars, and Howitzer cannons. [...] Amnesty International representatives observed extensive damage to civilian property within a radius of 100-150 m from these points, particularly in the south and south-west of the town, highlighting the inappropriateness of the use of GRAD missiles for targeting these locations.
- [63] The Fact-Finding Mission concludes that during the offensive on Tskhinvali the shelling in general, and the use of GRAD MLRS as an area weapon in particular, amount to indiscriminate attacks by Georgian forces, owing to the characteristics of the weaponry and its use in a populated area. Furthermore, the Georgian forces failed to comply with the obligation to take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- [64] The other highly debated weapons used in the course of the conflict are the cluster munitions. While the use of cluster bombs in order to stop the advance of the Russian forces was acknowledged by the Georgian authorities, Moscow did not officially authorise such use by its own forces.
- [65] According to Amnesty International, the Georgian authorities stressed that cluster munitions were deployed only against Russian armaments and military equipment in the vicinity of the Roki tunnel in the early hours of 8 August and only by Georgian ground forces. The Georgian authorities informed Amnesty International that such cluster munitions were also used on 8 August to attack Russian and Ossetian forces on the Dzara bypass road. Amnesty International noted that "the Georgian authorities maintain that there were no civilians on the Dzara road at the time of the Georgian cluster bombing as the movement of all kinds of civilian transport vehicles was stopped during combat operations in the area, and this was confirmed by Georgian forward observers." [...] However, it noted that "it is clear that several thousand civilians were fleeing their homes both towards central Georgia and to North Ossetia during the course of 8 August and that the Dzara road was an obvious avenue of flight for South Ossetians heading north."

- [66] Georgia explained the military necessity for using cluster bombs in the following terms:

“Cluster munitions [...] have been used exclusively against heavily armored vehicles and equipment moving into the territory of Georgia. The use of the aforementioned was based on a thorough analysis of the military necessity and the military advantage it could give to the Georgian army in the given situation. The pressing military necessity was to halt the advance of Russian military personnel and equipment into Georgian territory. [...]”

- [67] As for the presence of clusters that hit nine villages in the Gori District, HRW noted that “several factors suggest that Georgian forces did not target these villages, but rather that the submunitions landed on these villages owing to a massive failure of the weapons system.” HRW documented a number of civilian casualties as a consequence of these incidents, either when cluster munitions landed, or from unexploded duds.

[...]

- [68] Concerning the alleged use of cluster bombs by Russia, this state reiterated its position in its replies to the IFFMCG questionnaire: “Cluster munitions, though available to the strike units of the Russian Federation Air Force and designed to inflict casualties on the enemy and destroy military equipment in open spaces, have never been used.” This contradicts evidence, collected by Human Rights Watch, which asserted that cluster munitions were used, *inter alia*, in the village of Variani, killing three people; in Ruisi; and in the main square of Gori city, killing six people.

- [69] The death of a Dutch journalist in the course of the 12 August cluster munitions strike on Gori’s main square strengthens this claim that Russia did use cluster munitions. This is significant as not only HRW but also the commission of inquiry set up by the Dutch Ministry of Foreign Affairs concluded that this journalist had been killed as a result of the use of such weapons by the Russian side.

[...]

- [70] ***The use by Georgia of certain weapons including GRAD MRLS during the offensive against Tskhinvali and other villages in South Ossetia did not comply with the prohibition of indiscriminate attacks and the obligation to take precautions with regard to the choice of means and methods of warfare.***

The use of artillery and cluster munitions by Russian forces in populated areas also led to indiscriminate attacks and the violation of rules on precautions.

(ii) Indiscriminate attacks by Russia and Georgia

[...]

- [71] HRW [...] documented cases in which villagers from Tamarasheni described how Russian tanks had fired on villagers’ homes. Witnesses told Human Rights Watch that there were no Georgian military personnel in their houses at the time

when the tank fire took place. HRW also referred to “one witness [who] described an incident in which tanks methodically moved through the streets, firing on numerous houses in a row, suggesting that the fire was not directed at specific military targets and that such attacks were indiscriminate.”

- [72] Georgian attacks, both during the shelling of Tskhinvali and during the ground offensive, raise serious concerns. In the former, according to HRW, “at the very least the Georgian military effectively treated a number of clearly separate and distinct military objectives as a single military objective in an area that contained a concentration of civilians and civilian objects,” amounting under IHL to indiscriminate attacks. [...]
- [73] ***In several cases, Georgia and Russia conducted attacks that were indiscriminate and consequently violated IHL.***

c) Precautionary measures in attacks

[...]

- [74] [...] Most important are the issue of the intelligence used to select targets and the question of the presence of the civilian population in Tskhinvali at the time of the offensive. Amnesty International [...] noted that “at the time of the initial shelling of Tskhinvali, Georgian forces were positioned several kilometres from Tskhinvali, at a distance from which it would have been difficult to establish the precise location of the Ossetian positions firing on them. Nor, as Ossetian forces were lightly armed and mobile, could there have been any guarantee that positions from which munitions had been fired in preceding days were still occupied on the night of 7 August.” It also expressed concern about whether precautions were actually taken in relation to the choice of means and methods and issuing a warning to the civilians.

[...]

- [75] [...] There is [...] no doubt that many people were still in Tskhinvali on the night of 7 August. Consequently, the question is about the type of precautionary measures that were taken by the Georgian military command to minimise the harm to civilians, both during the shelling and afterwards, in the course of the ground operation.
- [76] During the meeting between representatives of the Ministry of Defence of Georgia and the IFFMCG in June 2009, the Mission’s experts were told that the Georgian forces had used smoke grenades to warn the population before artillery shelling. This seems to fall short of giving effective advance warning under IHL. In its replies to the questionnaire, Georgia indicated that “moreover, at 15:00 on 8 August, the Georgian authorities declared a three-hour unilateral cease-fire to allow the remaining civilians to leave the conflict area in the southern direction from Tskhinvali towards Ergneti.” This appears to be not enough in the light of the IHL obligation to take all feasible measures. When the offensive on Tskhinvali was carried out, at night, no general advance warning was given to the remaining population.

[77] It should be mentioned that the presence of South Ossetian fighters, mostly in buildings in whose basements civilians were sheltering, and the fact that they even shot at Georgian soldiers from these very basements, complicates the conduct of warfare on the part of the attacker. This does not, however, release the Georgian forces from their obligations. In this regard, one of the most worrying examples of the lack of precautionary measures taken by the Georgian forces is their use of tanks and infantry fighting vehicles to fire at those buildings while knowing that there were civilians inside. [...]

[78] ***During the offensive on Tskhinvali and other villages in South Ossetia, Georgian forces failed to take the precautions required under IHL.***

[...]

d) Passive precautions and human shields

[79] Under IHL, the defender too is bound by obligations to minimise civilian casualties and damage to civilian objects such as houses. Article 58 of Additional Protocol I of 1977 sets out the obligations with regard to precautions against the effects of attacks [...]. This is a rule of customary law applicable in both types of conflict. IHL also prohibits the use of human shields.

[80] Of very serious concern for the IFFMCG are the numerous testimonies, some by South Ossetian combatants themselves, that they used houses and residential basements in Tskhinvali from which to fire at Georgian ground troops, putting at risk the lives of civilians who were sheltering in the basements of the same buildings. [...]

[81] This is a clear violation of the obligation to avoid locating military objectives within or near densely populated areas. It probably did not constitute a violation of the prohibition against using human shields, however, as this rule requires the specific intent to prevent attacks by deliberately collocating military objectives and civilians.

[82] ***South Ossetian forces reportedly violated IHL by firing from houses and residential buildings and using them as defensive positions, putting the civilian population at risk.***

B. Treatment of persons and property in areas under changing control

[...]

d) Detention of combatants

[83] Under IHL, rules regarding detention and related status are different depending on the type of conflict, i.e. whether it is international or non-international in character. In the former case, combatants benefit from the status of prisoner of war under certain conditions.

- [84] With respect to persons detained by Georgian forces, according to the Georgian authorities 32 persons were detained because of their participation in hostilities. According to Human Rights Watch the authorities did not display evidence that they were all combatants. A few Ossetian civilians were also detained. [...] According to information given by an NGO to the HRAM [the Human Rights Assessment Mission] of the OSCE, “14 Ossetians, including two teenagers, were detained by Georgian police following the Russian withdrawal from the ‘buffer zone’ and were held incommunicado.”
- [85] Georgia provided additional information on persons it detained: “Russian military personnel held as POWs: five; – Members of separatist illegal armed formations: thirty-two; – Apparent mercenary: one (Russian citizen).” Georgia indicated that:
- [86] *“All Georgian-held prisoners were exchanged for the 159 Georgian civilians and 39 POWs held under Russian authority. The ICRC was afforded unimpeded access to Georgian detention facilities and visited three of the five POWs – the other two were taken prisoner late in the war. The ICRC visited facilities maintained by the Ministries of Defence and Justice on a number of occasions, inspecting the conditions in which not only the POWs were detained, but also those of the detained members of separatist illegal armed formations.*

“Those detained in the context of the conflict were placed separately from other prisoners.”

- [87] According to the Russian Federation, “during the operation Russian and South Ossetian military units detained 85 Georgian nationals” and “Taking into consideration the fact that some Georgian servicemen deserted from their units, disposed of their weapons and military uniform, destroyed their identity papers, changed into civilian clothing, etc., it proved impossible to ascertain the exact number of military personnel among those detained.”
- [88] The Russian Ministry of Foreign Affairs added the following in its replies to the questionnaire sent by the IFFMCG:

“Throughout the entire period during which Russia’s armed forces took part in the military operation in South Ossetia and Abkhazia between 8 and 12 August 2008, the Russian military forces detained Georgian military personnel only (as of 12.08.2008 no other Georgian military were detained). Since Russia took part in an armed conflict that was international in nature, these detainees were treated as combatants in accordance with IHL. Therefore, once detained they received the status of prisoners of war. To the best of our knowledge after the conflict ended and the prisoners of war were cleared of any potential military crimes, on 19 August all of them were handed over to the Georgian side in the presence of ICRC delegates with the Council of Europe Commissioner for Human Rights T. Hammarberg acting as a mediator. The Russian side treated these prisoners of war in accordance with the requirements set out in IHL. They were never subjected to torture.”

[...]

- [89] In the case of the detention of Georgian military servicemen by South Ossetian forces, however, direct eyewitnesses reported that Russian forces were present in the place of detention. Some of those Georgian combatants were captured by South Ossetian militias. Some were transferred first to Ossetian police and then handed over to Russian forces. [...]

e) Detention of civilians, arbitrary arrests, abduction and taking of hostages

- [90] There are also many cases where civilians of Georgian ethnicity have been deprived of their liberty. Such cases include the arrest and detention of civilians in inappropriate conditions by Ossetian forces, some being kidnapped and released against payment of a ransom. Many civilians also described their arrest as being taken hostage to be used in exchanges later.

- [91] Two elderly women from Achabeti village were brought by South Ossetian forces to Tskhinvali on 11 August and were detained together with more than 40 people, most of them also elderly, in the basement of what they identified as the FSB building in Tskhinvali. They were all kept together for three days in the same small room, where they had to take turns to lie down on a few wooden beds, and with very little bread or water. They were then kept in the yard for five days and had to clean the streets. Many civilians detained had to bury corpses.

[...]

- [92] During the meeting the IFFMCG experts had on 5 June 2009 with representatives of the *de facto* Ministry of Defence and Ministry of Interior of South Ossetia, these authorities actually acknowledged that civilians had been present in the Ministry of Interior building, but they indicated that they had been taken there in the context of safety measures to protect them from the effects of the hostilities. Not only is this in complete contradiction with numerous testimonies from persons detained there but, even if it were so, it would be impossible to explain why, if such measures were taken for protection purposes, those persons were not released until 27 of August, two weeks after the hostilities had ended, and why they had to clean the streets and bury dead bodies.

[...]

- [93] ***It seems that there have been numerous cases of illegal detention of civilians, arbitrary arrests, abduction and taking of hostages, mostly committed by South Ossetian forces and other South Ossetian armed groups.***

f) Pillage and looting

- [94] IHL prohibits pillage both in time of international armed conflict and in time of armed conflict of a non-international character. [...]

- [95] The conflict in Georgia and its aftermath have been characterised by a campaign of large-scale pillage and looting against ethnic Georgian villages in South Ossetia and in the so-called buffer zones. While this was mainly committed by Ossetian

military and militias, including Ossetian civilians, there are many eyewitness reports of looting by Russian forces. Most importantly, numerous testimonies refer to Russian soldiers being present while armed Ossetians were looting. Some pillage started immediately after the withdrawal of the Georgian forces.

- [96] [...] By way of example, the HRAM told of a woman in Kekhvi who saw her house being looted by a group of “Ossetians” wearing military uniforms with white arm bands. The men also stole her car and loaded it with furniture from a neighbour’s house before driving away. As she fled the village, she saw “Ossetian” soldiers who were being protected by Russian forces and were pillaging shops and other houses.
- [97] It is critical to stress that in the aftermath of the conflict the looting and pillage intensified both in South Ossetia and in the buffer zone [...].
- [98] Moreover, Ossetian villagers also participated in looting in September, demonstrating a lack of protection and policing by the Ossetian and Russian forces. Many testimonies refer to Russian forces being present whilst Ossetian militias were looting.
- [99] Far from being a few isolated cases, in certain villages the pillage seems to have been organised, with looters first using trucks to take the furniture and then coming to steal the windows and doors of houses.

[...]

- [100] ***During and, in particular, after the conflict a systematic and widespread campaign of looting took place in South Ossetia and in the buffer zone against mostly ethnic Georgian houses and properties. Ossetian forces, unidentified armed Ossetians, and even Ossetian civilians participated in this campaign, with reports of Russian forces also being involved.***

The Russian forces failed to prevent these acts and, most importantly, did not stop the looting and pillage after the ceasefire, even in cases where they witnessed it directly.

[...]

g) Destruction of property

- [101] While IHL provides that parties to an international armed conflict may seize military equipment belonging to an adversary as war booty, in both international and non-international armed conflict it prohibits the destruction or seizure of the property of an adversary, unless required by imperative military necessity. Article 33 of Geneva Convention IV states that “Reprisals against protected persons and their property are prohibited.” Under Article 147 of this convention, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a grave breach. The ICC Rome Statute also qualifies these acts as war crimes in non-international armed conflict. This prohibition should also be read in conjunction with the prohibition under IHL against collective punishment.

[...]

[102] In this regard it is [...] paramount to stress that a number of testimonies seem to suggest a pattern of deliberate destruction and torching in the ethnic Georgian villages in South Ossetia that was different in scale and motives from what happened in the buffer zone.

[...]

[103] After the cease-fire this campaign did not stop, but actually intensified. Regarding the extent of the damage caused, it is clear from both eyewitness reports and satellite images that many houses were burned in the last two weeks of August and in September.

[104] [...] Furthermore, although to date unverifiable, one person interviewed by the Mission's expert claimed that some burned houses were later destroyed to conceal the fact that they had been torched. This may be related to confirmed reports of burned houses having been "bulldozed" in September.

[105] The IIFFMCG also wishes to note that this campaign of burning houses in South Ossetia was accompanied by violent practices such as preventing people from extinguishing fires under threat of being killed or forcing people to watch their own house burning.

[106] The IIFFMCG concludes that [...] after the bombing, South Ossetians in uniform as well as Ossetian civilians who followed the Russian forces' advance undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians. Interviews by the IIFFMCG expert confirmed that with few exceptions Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but nor did they intervene to stop it.

[...]

[107] Without questioning the reality of the destruction by torching of houses in the buffer zone, the IIFFMCG wishes to observe that, at least for the villages its expert visited in June 2009 and in the light of the interviews it conducted, the patterns of destruction through arson appear to be slightly different than in South Ossetia. First, the scale of the destruction is less vast. [...] The motive for torching deserves particular attention. [...] Information gathered by the IIFFMCG expert appears to suggest that lists of houses to be burned down were pre-established. Some inhabitants felt that the destruction was prompted by the fact that the owner had a relative in the police who had allegedly been involved in acts committed against ethnic Ossetians. An elderly woman living with her family on the outskirts of Karaleti explained that the house in front of hers had been burned down by a group of Ossetians because the owner had bought cattle that had previously been stolen from ethnic Ossetians. [...]

[108] Another explanation for this more selective violence could be that many mixed families with Ossetian relatives live in the buffer zone. [...]

- [109] ***South Ossetians in uniform, and Ossetian civilians who followed the Russian forces' advance, undertook a systematic campaign of arson against homes and other civilian buildings in villages populated predominantly by ethnic Georgians, including in the so-called buffer zones.***

With few exceptions, Russian forces did not participate directly in the destruction of villages, aside from a brief period in mid-August, but neither did they intervene to stop it.

h) Maintenance of law and order

- [110] Under the IHL on military occupation the occupying power, once it has authority over a territory, has an obligation to take all the measures in its power to restore, and ensure, as far as possible, public order and safety. Ensuring safety includes protecting individuals from reprisals and revenge. There is also an obligation to respect private property.

[...]

- [111] While denying the status of occupying power, the Russian Federation acknowledged that it had tried to exercise police powers on the ground. [...]

- [112] [...] Russia claims that although it was not an occupying power, "the Russian military contingent called upon to carry out purely military tasks in the territory of South Ossetia, to the best of their abilities tried to maintain law and order and prevent any offences in the areas of their deployment including Georgia proper, where owing to the flight of Georgian government authorities an apparent vacuum of police presence ensued." First, it recognises the absence of policing by Georgian authorities. Second and most importantly it clearly states that effectively the Russian forces, to a certain extent, were trying to maintain order and safety. Russia elaborated further on the actions it carried out in this regard:

"From day one of the operation, the Russian military command undertook exhaustive measures to prevent pillaging, looting and acts of lawlessness with respect to the local Georgian population. All personnel serving in units that took part in the operation was familiarised with the Directive issued by the General Staff of the Russian Armed Forces and the order given by the Army Commander-in-Chief 'to maintain public safety and ensure the security and protection of citizens residing in the territory of the South Ossetian Republic'.

"Russian troops, jointly with South Ossetian law-enforcement and military units, provided round-the-clock protection of the homes and land allotments that remained undamaged in Georgian villages, at the same time ensuring the safety and security of South Ossetian residents regardless of their ethnic background."

[...]

- [113] In general, these elements demonstrate that to a certain degree, Russian forces were in a position to ensure public order and safety in the territories they were stationed in, and claim to have undertaken measures in this regard. This contrasts

strikingly with what happened on the ground, where there was a serious lack of action by the Russian troops to prevent violations and protect ethnic Georgians.

[114] One of the main measures taken by Russian troops was to set up roadblocks and checkpoints. Regarding South Ossetia, Human Rights Watch noted that “roadblocks set up by Russian forces on August 13 effectively stopped the looting and torching campaign by Ossetian forces, but the roadblocks were inexplicably removed after just a week.”

[115] As reported by HRW, two residents of Tkviavi, a village 12 kilometres south of Tskhinvali that was particularly hard hit by looters from South Ossetia, said that the looting had decreased when the Russian forces maintained a checkpoint in the village, although the marauders kept coming during the night. Furthermore, several Tkviavi villagers told Human Rights Watch that they believed that more frequent patrolling by the Russian forces or Georgian police would have improved security in the area. A witness told Human Rights Watch that looters “seemed to be afraid to encounter the Russians, and were hiding from them,” suggesting, according to HRW, that had Russian forces taken more preventive measures to stop violence against civilians these measures would have been effective.

[116] In this regard, other measures by the Russian troops consisted of patrolling and informing the inhabitants and giving the villagers phone numbers so they could contact the Russian military authorities if they witnessed any kind of violation. [...]

[117] At this stage it is critical to note that the measures such as checkpoints introduced by the Russian forces were meant to prevent violations by South Ossetian militias, and consequently ensure respect of IHL. Oddly, one result of the checkpoints was actually to prevent the Georgian police from maintaining law and order in those areas, and in some cases to stop villagers attempting to return home from Gori to villages in the “buffer zone,” while Russia continued to invoke the lawlessness.

[...]

[118] Nevertheless, from all the testimonies collected, it appears that the Russian authorities did not take the necessary measures to prevent or stop the widespread campaign of looting, burning and other serious violations committed after the ceasefire.

[...]

[119] ***The Russian authorities and the South Ossetian authorities failed overwhelmingly to take measures to maintain law and order and ensure the protection of the civilian population as required under IHL and HRL.***

[...]

D. Forced displacement

[...]

b) The prohibition of arbitrary or forcible displacement and the reasons for displacement in the context of the 2008 armed conflict and its aftermath

[...]

(ii) Patterns of and reasons for the displacements

[...]

[120] The Russian Federation insisted that “one of the most dramatic consequences of the Georgian military operation against South Ossetia was the massive exodus of local population to the territory of the Russian Federation in search of refuge.” Georgia claims on the contrary that more than 130,000 civilians have fled as a result of the campaign of expulsion of ethnic Georgians and raids against Georgian villages by Russian forces in conjunction with irregular proxy armed groups. [...]

[121] According to the Russian Federation, “[...] This process was not caused by any premeditated actions directed against ethnic Georgians *per se*.” This seems to contradict various testimonies according to which, days prior to the outbreak of the conflict, ethnic Georgians left because of the shelling against ethnic Georgian villages in South Ossetia [...].

[122] While it is not always possible to identify the exact reason for displacement in the context of armed conflict, it appears critical here to distinguish the general motive of fleeing the conflict zone to avoid the dangers of war from more specific actions deliberately carried out to force a displacement. In this regard, looting and the burning of houses and property were the reasons for the displacement of ethnic Georgians living in villages around Tskhinvali. This is particularly significant for people who had decided to stay in those villages despite the hostilities, but who were forced to leave. [...]

[123] The causes for displacement are more striking when we consider the period after 12 August when, as the EU-brokered peace deal was being discussed, hostilities virtually ceased. Of particular concern is what happened in the so called “buffer zone.” As outlined by the United Nations Inter-agency Humanitarian Assessment Mission to South Ossetia, “according to reports received from UN and NGO colleagues with access to the buffer zone outside the administrative boundaries of South Ossetia, a pattern of intimidation leading to displacement, and of destruction of properties, continues in certain targeted villages in that zone.” [...]

[124] The situation in the Akhalkgori district shows that displacement was not caused merely by general direct hostilities. Indeed there were no hostilities in this district – an area in the east of South Ossetia, populated mostly by ethnic Georgians and under Georgian administration before the war. [...] As noted by Human Rights Watch, “residents of Akhalkgori district face threats and harassment by militias

and anxiety about a possible closure of the district's administrative border with the rest of Georgia. Both factors have caused great numbers of people to leave their homes for undisputed Georgian territory." [...]

- [125] ***There were several reasons for the displacement of approximately 135,000 persons in the context of the 2008 August conflict and its aftermath. While the need to avoid the danger of hostilities and the general climate of insecurity account for most of the displacements, numerous documented cases of violations of IHL and HRL committed in order to force the displacement of ethnic Georgians in South Ossetia lead us to conclude that the prohibition against arbitrary or forced displacement has been violated.***

c) Allegations of ethnic cleansing against Georgians

- [126] While Georgia did not make allegations of genocide, it claimed that the crime of ethnic cleansing had been committed by South Ossetian and Russian forces. It submitted that "ethnic Georgians were subjected to ethnically motivated crimes committed either directly by Russian armed forces or through their tacit consent by South Ossetian militias (on the territories falling under Russian control)."

[...]

- [127] The assessment of this claim is complicated by the fact that ethnic cleansing is not a term defined in international treaty law. Taking stock of the various attempts to define "ethnic cleansing", Professor William Schabas noted: "while there is no generally recognized text defining ethnic cleansing, [such attempts] concur that it is aimed at displacing a population in order to change the ethnic composition of a given territory, and generally to render the territory ethnically homogeneous or 'pure'..." [...]

- [128] [...] [A] number of testimonies report destruction and torching done explicitly to force people to leave and prevent them from returning. This is significant when one considers that while most of the population of those villages left at the outbreak of the hostilities, this violence was directed against the few inhabitants who had stayed on. [...]

- [129] Given the scale and the type of acts of violence such as forced displacement, pillage and the destruction of homes and property committed in South Ossetia, the question of whether they could amount to a crime against humanity arises. [...]

- [130] ***Several elements suggest the conclusion that ethnic cleansing was carried out against ethnic Georgians in South Ossetia both during and after the August 2008 conflict.***

[...]

e) The right to return, and obstacles

(ii) Impediments to the full exercise of the right to return

[...]

[131] The most difficult issue appears to be the return of persons displaced from South Ossetia. [...]

[132] According to Georgia, “many of the ethnic Georgians who fled their villages in the Tskhinvali region/South Ossetia during the conflict and its immediate aftermath have not been able to return.” It referred *inter alia* to declarations made by the *de facto* South Ossetian authorities making people’s return conditional on their acceptance of South Ossetian passports and renunciation of Georgian passports [...].

[133] According to the HRAM, “some displaced persons appear to have been pressured by the Georgian authorities to return to their former places of residence in the areas adjacent to South Ossetia before conditions were in place to guarantee their security or an adequate standard of living, in contravention of OSCE commitments and other international standards.”

[...]

[134] ***The authorities in Abkhazia and South Ossetia, together with Russia, should take all appropriate measures to ensure that IDPs are able to return to their homes. No conditions for exercising this right, other than those laid down by international standards, shall be imposed on IDPs. Georgia shall respect the principle of return as a free, individual decision by displaced persons.***

f) Protection of property rights

[135] Under IHL the property rights of displaced persons must be respected. This rule is considered to be a norm of customary law. [...]

[136] The protection of property rights constitutes a critical issue: first, it entails ensuring that the property of displaced persons remains untouched until they can effectively return to their homes; secondly, it concerns property that has already been destroyed. [...]

[137] According to the Russian Federation, the “property rights of displaced persons in the territory of South Ossetia are protected by the South Ossetian law enforcement authorities. Russian organisations cooperating with South Ossetia have been instructed not to engage in any transactions involving real estate of dubious legal standing.” [...]

[138] On the contrary, many reports indicate the absence of proper measures to protect houses. [...]

[139] ***In South Ossetia there has been a serious failure on the part of the authorities and the Russian forces to protect the property rights of IDPs during – and, especially, after – the August 2008 conflict. Furthermore, South Ossetian***

forces did participate in the looting, destruction and burning of houses during and after the conflict.

Comprehensive reparation programmes should be designed and implemented. They should be seen as a complement to the exercise of the right to return of IDPs, and not a substitute for this right.

[...]

F. Investigation into and prosecution of violations of IHL and human rights law

[140] Under IHL, States have an obligation to investigate war crimes allegedly committed by their nationals and members of their armed forces, as well as other persons falling under their jurisdiction. The obligation to investigate and prosecute applies in both international and non-international armed conflict.

[...]

[141] These obligations to investigate and prosecute call for accountability on the part of all the sides that committed violations of IHL and HRL, whether they be Russians, Georgians, South Ossetians or Abkhaz.

[...]

[142] ***In the light of the grave violations of IHL and HRL committed during the conflict and in the weeks after the cease-fire, Russia and Georgia should undertake or continue prompt, thorough, independent and impartial investigations into these violations, and should prosecute their perpetrators. This is also an obligation incumbent on the authorities in South Ossetia. The fight against impunity is one of the prerequisites for a true and lasting solution to the conflict.***

G. Reparation

[...]

[143] There is a general obligation under IHL for a state responsible for violations of international humanitarian law to make full reparation for the loss or injury caused.

[144] The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law set out in more detail the rights of victims to restitution, compensation and rehabilitation. [See Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law]

[145] It is worth noting that the Russian Federation stated that “residents of South Ossetia who suffered as a result of the hostilities received compensation paid out of the Federal budget. Several types of such compensation were envisaged: 1) all civilian victims residing in South Ossetia received a one-time payment in the amount of 1 000 roubles; 2) separate payments were earmarked for retirees;

3) finally, residents who had lost their property during the hostilities were paid up to 50 thousand roubles.”

[146] This raises serious concerns as it would mean that no such reparations were paid to persons who suffered as a result of the hostilities on the territory of Georgia proper or in Abkhazia. Furthermore, it is crucial that such compensation should also be allocated to ethnic Georgians for the reconstruction of their homes in South Ossetia.

[147] The Russian and Georgian governments should provide compensation for civilian damage and destruction caused by violations of international humanitarian law for which they are respectively responsible. Compensation is also vital in the light of the extensive destruction of property by South Ossetian forces and other armed individuals.

[148] ***Accountability and reparation for violations of IHL and HRL are vital for a just and lasting peace. In the short term, this is also crucial in order to enable individuals who lost their property to rebuild their lives.***

[...]

DISCUSSION

A. Qualification of the conflict and applicable law

(*Paras [2]-[18]*)

1. a. How would you qualify the conflict? How does the IIFFMCG qualify it? Do you think that one should regard the situation as encompassing several parallel conflicts which should be analysed separately? In such situations, do you think that one should apply a different body of law for each conflict, even though they occur simultaneously? What law does the IIFFMCG apply? (GC I-IV, common Art. 2; P I, Art. 1; P II, Art. 1)
- b. If you consider the conflicts separately, how do you qualify the fighting between Georgian forces and Russian forces? Between Georgian forces, on the one hand, and South Ossetian and Abkhaz forces, on the other? Between Georgian forces and foreign individual volunteers or volunteer militias (*para. [15]*)? Does it matter whether the fighting occurred on disputed or on undisputed Georgian territory? (GC I-IV, common Art. 2; P I, Art. 1; P II, Art. 2)
2. a. (*Para. [9]*) Did IHL still apply after 12 August? Did it stop applying because of the cease-fire? When does IHL stop applying? Is IHL meant to stop applying as soon as hostilities end? In the present case, did IHL still apply after 12 August because the Russian Federation was considered to be occupying part of the Georgian territory (*see also paras [100]-[109]*)? (GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6; P I, Art. 3)
- c. Do you agree with the IIFFMCG that certain rules of IHL may still apply after the end of hostilities? In the present case, which rules, if any, still applied after 12 August?
3. Do you think that the Russian Federation's involvement in the conflict between Georgian forces, on the one hand, and Abkhaz and Ossetian forces, on the other, rendered the conflict international? What is the test to apply? Does the IIFFMCG answer the question? Do you think that there are sufficient elements to conclude that the Russian Federation was exercising overall control over Abkhaz forces?

Over South Ossetian forces? Is the Russian Federation's involvement the only possible reason for the conflict between Georgian forces and Abkhaz and Ossetian forces to be governed by the IHL of international armed conflicts? (GC I-IV, common Art. 2; P I, Art. 1; P II, Art. 1)

4. (*Para. [18]*) Do you agree that there is no difference between the rules governing international armed conflicts and those governing non-international armed conflicts? As IHL stands today, does it make a difference which law applies? Do you agree that similar rules apply to both? Even the rules relating to military occupation? When the same customary rules apply to both types of conflict, does that imply that the differences between the two legal systems are no longer valid?

B. Qualification of the territory

(*Paras [19]-[28]*)

5. How do you define occupation? How does the IFFMCG define it? Do you think that there is a difference between occupation as defined in Art. 42 of the Hague Regulations and occupation as envisaged in Convention IV? Do you agree with the IFFMCG that there may be different stages in the application of the law of occupation, according to the degree of control exercised over the territory (*paras [21]-[22]*)? (HR, Art. 42; GC I-IV, common Art. 2)
6.
 - a. (*Para. [25]*) How does the Russian Federation define occupation? Do you agree that “the presence of an armed force in the territory of another state is not always construed as occupation”? In what situations can the armed forces of a State be present on the territory of another State without occupying it? Do you agree that effective control over the territory is necessary in order to establish occupation? (HR, Art. 42; GC I-IV, common Art. 2)
 - b. (*Para. [25]*) What do you think of the Russian Federation's threefold argument to reject occupation? Are the three elements used relevant for assessing the existence of occupation? (HR, Art. 42; GC I-IV, common Art. 2)
7. (*Paras [110]-[119]*) Is it sufficient to be “in a position to ensure public order and safety” in order to be regarded as an Occupying Power under IHL? Does the fact that the Russian Federation failed to take all appropriate measures to prevent or stop violations contradict the conclusion that Russia was the Occupying Power? (HR, Arts 42-43)
8. What do you think of the IFFMCG's argument that if “Russia's military intervention cannot be justified under international law, and if neither Abkhazia nor South Ossetia is a recognized independent state”, the law of occupation applies? Does it matter whether the Russian Federation's intervention was justified under international law for IHL and the law of occupation to apply? Does it matter whether Abkhazia and South Ossetia were independent States? Had they been independent, would the Russian presence on their territories not have amounted to occupation?
9. Can South Ossetia be considered an occupied territory even though Georgia agreed to the presence of Russian troops in the Sochi agreement? Was the buffer zone outside South Ossetia occupied even though Georgia agreed to the temporary presence of Russian troops in the 12 August ceasefire?

C. Assessment of violations

10. In what instances does the IFFMCG conclude that IHL was violated? In what instances is it unable to assess whether IHL was or was not violated? Why is it more often possible to conclude that IHL has been violated when it comes to the treatment of persons and property under control of the enemy than in the conduct of hostilities? What should the IFFMCG have established in order to conclude whether the rules of IHL on the conduct of hostilities had been violated? Why has it been unable to establish those facts?

D. Conduct of hostilities – Military objectives

11. (*Paras [31]-[36]*) May members of peacekeeping operations be directly targeted? If so, in what circumstances? What other elements would you need to determine whether the attacks against Russian peacekeepers were lawful? [See **Case No. 22**, Convention on the Safety of UN Personnel, Arts 2 and 7]
12. (*Paras [37]-[39]*) Are administrative buildings as such legitimate targets of attack? Can they be considered legitimate targets merely because they belong to the enemy power? Can all objects administered by the enemy be considered military objectives? Or can they be attacked only when used for military purposes? (P I, Arts 50-52; CIHL, Rules 1-10)
13. (*Paras [40]-[42]*) How are schools and educational buildings protected under IHL? Under what circumstances, if ever, can such buildings become military targets? Was School No. 7 in Gori a legitimate target? Was it lawful to attack it because of the presence of Georgian military reservists in the school yard? (P I, Arts 50-52; CIHL, Rules 1-10)
14. (*Paras [43]-[47]*)
 - a. What protection do hospitals enjoy under IHL? Can they be considered military targets? If so, in what circumstances? Can the damage caused to the Tskhinvali hospital result from a lawful attack? Does it matter that a hospital is caring for both wounded civilians and combatants, and not just for civilians? (GC I, Arts 19 and 21; GC IV, Arts 18 and 19; P I, Arts 12 and 13; P II, Art. 11; CIHL, Rule 28)
 - b. Was Gori Military Hospital a military target? Does it make a difference whether a hospital is taking care of both civilians and wounded combatants or just combatants? What protection do hospitals enjoy under IHL? Can they become military targets? If yes, under what conditions? (GC I, Arts 19 and 21; GC IV, Arts 18 and 19; P I, Arts 12 and 13; P II, Art. 11; CIHL, Rule 28)
 - c. What protection do medical personnel enjoy under IHL? Was the attack against the hospital staff members lawful? Does it make a difference whether the hospital was displaying the red cross emblem? Can the attack amount to a grave breach? (GC I, Arts 24-25 and 50; GC IV, Arts 20 and 147; P I, Arts 15 and 85; P II, Art. 9; CIHL, Rules 25, 27 and 30)
15. (*Paras [48]-[51]*)
 - a. (*Paras [48]-[49]*) Does a civilian vehicle become a legitimate target when it is driven by armed militia fighters? In all cases? Or only when the militia fighter is directly participating in hostilities? Can militia fighters be targeted at any time? Can they be targeted when they are trying to flee or to get relatives out of the conflict zone? Can they be targeted if, when so doing, they are wearing uniforms or camouflage? (GC I-IV, common Art. 3; P I, Art. 50; P II, Art. 13(3); CIHL, Rules 5-6)
 - b. (*Paras [50]-[51]*) Could the attack against the convoys have been legitimate if militiamen had been present among those fleeing? Are all deliberate attacks on civilian vehicles war crimes? Can an attack amount to a grave breach? (GC I-IV, common Art. 3; P I, Art. 50; P II, Art. 13(3); CIHL, Rules 5-10)
16. (*Paras [52]-[55]*) What protection do cultural objects and buildings enjoy under IHL? What does special protection mean? Can a specially protected object become a military objective? What law applies to Georgian bombardments of South Ossetian cultural buildings? Does special protection also apply in non-international armed conflicts? [See **Document No. 10**, Conventions on the Protection of Cultural Property] (HR, Art. 27; P I, Arts 52-53 and 85(4); P II, Art. 16; CIHL, Rules 38-40)

E. Conduct of hostilities – Indiscriminate attacks

(*Paras [58]-[73]*)

17. a. (*Paras [58]-[63]*) Considering the characteristics of GRAD rockets and the damage they caused, do you think that their use was lawful? What rules are GRAD rockets subject to? Is it necessarily prohibited to use them in densely populated areas? What precautions in the choice of means and methods of warfare could and should Georgian forces have taken when shelling Tskhinvali to avoid or minimize civilian deaths, injury or damage? (P I, Arts 35, 51(4) and 57(2)(a)(ii); CIHL, Rule 17)
- b. (*Paras [64]-[70]*) Were cluster munitions prohibited during the conflict? In what circumstances, if ever, can a State use cluster munitions? Is it necessarily prohibited to use them in densely populated areas? [See **Document No. 19**, Convention on Cluster Munitions] (P I, Arts 35, 51(4) and 57(2)(a)(ii); CIHL, Rule 17)
- c. (*Para. [66]*) Can the argument of military necessity put forward by Georgia justify the use of cluster munitions on the Dzara road? Would your answer be different if Georgia knew that the road was being used by civilians to flee? (P I, Arts 51(5)(b) and 57(2)(a)(ii); CIHL, Rules 14 and 17)
- d. (*Para. [67]*) Considering that some casualties resulted from unexploded devices, do you think that, when assessing the proportionality of an attack, the expected civilian harm should also encompass casualties and harm over time? Even casualties and harm expected to occur after the end of the conflict? Has the mere possibility of future civilian harm to be taken into account when evaluating the proportionality of an attack? (P I, Art. 51(5)(b); CIHL, Rule 14)
- e. (*Para. [67]*) Is the bombardment of Georgian villages by Georgian forces governed by the IHL of international armed conflict? Even if the villages bombed were under Georgia's control at the time of the attack? Can IHL be violated even when the bombardment of a village is not deliberate, but due to a massive failure of the weapons system? (P I, Arts 49(2) and 57(1) and 2)(a)(ii); CIHL, Rules 15 and 17)
18. (*Paras [71]-[73]*) What is an indiscriminate attack? Is an attack indiscriminate when it is not directed at a specific military objective? When it treats "a number of clearly separate and distinct military objectives as a single military objective"? In such a case, is it indiscriminate only when the targets are located in an area containing "a concentration of civilians and civilian objects"? (P I, Art. 51(4) and (5); CIHL, Rules 12 and 13)

F. Conduct of hostilities – Precautionary measures

(*Paras [74]-[82]*)

19. a. What were Georgia's obligations regarding precautionary measures in order to minimize the harm to civilians? Can the use of smoke grenades be regarded as effective advance warning? (P I, Arts 57 and 58; CIHL, Rules 15-21)
- b. (*Para. [76]*) Once an attack has started, can a cease-fire be regarded as a sufficient precaution? What precautionary measures could Georgia have taken before launching the attack against Tskhinvali on 7 August? (P I, Arts 57 and 58; CIHL, Rules 15-21)
- c. (*Para. [77]*) What may an attacker do when the enemy is firing from a building that also shelters civilians? Is it only a question of taking all feasible precautionary measures? Is it not also a question of whether the attack is proportionate? What precautionary measures could and should Georgia have taken? (P I, Arts 51(5)(b), 57 and 58; CIHL, Rules 14-21)

20. a. (*Paras [79]-[82]*) What precautions must a defender take to protect the civilian population against the effect of attacks? Is it always possible to avoid locating military targets in populated areas? Is this a strict obligation under IHL? (P I, Art. 58; CIHL, Rule 23)
- b. (*Paras [79]-[82]*) Did South Ossetian combatants violate the prohibition to use human shields when they used residential buildings while civilians were inside? When is the use of inhabited civilian houses tantamount to use of human shields? (P I, Art. 51(7); CIHL, Rule 97)

G. Treatment of persons – Detention

(*Paras [83]-[89]*)

21. What is the status of the different groups of persons detained by Georgia (“Russian military personnel held as POWs”, “Members of separatist illegal armed formations” and “Apparent mercenary”)? Do any of them benefit from POW status? Do any of them have the right to be visited by the ICRC? (GC III, Arts 4 and 126; GC IV, Arts 4, 76 and 143; CIHL, Rule 124)
22. What is the status of the persons detained by Russian and South Ossetian military units? Does their status vary according to whether they were captured by Russian forces or by South Ossetian forces? What is the status of the Georgian combatants captured by South Ossetian forces but detained by joint Russian and South Ossetian units? (GC III, Art. 4; GC IV, Art. 4)
23. (*Para. [86]*) Is there an obligation under IHL to detain persons captured during an armed conflict separately from other prisoners? Does such an obligation exist for POWs only? For civilian internees only? (GC III, Art. 97; GC IV, Art. 84)
24. (*Paras [90]-[93]*)
 - a. What is the law applicable to Georgian civilians detained by South Ossetian forces? In what circumstances can civilians be detained in an armed conflict? Can a ransom be demanded for their release? What is the difference between internment and hostage-taking? (GC I-IV, common Art. 3; GC IV, Arts 34, 42, 78 and 147; P I, Art. 75(2)(c); P II, Art. 4(2)(c); CIHL, Rule 96)
 - b. Does IHL give any indication regarding places of internment? In the present case, was it lawful to detain the Georgian civilians in a basement, in a yard or at the Ministry of Defence and Ministry of Interior? Can civilian internees be asked to clean the streets? Can they be asked to bury corpses? (GC IV, Arts 85, 89 and 95; P II, Art. 5; CIHL, Rules 95, 118 and 121)

H. Treatment of persons – Forced displacement

(*Paras [120]-[130]*)

25. (*Paras [120]-[125]*)

- a. What is the law applicable to the displacements of ethnic Georgians described by the IIFFMCG? Does it make a difference whether the population fled because of the hostilities or because it was forced? If it was forced, does it make a difference whether it was forced to leave by Russian forces or by South Ossetian forces? Was the Russian Federation bound by the prohibition of forced displacements? Does it make a difference whether or not the Russian Federation was the Occupying Power? (GC IV, Arts 49 and 147; P I, Art. 85(4); P II, Art. 17; CIHL, Rule 129)
- b. What is the protection afforded by IHL to displaced persons? Is there a difference between the protection afforded to South Ossetians who fled to the Russian Federation and ethnic Georgians from South Ossetia who fled to the undisputed part of Georgia? (GC I-IV, common Art. 3; GC IV, Arts 23 and 49; P I, Art. 70; P II, Art. 17; CIHL, Rule 131)

26. (*Paras [126]-[130]*) Does IHL prohibit ethnic cleansing as such? Do other rules of IHL prohibit acts that may constitute ethnic cleansing?
27. (*Paras [131]-[134]*) Does IHL protect the right to return of displaced persons? Can South Ossetia make the return of those displaced during the conflict subject to conditions, such as the renunciation of their Georgian nationality? Can Georgia force displaced persons to return to their place of origin? (GC IV, Art. 49; CIHL, Rule 132)
28. (*Paras [135]-[139]*) How does IHL protect the property of displaced persons? Who is bound by the obligation to respect such property? Was there an obligation for South Ossetian forces to ensure that the property of displaced persons was respected? Was there an obligation for the Russian Federation to do so? (CIHL, Rule 133)

I. Treatment of property

29. (*Paras [94]-[100]*) Did IHL apply to the looting and pillaging that occurred after the cease-fire and the end of hostilities? Did IHL apply to the acts of pillage committed by Ossetian villagers in September? Assuming that IHL applied, what does it say about acts of pillage and destruction of private property? Did the provisions on pillage apply to South Ossetian forces the same way as they applied to Russian forces? Did Convention IV apply to the acts of pillage committed by South Ossetian forces? Does it make a difference whether or not Russian forces were involved? (HR, 28 and 47; GC IV, Art. 33; P II, Art. 4(2)(g); CIHL, Rule 52)
30. (*Paras [101]-[109]*) Did IHL apply to the arson campaign that occurred in late August and September in South Ossetia? Assuming that IHL applied, which law applied to the acts of the South Ossetian forces and civilians who participated in the campaign? Do you think that the campaign can be regarded as “reprisals against protected persons”? Can it be regarded as collective punishment? Did it amount to a grave breach? (GC IV, Arts 33 and 147; P I, Arts 51(6), 52(1), 75 and 85; P II, Art. 4; CIHL, Rules 103, 146-148)

J. Investigation and reparation

(*Paras [140]-[148]*)

31. What are the obligations of Georgia, South Ossetia and the Russian Federation in terms of investigation of alleged violations of IHL? Is there an overall obligation for a State to start investigations at the end of an armed conflict, or does the obligation arise only if potential violations are reported? (GC I-IV, Arts 52/53/132/143 respectively; CIHL, Rule 158)
32. Is there an obligation under IHL to pay reparation or compensation to victims of violations? Are Georgia and the Russian Federation liable for the violations committed by their armed forces? Who is liable for violations committed by South Ossetian forces? (Hague Convention IV, Art. 3; P I, Art. 90; CIHL, Rule 150)