A. ICTY, The Prosecutor v. Tadić, Appeals Chamber, Jurisdiction

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. Dusko Tadić,* IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995; available on http://www.un.org, footnotes omitted]

PROSECUTORv.DUSKO TADIC a/k/a “DULE”

DECISION ON THE DEFENCE MOTION FORINTERLOCUTORY APPEAL ON JURISDICTION

Paragraphs 1 to 48

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.

Paragraphs 58 to 76

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.

Paragraphs 77 to 93

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.

Paragraphs 94 to 109

(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.

Paragraphs 110 to 116

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.

Paragraphs 117 to 126

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. [...]

Paragraphs 128 to 143

(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 govern- ment 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 onhttp://www.un.org, footnotes omitted]

[...]

Paragraphs 45 to 554

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. [...]

Paragraphs 562 to 583

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 opstina 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 opstina 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. [...]

Paragraphs 610 to 726

(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 [SeePart 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]

Paragraphs 22 to 114

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.

Paragraphs 115 to 145

(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 justexpounded – 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.

Paragraphs 150 to 171

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,

[**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]

Paragraphs 390 to 395

(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.

Paragraphs 396 to 407

(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 8Conduct 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 ChamberJudgement, 3 April 2008, Case No. IT-04-84-T, available on www.icty.org, footnotes omitted]

Paragraphs 32 to 60

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.

[…]

Paragraphs 89 to 100

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/Irzniq where he sometimes travelled, the almost daily shelling of several villages towards the south. Rrustem 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"?

Discussion B - Qualification of the conflict and applicable law

1. (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))
2. (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))
3. 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?

Discussion C - Qualification of the persons – Protected Persons

1. (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)
2. (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 enrols 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?

Discussion D - Violations of IHL – Grave breaches

1. (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)

2. (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?

Discussion E - Interpretation of Article 3 of the ICTY Statute – "Laws and customs of war"

1. (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?

Discussion F - Article 3 common to the Geneva Conventions

1. (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?
2. (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?
3. (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?

Discussion G - State responsibility – effective control v. overall control

1. (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?

2. 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?
3. (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?

Discussion H - Miscellaneous

1. (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?
2. (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?
3. 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?