Charges - Paras 31 to 37

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**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

1. The Prosecutor alleged the following facts and charged the following counts:
2. The accused helped prepare the April 1993 attack on the Ahmici-Santici civilians [...].
3. 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.
4. 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.

5. 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.
6. 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.
7. 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. [...]

Applicable law - Paras 510 to 541

V. THE APPLICABLE LAW [...]

A. Preliminary Issues

1. General

1. 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.
2. 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 [...]

1. [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. [...]
2. 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.
3. 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 [...]

1. 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** 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.
2. 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.
3. 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.
4. [...] 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. [...]

5. 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. [...]
6. 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.
7. 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** ICRC, Iran/Iraq Memoranda] and by Trial Chamber I of the ICTY in *Martic*. [**See** ICTY, The Prosecutor v. Martic]
8. Secondly, the States that have participated in the numerous international or internal armed conficts 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.
9. 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** 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** 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.

10. 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).
11. 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

1. 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?
2. 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.

3. 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. [...]
4. 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.
5. 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. [...]

Paras 567 to 615

C. Persecution as a Crime Against Humanity

1. 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.
2. 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 [...].
3. 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** ICTY, The Prosecutor v. Tadic [Part C.]]
4. 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. [...]
5. 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

1. 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).”

1. [...] Although Control Council Law No. 10 eliminated this requirement, the ICC Statute upholds it in Article 7(1)(h) [**See** 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”. [...]
2. 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.
3. 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. [...]
4. 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.
5. 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** The International Criminal Court [Part A.]]
6. Article 7(2)(g) provides: [*ibid*.]
7. 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.

8. 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

1. 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.
2. 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.
3. 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.
4. 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

1. 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.
2. 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.
3. 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. [...]
4. 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.
5. 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.

1. 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.
2. 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?

1. 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.
2. 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.
3. 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”.

4. 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. [...]
5. 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. [...]
6. 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. [...]
7. [...] On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.
8. 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.
9. 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.
10. 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?

1. 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.

2. 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.
3. 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. [...]
4. It is also clear that other courts have used the term persecution to describe acts other than those enumerated in Article 5. [...]
5. 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.
6. 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.

Paras 616 to 636 and Disposition

3. The Definition of Persecution

1. 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. [...]
2. 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).
3. 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.
4. 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. [...]
5. 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.
6. 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*.
7. 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.

8. 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.
9. 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. [...]
10. 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

1. 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** ICTY, The Prosecutor v. Blaskic]
2. 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.
3. 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. [...]
4. 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

1. The Trial Chamber will now discuss the mens rea requirement of persecution as reflected in international case-law.
2. 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.
3. 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. [...]
4. 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 The International Criminal Court [Part A.] and 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)

1. *(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))
2. 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 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 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)

1. 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 The International Criminal Court [Part A.]])

IV. Persecution

(Paras 567-636)

1. 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?
2. 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?
3. 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?
4. 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?