

INTERNATIONAL COURT OF JUSTICE

**CASE CONCERNING
APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION
OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION
ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION**

(UKRAINE V. RUSSIAN FEDERATION)

**VOLUME XIII OF THE ANNEXES
TO THE MEMORIAL
SUBMITTED BY UKRAINE**

12 JUNE 2018

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Annex 455

Security Environment Research Center "Prometheus," Donbas in Flames (2017)

DONBAS IN FLAMES

GUIDE TO THE CONFLICT ZONE



2017

 PROMETHEUS 



This publication is the result of work of a group of authors of various competencies: investigative journalism, politology, geography, and history. Written as a kind of *vade mecum*, this guidebook will familiarize the reader with the precursors, problems, terminology, and characteristics of the war in the Donbas. The book is targeted at experts, journalists, and representatives of international missions working in Ukraine. It will also interest a wide range of readers trying to understand and develop their own opinion on the situation in the east of Ukraine.

The electronic version of this publication can be downloaded from <https://prometheus.ngo/donbas-v-ogni>

Donbas In Flames
Guide to the conflict zone
Lviv, 2017

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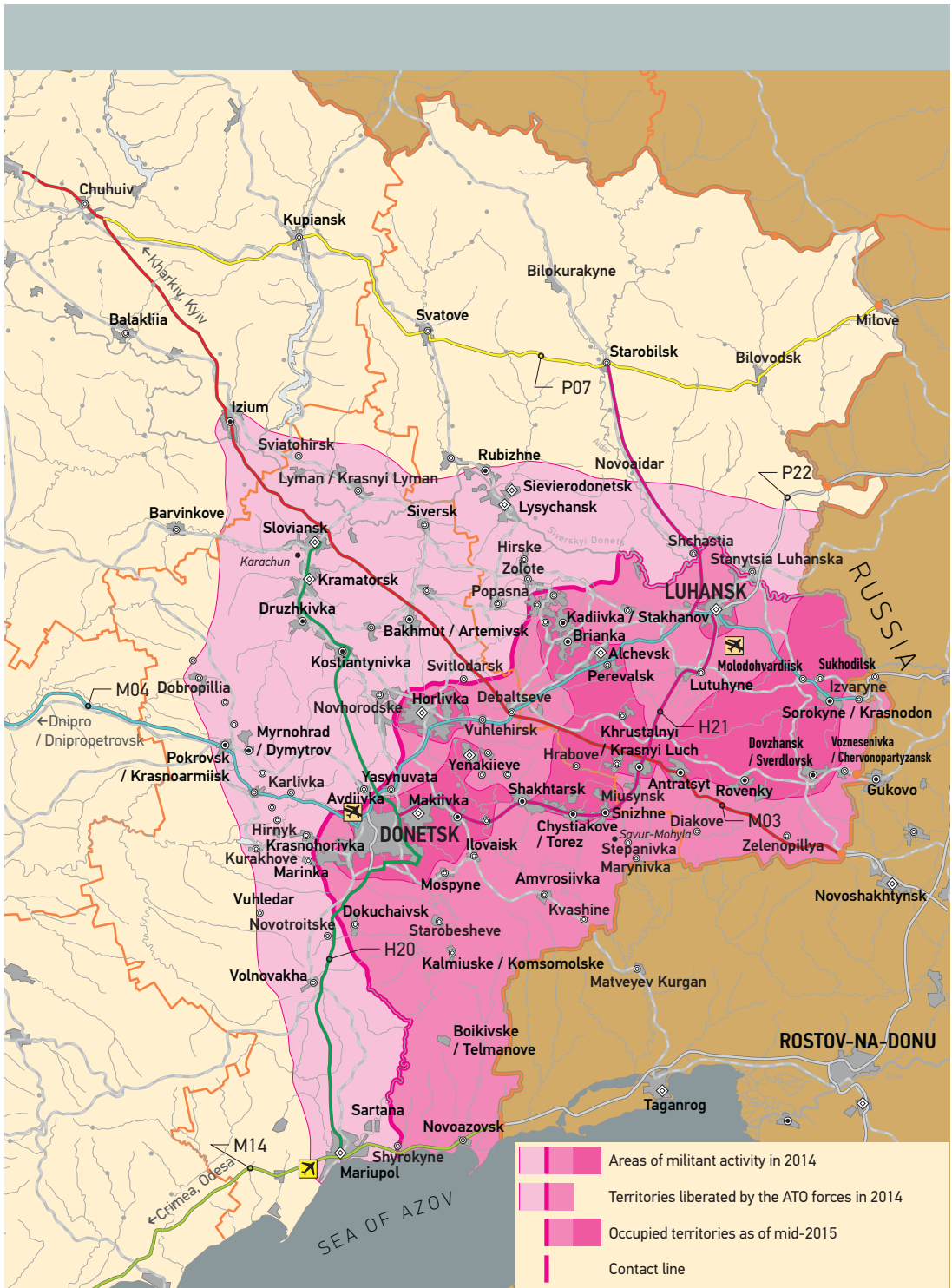
Foreword. When the Truth Is the Best Weapon

In 2016, Oxford Dictionaries selected the term “post-truth” as its international word of the year. Objective facts have been losing their key role in politics and decision-making, causing an overwhelming proliferation of fake news and public opinion manipulation. Western countries have only now realized how vulnerable they are to post-truth, but Ukraine first started feeling it in the spring of 2014, when, after the victory of the Euromaidan Revolution, the Kremlin launched its massive propaganda campaign. Seeking to undermine Ukrainian statehood, both on the domestic (Ukrainian) and international level, Russian agitprop has been targeting every potential audience, from housewives to key decision makers.

After three years of war, against all odds, Ukrainian society has learned how to confront Russia’s propaganda aggression through numerous initiatives aimed against the policy of post-truth. We believe that Ukraine’s first-hand experience can be useful to other countries and communities that are just becoming aware of the new threats and challenges.

Ukraine has been countering Russian hybrid aggression in the Donbas and Crimea for three years. Our research aims to offer an introductory lecture for journalists, analysts, diplomats and experts trying to comprehend the situation in the East of Ukraine, the region’s geographic and sociopolitical features, external and internal causes and stages of the war. We also want to steer you away from the models, stereotypes, and simplifications that often appear in the media. It is especially important for us to illustrate to our readers the hybrid nature of the military and propaganda aggression by the Kremlin, and outline the ways to counter it.

We would like to thank the InformNapalm volunteer community for providing source material for this research. We are also deeply grateful to the experts and journalists, who helped us with valuable ideas and advice during our work.





Chapter 1. Donbas – the Panoramic Picture

Donbas on the Map of Ukraine

Donetsk and Luhansk Oblasts are located in the east of Ukraine. They have many common features and are often joined under the name “Donbas”.

The word “Donbas” is an abbreviation of two words: “Donetsky Bassein” (“Donets coal basin”). This term was first introduced in the 1820s by Yevgraf Kovalevskyi, a mining engineer, to mark the coal deposits in the basin of the Siverskyi Donets river. The Donets coal basin is of a considerable length – over 500 kilometers from the Dnipro to the Don. The total area of the geological Donbas is approximately 60 thousand square kilometers, which is 13 times the area of the Ruhr coal basin. It spreads over parts of the current Dnipropetrovsk, Kharkiv, Donetsk, and Luhansk Oblasts of Ukraine, as well as a part of Rostov Oblast of Russia.

The heavy industry of the Donbas was the factor that determined the region’s administrative boundaries. Donetsk Governorate established in 1920 combined most of the industrial cities of the region. For the purposes of improving food provision to the workers of the Donbas, the territories of Pryazovia (the Sea of Azov area) and Slobozhanshchyna (Sloboda Ukraine), which were then mostly agrarian, were included in Donetsk Governorate. Lengthy reorganizations in the territories belonging to Donetsk Governorate eventually resulted in the appearance of the current Donetsk and Luhansk Oblasts.

Industrial complexes of the coal basin are the core of these regions. Even the names of some cities speak about the mining industry: Shakhtarsk (City of Miners), Antratsyt (Anthracite), Vuglegirsk (Coal Mountain), Vugledar (Gift of Coal), Girnyk (Miner). For that reason, “Donbas” is used as a synonym for Donetsk and Luhansk Oblasts combined.

However, many find this generalization objectionable. First, the borders of the oblasts do not match the borders of the coal basin. Mariupol in Donetsk Oblast and Starobilsk in Luhansk Oblast do not belong to the Donbas, while Pavlograd in Dnipropetrovsk Oblast and Shakhty in Rostov Oblast do. Second, in view of the armed conflict in the East of Ukraine, many Ukrainians speak against assigning any political meaning to the term “Donbas”. Despite these considerations, we proceed from the

Donbas In Flames

established tradition and the practical convenience of calling the territories of Donetsk and Luhansk Oblasts the Donbas. At the same time, we recognize the logic of alternative approaches.

The east of Ukraine is mostly flat steppe country crisscrossed with river ravines, the largest being the Siverskyi Donets. In Luhansk Oblast, the Donets became the separation line between the troops of the Anti-Terrorist Operation and the militants. Another feature of the terrain in the region is the Donets Ridge – a series of hills rising up to 200-300 meters above sea level. The strategic height Savur-Mohyla also belongs to the Donets Ridge. The typical landscapes in the industrial areas include spoil banks.

Donets coal basin



Donetsk and Luhansk Oblasts share a border with the Russian Federation. The land border between these oblasts and Russia is 923.24 kilometers long, out of which 409.3 kilometers (44.3%) are currently under the control of the militants of the DPR and the LPR. Additionally, Donetsk Oblast has access to the Sea of Azov, where the sea border between Ukraine and Russia presents its own problems.

One of the peculiarities of the land border between Ukraine and Russia is that it mostly lacks any natural barriers, such as large rivers or mountains. It stretches through mostly empty fields and grasslands. Until 2014, the eastern border was rather poorly equipped, because the Ukrainian-Russian border inherited not the outer border of the USSR (a state border with proper equipment) but its internal

Chapter 1. Donbas - the Panoramic Picture

(inter-republican) administrative border. Its demarcation began only in 2010. This factor facilitated illegal crossings into Ukraine from Russia.

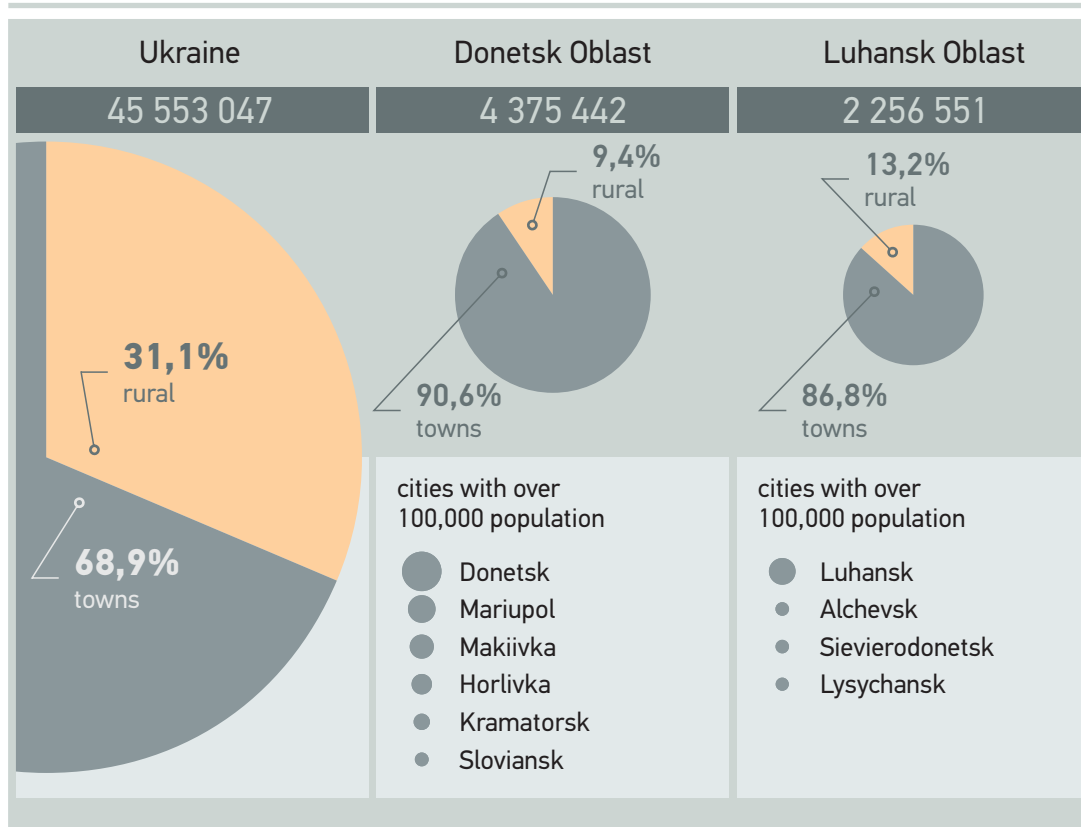
Donetsk and Luhansk Oblasts are connected to each other and to the rest of Ukraine as well as to Russia with a network of highways and railways. The most important roads in the region are international highways M03, M04, M14, reaching the state border of Ukraine, as well as national roads, particularly, roads H20 and H21. Control over these roads (or parts of them) was essential for both sides of the armed standoff in 2014.



The greatest dangers faced by a person in the Donbas are those associated with roads...

Anastasia Bereza, journalist

Population breakdown by the municipality type (source: State Statistics Service of Ukraine, 2013)



Donbas In Flames

Donetsk and Luhansk Oblasts hold an important place among the 27 regions of Ukraine. Together they cover approximately 9% of the territory of the country, at the same time being the most densely populated and urbanized area. Before the war, approximately 16% of the total population of Ukraine lived in these two oblasts. Donetsk Oblast is first in Ukraine in the number of cities – there are 52 of them. Luhansk Oblast is in third place with 37 cities (after Lviv Oblast). Together the two Donbas oblasts contain almost 20% of all the cities of Ukraine. Most of them are in the center of dense urban areas, which developed around heavy industry enterprises.

The high level of urbanization in the central parts of Donetsk and Luhansk Oblasts also had its influence on the pattern of the hostilities. At the early stages of the standoff, the militants managed to establish control over the large cities. Storming such cities would have required special training, which the Ukrainian army lacked. The Ukrainian command did not dare to directly attack the militants' locations in densely populated residential areas, as it meant the risk of numerous casualties among the civilians and the troops. As the result, most of the urban areas of Donetsk and Luhansk Oblasts remained under the control of the DPR and the LPR.

In 2015, the Ukrainian parliament passed the act entitled “On the condemnation of the Communist and National-Socialist (Nazi) regimes, and prohibition of propaganda of their symbols”. It required the cities, raions (subdivisions of oblasts), and oblasts that used communist symbols in their names to be renamed. Through 2016, in accordance with this law, 987 cities and 25 raions were renamed.

Of those, 166 cities and 8 raions are in Donetsk and Luhansk Oblasts, including 78 cities and 3 raions in the occupied territories of the Donbas. The self-proclaimed DPR and LPR do not accept these changes and continue using the old names.

Further in this text, we will specify the names of the cities that have been renamed in the form “new name / old name”. The detailed list of the renamed cities and raions of the Donbas is provided in the appendix.

As Seen by Analysts and Journalists

The Donbas as a whole is a subject that is covered from different standpoints. Journalists planning their trips to the zone of the military conflict should be especially careful about the words they are using. The words, together with the accompanying videos or photos, set the perceptions of this standoff. In order to comprehend the Donbas conflict, one has to take into account its characteristics that have been used by unbiased analysts, experts and researchers. It is essential to be able to distinguish well-reasoned statements from propagandist clichés.

The analysis below covers about 100 scientific texts by Ukrainian researchers in the social and humanitarian area that use the term “Donbas”. These texts fall under two categories: those created before the conflict and those prepared during its rise. The words frequently used in these texts are included in the Top 100 list. Together they form the basis of the content and, to a certain extent, help to understand the Donbas.

Chapter 1. Donbas - the Panoramic Picture

Top 100 words about the Donbas in Ukrainian publications before the war



Top 100 words about the Donbas in Ukrainian publications after the beginning of the war



Donbas In Flames

For example, from the Top 100 one can conclude that the region has been and still is regarded as a part of Ukraine. The regional specifics are often emphasized in the context of the difficult social and economic conditions as well as the strong attraction to the Soviet past. At the same time, if previously the Donbas was mostly described in relatively positive terms (formation, modernization, improvement, encouragement, investment, reconstruction, urbanization), since 2014 the region is mostly associated with problems of integration, safety, reclamation, overcoming, reconciliation, relocation, demarcation, and improvement of living conditions.



Participants of the anti-government protests near the seized SBU building in Luhansk. One of the persons has “USSR” shaved on his head. April 9, 2014. Photo by Taras Shumeyko.

Comprehensive studies of the Donbas could not predict the events happening today. Before the conflict, the region had been referred to as the center of labor, industry, life, education, market relations, traditions, creativity. These terms disappear from the Top 100 after 2014, while the analytical vocabulary acquires such new Donbas-related terms as “military conflict”, “(in)security”, “external aggression”, “casualties”, “uncontrolled territories”, “annexation”, “separatism”, “geopolitics”, “occupation”, “scenario”.

In pre-war Ukraine, the Donbas was generally described as a relatively prosperous and influential region of Ukraine with marked social and economic tendencies. Since the beginning of the war, these impressions have changed sharply. Now the region is analyzed primarily as the territory of the Russian-Ukrainian conflict and geopolitical standoff, a serious challenge for the national sovereignty of Ukraine.

Chapter 1. Donbas - the Panoramic Picture

By 2014, the expert community identified “Donbas” as a distinct socio-cultural trend; however, now we see only traces of the related associations, a vague image quickly losing its past attractiveness.

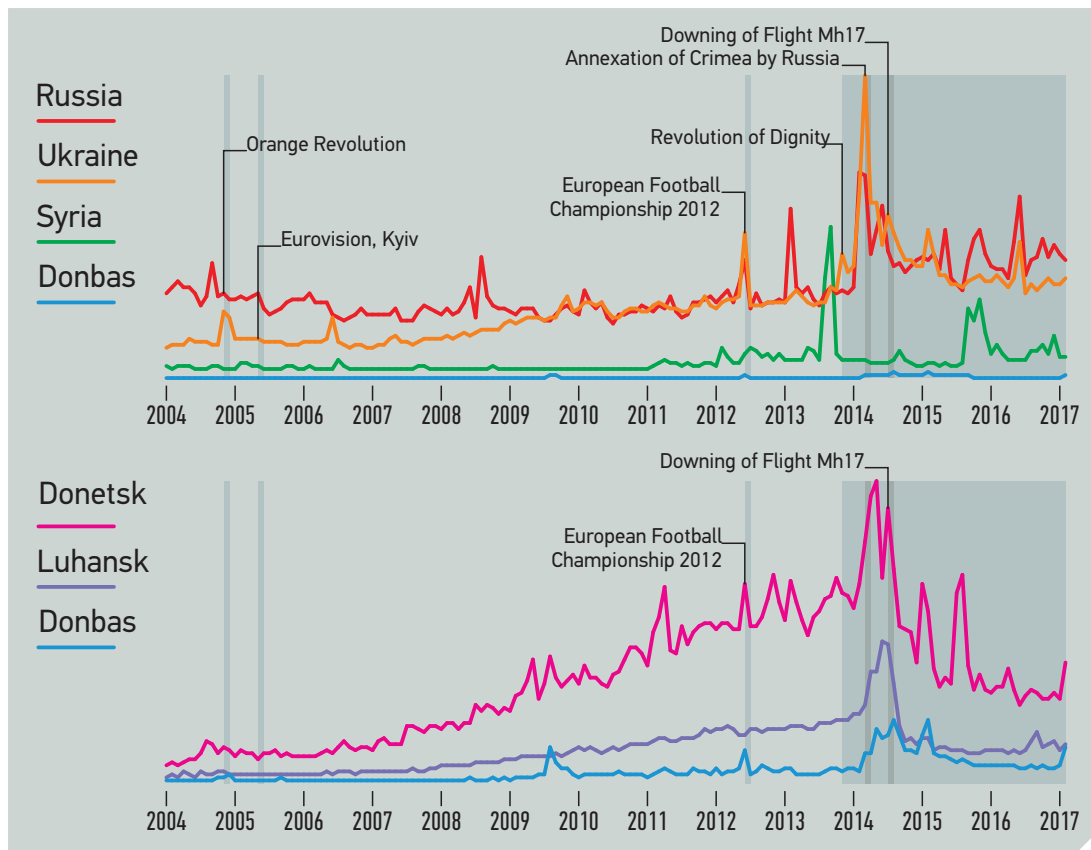
In the end, every person visiting the Donbas will most probably find their definition of this region of Ukraine. We gathered the region-related statements, which were suggested by Ukrainian and foreign experts, researchers, columnists, politicians, journalists, artists at various times and in various contexts. So, for our purposes, the Donbas is:

- its history embodies ... freedom, militancy, violence, terror, independence (Hiroaki Kuromiya)
- colonized steppe borderlands (Aleksandr Kaufman, Dmytro Bahaliy, et al)
- a land of “mass assimilation” and “intellectual genocide” (Oleksa Tykhyi)
- an integral part of Ukraine, “the land of the Ukrainian word” (Ivan Dziuba)
- russified mining towns and Ukrainian traditional villages (Vasyl Holoborodko)
- “feudal land” of “local lords”, oligarchs; a regional business clan (Ella Libanova, Denys Kazantsev, Roman Ofitsynskyi, et al)
- “lumpenized land” using blackmail as a weapon (Oles Honchar)
- social expanse of poverty (Liliya Lebid)
- an old industrial region with signs of “necro-industrialism” (Yevhen Shybalo)
- a part of the “rust belt” (Sergii Plokhii, Anders Aslund, et al)
- a frontier region, a contact border, a borderland (Yaroslava Vermenych, Oleksandr Osipian et al)
- a pole of the Ukrainian regional system, one of the “two Ukraines” – the opposite of Galicia (Mykola Ryabchuk et al)
- the Donets Ridge is a territory inhabited by residents with “traumatized consciousness of a Soviet person” (Oksana Mikheyeva)
- a region of “strong industry, advanced technologies (here and there) and old idols (everywhere) (Yevhen Sytnyk)
- a region of mythologized history (Andrew Wilson)
- a region of “darkened places, anomalous time zones” (Serhiy Zhadan)
- a land of regional patriotism (Kostyantyn Paustovskyi)
- miners’ culture (Marta Studenna-Skrukva)
- “international frontline” (Vladimir Kornilov)
- “holy land”, part of the “single space of the Holy Russia” (Vladimir Gundyayev)
- cultural synthesis of Ukraine and Russia (Illya Kononov)
- a non-homogeneous region – active and expectant, creative and common, dreamy and nostalgic, aggressive and abused (Vira Dodonova)
- an unstable region of radicalized worker movements (Charles Wynn)
- “the land of dreams” (Viktor Marushchenko)

Donbas (Un)Known to the World

Using the word “Donbas” and its spelling variations as the search terms in Google Trends, it is possible to make certain conclusions about the international interest towards the region. The infographic shows that in March, May, and August 2014 and February 2015, Google users’ interest towards the Donbas increased significantly, albeit with certain oscillations – up to its historical maximum of the period from 2004 to 2017. By the frequency of sources of the queries, Ukraine is followed by Poland, Italy, Germany, Russia, Spain, the Netherlands, United Kingdom, and USA. However, starting from March, 2015, this interest gradually diminishes.

Google Trends data



It is significant that in January 2017, Google users worldwide show one third as much interest towards a European region with an ongoing military conflict as in June 2012, when Donetsk became one of the host cities of the European football championship. In general, it is easy to see that the first successful steps towards forming a positive international image of the Donbas were made with the development

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of the sports infrastructure during the independency of Ukraine. Donetsk hosted matches of the UEFA Champions League in 2004/2005 and 2006/2007, the Euro-2009 (U-19) youth football championship, the Bannikov international football tournament, and the 2005 Davis Cup tournament, the 2013 World Youth Championships in Athletics, and other international sports events. The opening of the Donbas Arena – the first stadium in the Eastern Europe designed to the “five star” category standards, the best stadium of Euro-2012, the winner of the Safety & Security Award at the 2013 Stadium Business Awards – attracted, as anticipated, wide public attention. Now the stadium that on the day of its opening hosted almost 50,000 visitors from all over the world has been badly damaged.



Unveiling of the official Donetsk logo for Euro-2012 football championship. Donetsk, July 2010.

Nowadays, Google search users are more likely to make Donbas-related queries on other issues: war in the east of Ukraine, Syria, Petro Poroshenko, Donbas militia, pro-Russian movement in Ukraine, the Crimean peninsula, Russia, Novorossia, Islamic State, Vladimir Putin, Debaltseve, war in Donbas, news Donbas, save Donbas, Ukraine war, Donbas map, Donbas people, Donbas facebook, battalion Donbas, Islamic state of Donbas, and others.

At the same time, the following queries still maintain certain popularity: Donetsk territory, Donbas Arena stadium, Donbas hockey club, Shakhtar football club, Donbas Palace Hotel, European football championship of 2012, Industrial Union of Donbass, DonbassAero airlines, and others.

Donbas In Flames



Donbas Arena, the stadium opened in the center of Donetsk in 2009 in preparation to Euro-2012. On the right: the damage to the stadium as a result of the fighting in 2014.

« ...These are the typical problems of an industrial region in a country without economic reforms. The Donbas continued to depend on the old Soviet industry, which hadn't been reformed, hadn't been modernized, but had been privatized. And this state of affairs, of course, led to the increased role of clans and criminal gangs and to the rise of a completely unique mentality [...] It was absolutely clear that this area would be marginalized and it would be used by certain groups to establish their dominance. In these industrial areas a certain group of "lords" always appears, who keep the local population not just in subservience, but in ideological subservience, and people begin to believe that this is the model that is best suited to preserve "stability".

Vitaly Portnikov, political columnist



Chapter 2. Could the War Be Avoided?

Ukrainian land

Up to the second half of the 18th century, what is now Donetsk and Luhansk Oblasts remained sparsely populated. The steppes to the north of the Sea of Azov were the stage of the frequent clashes between Zaporozhian, Sloboda, and Don Cossacks on the one side, and Turkic nomads of the Crimean Khanate on the other. Victorious campaigns of the Russian Empire ended the domination of the Ottoman Empire along the northern coast of the Black Sea. This area ceased to be a dangerous borderland, finally becoming a part of Russia.

Streams of colonists flowed to the Donbas from Crimea, the Balkans, the Caucasus, central regions of Russia, and Western Europe. But the majority of the settlers were Ukrainians from neighboring territories. Ukrainians immediately became the dominant ethnic group in the region, which was evidenced by fiscal lists of the population in the 18th and 19th centuries, and later by the first general Census of the Russian Empire in 1897. In the 19th century, ethnographers also confirmed the Ukrainian character of the Donbas.

Since there were no separate Ukrainian administrative structures in the Russian Empire similar to the Kingdom of Poland or the Grand Duchy of Finland, the only way to determine Ukraine's borders was to identify the territories inhabited by the Ukrainian people.

Metaphorically the Ukrainian territory was defined by Pavlo Chubynsky in a poem - now the national anthem of Ukraine - "Ukraine has not yet died", written in 1862, as "From San to Don". The suggestion of the Don River as the eastern national border implied the inclusion of the Donbas in the area settled by Ukrainians. The more detailed picture of eastern Ukrainian territories was offered by ethnographic maps of the 19th century. The pragmatic approach dictated the need to take into account the existing administrative boundaries of the provinces of Russia, where the majority of population was Ukrainian.

This was the program that was presented by the Ukrainian national movement after the overthrow of the Russian monarchy in February 1917. The territories of the modern Donetsk and Luhansk Oblasts mostly belonged to the eastern outskirts of the Ekaterinoslav and Kharkiv Governorates. Since they were mostly inhabited by Ukrainians, they were to be included in the Ukrainian autonomy.

Donbas In Flames

On November 20, 1917, the Ukrainian Central Rada adopted the Third Universal which proclaimed the Ukrainian National Republic (UNR), consisting of nine governorates, including Ekaterinoslav and Kharkiv. In the future, the border territories, where Ukrainians were the majority population, were anticipated to join the UNR. For example, at the time, the south-eastern outskirts of the modern Donetsk and Luhansk Oblasts were a part of Taganrog District of the Don Host. According to the 1897 census, Ukrainians accounted for 61.7% of its population.

The Bolshevik leadership of Russia and its head Vladimir Lenin de facto recognized Ukraine within the Third Universal. However, the Bolsheviks immediately began an armed fight to seize power in the UNR. With the help of the Russian Red Army, the Soviet government was established in Ukraine. The Ukrainian Socialist Soviet Republic (UkrSSR), proclaimed by the Bolsheviks, claimed the same territory as the UNR. Thus, the issue of the administrative Ukrainian-Russian border was to be resolved between the Ukrainian and Russian Soviet Republics.

Transformation of the border between Ukraine and Russia in the Donbas



Chapter 2. Could the War Be Avoided?

Lenin's administration in Moscow did not question that parts of the Donbas within Ekaterinoslav and Kharkiv Governorates belonged to Ukraine. On February 25, 1919, the leaders of Soviet Ukraine and Russia confirmed the appropriate border line in a joint decision. In reality, Russia and Ukraine were governed from the same center, so the issue of the border between the two Soviet republics was seen as an academic question.

After the defeat of the troops of General Denikin, the Bolsheviks finally asserted their authority over the Donbas. On April 16, 1920, to accelerate the post-war reconstruction, they combined the whole industrial region within a newly formed Donetsk Governorate. It included the eastern parts of the Ekaterinoslav and Kharkiv Governorates, as well as the part of the Donbas that before the revolution belonged to the Don Host. The new governorate became a part of the UkrSSR, so the territory of Ukraine increased significantly taking in parts of the Don land. In August 1920, Stanytsia Luhanska was added to the Donetsk Governorate. These were the borders of UkrSSR as it joined the Soviet Union.

In addition to industrial areas, territories settled by Ukrainians as early as the beginning of the 19th century (e.g. Taganrog District) were transferred to Ukraine. However, the administrative border between Ukraine and Russia significantly differed from the ethnographic one. The UkrSSR hoped to exchange the Russian populated eastern part of the Donbas for the territories of Voronezh and Kursk Governorates, where Ukrainians were in the majority. The issue of changing borders between the republics was considered for more than a year, but the decision accepted on October 16, 1925 was not in favor of Ukraine. Russia took back most of the areas of the Eastern Donbas and Taganrog, while Ukraine in return was given only small parts of Voronezh and Kursk Governorates. The UkrSSR's attempts in 1926-1928 to initiate a review of the unfavorable decisions were unsuccessful.

After 1928 and until the collapse of the Soviet Union, the Ukrainian-Russian border in the Donbas remained unchanged. The boundary between Donetsk and Lugansk Oblasts was finalized in 1938.

The border of independent Ukraine is identical to the administrative border of the former Ukrainian SSR. This is consistent with the principles of international law and is enshrined in a number of multilateral and international agreements, including:

- Treaty between the Ukrainian SSR and the Russian SFSR (November 19, 1990);
- Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (May 31, 1997);
- Treaty Between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (January 28, 2003).

Since Ukraine's independence, the Russian Federation never officially put forward any territorial claims to the Ukrainian Donbas.

Rust Belt

The economic development of the Donbas is mostly determined by mineral deposits, primarily coal. In this regard the Donetsk Basin is similar to other old industrial zones, such as the Rust Belt in the U.S., mining regions in Great Britain, the Ruhr and Saar regions of Germany, Silesia in Poland, Nord-Pas-de-Calais in France. These regions have a high level of urbanization. They used to develop at a rapid pace. But the decline of heavy industry in the economy and the inability to compete with newly industrialized countries (China, India, etc.) brought unemployment and social vulnerability.

The first coal mines and steel mills in the Donbas appeared in the late 18th century. Then the workers were mainly Ukrainian-speaking peasants from nearby villages. The rise of coal mining, steel, and later machine-building industry, occurred in 1880-1890's. The need for labor led to significant population growth in the region. Skilled workers from Russia and, more generally, people of different nationalities looking for better life, were coming to the Donbas. Foreign investments and companies from Belgium, France, Germany, and Great Britain boosted the local economy. The first name of Donetsk - Yuzivka - comes from the name of John Hughes, a native of Wales, the owner of a steelworks. The Donbas was one of the main industrial centers of the Russian Empire and later the Soviet Union.

The typical mindset of the Donbas population was formed in the Soviet period, and it has remained the same to this day. Because of the demographic devastation during the Holodomor - the famine of 1932-1933 - the Ukrainian countryside was not a major donor of human resources for the growing industrial cities of the Donbas. The demand for labor was satisfied with people from all over the Soviet Union, creating an international, predominantly Russian-speaking environment in urban agglomerations.

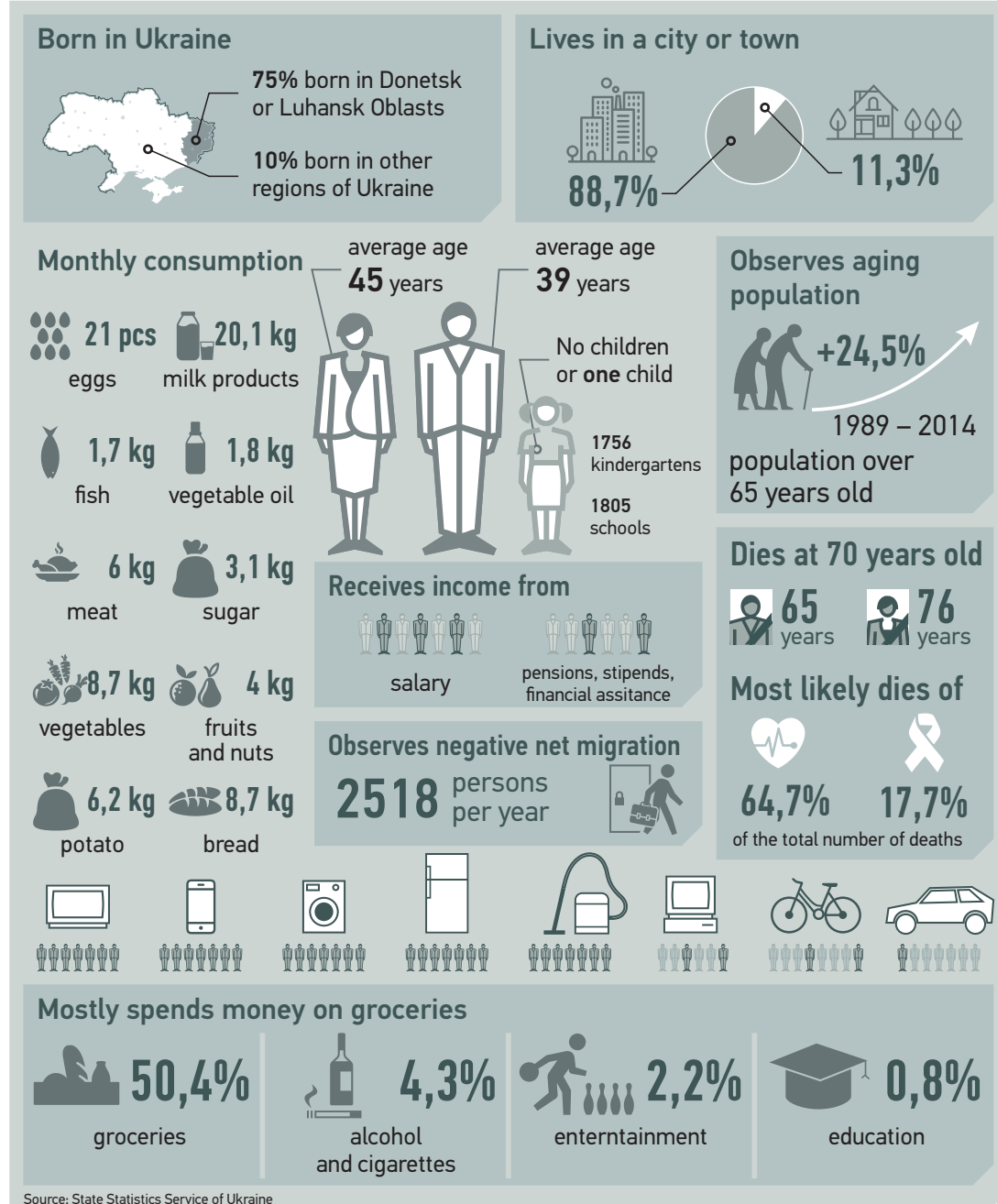
Soviet propaganda cultivated the image of the heroic working class. In the 1930s, the movement of champions in production was a signature sign of the Donbas. The most famous of them was Stakhanov movement named after Alexei Stakhanov. In 1935, he set a record for coal extraction and became an icon of Soviet miners. In 1978, the town of Kadiyivka in Luhansk Oblast was renamed Stakhanov. Another episode of Donbas heroic history was the Young Guard, an underground youth group that was active in Luhansk Oblast during the Nazi occupation in 1942-1943. The nostalgia for the former glory and the devotion to the memories of the anti-Nazi resistance were successfully used later by Russian propaganda in the politicization of the Donbas.

Despite the constant glorification of the Donbas by Soviet propaganda, its population faced unresolved social and economic problems. Worker strikes began in the Donbas in the 1960's, long before the Solidarity movement in Poland, peaking in 1989-1990. The strikers demanded better living and working conditions and reviews of company management. The great hope was that the independence of Ukraine would help resolve social problems. This created the precedent of a powerful political alliance between national democratic forces and the miners in the fight against the communist regime.

Contrary to expectations, with independence, the economic problems of Ukraine only deepened. The collapse of the interconnected industrial complex of the USSR, the primary consumer of the Donbas production, and painful transition from a planned to a market economy led to the decline of factories and mines. Unemployment increased sharply. Social problems were compounded by rising crime and industrial pollution. In the years preceding the conflict, Donetsk Oblast was ranked last among all regions of Ukraine in terms of human development index. Luhansk Oblast was also at the bottom of the list.

Chapter 2. Could the War Be Avoided?

Snapshot of an average resident of the Donbas before the war



Source: State Statistics Service of Ukraine

Donbas In Flames

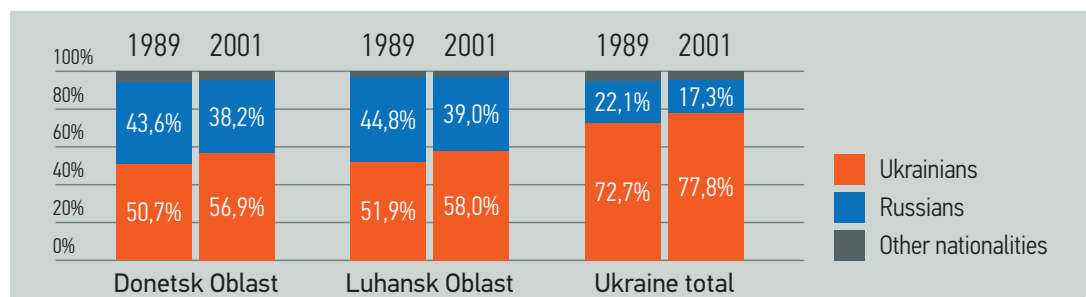
However, the output of Donbas economy remained significant. Anthracite coal is mined here, and it is used by all thermal power plants of the country. Coking coal went to steel production, which, along with agricultural products, is one of the main exports of Ukraine. Donbas business owners became the richest people in Ukraine. They converted their influence into political projects such as the Party of Regions. The importance of Donbas industrial enterprises for the economy of Ukraine has been a contentious subject. The opinion that the region “gives more than it receives” from the central government is popular, but it is not supported by any economic evidence. For example, in 2010 the share of Donetsk Oblast in Ukraine’s GDP was 12%, but the share of subsidies received by the oblast from the state budget was 20.9% of the total allocation for all oblasts.

The industrial facilities are located in urban agglomerations. Many factories are located in Donetsk, including: 4 steel and 1 non-ferrous metal works, 25 coal mines, 26 machine building plants, and 8 chemical plants. There are 2 steel mills and 19 machine building plants in Mariupol. Luhansk has 9 large industrial complexes. These cities formed the basis of the industry in the region. Company towns, with a single factory being the foundation of the local economy and a major source of employment, are a typical feature of the Donbas. For example, Severodonetsk was built around a chemical plant, Vuhledar exists because of nearby coal mines.

Similar and different

The latest and, for the time being, only census of independent Ukraine was conducted in 2001. For reference, we will use the data obtained in the last USSR census of 1989. Both censuses show that the most numerous nationalities in Ukraine (including Donetsk and Luhansk Oblasts) are Ukrainians and Russians, and the most spoken languages are Ukrainian and Russian.

Most numerous nationalities

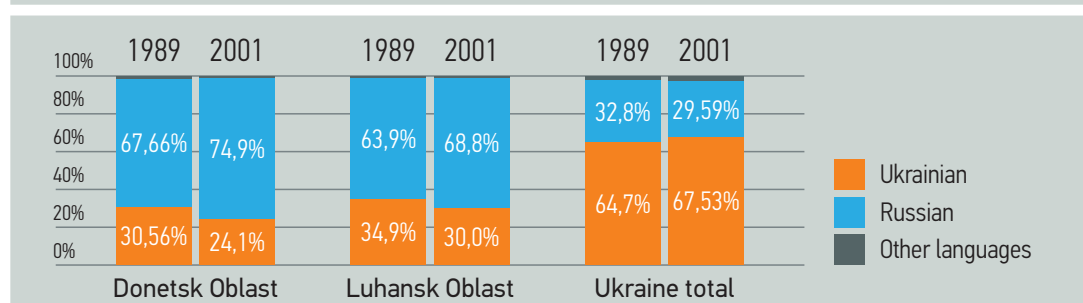


Even though the share of ethnic Russians in the population of Donetsk and Luhansk Oblasts is significantly higher than in Ukraine as a whole, Ukrainians are still the majority here. According to the 2001 census, in the Donbas Russians were the majority nationality only in 2 districts of Luhansk Oblast (Stanytsia Luhanska district and Sorokine district), and in 7 cities of regional significance: Donetsk, Makiyivka, Yenakiieve (Donetsk Oblast), Sorokyne / Krasnodon, Dovzhansk / Sverdlovsk, Khrustalny / Krasnyi Luch, Kadiivka / Stakhanov (Luhansk Oblast).

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Between the 1989 and 2001 censuses, the share of Ukrainians in the population increased, while the share of Russians decreased. This was true for both Ukraine as a whole and Donetsk and Luhansk Oblasts in particular. To a certain extent, the decrease of the share of Russians can be attributed to their migration to the Russian Federation after 1991; however, the main reason is the change of the national identity of many citizens of the independent Ukraine. After the collapse of the USSR, being a Russian national, as claimed by many people of different ethnicities, including Ukrainians, was no longer “prestigious”. On the contrary, many citizens of Ukraine, regardless of their ethnic origin, started to identify themselves with the Ukrainian political nation, and that was the meaning they associated with the concept of “nationality” during the 2001 census.

Most spoken languages

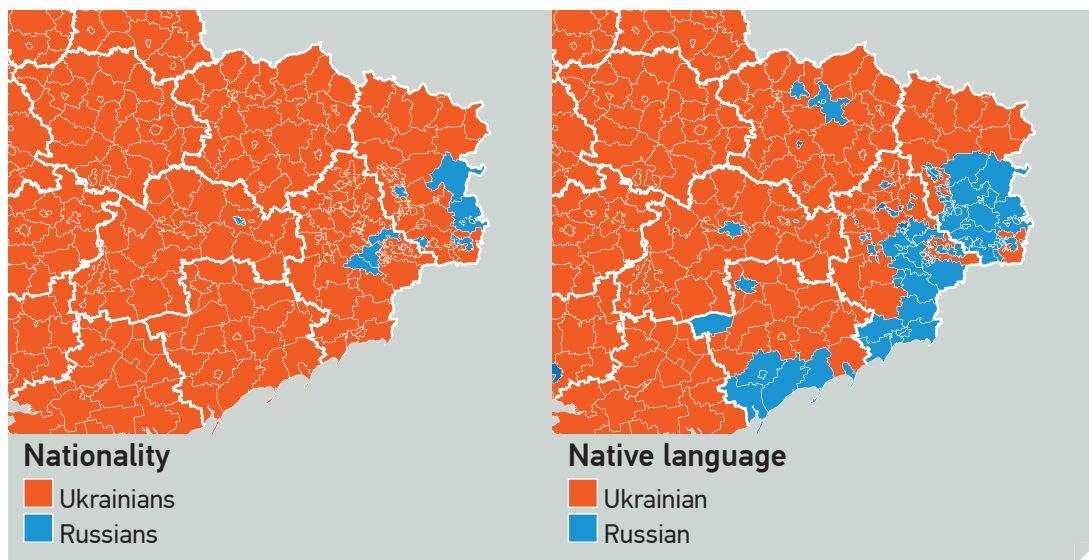


While Ukrainian is the most common native language in Ukraine, and the share of all citizens claiming Ukrainian as their native language increased between the 1989 and 2001 censuses, the situation in Donetsk and Luhansk Oblasts is different.

For most of the Donbas population Russian has been and still remains their native language. From the territorial perspective, Russian-speaking people are the majority in the urban communities of Donetsk and Luhansk Oblasts. Ukrainian-speaking areas are located mostly in the north and west of the region and are mainly rural. The census data shows that the share of Ukrainian-speaking population in these regions decreased as compared with the USSR period. This was due to the depressive trends in the rural areas and urbanization accompanied with Russification.

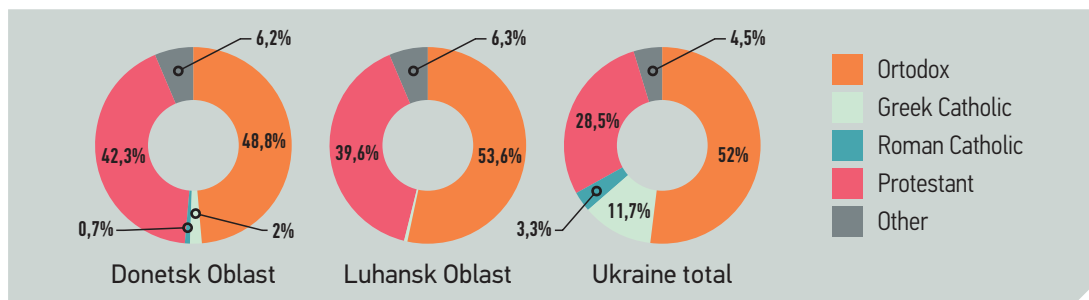
The absolute majority of the population of Donetsk and Luhansk Oblasts, just like in all of Ukraine, is fluent in both Ukrainian and Russian.

Composition of the population of Eastern Ukraine in the 2001 census by ethnicity and native language



The distribution of religious beliefs in the society can be to a certain extent evaluated on the basis of the data of the State Committee on Religions of Ukraine, containing the information on the number of registered religious organizations. As of 2013, religious communities in the region were represented in the following proportions:

Religious communities



The proportion of religious organizations in the region is similar to that in all of Ukraine: Orthodox Christians are the majority.

None of the ethnic, language, or religious factors make Donetsk or Luhansk Oblasts significantly different from the rest of the country. There is no distinct political differentiation in the Ukrainian society

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based on cultural background. On the contrary, there is the tendency towards mutual assimilation and the possibility for each individual to choose their ethnic, language and religious identity. Therefore, the war in the Donbas is not an internal conflict based on ethno-political or religious differences, like those in Ulster, Karabakh, or Bosnia

Voting Rights

On December 1, 1991, the All-Ukraine referendum on the support of the Act of Declaration of Independence of Ukraine was held. At the national level, 90.32% of the citizens voted for independence. The level of support for independence in Donetsk and Luhansk Oblasts was almost the same and rather high: 83.9% and 83.86%, respectively. During the period of 1991-2015, Ukraine held 6 presidential elections and 7 parliamentary elections, which ensured sufficiently frequent transition of power among political groups at the national level.

Donetsk Oblast holds the top spot in Ukraine by the number of registered voters with approximately 9% of the total. Together with Luhansk Oblast in the 7th place, the Donbas represents almost 14% of the total number of Ukrainian voters.

Judging by the results of the presidential campaigns, the voters in Donetsk and Luhansk Oblasts mostly supported the winning candidates. Donetsk Oblast favorites won four electoral campaigns, those of Luhansk Oblast – three campaigns. During the 22 peaceful years, the Presidents of Ukraine that won the vote in Donetsk Oblast were in office for 17 years. Luhansk Oblast favorites held the President's office for 12 years. These presidents were Leonid Kravchuk, Leonid Kuchma, and Viktor Yanukovich – that is, all presidents except Viktor Yushchenko.

Describing the political engagement of the population of the region is not a simple task. Of the 352 political parties of Ukraine, only 12 were established in the densely populated Donetsk and Luhansk Oblasts. However, the voters consistently supported the national-level political forces established in Kyiv, rather than local parties. In parliamentary elections, the residents of Donetsk and Luhansk Oblasts mostly voted for the Communist Party of Ukraine or for the ruling political forces (for example, the "For United Ukraine" bloc). This remained true up to 2006, when the Party of Regions supporting Viktor Yanukovich became their main favorite. Both the parties supported by Donbas voters and the people from that region were always properly represented in the parliament of Ukraine.

« By the end of the 1980s through the beginning of the 1990s, a miner movement was quite strong in the Donbas, then later - in the 1990s – it was either bought or banned...

Piotr Andrusieczko, journalist

None of the political forces most strongly supported by the voters of Donetsk and Luhansk Oblasts presented itself as a single-region party. None of the local parties stated as its goal the independence of the Donbas or its unification with Russia. The mainstream of the political life of Ukraine had no tradition of Donbas separatism.

Depending on the political situation, political representatives of the Donbas tried either to expand their influence to the entire country or to minimize their opponents' influence through decentralization. The leaders of the Party of Regions were mostly concerned about strengthening their personal

administrative and economic influence, and were quite successful in that, too. However, they failed to dominate the culture and ideology on the national scale. To prevent his opponents' "ideological expansion" into his main electoral regions, Yanukovich's party raised the issue of the federalization of Ukraine, securing the status of regional languages, and generally the right of certain regions to live "side by side rather than together".

The Party of Regions won the parliamentary elections three times (in 2006, 2007, and 2012); Yanukovich was the Prime Minister in 2006-2007, and in 2010 he won the presidential elections.

Therefore, before the war, the Donbas was always actively involved in the politics at the national level and was able to have its interests represented in Kyiv.

Unsolicited patronage

Officially, the Russian Federation never advanced any territorial claims to Ukraine. With the possible exception of Crimea, Moscow was interested in being able to influence the politics of the Ukrainian government, rather than claiming specific territories.

Ever since the collapse of the USSR in 1991, Russia has never stopped hoping to restore the political unity with most of the ex-Soviet republics. The European Union became a model of integration. Following the EU example, Moscow emphasized economic integration as the prerequisite for the political format.

Membership of the post-Soviet republics in the Customs Union of the Eurasian Economic Union was to become the first step. For Ukraine, which stated its intentions to integrate into the European economic and political structures (the EU and NATO), the Customs Union with Russia was less attractive. Balancing between the East and the West, Ukrainian governments for quite some time kept to the principle of the so-called "multi-vector" foreign policy.

In 2010-2013, Moscow increased its pressure on Kyiv. During that period Yanukovich was the President of Ukraine, and he had the reputation of a pro-Russian politician. He rejected the NATO integration policy and helped strengthen Russia's standing in the economy, ideology, security, and other important areas. The Kremlin put great hopes on Yanukovich becoming the leader, who would bring Ukraine into the Customs Union.

However, the President of Ukraine was also forced to take into account the pro-European popular opinion, and he also expected the West to provide financial aid. Therefore, the government initiated the EU-Ukraine Association Agreement and was preparing for its signing in November 2013. At the last moment, under the intense pressure from Moscow, Yanukovich refused to sign the Association Agreement, which triggered popular protests known as the Revolution of Dignity or the Euromaidan. When it became obvious that Yanukovich would not be able to hold the power and to bring Ukraine into the Customs Union, Moscow began its military aggression against Ukraine.

The ghost of Russian separatism in Ukraine appeared whenever Moscow became unsure of its position in Kyiv. In fact, it was a tool used to blackmail the Ukrainian authorities in order to keep Ukraine within the circle of Russian influence. For a long time, Moscow had been demanding federalization of Ukraine to strengthen its position in the peripheral regions. Autonomous peripheral regions led by pro-Russian politicians could have:

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- prevented the consolidation of the Ukrainian society
- blocked Kyiv's resolutions unfavorable for Moscow
- prepared the base for Russian expansion.

Moscow had been encouraging outward tendencies in Ukraine for years. And here the Donbas was getting special attention. It was in the focus of government and non-government organizations of the Russian Federation, their branches in Ukraine, and pro-Russian organizations of Ukraine – of regionalist, leftist, and Orthodox character. Russian interests in Ukraine were represented by the Institute of the CIS Countries (with its branches in Ukraine), the Coordination Council of the Organization of Russian Compatriots (with its branches in Ukraine), the All-Ukraine Social Movement “Ukrainian Choice”, the political party “Russian Bloc”, and others.

« At the History Department of the Donetsk University there was a group under the personal patronage of Aleksandr Dugin. Every year he arranged camps, offered ideological lessons to the delicate graduate youth and instilled neo-Eurasian ideas in them...

Taras Shumeyko, journalist

At the same time, several concepts of separating the Donbas from Kyiv were being developed.

“South-East”

Russian political strategists considered Crimea and the 8 oblasts in the South and East of Ukraine (Odesa, Mykolaiv, Kherson, Dnipropetrovsk, Zaporizhia, Kharkiv, Donetsk, and Luhansk) as the most promising base for launching the federalization agenda.

During the 2004 presidential elections, the team of the pro-Russian candidate Yanukovych was convincing their followers that the team of their opponent (Yushchenko) was allegedly scornful towards the southern and eastern regions of Ukraine; that they regarded them as “inferior”, when compared to the central and western regions. Although Yanukovych lost those elections, the south-eastern regions became the electoral base for him and his Party of Regions for many years. The contraposition of the different parts of Ukraine reached its peak on December 28, 2004, at the Congress of Deputies of All Levels in Severodonetsk (Luhansk Oblast). Yanukovych's supporters then attempted to proclaim the South-Eastern Ukrainian Autonomous Republic.



“Three ranks of Ukrainians”, the banner used by the Victor Yanukovych campaign during the presidential elections of 2004. On this map, the residents of the Western Ukraine are assigned the first rank, while the residents of the southern and eastern regions are assigned the third and worst rank. Yanukovych's competitor, Viktor Yushchenko, was accused of having this vision of Ukraine. This false accusation was never properly refuted and took root in the views held by many residents of the Donbas.

Donbas In Flames

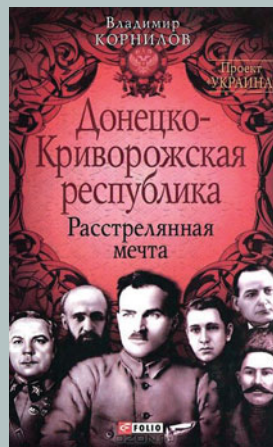
◀◀ At first, local oligarchs pushed this «for Russia» movement to keep their assets in the Donbas...

Taras Shumeyko, journalist

The Kremlin's political strategists were actively spreading the message of the national and civilizational singularity of the south-eastern regions. It was accompanied by fabricated facts about their national identity and their history as a part of Ukraine. Moscow declared its readiness to protect the interests of the population of those territories from Kyiv.

“Donetsk Republic”

In order to legitimize the Donbas as a political entity, various historical and economical justifications were offered. The Donetsk-Krivoy Rog Republic, a short-lived (winter-spring of 1918) political formation created by the Bolsheviks, was presented as a historical tradition. The status and significance of this formation were exaggerated in every possible way. The Donetsk-Krivoy Rog Republic was set against the real republics of that time: the Ukrainian People's Republic and the Ukrainian Socialist Soviet Republic. In 2011, the Director of the Ukrainian branch of the Institute of CIS Countries Vladimir Kornilov published a book titled “Donetsk-Krivoy Rog Republic: A dream shot dead”, where he tried to prove the allegation that the Donbas was a part not of Ukraine but of the Donetsk-Krivoy Rog Republic. Kornilov's work was widely promoted in Ukraine.



The cover of the book “Donetsk-Krivoy Rog Republic: A dream shot dead” by the Director of the Ukrainian branch of the Institute of CIS Countries Vladimir Kornilov. In this book, the author promotes the tradition of separate governance in the Donbas, contrasting it against the rest of Ukraine.

The economic reasoning was compressed into a very short statement: “The Donbas feeds Ukraine”. The alleged “injustice” was that the foreign policy and ideological agenda were formed by the “subsidized regions”, while the Donbas was deprived of its political rights.

Until 2013, the Kremlin actively supported the activities of pro-Russian organizations in Donetsk and Luhansk Oblasts, in particular The Donetsk Republic, The Donbas for Eurasian Union, The United Donbas, and others. The propaganda of these organizations stated that the economy of the Donbas would benefit from Ukraine's integration with the Customs Union of Russia, Belarus and Kazakhstan and not from the signing of the EU Association Agreement.

“Novorossiya”

The concept of Novorossiya offered a historical basis for the federative and separatist projects for the south-eastern regions of Ukraine. In the 18th century, Novorossiya Governorate was established in the Russian Empire. Its borders were always changing, but they never matched those of the current separatist “Novorossiya” project. For example, Kharkiv and the northern parts of Luhansk Oblast (Sloboda Ukraine) never belonged to the historical Novorossiya. On the other hand, the historical Novorossiya included, for example, Crimea and Taganrog.

Support for the idea of the “restoration of Novorossiya” as a distinct territory, culturally and politically different from the rest of Ukraine, first emerged in the early 1990s. However, until 2014 its followers remained marginalized. The gist of their argument was that all credit for the colonization of the steppe lands, establishment and development of cities was to be given to the Russian Empire. Therefore, “by right” Novorossiya was to belong to Russia rather than Ukraine.

The borders of the historical Novorossiya and Putin’s “Novorossiya”



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« The conflict is not supported internally, it is an occupied territory. If the Russian army had come to a different region of Ukraine, it would have also found some supporters, let's say in Kharkiv or Odesa, and then we would be trying to understand the characteristics of that phenomenon too. Of course, it was easier to do in the Donbas for several reasons: there are more people with the «Soviet mindset» there. However, in Kharkiv there were many more Kremlin agents, because that was the center of the Russian destabilization of Ukraine.

Vitaly Portnikov, political columnist

This political project was given a boost by Putin at his annual press conference on April 17, 2014, when he said that Kharkiv, Donetsk, Luhansk, Kherson, Mykolaiv, and Odesa belonged to Novorossiia, which had never belonged in Ukraine. According to the President of Russia, Novorossiia was unlawfully included into Ukraine by the Bolsheviks. In the spring of 2014, the concept of Novorossiia Confederation was developed. It was to include 8 so-called “people’s republics”, created out of the eastern and southern oblasts of Ukraine. In reality, only the Donetsk and Luhansk People’s Republics were formed in the particular districts of the corresponding oblasts.



The militants of Girkin’s unit near Slovyansk city administration building, April 16, 2014. Photo by Taras Shumeyko. The seizure of Slovyansk and other towns in the northern part of Donetsk Oblast by Girkin’s unit became the reason for the launch of the Anti-Terrorist Operation in the East of Ukraine (ATO).



Chapter 3. Chronicles of War

Russia's armed aggression against Ukraine began on February 20, 2014, when Russian military began to reposition its units at the Strait of Kerch and on the Crimean peninsula in violation of the rules stipulated by Russian-Ukrainian treaties on Russian Black Sea Fleet status in Ukraine. This date is recognized by both the Ukrainian and Russian sides as the beginning of the standoff. It is engraved on the Russian Ministry of Defense medal "For the Return of Crimea" established on March 21, 2014. The Verkhovna Rada of Ukraine in its statement released on April 21, 2015 and the Law of Ukraine "On amendments to some laws of Ukraine regarding the determination of the start date of the temporary occupation" of September 15, 2015 defined February 20, 2014 as the start of the Russian aggression.

In February and March of 2014, Crimea was the major theater of the conflict. Russia was successful in combining the operations of paramilitary and regular military units. Starting in April, the epicenter of the confrontation shifted to Donetsk and Luhansk Oblasts. Unlike in Crimea, in mainland Ukraine the Russian tactics did not work so well. The first stage of the war lasted until September 2014 and ended with the signing of the Minsk Protocol (Minsk I). The most intense fighting during the conflict occurred in July and August of 2014. The second stage of the war took place in December 2014 through February 2015 - up until "Package of measures to implement Minsk agreements" (Minsk II) came into effect. Since then the standoff took the form of a limited positional conflict.

End of February 2014

After the mass shooting of Euromaidan protesters, the President of Ukraine Viktor Yanukovich left Kyiv and escaped to Kharkiv, where on February 22 the congress of MPs and regional elected officials from the South-Eastern parts of mainland Ukraine and the Crimean peninsula took place. The situation echoed the congress of local government officials held on December 28, 2004 in Severodonetsk. Just like in 2004, the plans to establish an alternative power center in Kharkiv failed. Yanukovich did not show up at the congress, and its organizers fled to Russia shortly thereafter. Verkhovna Rada of Ukraine ousted Yanukovich and his cronies from the office in Kyiv.

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Ukrainian government was still recovering from the revolutionary turmoil. In Kharkiv, Donetsk, Simferopol, Odesa, and other large cities, the camps of supporters of the new government (participants of the Revolution of Dignity) and Yanukovych regime backers (so-called Antimaidan) coexisted. It were the civil activists from both camps who were in control of the situation and often took over governing from the paralyzed official apparatus.

Meanwhile, Russia was making the last preparations for the invasion of Ukraine. The stationing of Russia's Black Sea Fleet in Sevastopol and other locations in Crimea facilitated the task of infiltration and accumulation of disguised regular troops in the peninsula. Select local government officials were recruited by Moscow and received instructions from Russia. Russian hybrid forces were joined by local Antimaidan supporters, riot policemen from Berkut units, who had just recently cracked down on the protests in Kyiv, and fighters of paramilitary Cossack organizations, who had arrived from Russia.

On February 23, the so-called National Will Rally was held in Sevastopol, where local pro-Russian activists announced that they would not recognize the new government in Kyiv and called on Russia to intervene. Right at the rally, the crowd "voted" for the new "people's mayor" – a Russian citizen and businessman Alexei Chaly. The takeover tactics first tested in Sevastopol would later be used by Russia in the mainland cities of the South and East of Ukraine. During the night of February 23, Yanukovych with his family and closest supporters left Ukraine aboard one of Russia's Black Sea Fleet warships.

On the morning of February 27, Russian soldiers wearing unmarked military uniforms seized administrative buildings of the Autonomous Republic of Crimea in Simferopol. In the following days mobile combat teams of the Russian Army spread from Russian Black Sea Fleet garrisons across Crimea. Acting in close cooperation, paramilitary groups and Russian military servicemen seized key facilities and communications of Crimea. Ukrainian servicemen barricaded themselves at their military bases and offered passive resistance. At the time of political uncertainty, none of the Ukrainian commanders was bold enough to take the responsibility for authorizing the use of weapons.

The rise of anti-government groups in Southern and Eastern regions of Ukraine was branded by Russian propagandists "the Russian Spring". This label covered the pro-Russian unrest in both mainland Ukraine and Crimea.

March 2014

Within one month, all military bases and warships, along with the headquarters of the Ukrainian Naval Forces in Sevastopol, were captured by Russian hybrid forces. To seal the takeover of Crimea, a fake referendum on the status of the peninsula was held. The Russian government hastily signed a treaty with the self-proclaimed Crimean leaders for the "reunification" of Crimea with Russia. The treaty was signed into law by Russian President Putin on March 21, even before the military takeover operation in Crimea was over. The crew of the Ukrainian Navy minesweeper Cherkasy was the last one to surrender on March 25.

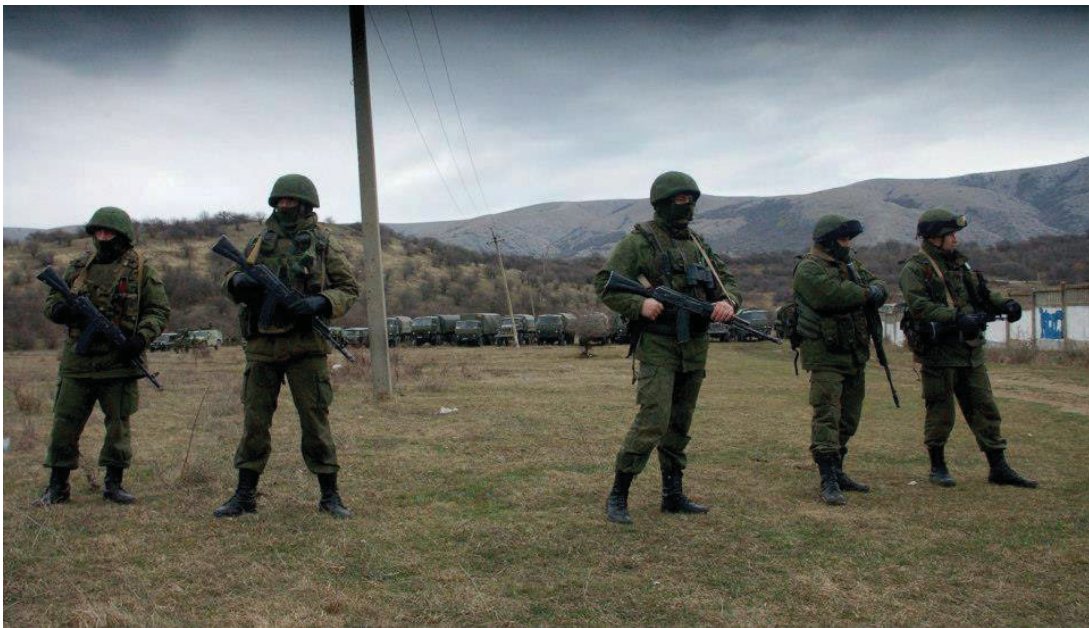
While the occupation of Crimea was underway, several cities of the East and South of Ukraine witnessed the first attempts to seize administrative buildings. Political "tourists" were bussed to the sites of anti-government protests in Ukrainian cities from Belgorod and Rostov Oblasts of Russia and

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from Transnistria. Pro-Russian rally participants seized Regional Administration buildings in Donetsk, Luhansk, Kharkiv, and Odesa and flew Russian flags on them. Following the example of Sevastopol, protesters appointed “people’s governors” and “people’s mayors”. At pro-Russian rallies speakers were demanding the federalization of Ukraine and making Russian an official state language. They also rejected the new interim government in Kyiv and appealed for support to the Russian leadership.

Despite persistent attempts, pro-Russian protesters could not hold on to their success in mainland Ukraine in March 2014. Maidan activists and law enforcement officers loyal to the government stood against them. From time to time, street clashes between activists would turn into bloody fights. Some pro-Russian protesters and rally leaders were arrested, “people’s governors” Pavel Gubarev and Aleksandr Kharitonov among them.

Step-by-step, the Ukrainian government started regaining control over the situation. On March 13, Interior Troops were reformed into the National Guard of Ukraine. Amid the revival of patriotic enthusiasm, participants of Euromaidan Revolution were readily joining its ranks



Russian troops surround the base of the 36th Separate Coastal Defense Brigade of the Ukrainian Navy. Perevalne, Crimea, March 2, 2014. Photo by Taras Shumeyko.

April 2014

The militants that helped Russia occupy Crimea were now redeploying to Southern and Eastern cities of mainland Ukraine. A major upsurge in pro-Russian unrest occurred on April 6-7. After a fight with the police, protesters seized Donetsk and Kharkiv Regional Administration buildings and proclaimed

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the “Donetsk People’s Republic” (DPR) and the “Kharkiv People’s Republic” (KhPR). In Luhansk, a mob seized the regional office of the Security Service of Ukraine with its firearms arsenal. On behalf of the “Joint Staff of the Army of the South-East”, the leaders of Luhansk militants released on Internet the ultimatum to government authorities.



Militants from Igor Girkin’s team ride the captured BMP-2 in the center of Slovyansk. In the foreground is the militant nicknamed “Balu”, who had arrived from Crimea. April, 16, 2014. Photo by Taras Shumeyko.

« There was a really interesting moment in Slovyansk, when we went there with reporters from Polish TV stations. We were approached by a commander of all those fighters. Not Girkin, someone of a lower rank. And we asked him, “Who are you all?” And he said, “We are Donbas militia.” I ran to the senior fighter right then and asked, “I’m sorry, are you all locals?” And I was answered, “No, we all came from Crimea.” That was direct evidence of where they all really came from - though I had had no doubts whatsoever, who they were.

Piotr Andrusieczko, journalist

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The Ukrainian government managed to reverse and stabilize the situation everywhere, with the exception of Donetsk and Luhansk. Police prevented the mob from seizing the building of the Mykolaiv Regional Administration. The Kharkiv Regional Administration building was retaken by special forces of Ukraine's Ministry of Internal Affairs. The leaders of the self-proclaimed KhPR and the most prominent separatists were arrested, though some of them fled to Russia, Transnistria, and occupied Crimea. Meanwhile, the leaders of the self-proclaimed DPR announced the formation of "armed self-defense groups".

The demands of Donbas militants were contradictory and confusing. Calls for the federalization of Ukraine, the independence of the Donbas, and the unification of the region with Russia were proclaimed all at the same time. It was obvious that Pushilin, Bolotov, and other leaders of the militants did not want to take the responsibility for further steps. They sat on their hands and waited for Moscow to repeat the Crimean scenario in the Donbas.

«...In April 2014, we were in Slovyansk ... Everything looked sort of surreal: people with Shock Worker of Socialist Labor badges were protesting against the Kyiv junta. Popular support was still weak at that time. Later, most of the indifferent masses sided with the separatists. The local narrative gradually persuaded them...

Taras Shumeyko, journalist

On April 12, 2014, government buildings of the city of Sloviansk in Donetsk Oblast were seized by the armed and well-equipped assault team led by Igor Girkin (a.k.a. Igor Strelkov), a Russian citizen with military intelligence background, who arrived from Russia. The militants also established control over a number of other towns in the northern part of Donetsk Oblast: Lyman / Krasnyi Lyman, Sviatohirsk, Kramatorsk, Druzhkivka. This laid the ground for the seizure of other towns in the region. Girkin's militants engaged in a firefight with the reconnaissance group of the Security Service of Ukraine (SBU) near Sloviansk, during which SBU captain Gennady Bilichenko was killed.

On April 14, acting President of Ukraine Oleksandr Turchynov signed a decree enacting the decision of the National Security and Defense Council of Ukraine on the start of the anti-terrorist operation (ATO) in Eastern Ukraine. Subsequently the ATO zone was divided into sectors: A (northern part of Luhansk Oblast), C (northern part of Donetsk Oblast), B (western part of Donetsk Oblast), M (areas close to Mariupol) and D (along the state border with Russia).

The 25th Separate Airborne Brigade of the Armed Forces of Ukraine stationed in Dnipropetrovsk Oblast was the combat-ready formation closest to the ATO zone. Its units were the first to be sent to Kramatorsk Airport. Later on, other Army and National Guard units joined them there. In Sloviansk, Igor Girkin appointed himself the commander of all DPR militant troops. They called themselves "People's Militia of the Donbas".

In April, Ukrainian troops were predominantly fighting against Girkin's militant groups in the northern part of Donetsk Oblast. When fighting with Ukrainian forces, militants widely used human shield tactics. Armed clashes also occurred in Mariupol. Two assault operations aimed at regaining control of Sloviansk that were conducted by Ukrainian troops on April 13 and April 24 came to naught. Meanwhile, Ukrainian government officials continued the negotiations with the militants in Donetsk and Luhansk, respectively.

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Locals incited by the Girkin's militants are blocking the path of Ukrainian armored convoys. Suburbs of Sloviansk, April 2014. Photo by Taras Shumeyko.

The Luhansk People's Republic (LPR) was proclaimed on April 27. By the end of the month the separatists managed to capture the entire city of Luhansk and some other cities of Luhansk Oblast, including Alchevsk, Stanytsia Luhanska, Dovzhansk / Sverdlovsk, and Khrustalny / Krasnyi Luch. Armed groups of LPR militants called themselves "United Army of the South-East".

May 2014

The beginning of May was marred by the bloody events in Odesa. On May 2, during provoked armed clashes between pro-Russian separatists and supporters of the united Ukraine, dozens of people were killed. Most of them were pro-Russian activists, who died in the fire that broke out in the Trade Unions Building. From that moment, overt activities of Russian supporters in the cities of Southern and Eastern Ukraine waned. However, the tragic events in Odesa were used by Russian propaganda as a recruiting tool for anti-Ukrainian militias participating in the armed conflict in the Donbas.

In the beginning of the month, the fighting with Girkin's militant groups continued around Kramatorsk. Ukrainian troops took Karachun, the dominant hill between Sloviansk and Kramatorsk. Ukrainian anti-terrorist forces began using helicopters, but almost immediately suffered losses to MANPADS. Ukrainian Armed Forces lost 3 helicopters in May. Armed militants took control of Mariupol and some other cities of Donetsk and Luhansk Oblasts.

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Lack of equipment, training and motivation of Ukraine's professional army were compensated by the astounding rise of Ukrainian civil society. Volunteers came to help the Army and the National Guard: Dnipro, Donbas, Aidar, Azov, and other volunteer battalions joined ATO forces.

« ... In May 2014, Aleksey Mozgovoy confidentially told us, BBC journalists, that his Prizrak squad was armed by Vladimir Zhirinovskiy's Liberal Democratic Party...
Taras Shumeyko, journalist

In the meantime, militants were forming new combat units to fight with government forces in the Donbas. The Vostok battalion was created in Donetsk Oblast, with the Cossack National Guard of Great Host of Don Cossacks, Prizrak and Zarya battalions in Luhansk Oblast.

Small special forces teams and trucks loaded with weapons started crossing the border from Russia. This was when first armed clashes at Ukraine-Russia border checkpoints occurred. Russian regular troops – in particular, the ones from Chechnya - were spotted in the Donbas in May.



A Chechen Interior Ministry special forces soldier on the roof of Donetsk Airport. May 26, 2014. Photo retrieved from the phone of a militant killed on that date.

Donbas In Flames

On May 11, 2014, militants' appointees organized the so-called "referendum on the independence of the DPR and the LPR" in various towns and villages of the Donbas. The passivity of government authorities and law enforcement officers at the local level contributed to the swift territorial expansion by militants seeking to gain control over all the territory of Donetsk and Luhansk Oblasts.

Roads became the next target of the fighting. Checkpoints were erected by both sides of the conflict in cities and on highways. The Zello push-to-talk application was used by anti-government forces for communication. Militants sought to take control of Route H20 connecting Sloviansk, Donetsk, and Mariupol. One of the battles took place near the town of Volnovakha on the highway connecting Donetsk and Mariupol. Along highway M03, militants reached as far as Kharkiv Oblast and attacked Izium. Militants ambushed the Donbas volunteer battalion on Route M04 near Karlivka (one of the entry points to Donetsk).

Armed clashes broke out around Luhansk as well. Expanding to the north, militants seized Severodonetsk, Lysychansk and Rubizhne. Deploying over Route H21, they attacked Novoaidar. Still, they failed capture the northern part of Luhansk Oblast and the western part of Donetsk Oblast.

On May 24, the leaders of the DPR and the LPR announced their association into the so-called Confederate Alliance of People's Republics of Novorossiia. This association was a formal declaration of territorial claims over other regions of Eastern and Southern Ukraine. The election of the President of Ukraine was held the next day. Polling stations opened for voting in the government-controlled part of the Donbas: in the western and northern parts of Donetsk Oblast and in the northern part of Luhansk Oblast.

On May 26, Ukrainian troops pushed Vostok battalion militants and Russian mercenaries out of Donetsk Airport. Ukrainian forces used several aircraft against the militants. At the end of the month, Ukrainian troops shot down their first Russian drone, which was flying over the ATO zone near Donetsk.

June 2014

In June, both sides of conflict were busy with military buildup and entrenching. The Ukrainian Army liberated Lyman / Krasnyi Lyman, Mariupol, and Schastya and made attempts to secure a denser blockade of Sloviansk. ATO forces took hold of Luhansk and Donetsk airports.

The ATO command continued to use aircraft, but still suffered losses. Militants shot down a helicopter and an An-30B reconnaissance airplane near Sloviansk. On June 14, an IL-76 transport aircraft was shot down by militants on approach to Luhansk Airport; all 49 troops onboard were killed.

DPR militants consolidated in the urban areas along the Donets Ridge. They established control over Chystiakove / Torez and Shakhtarsk located along Route H21. After the liberation of Mariupol, ATO forces continued their advance along the state border with the intent to cut off the militants' communication routes with Russia. This task was assigned to the sector D. Clashes at the border checkpoints - Dyakove, Marynivka, Voznesenivka / Chervonopartyzansk - intensified.

Meanwhile, trucks and armored vehicles were coming into Ukraine from Russia through Izvaryne on a massive scale. On June 13, ATO forces captured a BM-21 "Grad" MLRS near Dobropillya; the accompanying documents indicated that the MLRS belonged to the 18th Motorized Rifle Brigade of the 58th Army of Russia.



BM-21 "Grad" MLRS of the 18th Brigade of the 58th Army of Russia, captured by ATO troops near Dobropillya, Donetsk Oblast. June 13, 2014.

A short ceasefire lasted from June 20 to June 30; both sides used this time to continue their military buildup. In Donetsk, militants formed two new battalions: Oplot and Kalmius. Tanks and large caliber artillery appeared in the hands of the anti-government forces. Militants systematically violated the ceasefire.

July 2014

In early July, the fighting intensified in the northern part of Donetsk Oblast. On July 5, militant troops commanded by Girkin left Sloviansk, Kramatorsk, Druzhkivka, Kostyantynivka, and Bakhmut / Artemivsk and retreated to Donetsk. The epicenter of fighting in Donetsk Oblast shifted there as well. Militants set up a heavily fortified area on the outskirts of the city.

Protracted battles continued in Sector D. Attacking from the towns located on the Donets Ridge, militants were trying to secure access to the state border with Russia near Marynivka and Izvaryne. Ukrainian forces were squeezed into a narrow corridor between the militants' strongholds in the Donets Ridge cities and the state border with Russia.

On July 11, 2014, a Ukrainian forces' camp near Zelenopillya was shelled with rocket launchers from the territory of Russia. 36 troops were killed. After that, Ukrainian territory was regularly shelled from Russian territory across the border. Supported by Russian artillery, DPR militants attacked Ukrainian forces from the area of Chystyakove / Torez in the direction of the state border near Marynivka and cut off some units of Sector D positioned to the east of Stepanivka.

Donbas In Flames



DPR militants posing with the debris of Flight MH17.
Late 2014. Photo posted on a social network.

The fighting continued around Luhansk and Donetsk Airports controlled by ATO forces and on the outskirts of Luhansk and Donetsk. The Ukrainian Army virtually surrounded Horlivka and made attempts to cut the routes from Luhansk to Izvaryne and Alchevsk. Ukrainian aviation and artillery inflicted heavy losses on militants and military convoys coming from Russia by Route M04. However, the Ukrainian Air Force continued to suffer losses. Four Ukrainian military planes were shot down in July; two of them were hit with air-to-air missiles from the territory of Russia.

On July 17, near Hrabove in Donetsk Oblast, militants shot down the Boeing 777 aircraft operated by Malaysian Airlines as Flight MH17. All 298 people onboard were killed. In the days before the incident, militant-controlled websites reported about a newly acquired Buk surface-to-air system.

On July 20-24, Ukrainian Army drove the militants out of Lysychansk-Severodonetsk agglomeration in the north of Luhansk Oblast. The militants retreated to the area around Kadiivka / Stakhanov. Subsequent sieges and assaults of large cities by Ukrainian Army produced no results. Under the circumstances, ATO headquarters shifted to the tactic of partitioning the area under militants' control and blockading its individual parts. Ukrainian Sector C troops advanced on Debaltseve from the north with the aim to block M03, M04, and H21 routes and thus separate DPR and LPR forces.

After the successful recapture of Debaltseve on July 29, fierce battles unfolded in Shakhtarsk, located on Route H21 connecting Donetsk with Luhansk. A raiding group of the 95th Brigade reached the

Chapter 3. Chronicles of War

northern outskirts of Shakhtarsk and continued moving to Marynivka and the strategic height Savur-Mohyla. The group's task was to unblock the troops in Sector D that were encircled by enemy forces in the so-called Southern Kettle and suffered from constant shelling from the territory of Russia.

In late July, Russian regular troops equipped with armored vehicles were repeatedly spotted crossing the border from Russia into Ukraine.

August 2014

In early August, it became clear that Ukrainian troops in Sector D could not keep their positions along the border any more. On August 7, they broke out of the Southern Kettle moving west. Also, Ukrainian Army failed to hold Shakhtarsk and block Route H21.

The ATO forces' tactics were changed. Instead of a broad envelopment along the border, the Ukrainian Army launched an offensive on the stronghold cities along Donets Ridge from Ilovaisk to Khrustalny / Krasnyi Luch. ATO forces managed to gain control of Ilovaisk and Miusynsk. It was assumed that the offensive from Miusynsk towards Khrustalny / Krasnyi Luch would help cut Route H21 and connect with the ATO troops near Lutuhyne and Luhansk Airport. After a series of failed attacks, government forces finally managed to take and hold the Savur-Mohyla strategic height. In Sector A, the fighting continued for the control of the section of Route M04 between the border with Russia and Luhansk. In August, the Ukrainian side continued using military aircraft and lost 4 planes and 2 helicopters.



August 3, 2014. Border crossing "Dovzhansky" in Luhansk Oblast after the heavy artillery bombardment from Russian territory. Photo provided by Border Guard Lieutenant Colonel Oleksandr Demchenko.

In the meantime, militant groups in the cities of the Donets Ridge received significant reinforcements from Russia. During that period Moscow put together the plan of a joint offensive of the Russian Army and militants to surround and defeat Ukrainian forces. There were some major leadership changes in the DPR and the LPR. Girkin and Borodai were recalled from Donetsk to Russia, and Zakharchenko was placed in the top position. In Luhansk, Bolotov was replaced by Plotnitsky. On August 15, during a meeting of the so-called DPR Council of Ministers, Zakharchenko announced the commitment of "Novorossiia" army reserves in the form of 30 tanks, 120 armored vehicles, and 1,200 troops that trained in Russia over the previous four months.

Russian military convoys started coming in large numbers through the border abandoned by the Ukrainian Army and Border Guards. During the battles that took place in the last decade of August, about two dozen Russian Army servicemen were captured by ATO forces. The first so-called humanitarian convoy became a convenient cover for the deployment of Russian troops, weaponry, and ammunition to the Donbas.

On August 24, after accumulating considerable forces, the Russian hybrid army launched a counteroffensive in the Donbas. Advancing towards Amvrosiivka and Starobesheve, Russian troops surrounded ATO forces near Savur-Mohyla and Ilovaisk. Sector D that had been essentially defeated ceased to exist. In the southern part of Donetsk Oblast, Russian hybrid troops captured Novoazovsk and approached Mariupol. The command of the Ukrainian units surrounded in Ilovaisk negotiated a peaceful withdrawal to the main ATO positions, planning to go over predefined routes in two columns. However, on August 29, Russian troops violated the agreement and destroyed the columns as they were moving out. Near Ilovaisk, Ukrainian forces suffered their heaviest losses of the war.

Beginning of September 2014

In early September, the ATO command had to take into account the fact of the direct Russian military invasion in the Donbas. Ukrainian units that were holding Lutuhyne and Luhansk Airport retreated north to Schastya. The heaviest fighting took place between Donetsk and the Sea of Azov. On September 2-5, the 95th and 79th Airborne Brigades conducted raids in the direction of Boikivske / Telmanove and Kalmiuske / Komsomolske, inflicting significant losses on the militants and Russian troops.

On September 5, on Route H21 near Vesela Hora (between Luhansk and Schastya) a combat team of the Aidar volunteer battalion was ambushed. Several dozen Ukrainian soldiers were killed. The Minsk Protocol (Minsk I) on a bilateral ceasefire was signed on the same day.

September 2014 - February 2015

During the fall of 2014, the contact line between the militants and the Ukrainian forces remained stable. Ceasefire violations occurred on a regular basis, but large-scale offensive combat operations no longer occurred.

At that time, the advancement of the Russian hybrid army towards Mariupol was considered the most probable scenario. It was anticipated that Russian forces would attack Mariupol, then move along Route M14 to establish a land bridge to the occupied Crimea. This scenario was actively discussed by both parties of the conflict.



Officers of the 15th Separate Motorized Rifle Brigade of Russian Peacekeeping Force (military unit 90600) posing with the dismantled sign "State border of Ukraine. No trespassing." September 2014.
<https://goo.gl/gSPdbM>

Hostilities resumed in late November. DPR militants supported by regular Russian Army units attacked ATO forces in Donetsk Airport. Heavy shelling resumed everywhere along the contact line. On January 13, Russian hybrid army shelled the checkpoint on Route H20 near Volnovakha and hit a passenger bus. As a result, 12 civilians were killed and 18 were wounded. The fighting for Donetsk Airport continued until January 21 and ended with the withdrawal of Ukrainian units from the airport.

Once the battle for Donetsk Airport was over, Russian hybrid forces launched a large scale offensive against the Debaltseve bulge. On January 24, DPR artillery shelled a residential area of Mariupol, killing 30 and injuring 128 civilians. The leader of the self-proclaimed DPR Zakharchenko announced the official start of Mariupol offensive.

The Russian command planned to surround and destroy ATO forces near Debaltseve. On February 10, in order to divert enemy forces from the Debaltseve bulge, Ukrainian Sector M units carried out an attack towards Novoazovsk. Ukrainian advancement came to a halt near the village of Shyrokyne.

On February 12, "Package of measures for the implementation of the Minsk Agreements" (commonly referred to as Minsk II) was signed. It provided for immediate ceasefire and outlined the plan for a political settlement of the conflict. Yet, Minsk II did not stop the Russian offensive. The fighting in Sector C ended only on February 18, 2015, after government forces withdrew from Debaltseve and consolidated at the so-called Svitlodarsk bulge.

From February 2015 to this day

Over this period, the DPR and the LPR, with the participation of their Russian handlers, have reorganized the disjointed militant groups into 1st Army Corps (DPR) and 2nd Army Corps (LPR). Some disobedient warlords have been removed to Russia or liquidated.

The leadership of the Russian Federation sought to achieve their political goals in Ukraine by taking advantage of the Minsk Process. This plan involved the integration of DPR and LPR militants into the decision-making process of the Ukrainian state government. On May 18, 2015, the self-appointed Minister of Foreign Affairs of the DPR Alexander Kofman and Speaker of the Parliament of Novorossiia Oleg Tsaryov announced the freezing of the Novorossiia project for an indefinite period, since its existence was not envisaged by the Minsk Agreements.

« It didn't become a large scale war, like it was in July or August, with heavy artillery, right from the start. The conflict escalated gradually, and we kept getting used to it.

Piotr Andrusieczko, journalist

Periodic outbreaks in fighting can be correlated with the moments when the Kremlin wants to pressure Ukrainian leadership into complying with its agenda. The Battle of Debaltseve was the last notable episode of the war. Large scale offensives no longer occur, but the ceasefire is regularly violated. Among the major clashes of this period can be mentioned the failed assault by the militants against Mariinka in June 2015, the spikes of hostilities at the Svitlodarsk bulge in June and December of 2016, and the fighting in the Avdiivka industrial zone that has been continuing since the end of January 2017.



Chapter 4. Life During Wartime

Losses and dangers

The Office of the United Nations High Commissioner for Human Rights reported that from mid-April 2014 to December 1, 2016 on both sides of the conflict in the Donbas at least 9,758 people were killed, of whom more than 2,000 were civilians, and about 22,800 people were wounded. On February 8, 2017, the National Police of Ukraine reported 1,767 civilians killed and 2,871 wounded in the Donbas during the ATO. According to the Ukrainian Armed Forces, their combat losses as of February 17, 2017 were 2,197 dead and about 8,000 wounded.

« Before a trip to the Donbas, it is necessary to get training for working in dangerous places, most importantly in tactical medical aid, which should be refreshed once a year. One should be properly equipped and physically fit.
Sergiy Karazy, journalist

The report of the United Nations Children's Fund (UNICEF) from February 17, 2017 states that one million children in the east of Ukraine are in urgent need of humanitarian assistance; 200,000 children live within 15 kilometers on both sides of the line of contact, of which around 19,000 are exposed to the constant danger of landmines and other explosive devices. Every fifth school in the Donbas has been destroyed or damaged in the fighting.

The entire region has experienced a sharp increase in the number of violent deaths, the deepening demographic crisis, desolation of some areas, significant reduction in industrial production, rising crime rate, deterioration of social standards, high level of migration (mostly due to internally displaced persons - IDPs), and a humanitarian crisis in general.

The peace process in the Donbas is governed by the Package of Measures for the Implementation of the Minsk Agreements (Minsk II). This format gives no reason for optimism as to the political solution for the conflict, but it constrains Russian hybrid forces from an armed escalation. Since March 2014, the Special Monitoring Mission of the OSCE has been operating in Ukraine, its work is focused on monitoring the implementation of the ceasefire in the Donbas.

ATO zone

The parts of the territory of Donetsk and Luhansk oblasts, which experienced or continue to experience the armed conflict, are defined in Ukrainian legislation as «the territory of the anti-terrorist operation» (ATO zone). This area covers about 40,000 sq. km, with its localities listed in a governmental decree.

The ATO zone can be divided into three types of areas:

- the territory controlled by the Ukrainian authorities;
- temporarily occupied territory (the so-called DPR and LPR);
- contact line and the “gray” area.

Ukraine controls most of the territory of Donetsk and Luhansk oblasts. At the end of December 2016 it had about 2.6 million residents.

Several localities (cities and towns of Kramatorsk and Lysychansk-Severodonetsk agglomerations, Mariupol, and others) were liberated by the ATO forces during the summer campaign of 2014. Since Donetsk and Luhansk remained occupied, the regional governments were temporarily relocated to other cities. From June to October 2014, the regional authorities of Donetsk Oblast were located in Mariupol, and then were moved to Kramatorsk. The center of Luhansk Oblast has been in Severodonetsk since September 2014.

During 2014-2015, administrative boundaries were changed for Novoaidar and Popasna Raions of Luhansk Oblast and Bakhmut / Artemivsk and Volnovakha Raions of Donetsk Oblast. They absorbed parts of other raions, where administrative centers are under the control of militants.

«...Even if you go into some sort of “gray zone», a place where there is no fighting, you must bear in mind that ambulances there might not have dressings. When you are brought to a hospital, it may be too late... So, what you are counting on is your individual first aid kit.

Anastasia Bereza, a journalist

Given the nature of the governing process in the conflict zone, the Parliament of Ukraine passed the Law «On civil-military administrations» (CMA). CMAs were created as temporary public administration bodies within the framework of the Antiterrorist Center of the Security Service of Ukraine. They perform a subset of local government functions. The CMAs, as a rule, operate in the areas adjacent to the contact line and are staffed by military personnel. As of November 2016, there were active Luhansk and Donetsk regional CMAs, four raion CMAs and 25 CMAs responsible for specific cities and towns.

In the areas controlled by Ukraine, humanitarian aid is provided and distributed through the mission of the International Committee of the Red Cross (ICRC) and the Red Cross Society of Ukraine, UNICEF, GIZ, KfW Development Bank, and Caritas. Ukraine receives the largest amount of aid from the European Union, administered through the Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO).

The area controlled by DPR and LPR militants measures more than 15,000 sq. km, a little larger than Montenegro. It is less than 30% of the total area of Donetsk and Luhansk Oblasts (which they lay claim to), and only about 2.5% of the territory of Ukraine. The militants hold 46 cities and towns. According to

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various sources, about 3.8 million people (over 8% of the population of Ukraine) remain in the occupied parts of the Donbas. Most likely, this number is exaggerated and does not take into account all IDPs.

Minsk II defines the territory controlled by DPR and LPR militants as «Particular Districts of Donetsk and Luhansk Oblasts» (PDDLO). Of the 36 raions of the two oblasts, the PDDLO completely cover the territory of only 10 raions and parts of a few others.

« There is still no clear power vertical in the DPR/LPR, so it can happen that military units do not obey commands from Donetsk / Luhansk. So, the more connections you have, the better are your chances of getting out of the basement even before the scandal around your detention receives international publicity.

Taras Shumeyko, journalist

The administrations of the DPR and the LPR claim the status of sovereign state governments. They imitate the activities of authorities and the legal procedures typical for democratic countries (elections, referenda etc.). However, neither the DPR nor the LPR has been diplomatically recognized by any of the UN member countries. The leaders of the administrations of these entities (Zakharchenko and Plotnitsky) are signatories under the Minsk I and Minsk II agreements, but without any reference to their posts. Thus, the participants in the peace process recognize these persons as holding authority over the PDDLO de facto. In the resolutions of the Ukrainian Parliament from 2014 and 2015, the PDDLO are considered temporarily occupied territories, the DPR and the LPR are considered terrorist organizations, and the Russian Federation is referred to as the aggressor state. However, these definitions have not been codified into the law of Ukraine. Law enforcement agencies of Ukraine have initiated terrorism criminal cases against the leaders of the DPR and the LPR.

Most experts point to the critical dependence of the PDDLO administrations on the Russian Federation and its policymakers. Moscow controls and reshuffles as necessary the leaders of the DPR and the LPR, ensures operational capability of their military forces, and provides logistical support for the PDDLO administrations.

Missions of international organizations have noted a total regimentation of social processes and private life of citizens in the occupied territories. Curfew as well as censorship have been imposed, the official propaganda follows the guidelines set by the Russian Federation. Intimidation, torture, hostage-taking, terror, restrictions on freedom of movement, and persecution of minorities are common practice.

« I was going to a meeting in Donetsk, took a photo of the Lenin monument in the downtown with my phone and suddenly saw that a car without license plates was following me. The car stopped on the sidewalk and two militants with guns came out and took me ... One was relatively polite. The second immediately began speaking very roughly ... I pulled the phone, but some officer just took it ... It lasted from 40 minutes to an hour. I stood there, and they kept asking me questions... Once I was released, the polite one told me, using obscenities: «You know, you just have a 'bad' passport.

Piotr Andrusieczko, journalist

Using indirect estimation method (by measuring the night-time light or NTL on the satellite images of Donetsk and Luhansk), economists Tom Coupe, Michał Myck and Mateusz Najsztub have shown a decline in the economic activity of the region. According to their data, relevant indicators have declined by half in Donetsk and by two thirds in Luhansk.

Major features of the economic situation in the PDDL0:

- Some plants and large enterprises have been shut down, their equipment has been dismantled and sold as scrap metal or illegally exported to Russia (mainly to state owned enterprises);
- Many coal mines have been shut down;
- A number of enterprises physically located in the PDDL0 have been re-registered in the government controlled territory (mostly companies belonging to financial industrial groups, in particular DTEK); their products are normally transported to the government controlled territory by rail;
- Relations pertaining to property and businesses have been largely criminalized;
- Medium and small businesses, especially service businesses are being shut down or expropriated;
- Local budgets are completely dependent on the financial support from the Russian Federation and financial industrial groups;
- The occupied territories now effectively operate in the ruble zone (RUB, UAH, USD and EUR are in circulation).

Hybrid charity

External assistance to the population of the PDDL0 can be classified into several types.

- Payment of pensions and social benefits by the Ukrainian government

The Ukrainian government is trying to meet its social commitments and pay pensions to the persons residing in the territory of the PDDL0 that are able to travel to the territory controlled by Ukraine. An effective payment mechanism still hasn't been established; this matter is the subject of manipulations on both sides of the contact line.

- Humanitarian assistance by Ukraine

Nominally, the majority of humanitarian goods brought to the PDDL0 is connected to the Rinat Akhmetov Foundation. According to the foundation, 286 convoys crossed the contact line during the war in the Donbas, and the local population received 11,236,000 food packages. The deliveries are documented according to the Ukrainian law. However, it is not possible to officially control the distribution of the aid, because neither representatives of the International Committee of the Red Cross nor those of the Red Cross Society of Ukraine are admitted to the territory of the PDDL0. The administrations of the DPR and the LPR do not accept humanitarian aid from other Ukrainian and international organizations, forcing them to use Rinat Akhmetov Foundation as an intermediary. There were cases, when the trucks with humanitarian aid contained dual-use items, in particular radios and other communication equipment.



Russian “humanitarian convoy”

➤ Humanitarian aid from the Russian Federation

Humanitarian goods are also brought into the PDDL0 from the Russian Federation in the so-called humanitarian convoys. Departures and arrivals of these convoys are always publicized by Russia and the administrations of the DPR and the LPR. From August 2014 until the end of 2016, the Russia-Ukraine border was crossed by 59 convoys (more than 6660 vehicles) carrying approximately 56,000 tons of cargo. These convoys violate all internationally accepted procedures and standards: the Ukrainian side is not informed about the types of cargo crossing the border; there is no inspection of the contents of the trucks by border and customs authorities of Ukraine; the cargo is never handed over to the International Red Cross for distribution. Instead, the goods are distributed by the DPR and LPR administrations. It has been proven on several occasions that on their way back the vehicles of the «humanitarian convoys» were used to haul dismantled equipment from the looted plants, scrap metal, as well as the bodies of dead Russian soldiers and mercenaries (known as Cargo 200).

Internally displaced persons

According to the official data of the Ministry of Social Policy of Ukraine, as of May 2016, the number of registered IDPs from the temporarily occupied areas of the Donbas reached 1.75 million people. Ukraine is ranked fourth in the world by the number of IDPs, following Syria, Yemen and Iraq, which are experiencing the most violent conflicts on the planet.

IDPs from the PDDL0 find shelter all over the territory of Ukraine. Most of them settle in the unoccupied parts of Donetsk and Luhansk Oblasts (724 and 262 thousand people, respectively). The total exceeds the number of Syrian refugees (884 thousands, according to the UN data), who had arrived in the EU by October 2016, causing the migrant crisis.

Donbas In Flames

Many IDPs from the Donbas have also moved to Kharkiv and Zaporizhia Oblasts and the city of Kyiv. The problems of the migrants are placing additional strain on the central and local budgets. In the state budget for 2017, about 3.2 billion hryvnias (about \$114 million) have been allocated for monthly targeted assistance to the IDPs. However, this amount is not sufficient to cover the costs of the resettlement of IDPs in the new locations. Many migrants are forced to deal with bureaucratic red tape at the local level as well as imperfect regulations.

The inefficiencies of the governmental machinery are partially compensated by Ukrainian civil society initiatives. Numerous volunteer associations and community organizations provide a variety of support to IDPs - from free legal services and advice on the paperwork to the search for housing or construction.



Donetsk Oblast. Kirill Demenkov, a serviceman of the 46th Separate Operational Purpose Brigade of the Russian Interior Ministry, is posing in front of the destroyed civilian buildings, holding an icon of Virgin Mary (likely removed from one of the buildings) in his right hand, and a rifle in his left hand.

<https://goo.gl/sqFBRS>

Transportation in the ATO zone

Air transportation

Airports in the regional centers of the Donbas became the scenes of fierce fighting and have been almost completely destroyed. Donetsk airport was closed for passenger flights on May 26, 2014, and Luhansk airport on June 11, 2014. The functioning Ukrainian airports nearest to the ATO zone are located in Mariupol, Zaporizhia, Dnipro / Dnipropetrovsk, and Kharkiv.

Automotive transportation

In Donetsk and Luhansk Oblasts, it is possible to travel by car, hire a taxi, or use scheduled bus services. This is true for both the government controlled part of Donbas and the PDDL0. The roads of the region are in various conditions, some of them have been damaged by the fighting or by the passage of armored vehicles. According to the Ukraine's roads authority Ukravtodor, Route P07 (Chuhuiv - Milove), which is the main route to the eastern part of Luhansk Oblast, is on the top ten list of the worst roads in Ukraine.

Vehicles and their passengers cross the line of contact according to the SBU regulation titled «Temporary procedures for control over movements of individuals, vehicles, and goods along the contact line in Donetsk and Luhansk Oblasts». At the beginning of 2017, crossing the line of contact by car could be done over six road corridors:

1. Kadiivka / Stakhanov - Zolote - Hirne - Lysychansk (Lysychansk checkpoint);
2. Horlivka - Bakhmut / Artemivsk (Zaitseve checkpoint);
3. Donetsk - Kurakhove (Marinka checkpoint);
4. Donetsk - Mariupol (Novotroitske checkpoint);
5. Novoazovsk - Pokrovsk / Krasnoarmiysk - Talakovka - Mariupol (Hnutove checkpoint);
6. Stanytsia Luhanska - Novoaidar (Stanytsia Luhanska checkpoint).

« It is always very unpleasant to go through a checkpoint, it is almost always stressful. Better not to talk more than necessary - just answer questions.
Taras Shumeyko, journalist

« We quickly realized that we could not approach any checkpoint (from either the militants' side or Ukrainian) not just with cameras on, but even with cameras in hand; we were immediately suspected of filming their positions.
Piotr Andrusieczko, journalist

Bypass roads outside the corridors are blocked by the Ukrainian Army. To enter and exit the PDDL0, citizens of Ukraine and foreigners need to be in possession of a passport and a permit. These permits are issued after registering on the SBU web portal and filling an application form. Also, the application can be submitted to the coordination center, a coordination group, or a checkpoint.

There are no scheduled bus routes across the contact line due to the ban issued by SBU. However, there is a well-run scheme, where a bus drives the passengers to the line of contact, and another bus picks them up on the other side. There are also scheduled routes from the PDDL0 to Russia through uncontrolled portions of the border.

Railways

In the past, there had been a well developed network of railways connecting Donetsk and Luhansk with other cities of Ukraine and Russia. Passenger trains were canceled at the end of July and in August 2014, when the intensity of the fighting reached its peak. After the contact line stabilized, the railway operations resumed, but the routes and procedures changed.

Currently, the cities in the territory controlled by Ukraine are reachable by rail from Kyiv, Kharkiv, Dnipro / Dnipropetrovsk, and other cities. The trains terminate in Mariupol, Pokrovsk / Krasnoarmiysk, Kostyantynivka, Bakhmut / Artemivsk, and Lysychansk. It is possible to reach towns even closer to the line of contact using commuter trains: they run to Avdiivka, Novgorodske, Popasna, Shchastia, and Stanytsia Luhanska.

Passenger trains do not cross the line of contact. However, freight trains operate through six checkpoints between the government controlled territory and the PDDL0. They provide the link for the heavy industry enterprises located in the PDDL0 that supply their products to the territory controlled by Ukraine. Economic ties with such companies in the occupied territories cause mixed reactions in the Ukrainian society. There are initiatives to blockade the rail freight.

In the PDDL0 territory, the commuter rail system also operates. In addition to domestic trains, there is an indirect rail link from Donetsk to Rostov-on-Don in Russia: from the PDDL0 a commuter train takes passengers to the border point Kvashine, and on the Russian side the passengers change to a local train of the Russian Railways. Between the territories controlled by the DPR and the LPR there are «customs restrictions» on the import of certain goods.



Chapter 5. in the Focus of Mass Media

The Donbas as discussed by analysts is very different from the Donbas in today's media. But it is the domination in the media space that can play a key role in the current standoff.

Before the beginning of the Russian-Ukrainian war, the media space experienced significant changes. Rapid development of technology, high-speed Internet, blogs, and social networks increased the volume and speed of information exchange thousandfold. Russia was diligent in its preparations for the hybrid aggression, and it focused specifically on informational confrontation. Manuals, guidelines, troll factories, talking points, procedures, and divisions of responsibilities were developed well in advance.

«...After the marchers for the unity of Ukraine were beaten, we, the journalists from BBC, were dining at a restaurant in Donetsk and watching news on the Russian Channel One... When we saw how Russian television twisted what happened before our eyes, one of the British journalists could not help but say: 'It must be such a shame to work for Russian TV.' It was clear that the Russians who sat next to us heard what was said. Perhaps they really felt ashamed...

Taras Shumeyko, journalist

The information war for the Donbas unfolded in several stages. These stages in the form of short informational pieces of the corresponding periods are listed below.

Shock

Mass media continue monitoring the events in Ukraine where the Euromaidan has just ended. People are still shell-shocked by the shooting of unarmed protesters in the center of Kyiv. The President, ministers, MPs, and bureaucrats have fled the country in the aircraft stuffed with cash, gold, and antiques. Pandemic corruption has left the country balancing on the edge of default. On February 20, 2014, Russian troops use the political crisis in Ukraine to start their occupation of Crimea and, on

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March 20, after the falsified referendum, the State Duma of the Russian Federation ratifies the Treaty on the Accession of the Republic of Crimea to Russia. The official Kyiv is shocked – it is unable to fully comprehend the situation. The security agencies are disoriented, they have no action plan. In March 2014, alarming news starts coming from Donetsk, Luhansk, Kharkiv, Odesa, Dnipro / Dnipropetrovsk, Mykolaiv, Kherson, and Zaporizhya. The media space explodes with contradictory information and gruesome pictures of violence.

Internet – Hundreds of randomly commented amateur videos are posted. The videos show various groups of people. Young men in sportswear and jeans with black-and orange ribbons (the so-called St. George ribbons) chanting “Russia! Russia!”, hitting people holding symbols of Ukraine with bats and pieces of rebar, burning and trampling flags of Ukraine in the cities’ central squares. Older people holding Communist banners. New videos of pro-Ukrainian or pro-Russian marches and meetings regularly appear from different cities.

Ukrainian mass media – They broadcast stories similar to those that appear on the Internet. Many of them are televised as is, with the “No comment” text overlay. Some TV channels try to offer explanations; however, reliable information is hard to find, so all news programs seem incomplete. News fail to give answers to the multitudes of questions the viewers have, the media show the facts but give no reasonable explanations. Ukrainians are seized by panic and the total incomprehension of the events. Nobody knows what to do.

« In 2014, we were so shocked that we did not even have time to analyze everything that was happening. We did not know what would happen next. ... These were scenarios prepared many years prior that at a certain point were finally acted out.

Piotr Andrusieczko, journalist

Russian mass media – While many Ukrainians still can’t figure out what is going on in their cities, the Russian media already have answers to all questions. All Russian TV news programs report that Ukraine is engulfed in mass unrest with people protesting against the “coup d’etat”, the “junta”, “oppression of the Russian-speaking citizens”. They call the runaway Viktor Yanukovich the legitimate President of Ukraine and give airtime to the statements he’s making while hiding in Russia. The propaganda keeps pushing the “Ukraine is no more” message. Which means that there is no law and no law enforcement, only the radicals fighting for power. They insist that Ukraine has started a genocide against Russian speakers. They use the headlines: “The South-East of Ukraine Becomes Novorossiya”, “Time to Return the Donbass to Russia”, “The South-East of Ukraine - with Russia or Drowned in Blood”. News programs are broadcast more frequently than before, with almost 90% of the airtime dedicated to the events in Ukraine.

« I started working for the BBC in spring 2014 in the Donbas, when unrest had just started there. Columns of vagrants and ‘tourists’ from Russia were walking around Donetsk, but Western journalists did not always capture the nuances – they thought it was really citizens out on the street.

Taras Shumeyko, journalist

Western mass media – At the beginning of the war, most of the Western media have no resident correspondents in Kyiv, let alone in the Donbas. So, the information on the Donbas events is obtained through resident correspondents in Moscow, who often rephrase Russian media and repeat propaganda clichés for the Western audience. As the result, the myth of a violent standoff between the West and the East of Ukraine permeates Western media and the terms “rebels”, “separatists”, and “militia” become deeply entrenched in the reporters’ lexicon.

Pushback

Gradually, bits and pieces of information form a complete picture. It becomes obvious that the unrest, fights, murders, and seizures of administrative buildings are neither protests of local political elites nor popular actions. The young men prowling the cities with Russian flags speak Russian with a distinct non-local accent and have to ask their way around. The positions of separatist leaders are taken by Russian citizens who have come from abroad: Igor Girkin, Alexander Borodai, Marat Bashirov, Vladimir Antyufeyev, Igor Bezler, Arseny Pavlov, Alexander Mozhayev, and others. Some of them previously took part in other armed conflicts (Chechnya, the Balkans, Transnistria) and have old connections with the Russian special services. There are even more Russian citizens among the militants.

After the failure to resolve the problem by diplomacy, Kyiv decides to move the troops to the east of Ukraine. At the same time, large numbers of Ukrainian volunteers travel to the Donbas.

Ukrainian mass media – Start mentioning Russia’s role in coordinating the hostilities in the Donbas and provide increasingly more factual information. Articles and stories about Russia supplying weapons to the militants start to appear. Journalists report that there are whole units of men from the Caucasian republics and the Far East of Russia among the “separatists”. There are more and more frequent reports stating that the first line of motley mercenary forces is backed by the second line of regular Russian troops. They join the action, when the mercenaries are unable to manage on their own, and they also train the militants.

When Russia starts dispatching humanitarian convoys to the Donbas, journalists quickly establish that the white trucks mostly carry weapons and ammunition, which is why the vehicles avoid Ukrainian border checkpoints. Special mention should be given to Ukrainian media coverage of the defense of Luhansk and Donetsk Airports, Russian shelling of Ukrainian positions and towns – Zelenopillya, Volnovakha, Mariupol, shelling of border areas from the territory of Russia in August 2014, the Ilovaisk tragedy, the battles for Debaltseve, the shooting down of Ukrainian aircraft by the Russian hybrid army.

Russian mass media – Despite the overwhelming evidence, Russian mass media keep insisting that there are no regular Russian troops in the Donbas, and it is only local “miners and tractor drivers” fighting there. No weapons are sent to Ukraine from Russia, either – all weapons are captured from the Armed Forces of Ukraine. The “Ukraine is attacking the Donbas” message is being widely spread. Russian propaganda describes the conflict using the parallels with World War II: the Ukrainian forces are assigned the role of “fascists” and “punishers”, while their opponents are described as “rebels” and “defenders of people”. Absurd as it may seem, Ukrainian Jews are also easily added to the ranks of “fascists”. The scale of the war in Ukraine is exaggerated. Instead of properly locating the military conflict in two eastern oblasts of Ukraine, the propagandists use the broader concept of “South-East of Ukraine” which includes 8 oblasts of Ukraine. Fake news claim massive casualties among the

Ukrainian troops, which are allegedly kept secret by the government. The responsibility for shellings of residential areas and for the downing of Flight MH17 is placed on Ukraine. Russian mass media start mentioning a “peacemaking operation” in Ukraine and “peace enforcement”.

Seeing that the majority of Ukrainian regions have outright refused to join the Russian “Novorossiia” project and that even the residents of the Donbas are reluctant to join the “militias”, Russian mass media take the propaganda to a new level. Russian TV channels use actors to film appalling staged pieces about “the atrocities committed by the Kiev junta”, which they broadcast as actual news stories. The most remarkable example of such performance is the interview with a “Donbas refugee”, who tells the Russian TV channel about “Ukrainian soldiers crucifying a three-year old boy in Slovyansk” (this fabrication was completely dismantled by both Ukrainian and Western journalists). Dozens of fully or partially staged stories appear every week to make more and more Russians and Ukrainians watching Russian TV join the mercenaries.

Internet community – Internet users on different sides of the conflict start a true information war. People report shellings live on Twitter, create Internet memes, share Facebook posts, and start groups focused on military operations, displaced persons, and other issues related to the Donbas war coverage. The Russian side expands the so-called “troll factories”, hiring people to broadcast the talking points of the Kremlin propaganda via social networks and comments to articles and videos. On the Ukrainian side, volunteers create collectives with the goal of confronting Russian propaganda: Information Resistance, InformNapalm, StopFake, and others. They gather evidence of the Russian aggression against Ukraine and take apart propagandist fakes.

Stabilization

This stage is characterized by the overall fatigue with the Donbas war felt by both the West and Ukrainian citizens. Despite two Minsk Agreements and economic sanctions against Russia, the Kremlin does not abandon its attempts of armed aggression. There is no consistent ceasefire. Ukrainian control of the border and democratic elections in the PDDL0 seem unattainable. Ukraine and its supporters abroad intensify their actions aimed at holding Russia responsible for violating the international laws and for its military crimes in the Donbas. The Joint Investigation Team publishes its preliminary report on the MH17 crash, which rejects all Russian versions. On the basis of the available evidence, international organizations – PACE, OSCE, UN General Assembly, NATO PA – approve the resolutions on the Russian aggression against Ukraine in the Donbas and its unlawful occupation of Crimea. The International Criminal Court in the Hague acknowledges sufficient evidence of military crimes in the Donbas and passes a resolution to continue the proceedings on over 800 documented incidents. Russia is openly referred to as the aggressor and the country breaking multiple international norms and commitments.

Russian mass media – They keep insisting that Ukraine is not abiding by the Minsk II agreement. Still ignoring all evidence, they repeatedly claim that Russia is not a party to the conflict, that it is strictly internal, emphasizing it by their preferred term, “civil war”. The activities of the political opposition in Ukraine that uses “anti-war” slogans receive constant media coverage. The message that “Ukrainians are tired of the war” is widely circulated. At the same time, the responsibility for the continuation or resolution of the conflict is placed exclusively on the government of Ukraine. Social problems and corruption in Ukraine are becoming the focus of attention. Actively promoted is the idea that “the

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continued war is in the interest of the government”, since it “distracts the people from the worsening economic situation in the country”. Disguised Russian propaganda is used to provoke radical Ukrainian organizations (including the veterans of the Anti-Terrorist Operation) to rise against the government under patriotic and social slogans.

Ukrainian mass media – They keep assuring their audience that the international community still supports Ukraine, publishing reports on the USA giving Humvees and radar units to Ukraine, the help from Canada, the Great Britain, Lithuania, and other countries. The accomplishments of the Ukrainian Armed Forces and Ukroboronprom (Ukraine Defense Industry) also receive the attention of journalists, who note the growth of the Ukrainian defense industry and the ability of the army to fulfil any tasks after the numerous international exercises and trainings by NATO instructors.

Western mass media – In the context of the Donbas war, they focus on the requirements for the fulfilment of the Minsk II agreement. Russia is often associated with cyberattacks, bombardments in Syria, bribes to European politicians, military intimidation (deployment of Russian missile systems to Kaliningrad and repeated violations of NATO members’ airspace), interfering in the domestic affairs of other countries, and the attempts to influence elections. Many journalists stress the necessity of maintaining the sanctions against Russia and strengthening the borders. At the same time, a number of alternative media, some of them sponsored by Russia, are trying to whitewash Russia’s image in the eyes of the international community. They publish articles attempting to present Russia as a country fighting global terrorism, opposing unsubstantiated accusations by enemies, and being the victim of unjustified sanctions.

Internet community – In general, the Internet community’s behavior is similar to that at the previous stage. However, the cyber-conflict is growing more intense. All sides voice accusations of massive hacker attacks, not only against the conflicting parties – Ukraine and Russia – but beyond – in the USA, Germany, the Netherlands, Poland, and other countries. DDoS attacks become routine for most of the news websites and government organizations. Russian hackers break into automated control systems of Ukrainian power facilities and perform a series of attacks on government organizations of Ukraine and the Western countries. At the same time, Ukrainian hackers obtain and publish private and proprietary information confirming the key role of Russian authorities in planning and coordinating the actions aimed at Ukraine.

Inattention

This is the stage we are in right now. While in the beginning of the conflict an outside observer could not understand who started the Donbas war, who participated in the fighting, what exactly was happening in the east of Ukraine, and who was to blame, and the western mainstream opinion was “let’s not mess with Russia”, now the global community is beginning to realize that the Russian leaders are unpredictable, uncontrollable, and unscrupulous, and will never stop on their own. Despite these disheartening conclusions, there are still attempts to resolve the problem with the least amount of effort. The sanctions and coordinated diplomatic efforts are used to try to return Russia to the constructive track and to persuade it to remove its troops from Ukraine. At the same time, the NATO countries are strengthening their defense and trying to oppose other threats coming from Russia. The EU countries and the USA create centers for countering Russian propaganda, protecting data,



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and responding to cyberattacks. Conclusions by specialized analytical centers carry more authority in making decisions in respect to Russia. International organizations are compiling the evidence of Russian military aggression and are developing new diplomatic, political, economic, and military approaches to resolving the Donbas conflict.

Russian mass media – They insist that everybody “unfairly turned against Russia”, while Russia “is fighting for global peace and stability”. They emphasize Russia’s key role in resolving global problems, in particular those related to fighting international terrorism. They express assurance that new governments of the western countries will base their actions on “practical” motivations and will review the sanctions policy. Considerable efforts are made to ensure international isolation of Ukraine. For example, the difference in views on the historic events of the 20th century is used to provoke a conflict between Ukraine and Poland. There are strong demands for Ukraine to directly negotiate with the “government representatives” of the PDDLLO.

Ukrainian mass media, Western mass media and Internet community – For the time being, they are continuing the same trends as at the previous stage.

Widespread talking points of Russian propaganda

Kremlin's claim	Fact	Evidence and sources	
There are no regular Russian troops in the Donbas	Participation of Russian troops from 75 regular military units in the Donbas war has been proven as fact. They all deploy to Ukraine on the orders of their command, the Russian Ministry of Defense pays their salaries, and they are regularly awarded combat decorations.	Evidence of Russia’s military presence in the Donbas was published multiple times by independent analytical centers (RUSI, Atlantic Council), independent investigation teams (Bellingcat), Ukrainian intelligence, and journalists. One of the most complete databases containing the facts that establish the presence of Russian troops and army units in the Donbas in 2014-2016 has been put together by the volunteers of InformNapalm international community: russian-presence-in-ukraine.silk.co .	
Russian authorities are not involved in recruiting mercenaries to fight in the Donbas	Recruitment is performed by military registration offices, veteran and Cossack organizations, which arrange coordinated deployment of militants to the area of fighting in the east of Ukraine.	Journalists published numerous articles on the subject. Detailed description of the recruitment process can be found in Boris Nemtsov’s report “Putin. War”: https://goo.gl/Vxyl14 .	

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Kremlin's claim	Fact	Evidence and sources	
Russia does not supply military equipment, weapons and ammunition to the Donbas	Although Russian mass media insist that all weapons used by the militants in the Donbas have been captured from the Ukrainian army, there is vast evidence confirming that from the beginning of the hostilities, Russia has been supplying tanks, artillery, MANPADS, anti-aircraft missiles, electronic warfare stations, APCs, armored vehicles, trucks, trailers, drones, small arms, grenades, mines, various ammunition, etc., to the Donbas.	Strong evidence shows the use of unique weapons that have never been supplied to Ukraine. For example, InformNapalm volunteers have compiled the database that includes more than 40 types of weapons that could only be sourced from Russia: https://goo.gl/dXLC1f . The continuous flow of weapons and military equipment from Russia to the east of Ukraine is discussed in the Atlantic Council's report "Hiding in Plain Sight: Putin's War in Ukraine": https://goo.gl/oBounk	 
Russia does not sponsor the DPR and the LPR terrorist organizations	In fact, over 90% of the budgets of the DPR and the LPR is covered by Russia. The industry in the region has been destroyed, some of the factory equipment has been dismantled and moved to Russia, less valuable assets (mines, warehouses, small production equipment, etc.) have been taken apart and sold as scrap. Money, mostly cash, is delivered to the occupied territory by guarded trains. Also, the Kremlin uses banks in the occupied Abkhazia (Georgia) in its mechanisms of financing the terrorist organizations. Even the militant leaders have confirmed financing by Russia on more than one occasion.	A lot of evidence exists. The most notable are the investigations by the German newspaper Bild https://goo.gl/xK5YRn and France24 TV channel https://youtu.be/jxtq4PNfRPg	 

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Kremlin's claim

Ukraine is responsible for the downing of Flight MH17

Fact

Even though the Joint Investigation Team has published only the preliminary investigation results, it has rejected all the versions offered by Russian mass media. "JIT concludes that flight MH17 was shot down by a missile of the 9M38 series, launched by a BUK-TELAR, from farmland in the vicinity of Pervomaiskiy. At that time, the area was controlled by pro-Russian fighters. The BUK-TELAR was brought in from the territory of the Russian Federation and subsequently, after having shot down flight MH-17, was taken back to the Russian Federation."

Evidence and sources

Full text of the Joint Investigation Team report can be found at <https://goo.gl/pt6mIG>








Russia does not pay salaries to the militants in the Donbas

Contrary to these claims, there is solid evidence of Russia paying for "business trips" of career servicemen and mercenaries. Russian career servicemen are offered triple salaries for their participation in the fighting against Ukraine in the Donbas. Even the exact amounts are reported: 60-90 thousand roubles per month for enlisted soldiers and 120-150 thousand for officers. In some special cases, salaries as high as 240 thousand roubles have been reported.

There are multiple sources for this information. One of the best known is Boris Nemtsov's report "Putin. War": <https://goo.gl/Vxyl14> Triple salaries for Russian servicemen in the Donbas were also mentioned by Vasyl Hrytsak, Head of the Security Service of Ukraine.



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Kremlin's claim	Fact	Evidence and sources	
Russia never shelled the territory of Ukraine across the border	In July, 2014, the Ukrainian troops' advance at the militants' positions was so rapid that Russia decided to use massive shellings from the territory of Rostov Oblast in the Russian Federation. There are videos of these shellings, witnesses' statements, satellite data as well as photo forensics data.	Cross-border shellings of the territory of Ukraine are mentioned in Atlantic Council's report "Hiding in Plain Sight: Putin's War in Ukraine" https://goo.gl/bRCWDt as well as in InformNapalm's analysis of satellite images of 539 craters remaining after the shellings in August, 2014: https://goo.gl/S0mrtT and in Bellingcat's recent notable investigation of Russian shellings: https://goo.gl/Kp81GJ	  
Russian troops and militants never torture prisoners of war and civilians	There are multiple witness statements and evidence of torture of both Ukrainian servicemen captured by the Russian hybrid army troops in the Donbas and civilians. 47 Ukrainian Army soldiers freed from the militants' capture decided to appeal to international institutions about their tortures while in captivity. Also there are witness statements and other evidence of many prisoners being shot on the spot.	One of the reliable pieces of evidence of prisoner torture is the documentary Those Who Survived Hell (youtu.be/hSLaPMhRQ_E) containing the statements of people who were imprisoned in the occupied territories. The relevant information can also be found in the report of Małgorzata Gosiewska, Deputy of the Sejm of the Republic of Poland: https://goo.gl/ZdVbe5	 

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Kremlin's claim	Fact	Evidence and sources	
Human rights and freedoms are respected in the territories controlled by the DPR and the LPR.	There is documented evidence of grave violations of the human rights in the occupied territory, particularly: extrajudicial executions, kidnapping, torture, illegal arrests and imprisonments, excessive restrictions of the freedom of speech. The right to life is violated due to accidental and intentional shellings of residential areas. Expropriation of citizens' property is widespread. In addition, women and young girls are kidnapped to be made sex workers, people of both genders – for forced labor. Children are used as fighters, informers, or “human shield” for the Russian hybrid army. Freedom of speech is highly restricted in the occupied territories.	Official reports of the Commissioner on Human Rights of the Council of Europe, the UN Human Rights Monitoring Mission in Ukraine, Special Monitoring Mission of the OSCE Office for Democratic Institutions and Human Rights, missions of independent international human rights organizations. In respect to the involvement of children in combat, in addition to the reports of the OSCE SMM and other international organizations, the summary report on child labor in Ukraine in 2015 is worth mentioning: https://goo.gl/7LMdpG Human rights violations by Russia in the occupied territories were also recognized in a resolution of PACE. There is a large amount of data concerning extrajudicial executions, kidnapping and torture. Recently, the InformNapalm volunteers investigated the horrible execution of prisoners of war: https://goo.gl/fhlOhv	 
There is no Russian aggression, and the Kremlin officials had nothing to do with planning and organizing the Donbas war.	The Russian authorities are directly involved in the organization of the military aggression against Ukraine. There is evidence against top officials of the Russian Federation, in particular Vladislav Surkov, an aide to the President of Russia, Sergey Glazyev, an adviser to the President of Russia on regional economic integration, and Konstantin Zatulin, an ex-deputy of the Russian State Duma. Surkov's role is especially interesting as he is the de facto head of the “DPR” and “LPR” terrorist organizations.	- mailbox dump of Vladislav Surkov's reception office known as SurkovLeaks, obtained by the hacktivists of the Ukrainian Cyber Alliance (UCA) and provided to InformNapalm for analysis: https://goo.gl/Cm567e - the recordings of Glazyev's telephone conversations with the organizers of pro-Russian protests in Ukrainian cities, known as “Glazyev Tapes,” were made public by the Prosecutor General's Office of Ukraine; they shed light on how the beginning of the war in Ukraine was orchestrated: youtu.be/0w78QuxBUe0	 

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Kremlin's claim	Fact	Evidence and sources
Russia's actions in Ukraine violate no international laws.	In fact, Russia has violated: the UN Charter, the Declaration on Principles of International Law of 1970, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, the Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States of 1981, the Declaration on Protection of Independence and Sovereignty of 1965, the Final Act of the Conference on Security and Co-operation in Europe (the Helsinki Accords), the Budapest Memorandum signed between Ukraine, the Russian Federation, the USA, and the Great Britain, ensuring sovereignty and protection of the territorial integrity of Ukraine of 1994. By providing support to the terrorist organizations in the east of Ukraine and in Crimea, Russia has violated the International Convention for the Suppression of the Financing of Terrorism of 1999 and the Declaration on Measures to Eliminate International Terrorism of 1994. These are just a few of the international treaties violated by Russia's invasion into Ukraine and occupation of its territory.	Texts of the corresponding laws https://goo.gl/vw4buH



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Kremlin's claim

Pro-Russian combatants in the Donbas cannot be considered war criminals

Fact

In November, 2016, the International Criminal Court in the Hague found the evidence of military crimes in the Donbas sufficient and passed a resolution on continuation of proceedings of over 800 documented incidents. Any violations of law during the Donbas war may be considered war crimes if they violate the Geneva Convention and the rules of international humanitarian law – both by the Ukrainian Army and by the Russian hybrid army.

Evidence and sources

Report of the International Criminal Court on Preliminary Examination Activities, 2016: <https://goo.gl/hUHDfk>, also the texts of the Geneva Conventions and other international laws.





Chapter 6. Russian Presence

Using the Internet to research the aggression

In the modern world, intelligence services of the world powers can use a wide range of sources of information, including satellite data. However, for a long time, the facts of Russian aggression against Ukraine were not being made public.

The information vacuum concerning the evidence of the aggression is being filled by journalists, analysts, and volunteers. They have also undertaken the systematization of the facts of the Russian presence. Civil intelligence communities have been actively forming based on the principle of “swarm intelligence”. New types of communications easily cross national borders and attract participants with different knowledge and skill sets from around the world.

«...We must organize the evidence of the presence of regular troops (or servicemen ‘on business trips’), collect photos and other documents. This is what Bellingcat, InformNapalm, journalists like Simon Ostrovsky and individual activists like Vladimir Dyukov, a patriot from Torez, have been doing... Thanks to the efforts of these people, we now know that there are Russians, Chechens, and even Buryats with regular Russian Army units on the eastern front.

Taras Shumeyko, journalist

Among other things, these networks are engaged in open source intelligence (OSINT), fact-checking of news stories, identification of fake news, creating analytical content, and disclosure of the future plans of the aggressor, publishing the information that Russia tries to keep secret from the world.

InformNapalm international intelligence community has achieved notable success in this regard, bringing together OSINT researchers, analysts, bloggers, IT specialists, translators, and video and graphic designers. The InformNapalm web site is maintained by about 30 language-specific editorial teams reporting on the facts of the Russian aggression against Ukraine, Syria, and other countries that have become targets of the hybrid warfare, including Belarus, Poland, Czechia, and the states in the Baltics and the Balkans.



August-September 2014. Anton Dmitriyev and Sergei Malafeyev, servicemen of the 44th training tank regiment of the Russian Army (military unit 30616-8, part of the 467th District Training Center), next to the road sign on the village line of Chervonosil'ske, Amvrosiivka Raion, Donetsk Oblast. The village is located 12km away from Ilovaisk, where heavy fighting took place in August 2014.

<https://goo.gl/FKskkT>

The reports published by InformNapalm are cited by the mainstream media not only in Ukraine, but also in other countries. In addition to high-profile disclosures, InformNapalm offers analytical reports and presentations, which are used as evidence in the decision making process of international institutions.

On October 11, 2016, an analytical report and a video presentation by InformNapalm on the evidence of the Russian aggression was presented at the meeting of the Parliamentary Assembly of the Council of Europe (PACE) in Strasbourg. PACE went on to adopt two resolutions on Ukraine, recognizing the fact of the Russian aggression and appealing to Russia directly to withdraw its troops from Donbas.

On November 19, 2016, the Ukrainian delegation presented two video reports based on the materials of InformNapalm investigations at a meeting of the NATO Parliamentary Assembly in Istanbul. Then on November 21, the NATO Parliamentary Assembly adopted a resolution recognizing the fact of Russia's aggression against Ukraine.

This kind of cooperation of volunteers, diplomats, and international organizations facilitated the breakthrough in the understanding of the situation in the Donbas by the international community.

Today, the systematic database of the evidence of the Russian military aggression against Ukraine gathered by InformNapalm is the largest publicly available resource on this subject. Therefore, it has been used in this guidebook to demonstrate the Russian presence in the Donbas.

Chapter 6. Russian Presence



October 2, 2014. A column of Russian T-90A tanks from the 136th Separate Motorized Rifle Brigade of the Russian Army (military unit 63354, located in Buynaksk, Dagestan) is moving along the road near Fabrichne in the area of Luhansk Airport. Photo was found by InformNapalm in the social profile of Russian tankman Vitali Marakasov. <https://goo.gl/U5eaYA>

The mechanics of the aggression

Russian Army servicemen appeared in the Donbas in the spring of 2014. Initially, they were mostly special forces officers of the Main Intelligence Directorate (GRU) of the Russian Army and law enforcement officers from the North Caucasus republics. In the summer of that year, Russian armored vehicles, artillery, and multiple launch rocket systems (MLRS) became increasingly visible. In August 2014, battalion tactical groups (BTG) of the Russian Army, which entered the territory of Ukraine, managed to turn the situation in favor of the militants, encircling ATO forces near Ilovaisk. Russian BTGs were also involved in the battles for Donetsk Airport and Debaltseve in late 2014 - early 2015.

In early 2015, Russian military command shifted to a different tactic of deploying its troops in the Donbas. With Minsk Agreements in effect, Moscow had to give up the use of entire battalion or company tactical groups, because large regular military units of the Russian Army could not remain unnoticed when operating in the Donbas. To cover up the activities of the Russian military in Ukraine, the two newly formed army corps (1st and 2nd AC) included both regular troops and militants in hybrid military formations..

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Russian servicemen are posted to the militant units one by one or in small groups (up to a squad), dissolving among the local fighters and foreign mercenaries. The testimony of POWs (e.g. Russian Major Vladimir Starkov), intercepted telephone conversations (e.g. Russian Lieutenant Colonel Stanislav Yershov) and OSINT investigations indicate that the so-called 12th Reserve Command of the Southern Military District of the Russian Ministry of Defense in Novochoerkassk, Rostov Oblast serves as the cover for the deployment of Russian servicemen to the territory of Ukraine.

In its investigations, InformNapalm international volunteer community documented the participation of servicemen from 75 army and security units of the Russian Federation in the war in the Donbas. The following list of military units is accurate but likely incomplete.



Detailed list available at
<http://russian-presence-in-ukraine.silk.co/>

Ground troops

Servicemen of 45 Russian Army units were identified as participants in the fighting in the Donbas. These include infantry, artillery, armored, air defense, and aerial reconnaissance units. Most BTGs deployed for the war with Ukraine were formed from the assets of infantry units of the Southern Military District: the 136th, 18th, 17th, 8th, 19th, 205th, 33rd, and 34th Motorized Rifle Brigades, the 291st Artillery Brigade, and the 7th Military Base. They are staffed mainly with contract servicemen with combat experience gained in operations in the North Caucasus. There are also tactical groups deployed from the more remote regions of Russia.

Airborne troops

Servicemen from 12 military units were recorded. They were involved in the rapid response operations in critical situations and to maintain initiative primarily in offensive operations. The battles of Ilovaik, Debaltseve, and Donetsk Airport - all these operations involved Russian paratroopers as parts of assault and support groups.

GRU special forces

Representatives of 7 special units of the Main Intelligence Directorate of the General Staff of Russia (GRU) were identified. Russian special forces in Ukraine have been engaged in reconnaissance and sabotage operations. They seized administrative buildings, attacked Ukrainian military facilities, and ambushed military convoys. At the current stage, Russian special forces servicemen are integrated into the illegal armed groups. Under cover identities, they hold key positions - from deputy commanders to junior officers and specialists for operation and maintenance of the modern types of weapons and military equipment.

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Navy, including Naval Infantry (marines) and coastal defense

Members of four military units were identified: the 61st Naval Infantry Brigade and the 200th Special Forces Brigade of The Northern Fleet were active in Luhansk Oblast in 2014-2015, the 99th Tactical Group of the Northern Fleet - in Donetsk Oblast in 2015, the 810th Brigade of the Black Sea Fleet (based in occupied Crimea) - in the area of Mariupol in October 2016.



January 28, 2015. Special forces soldier of the 3rd Brigade of GRU poses with the Russian "Val" rifle. The photo had this comment added: "Before the assault on a height... In 2 hours I will be 300." ("300" denotes troops wounded in action.) The soldier was wounded at 15:30 while attacking the height 307.9 near the village of Sanzharivka, Donetsk Oblast.
<https://goo.gl/Uw4Whf>

National Guard (Russian Guard)

Members of five of these units were identified, all contract servicemen with combat experience from the North Caucasus: 46th Separate Operations Brigade, 451th Operations Regiment, and 15th Special Operations Unit "Vyatich" directly participated in the hostilities and also trained the illegal armed groups.

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Air Force

Servicemen of air defense and electronic warfare units, which are structurally included in the Russian Air Force, have been identified. In spring 2015, units of the 338th Electronic Regiment of the 4th Army were spotted in the Donbas. Their task is airfield security and control of air space (operating Kasta and Nebo radar types). Also Pantsir-S1, the modern surface-to-air missile and gun systems, were spotted. One of these vehicles was identified as belonging to the 606th Air Defense Missile Regiment. The Buk surface-to-air missile system that brought down Flight MH17 is probably another Russian delivery to the Donbas.

Some Russian servicemen have been coming to Ukraine from units stationed in the Far East, in the Arctic, and even Tajikistan. Military units based in the occupied Abkhazia and Crimea as well as Transnistria have also been involved in the war in the Donbas. Russian military and political leadership are using the military conflicts in the Donbas and in Syria to test new weaponry and operational capabilities of Russian troops, for both conventional and non-conventional or hybrid warfare.



More information is available at
<https://goo.gl/iffv3>



February 2, 2016. Fire range exercise by Russian militants at the village of Manuilivka, near Chystiakove / Torez, Donetsk Oblast. The photo shows the Russian 2B26 MLRS based on Kamaz-5350 truck, which is not in service in the Ukrainian Army and is a direct proof of weapon deliveries from Russia.
<https://goo.gl/RuhNj6>

Chapter 6. Russian Presence



Ukrainian soldiers inspect the firing position of a Russian team armed with mortars that crossed the border on the night of July 7, 2014, and fired on the positions of the 79th Separate Air Assault Brigade of the Ukrainian Army. Under return fire, the unit left their personal belongings and the plate of a 120mm mortar and escaped across the border. Photo provided by Lieutenant Viktor Mykhailiuk, the commander of the NBC platoon of the 79th Brigade. <https://goo.gl/eQ9rnw>

Donbas In Flames



DPR militants with the two destroyed Russian T-72B tanks of the 1989 model that belonged to the 5th Separate Tank Brigade of the Russian Army (military unit 46108). The tanks were destroyed during the fighting for the village of Logvinove that was the key position during the battle for Debaltseve. The attribution of the tanks was made based on InformNapalm research. The loss of Russian T-72B tanks was also confirmed in the interview of the 5th Brigade soldier Dorzhi Batomunkuyev, which he gave to the Russian newspaper “Novaya Gazeta” on March 2, 2015. <https://goo.gl/MjOofE>

Russian weaponry in the Donbas

Another important component of the Russian aggression in the Donbas is the supply of weapons and military equipment to the militants. The saturation of the occupied areas of Donetsk and Luhansk Oblasts with Russian military equipment has led to the situation where by some indicators (e.g. the numbers of tanks or artillery systems) the military formations of the DPR and the LPR surpass such NATO countries as France or Germany.

InformNapalm community has conducted more than 45 specific OSINT investigations, which identified more than 40 types of Russian military equipment.

Most of the equipment listed below are modern types, which were adopted by the Russian Armed Forces from 2004 to 2015. This military equipment is not produced in Ukraine, and was never imported by Ukraine, therefore could not have been captured by the militants. Operation and maintenance of modern military equipment also requires qualified staff, which also suggests the participation of Russian military personnel in the war in the Donbas.

The following list is accurate, but likely incomplete. The investigations do not answer the question about the numbers of pieces of each equipment type detected in the ATO zone. Most of the listed hardware are electronic warfare and signals intelligence systems.

While using the Donbas as the proving grounds for new types of weaponry, Russia is also flooding the occupied territory of Ukraine with the legacy weapons from Soviet times, which have also been repeatedly recorded in InformNapalm investigations. Proving the direct deliveries of these types of equipment to the militants from the Russian Federation require different methods. Therefore such discussion is outside the scope of this report.

List of equipment types

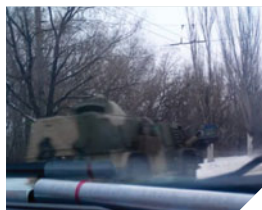
GAZ-233014 Tigr, infantry mobility vehicle



Approved for service by the Russian Ministry of Defense in 2005. Never supplied to Ukraine. Identified in Luhansk Oblast and described in numerous InformNapalm investigations. This infantry mobility vehicle (IMV) belongs to the 136th Motorized Rifle Brigade of the of the 58th Army of the Southern Military District of the Russian Federation

Tigr has level 3 ballistic protection according to the Russian GOST R 50963-96 technical standard.

GAZ-39371 Vodnik, infantry mobility vehicle



Russian multipurpose all-terrain armored vehicle designed for personnel and cargo transportation. It provides protection for the crew from small arms. Entered service with the Russian Army in 2005. Never supplied to Ukraine. It features on the video from Sorokyne / Krasnodon (Luhansk Oblast) made on January 10, 2015.

KAMAZ-43269 Vystrel, infantry mobility vehicle



Russian light-armored vehicle. It passed the experimental test at the 7th Military Base in Gudauta. Since 2009, vehicles of this type were recorded in Georgia at Russian military bases in Abkhazia and Samachablo (Tskhinvali region). Also used by regional special operation units of the Federal Penitentiary Service (FSIN) of Russia. Was spotted in Luhansk and Luhansk Oblast. More than 10 vehicles of this type were recorded in Donbas.

BTR-82A, armored personnel carrier



Russian armored personnel carrier (APC) is a deep modernization of the BTR-80. Armament: integrated turret system armed with a 30 mm 2A42 automatic cannon aligned with a 7.62 mm PKTM machine gun. Entered service with the Russian Army in 2013. Never supplied to Ukraine. Identified in Luhansk Oblast and described in numerous InformNapalm investigations. It was identified as belonging to the 18th Motorized Rifle Brigade of the Russian army.

T-72B, main battle tank, 1989 model



Modernized version of the T-72 equipped with new armament and fire control systems, Kontakt-5 explosive reactive armor (ERA), 9K120 Svir laser-guided antitank guided missile system (ATGM), B-84 engine, 1A40 fire control system and 2A46M smoothbore gun. Not operated by Ukrainian Army, never supplied to Ukraine. Identified in Luhansk, Debaltseve and Makiivka. The 5th Armored Brigade of the Eastern Military District of Russia was identified as its operator.

T-72BA, main battle tank, 1999 model



A modernized modification of the T-72B, modernization is performed at the Uralvagonzavod factory within an overhaul. First tanks were delivered in 1999-2000. The modified vehicle is set apart from the regular B model through treads, ERA and a distinctive wind sensor on the turret. Never supplied to Ukraine. The destruction of Russian tanks of this modification was recorded near Starobesheve (Donetsk Oblast). Their operator was identified as the 21st Motorized Rifle Brigade of the Russian Army.

T-72B3, main battle tank, 2011 model



The upgraded version of the T-72. Supplied to the Russian Army from 2012. Never supplied to Ukraine. It has been identified in Luhansk, Ilovaisk and Debaltseve. A MBT of this modification was destroyed in the area Debaltseve. In service with 6th Armored Brigade of the Russian Armed Forces.

Chapter 6. Russian Presence

T-90A, main battle tank, 2006 model



Modification of the T-90. It was fitted with up-to-date second-generation ESSA thermal imaging scope, stabilized in two planes and integrated with the main scope and its range-finding channel. This enhanced the night vision range from 1800 to 4000 m. Never supplied to Ukraine. Identified in Luhansk Oblast. In service with the 136-th Motorized Rifle Brigade of the Russian Armed Forces.

T-72S1, main battle tank



The export version of the T-72B1, was supplied by Russia to Iran and Venezuela in 2011-2012. The main external difference from the T-72B is the night sight and the DVE-BS wind sensor. It was introduced into the Russian army in 1993, after the cancellation of a number of export sales. Never supplied to Ukraine. Identified at a factory in Bile village (Luhansk Oblast) not far from the M04 motorway, 3 km west of Zbirna railway station.

Mustang KamAZ-5350 Armored Truck



Russian military truck with 6x6 wheel drive. Never supplied to Ukraine. Spotted in Luhansk and Donetsk Oblasts. A vehicle of this type with an additional protection kit and the MM-501 multi-functional module to transport personnel was recorded destroyed in Khrustalnyi / Krasnyi Luch (Luhansk Oblast)

Ural-632301, military truck



Russian multi-purpose 8x8 military truck with load capacity up to 14 tons. Approved for service in 2004. Never supplied to Ukraine. Identified in Donetsk Oblast in numerous InformNapalm investigations.

Ural-43206, military truck



Russian multi-purpose 4x4 truck. Initially issued to the Russian army in 2008. Never supplied to Ukraine. Identified in Luhansk Oblast in numerous InformNapalm investigations.

2B26 Grad-K, multiple launch rocket system



Modernized version of the Grad multiple launch rocket system (MLRS) mounted on KamAZ-5350 chassis, instead of the dated Ural-375D. Entered service with the Russian army in 2011. Never supplied to Ukraine. Identified in Chystiakove / Torez (Donetsk Oblast).

9K58 Smerch, multiple launch rocket system



The 300mm multiple launch rocket system. It is in service both with the Russian and the Ukrainian army. However, there are no registered facts of the militants capturing this MRLS. On the January 22, 2015, a Smerch launcher was spotted in the occupied city of Makiivka (Donetsk Oblast). On the February 10, 2015 the pro-Russian militants launched a rocket attack on the military airfield and residential areas of Kramatorsk.

1RL232-2M Leopard, battlefield surveillance radar



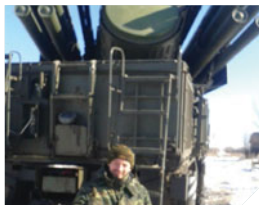
This sophisticated ground-based battlefield surveillance radar is capable of detecting ground and marine surface targets as well as artillery shell bursts. The high positioning accuracy for targets and shell bursts allows for precision fire adjustment. Its radio-electronic equipment enables the station to monitor the situation in range from 200 m to 40 km. Unveiled at the Oboronexpo 2014. Never supplied to Ukraine. Identified in Debaltseve, Donetsk Oblast.

9K330 Tor, 9K331 Tor M-1 and 9K332 Tor M-2, tactical surface-to-air missile systems



This is an all-weather low to medium altitude, short-range surface-to-air missile system designed for engaging airplanes, helicopters, cruise missiles, guided munitions, drones and short-range ballistic threats. 9K330 Tor was phased out from service in Ukraine in 2001. No evidence of capture of this type of SAM by militants. 9K330 was identified in Donetsk and its latest Russian modification 9K332 was recorded in Shahtarsk, Donetsk Oblast on January 20, 2015.

96K6 Pantsir-S1, surface-to-air missile and gun system



Russian self-propelled land-based surface-to-air missile and gun system (SAMG). Designed to provide point air defense of military, industrial and administrative installations against aircraft, helicopters, precision munitions, cruise missiles and UAV's, as well as additional protection to air defense units from air and surface threats. Approved for service by the Russian Defense Ministry in 2012. Never supplied to Ukraine. Identified in Luhansk and Shakhtarsk, Donetsk Oblast.

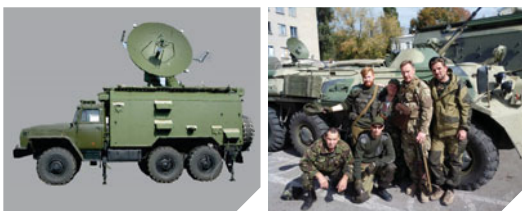
Chapter 6. Russian Presence

P-166-0,5 radio station



Mobile military medium-power HF/VHF radio station based on K1Sh1 versatile wheel chassis. Entered service with the Russian Army in 2005. Never supplied to Ukraine. Identified in Debaltseve, Donetsk Oblast.

R-441-0V Liven, radio station



Designed to provide countermeasures-safe satellite communication for military units and separate objects of operational and operational-strategic command levels. Entered service with the Russian Army in 2007. Never supplied to Ukraine. Spotted in Luhansk.

R-149BMR Kushetka-B, command vehicle



Russian command vehicle of the operational and tactical level based on K1Sh1 chassis. It is designed to ensure monitoring of the combat zone operational environment. It is fitted with HF and VHF radios and navigation equipment. Never supplied to Ukraine. Spotted in Luhansk Oblast.

RB-341V Leer-3, EW system



Russian system featuring a control truck on KAMAZ-5350 chassis and an Orlan-10 drone. Objectives: jamming of mobile communication; simulation of GSM 900 and GSM 1800 base stations and sending faked signals (messages); signals intelligence by detecting emission points of GSM phones. Unveiled in early October 2015. Never supplied to Ukraine.

R-378B Borisoglebsk-2, EW system



Russian automated jamming station based on the MT-LB. The system is designed to jam mobile satellite communication and navigation systems in an integrated tactical command and control system. Never supplied to Ukraine. Spotted in Kadiivka / Stakhanov and Luhansk.

R-934UM, EW system



Russian radio jamming station. It provides automated detection, direction finding and signal intelligence of radio sources in the frequency range between 100 and 2000 MHz; it also jams VHF radiotelephone and mobile trunked radio systems. Never supplied to Ukraine. Identified in Luhansk in InformNapalm investigations.

R-330Zh Zhitel, EW system



Russian radio jamming station. It provides automated detection, direction finding and signal intelligence of radio sources in the frequency range between 100 and 2000 MHz; it also jams portable and mobile ground stations of satellite communication systems and base stations of GSM-900/1800 cellular communication systems. Never supplied to Ukraine. Identified in Makiivka and Horlivka, Donetsk Oblast.

Torn, EW system



Russian radio jamming station. Specifications are not known. Currently in testing with the Russian Armed Forces. Never supplied to Ukraine. Spotted by the InformNapalm investigators in Donetsk.

Rtut-BM, EW system



Russian radio proximity fuse jamming station. Designed for the protection of personnel and military equipment from various types of shells and missiles equipped with proximity fuses. In addition, the system can be used to jam communication and radar systems. Was released in 2011. First entered service with the Russian Army in 2013. Never supplied to Ukraine. Spotted in Donetsk.

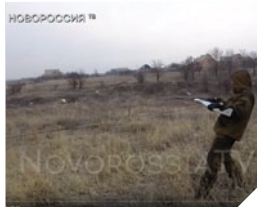
RB-636AM2 Svet-KU, EW system



Designed for monitoring of the airwaves and tracking various radio emitting sources. The system is able to monitor the radio environment and to protect the data transmitted over wireless channels against interception. Entered service with the Russian Armed Forces in 2012. Never supplied to Ukraine. Spotted in Luhansk.

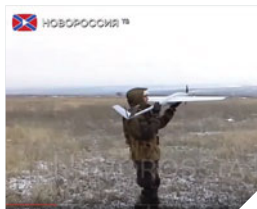
Chapter 6. Russian Presence

Granat-1, UAV



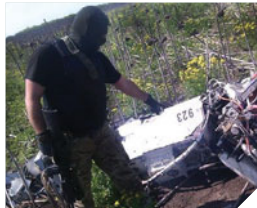
Russian unmanned aerial vehicle, part of a remote monitoring and relay system, capable of air surveillance by photo, video and thermal imaging equipment at a distance of 15 km. The development of the system was completed in 2010. Never supplied to Ukraine. Identified in Debaltseve in an InformNapalm investigation.

Granat-2, UAV



Russian unmanned aerial vehicle, part of the of a remote monitoring and relay system, capable of air surveillance by photo, video and thermal imaging equipment at a distance of 15 km. The development of the system was completed in 2010. Never supplied to Ukraine. Identified in Debaltseve in an InformNapalm investigation.

Forpost, UAV



Russian unmanned aerial vehicle. A licensed copy of an Israeli Searcher 2 drone. Manufactured at the Ural Works of Civil Aviation since 2012 Never supplied to Ukraine. In 2015, the UAV of this type, with the side number 923 was shot down by Ukrainian forces in Donetsk Oblast. The Forpost UAV is in service with only 5 units of the Russian Armed Forces as of 2015. Totally, 10 UAV's (2 pieces per each military unit).

Orlan-10, UAV



Russian unmanned aerial vehicle. Its maximum operating range is 120 km. The system entered operation in 2010. Never supplied to Ukraine. Identified in Zelenopillia, Luhansk Oblast and Amvrosiivka, Donetsk Oblast.

Eleron-3SV, UAV



Russian unmanned aerial vehicle. Its maximum operating range is 25 km. Never supplied to Ukraine. Identified in Olenivka village, Donetsk Oblast by the InformNapalm investigators.

Zastava, UAV



Russian unmanned aerial vehicle. A licensed copy of the Israeli UAV manufactured by IAI. Manufactured at the Ural Works of Civil Aviation since 2010 Its maximum operating range is 10 km. It is in service with the Russian Armed Forces. Never supplied to Ukraine. It was shot down by Ukrainian border guards near Harasymivka village, Luhansk Oblast.



December 19, 2014. The photo was taken at the Russian military range "Kuzminskiy" in Rostov Oblast and uploaded by Aleksandr "Terek" Vdovenko, a citizen of Russia and a DPR militant, who participated in the fighting in the Donbas since July 2014, in such places as Shakhtarsk, Nikishino, Faschivka, Vuhlehirsk, and others. In the photo, he is holding a recent model "Granat-2" UAV. The photo is titled, "Our birds". These Russian UAVs were also employed in the battle for Debaltseve.

<https://goo.gl/JPFPSj>

Chapter 6. Russian Presence

Examples of the Soviet period military equipment supplied by Russia to the conflict area:

- T-64 main battle tanks
- Early modifications of T-72B tanks
- 2S1 “Gvozdika” self-propelled howitzers
- “Strela-10” surface-to-air missile systems
- BMP-1 and BMP-2 infantry fighting vehicles
- MT-LB multipurpose armored vehicles
- D-30 122mm towed howitzers
- “Msta-B” 152mm howitzers
- MT-12 “Rapira” anti-tank guns



More information is available at
<https://goo.gl/iUYYkA>



Summer 2015. The photo shows the modern Russian EW system RB-314B “Leer-3” in Donetsk. It was also seen in videos taken in March 2016 in Donetsk suburbs. The system includes Russian “Orlan-10” UAVs. It is used for jamming GSM end user devices, signals intelligence, and imitation of cell tower operation. It is also used to send text messages.
<https://goo.gl/qQ4Dmf>

Donbas In Flames



Kirill Demenkov, a serviceman from the 46th Separate Operational Purpose Brigade of the Russian Interior Ministry. He is in the Donbas on a regular basis, fights in the illegal armed formations of the DPR in the industrial zone near Avdiivka and Donetsk Airport. Often he takes photos in front of burning and destroyed houses, has many pictures with the Russian “Shmel” portable rocket launcher and other weapons. He is suspected of arson and looting.
<https://goo.gl/sqFBRS>



Afterword

Many people participate in the discussions about the Donbas. Far fewer of them actually went there. The lack of real experts on the region is noticeable. However, the Donbas is now an integral part of the geopolitical standoff that in the future will require even more comprehensive attention.

Maps and historic records present the Donbas as a monolithic conglomeration of legacy industry and a part of Ukraine. Statistics and official reports show that the everyday problems of its residents are close to the heart of every Ukrainian. The interviews of independent experts tell us about the contradictions of life in the Donbas and near the border that are typical for the new century (nostalgia and European aspirations, overblown economic ambitions, and at the same time significant achievements in sports that became the pride of the whole nation in the last several years).

It is only in masterfully built political speeches and reports by Russian media where Donbas appears as a special, separate reality. This ultimately gave the strongest impulse to the flare up of the fighting there.

The chronicles of the information and real wars, the mechanics of the Russian aggression, new solutions to opposing it made possible by the Internet, international missions - all of that necessitated the creation of this guide to the Donbas, a collection of reference points, norms, and the survival rules in the region. However, during its creation it became obvious that this guidebook can't pretend to be complete, as long as the war continues and the numbers of dead, wounded, and wronged require constant adjustments...

We plan to continue research in the other projects of the Prometheus Center in order to find the answers to the difficult and still unaddressed questions about Donbas. This will include further updates to our website, www.prometheus.ngo. The already diverse Donbas, like all militarized zones, is changing and breaking apart - into the occupied, frontline, and free sections, into the ruined, damaged, and viable ones, into the retrograde and modern ones... Traveling along those landscapes can be dangerous, but unavoidable on the way to the goal of restoring the mutual trust in the modern post-truth world.



Appendixes

Toponyms changed in Donetsk and Luhansk Oblasts in the process of decommunization

Renamed raions of Donetsk Oblast

<i>New name</i>	<i>Old name</i>	<i>Occupation</i>
Bakhmut	Artemivsk	
Boikivske	Telmanivske	occupied
Lyman	Krasnyi Lyman	
Manhush	Pershotravneve	
Nikolske	Volodarske	
Pokrovsk	Krasnoarmiisk	

Renamed localities of Donetsk Oblast

<i>Type</i>	<i>New name</i>	<i>Old name</i>	<i>Raion / subordination</i>	<i>Occupation</i>
village	Azov	Dzerzhynske	Novoazovsk	occupied
town	Bakhmut	Artemivsk	Bakhmut	
settlement	Balka	Chervonyi Zhovten	Snizhne city council	occupied
settlement	Betmanove	Krasnyi Partyzan	Yasynuvata	occupied
village	Bilokrynychne	Kalinine	Boikivske	occupied
urban-type settlement	Blagodatne	Voikove	Khartsyzk city council	occupied
settlement	Blahodatne	Oktiabr	Velyka Novosilka	
urban-type settlement	Boikivske	Telmanove	Boikivske	occupied

Appendixes

town	Bunge	Yunokomunarivsk	Yenakiieve city council	occupied
village	Chyrylanske	Oktiabrsk	Boikivske / Michurine village council	occupied
town	Chystiakove	Torez		occupied
settlement	Dachne	Horkoho	Toretsk city council	
village	Debaltsivske	Komuna	Bakhmut	occupied
village	Dianivka	Kirovske	Volnovakha	
settlement	Dovha Balka	Artema	Kostiantynivka	
village	Druzhkivske	Chervonozoriane	Druzhkivka city council	
village	Fedorivka	Lunacharske	Pokrovsk	
village	Horikhove	Petrovskogo	Pokrovsk	
urban-type settlement	Hrafske	Komsomolskyi	Volnovakha	
village	Hryhorivka	Leninske	Pokrovsk	
village	Illinivka	Illich	Kostiantynivka	
village	Ivanivske	Krasne	Bakhmut	
town	Kalmiuske	Komsomolske	Starobesheve	occupied
settlement	Kalynivka	Kalinina	Bakhmut	
village	Kalynivka	Kalinine	Pokrovsk	
village	Kalynove	Kalinine	Volnovakha	
settlement	Kalynove	Kotovskogo	Amvrosiivka	occupied
village	Kamiane	Voikove	Starobesheve	occupied
village	Kellerivka	Kirove	Nikolske	
settlement	Kermenchyk	Oktiabrsk	Velyka Novosilka	
urban-type settlement	Kholodne	Sverdlove	Makiivka city council	occupied
village	Khreshchatytske	Krasnoarmiiske	Novoazovsk	occupied
town	Khrestivka	Kirovske		occupied
settlement	Khromove	Artemivske	Bakhmut	
urban-type settlement	Kopani	Voikovskiy	Amvrosiivka	occupied
village	Kostiantynopolske	Ostrovskogo	Marinka	
settlement	Kotlyne	Dymytrove	Pokrovsk	
village	Krynichky	Petrivske	Yenakiieve city council	occupied
village	Krynichne	Oktiabrsk	Nikolske	
village	Kyslyche	Oktiabrsk	Mospyne city council, Donetsk	occupied
village	Lavrynove	Radianske	Boikivske	occupied
village	Liubivka	Leninske	Starobesheve	occupied
town	Lyman	Krasnyi Lyman	Lyman	
urban-type settlement	Lyske	Krasnyi Oktiabr	Makiivka city council	occupied

Donbas In Flames

village	Maiachka	Oktiabrsk	Sloviansk	
village	Maiorove	Krasnyi Oktiabr	Boikivske	occupied
village	Malynivka	Ulianivka	Pokrovsk	
settlement	Manzhukiv Kut	Kalinina	Starobesheve	occupied
village	Molodetske	Lenine	Pokrovsk	
settlement	Myrne	Dzerzhynske	Lyman	
village	Myrne	Karla Marksa	Velyka Novosilka	
village	Myrne	Lenina	Dobropillia	
town	Myrnohrad	Dymytrov		
village	Nadiia	Artema	Dobropillia	
urban-type settlement	Nikolske	Volodarske	Nikolske	
settlement	Nova Olenivka	Petrivske	Volnovakha / Olenivka village council	
village	Nove Shakhove	Rozy Liuksemburh	Dobropillia	
village	Novoapostolivka	Chycherine	Volnovakha	
village	Novoselivka	Krasnoarmiiske	Sloviansk	
village	Oleksandrivske	Oktiabrsk	Boikivske / Konkove village council	occupied
village	Oleksandrivske	Rozy Liuksemburh	Novoazovsk	occupied
village	Oleksandropil	Rozivka	Yasynuvata	
settlement	Ozerianivka	Pershe Travnia	Toretsk city council	
village	Ozerne	Illichivka	Lyman	
village	Pazeno	Petrivske	Bakhmut	
village	Petrivka	Petrivske	Volnovakha / Stritenka village council	
village	Petrivka	Petrivske	Dobropillia / Zoloty Kolodiaz village council	
urban-type settlement	Piatypillia	Proletarske	Makiivka city council	occupied
village	Pikuzy	Kominternove	Volnovakha	occupied
urban-type settlement	Pivdenne	Leninske	Toretsk city council	
urban-type settlement	Pivnichne	Kirove	Toretsk city council	
town	Pokrovsk	Krasnoarmiisk	Pokrovsk	
village	Pokrovske	Illichivske	Manhush	
village	Prymiske	Radianska Ukraina	Manhush	
village	Sadove	Novopetrivske	Amvroshivka, Blahodatne village council	occupied
village	Sarabash	Komunarivka	Starobesheve	occupied
village	Shakhove	Oktiabrsk	Dobropillia	
village	Sofiivka	Artemivka	Kostiantynivka	
urban-type settlement	Sofiivka	Karlo-Marksove	Yenakieve city council	occupied

Appendixes

village	Soniachne	Krasnivka	Volnovakha	
village	Sontsivka	Krasne	Pokrovsk	
village	Stara Mykolaivka	Pravdivka	Kostiantynivka	
settlement	Stepove	Petrivske	Yasynuvata	
village	Stritenka	Oktiabrsk	Volnovakha	
settlement	Stupakove	Krasnyi Pakhar	Bakhmut	occupied
village	Sviato-Pokrovske	Kirove	Bakhmut	
village	Temriuk	Starchenkove	Nikolske	
town	Toretsk	Dzerzhynsk		
village	Ukrainka	Chervona Ukraina	Manhush	
village	Uzhivka	Leninske	Novoazovsk	occupied
settlement	Verezamske	Kirove	Starobesheve	occupied
village	Verkhniolanchyk	Leninske	Amvrosiivka	occupied
settlement	Verkhniiosykove	Volodarskogo	Amvrosiivka	occupied
village	Verkhnioshyrokiivske	Oktiabr	Novoazovsk	occupied
village	Verkhokamianka	Vorovske	Starobesheve	occupied
village	Vesna	Urytske	Dobropillia	
village	Vidrodzhennia	Dymytrava	Shakhtarsk	occupied
village	Vilkhivchik	Novopetrivske	Amvrosiivka, Oleksiivske village council	occupied
village	Vozdvyzhenka	Krasnyi Pakhar	Bakhmut	
village	Yurivka	Vorovske	Pokrovsk	
town	Zalizne	Artemove	Toretsk city council	
urban-type settlement	Zarichne	Kirovsk	Lyman	
village	Zirka	Chervona Zirka	Velyka Novosilka	

Renamed raions of Luhansk Oblast

<i>New name</i>	<i>Old name</i>	<i>Occupation</i>
Sorokyne	Krasnodon	occupied
Dovzhansk	Sverdlovsk	occupied

Renamed localities of Luhansk Oblast

<i>Type</i>	<i>New name</i>	<i>Old name</i>	<i>Raion / subordination</i>	<i>Occupation</i>
village	Andriivka	Rozivka	Svatove	
village	Berezove	Dzerzhynske	Milove	
town	Bokovo-Khrustalne	Vakhrusheve	Khrustalni city council	occupied
urban-type settlement	Buran	Enhelsove	Sorokyne city council	occupied

Donbas In Flames

village	Chapliivka	Krasna Chapliivka	Troitske	
village	Chornohorivka	Krasna Zoria	Perevalsk	occupied
village	Derkulove	Komuna	Markivka	
settlement	Dibrova	Chervona Dibrova	Kreminna	
town	Dovzhansk	Sverdlovsk	Dovzhansk	occupied
urban-type settlement	Dubove	Komsomolskyi	Dovzhansk city council	occupied
village	Dzherelne	Kalinine	Troitske	
village	Dzherelne	Zhovtneve	Svatove	
town	Holubivka	Kirovsk		occupied
village	Horikhova Balka	Radianske	Sorokyne	occupied
village	Hrekivka	Petrivske	Kreminna	
urban-type settlement	Ivanivske	Lotykove	Slovianoserbsk	occupied
town	Kadiivka	Stakhanov		occupied
settlement	Kamiani Plast	Komsomolets	Lutuhyne	occupied
urban-type settlement	Kartushyne	Proletarskyi	Rovenky city council	occupied
urban-type settlement	Katerynivka	Yuvileine	Luhansk city council	occupied
town	Khrustalnyi	Krasnyi Luch		occupied
village	Korzhove	Petrivka	Svatove	
urban-type settlement	Krynychanske	Chervonohvardiiske	Holubivka city council	occupied
urban-type settlement	Krynychne	Biriukove	Dovzhansk	occupied
urban-type settlement	Kundriuche	Kalininskyi	Dovzhansk	occupied
town	Kypuche	Artemivsk	Perevalsk	occupied
settlement	Lahidne	Komsomolskyi	Svatove	
village	Leonove	Chervonyi Zhovten	Anratsyt	occupied
urban-type settlement	Liubymivka	Dzerzhynskyi	Rovenky city council	occupied
village	Lobivski Kopalni	Krasnyi Kolos	Rovenky city council	
village	Makariv Yar	Parkhomenko	Sorokyne	occupied
settlement	Malokalynove	Radhospnyi	Sorokyne	occupied
village	Mamusheve	Krasnyi Luch	Slovianoserbsk	occupied
urban-type settlement	Mariia	Lenina	Lutuhyne	occupied
village	Marivka	Karla Libknechta	Lutuhyne	occupied
village	Miasozharivka	Artemivka	Svatove	
settlement	Myrne	Chervonoarmiiske	Bilokurakyne	
village	Novoiehorivka	Sverdlovka	Svatove / Raihorodka village council	
settlement	Nyzhnia Shevyrivka	Ordzhonikidze	Sorokyne	occupied
urban-type settlement	Petropavlivka	Petrivka	Stanytsia-Luhanska	
town	Petrovo-Krasnosillia	Petrivske	Khrustalnyi city council	occupied

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village	Pivneve	Industrialne	Kreminna	
village	Rannia Zoria	Chervona Zirka	Milove	
settlement	Seleznivske	Radhospnyi	Perevalsk	occupied
urban-type settlement	Sentianivka	Frunze	Slovianoserbsk	occupied
village	Shelestivka	Chervona Zoria	Milove	
town	Sorokyne	Krasnodon	Sorokyne	occupied
village	Sotenne	Chervonyj Zhovten	Stanytsia-Luhanska	
settlement	Stare	Chervonyj Prapor	Perevalsk	occupied
village	Storozhivka	Kalynivka	Svatove	
village	Sukhodil	Pionerske	Stanytsia-Luhanska	occupied
urban-type settlement	Teple	Krasnodon	Sorokyne city council	occupied
village	Travneve	Pervomaisk	Svatove	
village	Tverdokhlibove	Sverdlovka	Svatove / Nyzhnia Duvanka village council	
urban-type settlement	Valianivske	Leninske	Dovzhansk city council	occupied
urban-type settlement	Vedmezhe	Volodarsk	Dovzhansk city council	occupied
village	Vestativka	Petrivske	Svatove	
town	Voznesenivka	Chervonopartyzansk	Dovzhansk city council	occupied
village	Zaitseve	Illichivka	Troitske	
village	Zaliznychne	Chapaievka	Rovenky city council	occupied
settlement	Zelenyj Hai	Radhospnyi	Novopskov	
village	Zherebiache	Artema	Khrustalnyi city council	occupied
settlement	Zrazkove	Dzerzhynske	Luhansk city council	occupied

War lexicon

Descriptions of the conflict

<p>Ukrainian legal acts</p>	<p>ATO; terrorist war against Ukraine; military conflict; armed conflict; armed conflict in the east of Ukraine; Russian information warfare against Ukraine; armed aggression and violation of the territorial integrity of Ukraine (temporary occupation of the Autonomous Republic of Crimea, and the city of Sevastopol) by the Russian Federation; Russian military aggression in the particular districts of Donetsk and Luhansk Oblasts); armed aggression of the Russian Federation against Ukraine</p>
<p>International legal acts and official statements</p>	<p>The armed conflict in the east of Ukraine; the conflict in Ukraine; Russian military aggression against Ukraine; illegal military operations; Russia's armed intervention into Ukraine; participation of the regular units of the Russian Army in direct military operations on the territory of Ukraine; aggression and hybrid warfare on the part of the Russian Federation; Russian aggression in Ukraine; armed conflict in the particular districts of Donetsk and Luhansk Oblasts; military operations on the territory of Ukraine</p>
<p>Ukrainian media</p>	<p>Military conflict; armed conflict; the conflict in the east of Ukraine; military aggression of the Russian Federation; hybrid warfare; anti-terrorist operation</p>
<p>International media</p>	<p>Ukrainian crisis; Ukrainian conflict; civil war in Ukraine; Russian aggression in Ukraine; Russian military intervention in Ukraine; Russian war against Ukraine; hybrid warfare; separatist uprising</p>
<p>Russian propaganda / media</p>	<p>Civil war; war in Ukraine; war of Independence of the DPR and the LPR; internal conflict; the conflict in Ukraine</p>

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Parties to the conflict		The conflict area
Ukrainian Army	Russia-backed mercenaries; illegal armed groups; Russian occupation forces; militants; separatist groups controlling occupied territories in Donetsk and Luhansk Oblasts	DPR and LPR terrorist organizations; temporarily occupied territories
Ukrainian Army; government forces	Armed groups; armed separatists; members of armed groups; separatists; foreign fighters	The self-proclaimed DPR and LPR; the territory under the control of armed groups; territory controlled by the government; areas controlled by armed groups
Ukrainian military; Ukrainian Army; ATO forces; ATO fighters	Terrorists; militants; gangs; pro-Russian mercenaries / militants; pro-Russian separatists; Russian terrorist groups; terrorist groups; illegal armed groups; Russian occupation forces; occupiers; invaders; hybrid forces of the Russian Federation	ATO / Occupied Territories; conflict zone; particular districts of Donetsk and Luhansk Oblasts (PDDL0); territory not controlled by Ukrainian authorities; the so-called DPR and LPR
Ukrainian troops; government troops; Ukrainian army	Rebels; separatist rebels; Russian speaking rebels; Russian hybrid army; Russian terrorist forces; rebel freedom movement; Russia-supported fighters; Russian mercenaries; Russian terrorist army	Ukrainian territory outside the control of the Government; the so-called DPR, LPR
Ukies; junta; punishers; fascists; neo-Nazis; foreign mercenaries; enemy; Ukrainian security officials	Militia; armed forces of the DPR and the LPR; militias; defenders of Donbass; representatives of the republics; representatives of Donbass	The self-proclaimed DPR and LPR; Novorossiia; Kiev-controlled territory of Luhansk and Donetsk Oblasts

Acknowledgements of the Russian aggression by international institutions

NATO-Ukraine Commission



Date	Main message	Reference
March 2, 2014 Brussels	Extraordinary meeting of the NATO-Ukraine Commission. Russia's actions in the territory of Ukraine are condemned and considered a breach of international law.	
April 2014 Brussels	Meeting of the NATO-Ukraine Commission at the level of foreign affairs ministers. The topics discussed included the political and security situation in Ukraine against the background of Russian aggression.	Statement of the NATO-Ukraine Commission https://goo.gl/trHcuU
August 29 2014 Brussels	Extraordinary meeting of the NATO-Ukraine Commission was held due to a serious military escalation by Russia against Ukraine. At the meeting, the NATO member states unanimously found Russia's illegal actions to be an act of aggression against Ukraine.	Statement of NATO Secretary General https://goo.gl/8SPI21
September 4, 2014 Wales	NATO summit, meeting of the NATO-Ukraine Commission at the level of Heads of State and Governments with the participation of President of Ukraine P. Poroshenko. Acknowledgment of Russia's intervention into Ukraine and the fact of participation of the regular units of the Armed Forces of the Russian Federation in direct military operation in Ukraine; official acknowledgment of the fact that Russia's actions are intended and have serious implications for the stability and security of the entire Euro-Atlantic area; acknowledgment of Russia's support of militants in eastern Ukraine; joint support of Ukraine's sovereignty and territorial integrity within its internationally recognized borders and strong non-recognition and condemnation of Russia's annexation of the Autonomous Republic of Crimea; call on Russia to end its support for militants, withdraw its troops and stop its military activities along and across the Ukrainian border, engage in a meaningful dialogue with the Ukrainian authorities.	Joint statement of the NATO-Ukraine Commission at the level of Heads of State and Governments https://goo.gl/ynPkzC

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<p>December 2, 2014, Brussels</p>	<p>Meeting of the NATO-Ukraine Commission at the level of foreign ministers. Approval of the Statement of the NATO-Ukraine Commission on urgent measures of the Alliance's support of Ukraine in fighting the unprecedented aggression and hybrid war with the Russian Federation.</p>	<p>Statement of the NATO-Ukraine Commission https://goo.gl/WeZlNd</p>	
<p>January 26, 2015 Brussels</p>	<p>Extraordinary meeting of the NATO-Ukraine Commission at the level of ambassadors. Terrorists' attack at civilians, militants' shelling of a regular bus near Volnovakha, a trolley-bus stop in Donetsk, and residential areas of Mariupol. The meeting participants strongly condemned the actions of pro-Russian terrorists of the "Donetsk People's Republic" and "Luhansk People's Republic", primarily, for their attacks on civilians, as well as the Kremlin's aggressive policy. The members of the Alliance again firmly called on Russia to stop financing the terrorists, supplying them with advanced equipment and human resources and urged Russia to return to negotiations.</p>	<p>Statement of NATO Secretary General Jens Stoltenberg https://goo.gl/TmmJEf</p>	
<p>May 13, 2015 Antalya</p>	<p>Meeting of the NATO-Ukraine Commission at the level of foreign ministers. Condemnation of Russia's aggressive actions and continued violation of international law and its international obligations.</p>	<p>Statement https://goo.gl/nfeFz2</p>	
<p>July 9, 2016 Warsaw</p>	<p>Meeting of the NATO-Ukraine Commission at the level of Heads of State and Governments with the participation of President of Ukraine P. Poroshenko. Russia has continued its aggressive actions undermining Ukraine's sovereignty, territorial integrity and security, in violation of international law. These developments have serious implications for the stability and security of the entire Euro-Atlantic area. Russia continues to foment a persistent state of instability in eastern Ukraine, which has led to the loss of nearly 10,000 lives in the Donbas and deprived Ukraine of a considerable part of its economic output.</p>	<p>Joint statement of the NATO-Ukraine Commission at the level of Heads of State and Governments https://goo.gl/v0NKlx</p>	

Donbas In Flames


UN General Assembly

Date	Main message	Reference	
March 27, 2014 New York	The referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol.	Resolution 68/262 Territorial integrity of Ukraine https://goo.gl/n5pjzH	
November 15, 2016 New York	The document affirms the territorial integrity of Ukraine; the Russian Federation is referred to as the occupying Power and the Autonomous Republic of Crimea and the city of Sevastopol are found temporary occupied territory.	Draft resolution Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) https://goo.gl/81vUas	
December 19, 2016 New York	Russia's status of occupying Power is affirmed and the entire responsibility for serious violation of human rights in the territory of the Autonomous Republic of Crimea and the city of Sevastopol.	Resolution Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)	



NATO Parliamentary Assembly

Date	Main message	Reference	
November 21, 2016 Istanbul	The resolution condemns Russia's military, economic and information aggression against Ukraine, and expresses concern about the persistent failure to implement the Minsk Agreements due to the almost daily violation of the ceasefire in eastern Ukraine by Russia and its proxies.	Resolution 431 Supporting Nato's Post-Warsaw Defence and Deterrence Posture https://goo.gl/ozrOnI	




Committee of Ministers of the Council of Europe

Date	Main message	Reference	
September 17, 2014 Strasbourg	The presence of Russian troops in Ukraine and the Russian influence on the escalation in the east of Ukraine were acknowledged.	Decision of the Committee of Ministers of the Council of Europe Situation in Ukraine https://goo.gl/fmv6Gz	

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<p>March 25, 2014 Strasbourg</p>	<p>Non-acknowledgment of the so-called referendum in the Autonomous republic of Crimea on March 16, condemnation of Russia's use of military power to move borders, support of the territorial integrity and sovereignty of Ukraine</p>	<p>Declaration https://goo.gl/2YbqPP</p>	
<p>October 16, 2014 Strasbourg</p>	<p>Condemnation of Russia's military intervention in the east of Ukraine and of all forms of pressure on the neighbours; statement that the security of this continent is gravely threatened by the by Russia's repeated failure to comply with international rules, principles and values of the Council of Europe; call for the restoration of Ukraine's territorial integrity; emphasis of the fact that armed separatism, supported by mercenaries and the intervention of foreign troops, is the antithesis of all that the Congress stands for.</p>	<p>Declaration 3 (2014) Separatist tensions in Ukraine and neighbouring countries https://goo.gl/ddLGHD</p>	

Parliamentary Assembly of the Council of Europe

Date	Main message	Reference	
<p>April 9, 2014 Strasbourg</p>	<p>The Assembly considers that the drive for secession and integration of Crimea into the Russian Federation was instigated and incited by the Russian authorities, under the cover of a military intervention.</p>	<p>Resolution 1988 (2014) Recent developments in Ukraine: threats to the functioning of democratic institutions https://goo.gl/kUsC5q</p>	
<p>October 2, 2014 Strasbourg</p>	<p>The Assembly recognizes direct military intervention of Russia into Ukraine and calls on the Russian Federation to reverse its illegal annexation of Crimea; to cease any military aid to the insurgents in eastern Ukraine, as well as to withdraw its military forces from that area; to refrain from any actions that could aggravate the situation in that area.</p>	<p>Resolution 2018(2014) The progress of the Assembly's monitoring procedure (October 2013-September 2014) https://goo.gl/1XI4DB</p>	
<p>January 28, 2015 Strasbourg</p>	<p>The resolution contains a list of requirements of the Assembly to the Russian Federation: stop the escalation of violence in the east of Ukraine, the support of illegal armed groups; withdraw its troops from Ukraine as well as the requirements in respect of frozen conflicts in other neighboring countries. The following rights were suspended for the Russian delegation: voting rights and the right to be represented in the PACE boards; the right to represent the Assembly at the Council of Europe bodies, external institutions and organizations, to sit on ad hoc committees on observation of elections, to be appointed rapporteur.</p>	<p>Resolution 2034 Challenge, on substantive grounds, of the still unratified credentials of the delegation of the Russian Federation https://goo.gl/AMcgPV</p>	

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<p>June 22-26, 2015 Strasbourg</p>	<p>The resolution contains an important political element in the form of statement that the Russian aggression against Ukraine is the cause of the missing persons problem.</p>	<p>Resolution 2067 (2015) Missing persons during the conflict in Ukraine https://goo.gl/Wp0lVm</p>	
<p>April 21, 2016 Strasbourg</p>	<p>The Assembly believes that without the strong determination of all sides to stop this war, a solution to the problem of people captured during the Russian military aggressions in Ukraine is not possible. Therefore, it urges Ukraine, the Russian Federation and the separatist groups controlling the occupied territories of the Donetsk and Luhansk regions to stop all military operations in the east of Ukraine, withdraw all weapons and restore peace in this region.</p>	<p>Resolution 2112 (2016) The humanitarian concerns with regard to people captured during the war in Ukraine https://goo.gl/x6A573</p>	
<p>October 12, 2016 Strasbourg</p>	<p>PACE reaffirms its position that the annexation of Crimea by the Russian Federation and the military intervention by Russian forces in eastern Ukraine violate international law and the principles upheld by the Council of Europe, as stated in Assembly Resolution 2112 (2016), Resolution 2063 (2015), Resolution 1990 (2014) and Resolution 1988 (2014).</p>	<p>Resolution 2133 (2016) Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities https://goo.gl/7lwAcY</p>	
<p>August 31, 2016 Strasbourg</p>	<p>The Donbas conflict is recognized as Russian aggression</p>	<p>Report 14130 Political consequences of the conflict in Ukraine https://goo.gl/fB3zN2</p>	

International Criminal Court in the Hague

Date	Main message	Reference	
<p>November 14, 2016 The Hague</p>	<p>The Prosecution of the International Criminal Court in The Hague in its preliminary report referred to the events in Crimea as an international armed conflict between Ukraine and the Russian Federation, and stated that the situation within the territory of Crimea and Sevastopol factually amounts to an on-going state of occupation.</p>	<p>Preliminary report The situation in Ukraine https://goo.gl/mOEAVd</p>	

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OSCE Parliamentary Assembly

Date	Main message	Reference
July 1, 2014 Baku	Condemnation of Russia's annexation of Crimea and support of the armed conflict in Ukraine. Since February 2014, the Russian Federation in its relations with Ukraine violated every one of the ten Helsinki principles in its relations with Ukraine, some in a clear, gross, and thus far uncorrected manner, and is in violation with the commitments it undertook in the Budapest Memorandum, as well as other international obligations. The Assembly "Views the 16 March 2014 referendum in Crimea as an illegitimate and illegal act, the results of which have no validity whatsoever" and calls upon all participating States to refuse to recognize the forced annexation of Crimea by the Russian Federation.	Resolution on Clear, gross and uncorrected violations of Helsinki principles by the Russian Federation https://goo.gl/Zh2o6p
July 8, 2015 Helsinki	The Assembly considers that the actions by the Russian Federation in the Autonomous Republic of Crimea and the city of Sevastopol, as well as in certain areas of the Donetsk and Luhansk regions of Ukraine, constitute acts of military aggression against Ukraine.	Resolution The Continuation of Clear, Gross and Uncorrected Violations of OSCE Commitments and International Norms by the Russian Federation https://goo.gl/IH0Eqe

Verkhovna Rada of Ukraine

Date	Main message	Reference
January 27, 2015 Kyiv	Ukraine remains subject of the military aggression of the Russian Federation performed, among others, in the form of support and equipment of massive terrorist attacks.	Resolution of the Verkhovna Rada of Ukraine, No. 129-VIII On the Appeal of the Verkhovna Rada of Ukraine https://goo.gl/EJKGRp
July 22, 2014 Kyiv	Since February 2014, Ukraine has been suffering the aggression from a state guaranteeing its independence and territorial integrity. The Russian Federation occupied two regions of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – and proceeded with active destabilization of the southern and eastern regions of Ukraine. Unsupported by the Ukrainian citizens in the south and east of the country, the government of the Russian Federation started organizing a terrorist war against Ukraine.	Resolution of the Verkhovna Rada of Ukraine, No. 1597-VII On Measures to Prevent Expansion of International Terrorist Supported by the Russian Federation https://goo.gl/svqdwB

Donbas In Flames

March 17, 2015
Kyiv

To recognize the districts, cities, towns, and villages of Donetsk and Luhansk Oblasts where, subject to the Law of Ukraine "On the Special Rules of Local Administration in Particular Regions of Donetsk and Luhansk Oblasts" the special rules of local administration are introduced, as temporarily occupied until the withdrawal of all illegal armed groups, Russian occupation units, their military equipment as well as militants and mercenaries, from the territory of Ukraine and restoration of Ukraine's full control over the state border of Ukraine.

Resolution of the Verkhovna Rada of Ukraine, No. 254-VIII On Recognizing Particular Districts, Cities, Towns and Villages of Donetsk and Luhansk Oblasts Temporarily Occupied" <https://goo.gl/HR7Wuq>



April 21, 2015
Kyiv

Should the Russian Federation refuse to cease military aggression against Ukraine, the Verkhovna Rada of Ukraine calls to the international community to enhance the sanctions against the Russian Federation as the aggressor state and to accelerate the provision of increased financial aid and supply of weapons to Ukraine in view of the fact that in its resistance against the Russian armed aggression, Ukraine protects the united democratic Europe and the rest of the free world.

Resolution of the Verkhovna Rada of Ukraine, No. 337-VIII On the Statement of the Verkhovna Rada of Ukraine "About Resistance Against the Armed Aggression by the Russian Federation and Overcoming Its Consequences" <https://goo.gl/PfZB7G>



« This is a concise and excellent guide to the Donbas, essential reading for anyone interested in understanding the war-torn region. Highly recommended.

Hiroaki Kuromiya,
Professor at Indiana University (USA),
Author of books on history and politics in the Donbas

Annex 456

Daniel Romein, Identifying Khmuryi, the Major General Linked to the Downing of MH17,
bell¿ngcat (15 February 2017)

Identifying Khmuryi, the Major General Linked to the Downing of MH17

[bellingcat.com/news/uk-and-europe/2017/02/15/identifying-khmuryi-the-major-general-linked-to-the-downing-of-mh17](https://www.bellingcat.com/news/uk-and-europe/2017/02/15/identifying-khmuryi-the-major-general-linked-to-the-downing-of-mh17)

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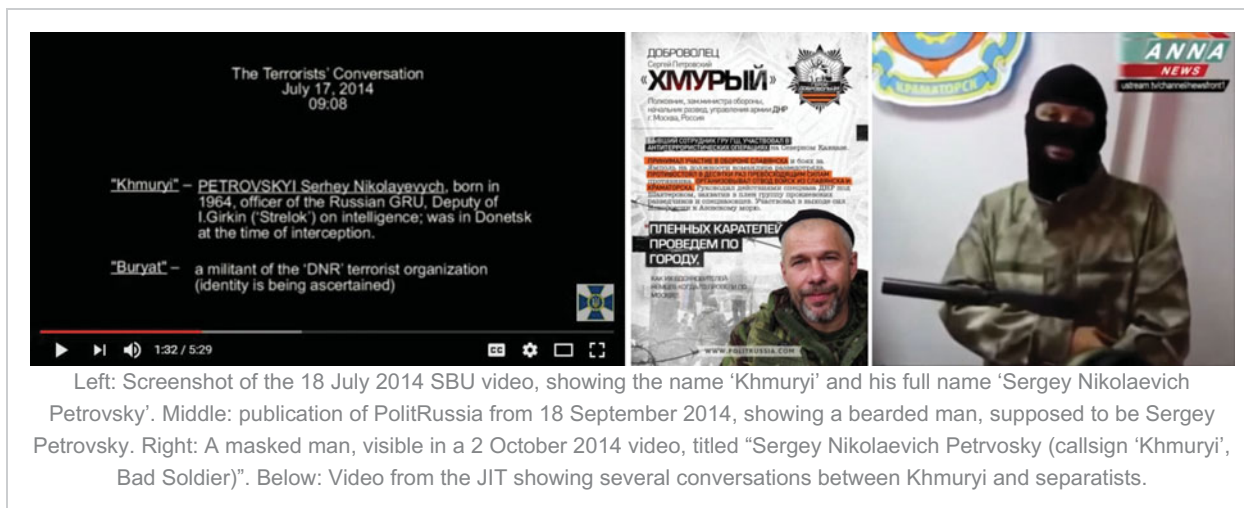
By [Daniel Romein](#)

Translations: [Русский](#)

This article was collaboratively researched and written by the Bellingcat MH17 Investigation Team.

On 18 July 2014, the Security Service of Ukraine (SBU) published [several tapped telephone conversations](#) in relation to the July 17 downing of Malaysian Airlines Flight 17 (MH17). Most of these conversations, recorded on the day of the downing, are between an officer identified as ‘Khmuryi’ (‘Gloomy’ or ‘Grumpy’) and other separatist officers or soldiers of the self-proclaimed Donetsk People’s Republic. The SBU identified ‘Khmuryi’ as ‘Sergey Nikolaevich Petrovsky’, a Russian GRU officer, but it took some time before this was covered in-depth by either Western or Russian-language media.

On 1 April 2015, the Dutch news organizations [NRC](#), [NOS](#) and [De Telegraaf](#) wrote on Khmuryi after the Joint Investigation Team (JIT) published a [video](#) that included the tapped phone conversations, but audible censoring of the identities of the parties in the call. However, on 18 September 2014, Russian-language media site PolitRussia published an [article](#) and a [video](#) about ‘Khmuryi’, a DNR officer named Sergey Petrovsky, presenting a photograph and a video interview. This publication is based on a [video](#) from 27 June 2014 showing an interview with a member of the so-called Donbas People’s Militia with the call sign ‘Khmuryi’. However, that video does not provide the full name of the commander. As this article will show, the man interviewed who reportedly fought in Slavyansk and is from Moscow is almost certainly not the same “Khmuryi” from the intercepted telephone conversation. Another [video](#), titled ‘Sergey Nikolaevich Petrovsky (call sign Khmuryi, Bad soldier)’ and uploaded 2 October 2014, shows a video message of a masked man, who according to the video title is Sergey Petrovsky. However, the video was previously uploaded on [12 June 2014](#), entitled ‘Spetsnaz of Strelkov,’ and this man seems to be a different person than the bearded man in the 27 June 2014 video, as his voice differs.



On 30 November 2014, an [interview](#) with General Sergey Nikolaevich Petrovsky was published on the Russian news site Politikus, making clear that he was then the head of the Main Intelligence Directorate (GRU) of the Donetsk People's Republic and that his military career started in the Soviet army in 1984, when he participated in the war in Afghanistan. In the 90s, he took part in wars in North Ossetia and Chechnya, where he met Igor 'Strelkov' Girkin, who was the Minister of Defence of the Donetsk People's Republic in 2014. In another [interview](#), published 25 December 2014 on ultranationalist Russian news site Zavtra, he describes himself as Major General Sergey Petrovsky, born in 1962 in the Donetsk region. It is unclear if he achieved the rank of major general in the Russian Federation or the self-proclaimed separatist republic. He also described having over 30 years of service in the Soviet and Russian armies. An earlier [interview](#) with 'Khmuryi', then a colonel, was published in 2003 on the Russian news site Izvestia, as mentioned in a 2016 publication on a blog named [Globalized](#). This blog, but also another blog on [28 November 2014](#), describes that a person who calls himself 'Plokhoy Soldat' ('Bad Soldier'), with an avatar saying 'Khmuryi', frequently posted on a [forum](#) of the website [Antikvariat](#), a website about history, military relics, and other topics, and where Igor 'Strelkov' Girkin also regularly posted [messages](#) about the war in Ukraine. In this forum, he [wrote on 19 July 2014](#) that he is Colonel Sergey Nikolaevich Petrovsky, Deputy Minister of Defence of the Donetsk People's Republic for guards reconnaissance.

It is because of Igor Girkin's [e-mail account](#) that was hacked in May 2014 that the true identity of Sergey Petrovsky, which is not his real name, came to light. Several e-mails from Girkin's e-mail account were [published](#), among them an e-mail sent on 28 April 2014 from Sergey Dubinsky with e-mail address karahan1962@mail.ru, writing "Igor, this is Zubr [European bison], hi, do you still remember me??" This name and e-mail address lead to a [social media profile](#) that makes clear that Dubinsky was born on 9 August 1962 and lived in Donetsk, Ukraine. It's noteworthy to mention that this year of birth (1962) differs from SBU's claim he was born in 1964. The e-mail address also leads to a [forum](#) on a website about the 181st Motorized Infantry Regiment, that belonged to the [108th Motorized Infantry Division](#), which was involved in the Afghan war from 1979 to 1989. In the forum, after a list of names of soldiers and the years they served, a guest introduces himself on [18 July 2010](#) as 'Karakhan' and

Sergey Dubinsky, serving from 1985 to 1987, currently living in Donetsk, Ukraine. In 2011 he registered himself as user '[Karakhan](#)', Sergey Dubinsky, born on 9 August 1962, and uploaded a [photograph](#) of himself in a military uniform, showing the rank of Colonel. One of his fellow veterans soon after uploaded several [photographs](#) of him as well, and in 2016 another fellow veteran uploaded a larger version of the [photograph](#) of Sergey Dubinsky in uniform and described him as 'Petrovsky, Dvorkovskiy, Khmuryi, Zubr [European bison], Bison and our Karakhan' and as 'Khmuryi in DNR (Donetsk People's Republic)' in now-deleted posts on the forum. A [video](#) in the forum and a [YouTube video](#) show the same photograph of Sergey Dubinsky in a military uniform.

Top left: Khmuryi's avatar on the Antikvariat forum; down left: photograph of Sergey Dubinsky in Afghanistan from his social media profile on 'Moi Mir' (My World); right: photograph of Sergey Dubinsky in a colonel uniform, uploaded in 2011.

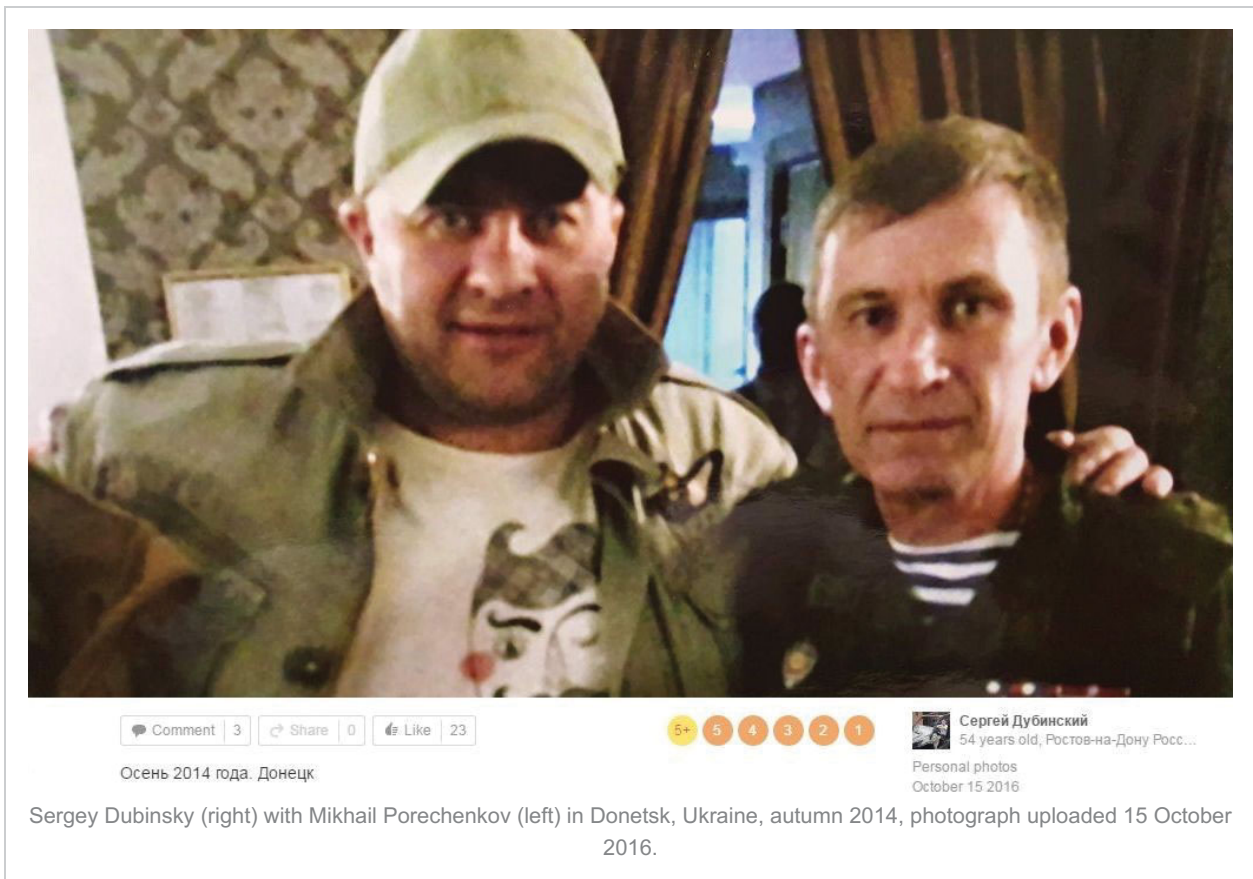
The photograph of Sergey Dubinsky in uniform seems to have been edited (for example, a fragment of the medal '[Order for Merit to the Fatherland](#)' on his tie seems to be missing), though the number of medals fit with a colonel and a military career since 1984. However, most of the medals on his uniform are from the Soviet era, such as the '[Order of the Red Star](#)', '[Order for Service to the Motherland in the Armed Forces of the USSR](#)', the medal '[Veteran of the Armed Forces of the USSR](#)', all three medals '[For Impeccable Service](#)' and a jubilee medal '[70 Years of the USSR Armed Forces](#)'. The medals 'Veteran of the Armed Forces of the USSR' were only awarded to people who served in the Armed Forces of the Soviet Union for 25 years or more and the medals 'For Impeccable Service' were awarded to people who served 10, 15 and 20 years in the Armed Forces of the Soviet Union, so with a military career that started in 1984 it's impossible for him to have these medals, as the Soviet Union ceased to exist in 1991. Two medals on the bottom right are medals for [veterans of the Afghan war](#): the badge for '[Soldiers-Internationalists](#)' and the medal '[From the Grateful Afghan People](#)'. Only the two medals '[Order of Courage](#)' up left could have been awarded during his service in the Russian army. The medal up right seems to be the jubilee medal '[50 Years of Victory in the Great Patriotic War of 1941-1945](#)', a medal that was awarded in 1993, according to [another source](#), only to veterans of the 2nd World War and former underage prisoners of concentration camps. Since Dubinsky was born in 1962, he could not belong to these two categories.

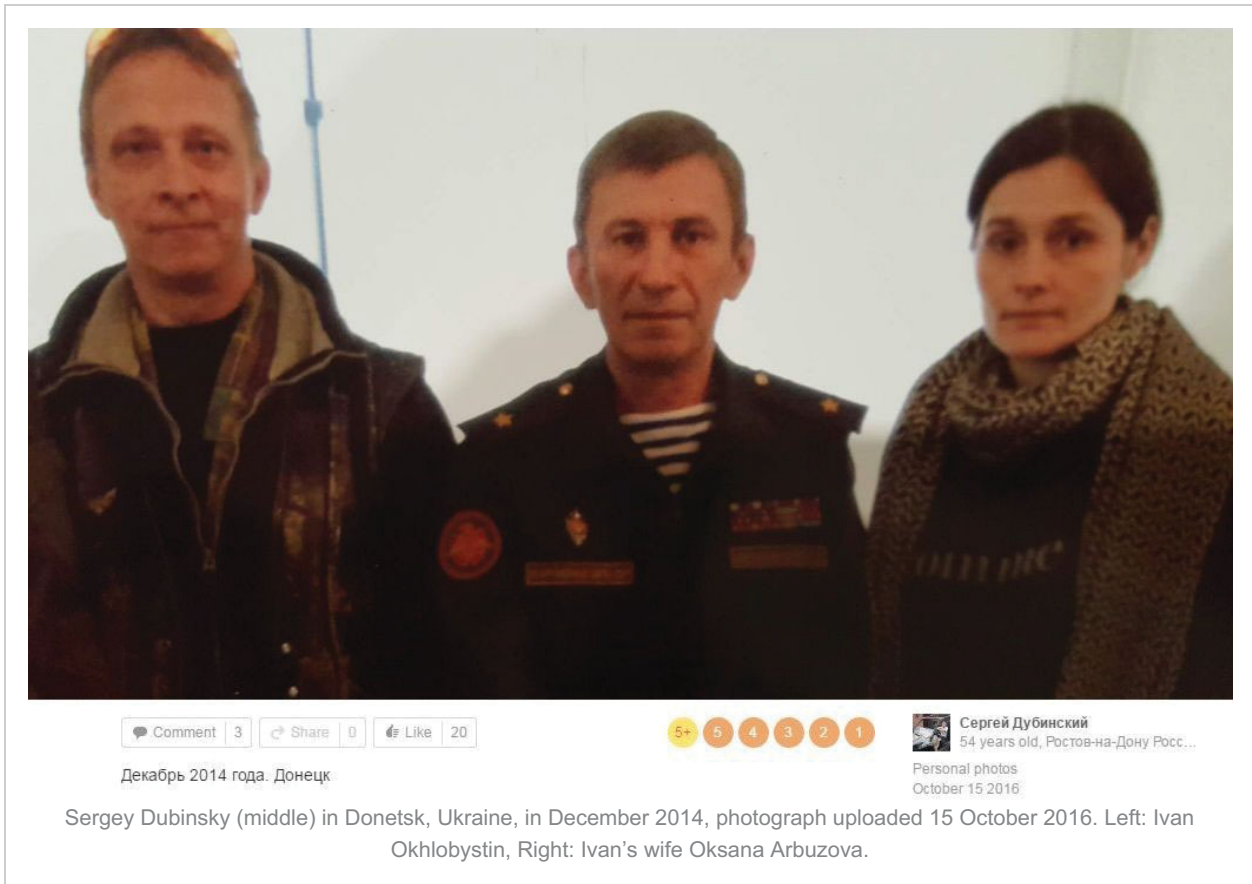
Articles about the Donetsk People's Republic published his photograph on [10 August 2015](#), [14 September 2015](#) and [12 November 2015](#), but only on [19 November 2016](#) the link to MH17 was made on a website about Donetsk. Data and photographs of Sergey Dubinsky were published on the website of '[Mirotvorets](#)' ('Peacemaker'), an organization that gathers personal information largely from open sources on Russians, separatists, and alleged collaborators related to the war in the Donbas. On 7 February 2017, an open source research collective [InformNapalm](#) published additional information about Sergey Dubinsky and the exact location of his current residence: ulitsa Molodozhnaya 4B, Bolshoy Log, Rostov Oblast in Russia.

Bellingcat found another [social media profile](#) of Sergey Nikolaevich Dubinsky, with information indicating that this user was born on 9 August 1962, and living in Donetsk, Ukraine, and in Rostov-on-Don, Russia. According to the photographs from this profile, Dubinsky and his

family were living in Russia in 2010, but apparently lived in Ukraine in the summer of 2011. According to an openly accessible [traffic police database](#) of Rostov-on-Don, Sergey Nikolaevich Dubinsky, born on 9 August 1962, lived in [Stepnoy](#) in an undefined street house number 1, apartment 117, and had three different cars registered on his name between 1998 and 2004. Stepnoy in the Rostov Oblast is a military village, where the [22nd Spetsnaz Brigade](#) (literally translated as the 22th Separate Brigade for Special Purposes), or [military unit 11659](#) is [located](#), a military unit that is part of the [GRU](#), the Main Intelligence Directorate.

Photographs in his album prove that he was in Donetsk, Ukraine in the autumn and December of 2014. On the autumn 2014 photograph Dubinsky is visible next to Russian actor [Mikhail Porechenkov](#), who visited Donetsk on [30 October 2014](#). In the December 2014 photograph, Russian actor [Ivan Okhlobystin](#), who is banned from Ukraine because of his support to pro-Russian separatists, and his wife Oksana Arbuzova are visible. He visited the Donbas area in late [November 2014](#) and Donetsk on [30 November 2014](#), where he seems to have met [Igor 'Strelkov' Girkin](#) and claims to have received a [watch](#) for Christmas from 'Khmuryi', General Major Sergey Nikolaevich Petrovsky.





The December 2014 photograph shows Sergey Dubinsky in what appears to be a Russian military uniform with the rank major general, quite comparable to, for example, the 2015 uniform of Russia's Defense Ministry Spokesperson Major General [Igor Konashenkov](#). Dubinsky seems to wear a shoulder patch of either 'Spetsnaz GRU', the special forces of the Russian Main Intelligence Directorate, or the Russian Ground Forces, though he reportedly resigned from the Russian Armed Forces in April 2014.

It seems that Dubinsky left Donetsk in [early 2015](#) and was even denied entry to the Donetsk People's Republic because of extracting money from businessmen. A decree of the Russian Federation of [17 April 2015](#) (which has been [archived](#)) sought to revoke money from Sergey Dubinsky, and described how he received a pension for his service in several military units. The first unit named is military unit 61019, a unit that was very likely disbanded quite some time ago, as no information is available on it online. The second unit mentioned is the aforementioned military unit 11659, or the 22nd Spetsnaz Brigade, and the third unit mentioned is military unit [51019](#), or the [116th Separate Special Purpose Radio Unit](#), located in [Stepnoy](#).

Photographs uploaded in the summer of 2016 show Dubinsky's new house, which was [geolocated](#) to the same location of the InformNapalm article: ulitsa Molodozhnaya in Bolshoy Log, Rostov Oblast in Russia. Only the house number is not clear, as Google and Yandex maps do not specify house numbers for all the houses in that street, but likely the house number is 4a, rather than 4b. The view in the photograph corresponds to the view behind the house on [Google Streetview](#). Another photograph shows Dubinsky in a Canadian-produced vehicle, a [Can-Am Commander XT](#), worth almost \$15,000 when purchased new.



Comment 14 Share 0 Like 23

5+ 5 4 3 2 1

Сергей Дубинский
54 years old, Ростов-на-Дону, Россия
Personal photos
August 8 2016

Дом, родной дом

The new house of Sergey Dubinsky, where he (and his family) very likely live since 2015, photograph uploaded 8 August 2016.



Comment 29 Share 0 Like 41

5+ 5 4 3 2 1

Сергей Дубинский
54 years old, Ростов-на-Дону, Россия
Personal photos
August 4 2016

Show previous To the top

Sergey Dubinsky sitting in a Can-Am Commander XT, likely in front of his house, photograph uploaded 4 August 2016.

Bellingcat's conclusion is that the man whose telephone was tapped by the Ukrainian Security Service on 17 July 2014, assuming the SBU correctly identified his voice and/or knew that the intercepted telephone number belonged to him and was thus involved in the transport of the Buk missile launcher that downed MH17 on the same date, is named Sergey Nikolaevich Dubinsky, nicknamed 'Khmuryi'. Dubinsky is a Russian war veteran and was a colonel in July 2014, fought in the Soviet-Afghan war and later in Chechnya, and later served in the 22nd Spetsnaz Brigade, a unit connected to the 'GRU', the Main Intelligence Directorate. This man does not appear to be the same person as the bearded man, who likely coincidentally also used the call sign 'Khmuryi' in a June 2014 interview; Dubinsky wrote in the Antikvariat forum on [2 July 2014](#) that he had been confused with someone else "from Slavyansk." However, Dubinsky may be the same person as the masked man in an October 2014 video titled 'Sergey Nikolaevich Petrovsky (call sign Khmuryi, Bad Soldier)', previously uploaded on 12 June 2014 as 'Spetsnaz of Strelkov'. Dubinsky wrote in the same post of [2 July 2014](#) on the Antikvariat forum that he is not a man seen in the media, with one exception, just as he read in the text of the 12 June 2014 video.

Sergey Dubinsky was granted the higher rank of major general in the Donetsk People's Republic in, apparently, August 2014, shortly after the downing of MH17, and later relocated to the Russian Federation after being expelled from Donetsk for alleged financial crimes. Nowadays Dubinsky lives a fairly luxurious life for Russian standards, in a quiet village, spending time with his family and enjoying rides in an expensive recreational vehicle.

Share this article:

Daniel Romein is an IT-specialist and open source investigator focused on the MH17 case and the conflict in Ukraine.



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Annex 457

Landelijk Parket, JIT Requests for Information About Photograph BUK-Telar, Openbaar
Ministerie (19 October 2017)

JIT requests for information about photograph BUK-Telar

19 oktober 2017 - Landelijk Parket

Recently the JIT has received a new photograph of a BUK-Telar. This picture was probably taken on July 17, 2014 in the town of Makeevka, Ukraine. The JIT presumes that the picture contains the BUK-Telar which is responsible for downing flight MH17.

The JIT requests anyone who has any kind of information about the picture, the vehicles on it and the location where the picture was taken to contact the JIT. We will handle your information with ultimate care. JIT investigators are available to help you in several languages including Russian and Ukrainian.

Witnesses

Witnesses can contact (<https://www.politie.nl/themas/flight-mh17/witness-appeal-crash-mh17.html#Contact>), the JIT to provide information or evidence.

For those concerned about safety, refer to Witness Safety & Protection (<https://www.politie.nl/themas/flight-mh17/witness-appeal-crash-mh17.html#Witness>).

The criminal investigation

The criminal investigation is aimed *at* identifying the suspects and is conducted by the Joint Investigation Team (JIT). Visit the website of the Netherlands Public Prosecutor's Office (<https://www.om.nl/onderwerpen/mh17-crash/>) for the latest information. You can also find the JIT on Vkontakte (<https://vk.com/jitmh17investigation>).

Gerelateerd

Update in strafrechtelijk onderzoek MH17-ramp (<https://www.om.nl/onderwerpen/mh17-crash/@103182/update/>)

Update in criminal investigation MH17 disaster (<https://www.om.nl/onderwerpen/mh17-crash/@103183/update-criminal/>)

Последние данные уголовного расследования катастрофы авиалайнера Boeing-777 рейса MH17 (<https://www.om.nl/onderwerpen/mh17-crash/@103184/boeing-777-17/>)

Narrative conference 24 May 2018 (<https://www.om.nl/onderwerpen/mh17-vliegramp/persbijeenkomst-24/narrative-conference/>)

Update in criminal investigation MH17 disaster (<https://www.om.nl/onderwerpen/mh17-crash/@103196/update-criminal-0/>)

Meer over

- English (https://www.om.nl/vaste-onderdelen/zoeken/?zoeken_term=English&Zoe_Clt_TrflDt=622)
- MH17 (https://www.om.nl/vaste-onderdelen/zoeken/?zoeken_term=MH17&Zoe_Clt_TrflDt=462)



Request

The JIT requests anyone who has any kind of information about the picture, the vehicles on it and the location where the picture was taken to contact (<https://www.politie.nl/themas/vlucht-mh17/witness-appeal-crash-mh17.html#Contact>), the JIT.



More information

[MH17 crash](https://www.om.nl/onderwerpen/mh17-crash/) (<https://www.om.nl/onderwerpen/mh17-crash/>)

Annex 458

Bellingcat Investigation Team, New MH17 Photograph Geolocated to Donetsk, bellingcat (20 October 2017)



<https://www.bellingcat.com>

[UK & Europe \(https://www.bellingcat.com/category/news/uk-and-europe/\)](https://www.bellingcat.com/category/news/uk-and-europe/)

[MH17 \(https://www.bellingcat.com/tag/mh17/\)](https://www.bellingcat.com/tag/mh17/) [Russia \(https://www.bellingcat.com/tag/russia-en/\)](https://www.bellingcat.com/tag/russia-en/)

[Ukraine \(https://www.bellingcat.com/tag/ukraine-en/\)](https://www.bellingcat.com/tag/ukraine-en/)

New MH17 Photograph Geolocated to Donetsk

October 20, 2017 By [Bellingcat Investigation Team \(https://www.bellingcat.com/author/bellingcat/\)](https://www.bellingcat.com/author/bellingcat/)

Translations: [Русский \(https://ru.bellingcat.com/novosti/ukraine/2017/10/20/jit-photo-geolocated/\)](https://ru.bellingcat.com/novosti/ukraine/2017/10/20/jit-photo-geolocated/)

On October 19, 2017, the Joint Investigation Team (JIT), the Dutch-led criminal investigation into the downing of Malaysian Airlines Flight 17 (MH17) over Ukraine, [published a new photograph Buk 332 \(https://www.politie.nl/themas/flight-mh17/witness-appeal-crash-mh17.html#alinea-title-information-about-photograph-buktelar\)](https://www.politie.nl/themas/flight-mh17/witness-appeal-crash-mh17.html#alinea-title-information-about-photograph-buktelar), the Russian Buk missile launcher that downed MH17 on July 17, 2014. Buk 332, previously identified by Bellingcat as 'Buk 3x2,' is an anti-aircraft missile launcher belonging to Russia's Kursk-based 53rd Anti-Aircraft Missile Brigade. The image shows the right side of the Buk, loaded on the red low loader. In publishing the photograph, the JIT wrote that the photograph was "probably taken on July 17, 2014 in the town of Makeevka, Ukraine," but we can now conclusively say that the photograph was actually taken at 78 Prospekt Ilycha, at the intersection with Shakhtostroteley, in Donetsk.



[.https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/9OF67tBB15o.jpg](https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/9OF67tBB15o.jpg)

The Hunt

Using Check, a crowdsourced verification platform, [we asked our readers](https://checkmedia.org/bellingcat/project/980/media/6382) [.https://checkmedia.org/bellingcat/project/980/media/6382](https://checkmedia.org/bellingcat/project/980/media/6382) to contribute tips regarding the location of this photograph so that we could collectively geolocate this key piece of evidence concerning the downing of MH17.



Bellingcat

@bellingcat

Geolocating this #MH17 photograph seems impossible, but we already have a lead. Help us to crowdsource this task:

checkmedia.org/bellingcat/pro...

13:29 - 19 Oct 2017

87 182 people are talking about this

One of the strongest candidates was 78 Prospekt Ilycha in Donetsk, due to previous witness accounts identifying a Buk missile launcher with its Russian/separatist convoy at this site.



Донецк - это Украина!

17 Jul 2014



Плохие новости.

В районе 9 часов из Макеевки в сторону Донецка по макеевскому шоссе проследовал тягач на платформе которого был установлен ЗРК БукМ1-М2?

Указанная ЗРК проследовала до пересечения с бульваром Шахтостроителей. Ее сопровождал конвой в составе, 1 паркетник серого цвета Rav4, камуфлированный автомобиль УАЗ и микроавтобус хюндай синего цвета с тонировкой. По состоянию на 9-15 комплекс находился на пересечении Шахтостроителей и Ильича. Боевики повыходили из автомобилей заняв таким образом 2 крайних левых полосы движения. Очевидно, ожидали дальнейших логистических указаний.

(<https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/donetsketoukraina-1.jpg>).

Source (https://vk.com/wall-67445695_68330) (Archive (<https://archive.today/olxfw>))

*"Bad news. Around 9am, a hauler was going along the Makeevka highway (<https://www.google.com/maps/place/Makiivs'ke+Hwy,+Donetsk,+Donetsk+Oblast,+Ukraine/@48.007>) Makeevka in the direction of Donetsk. On the platform was a BukM1-M2? This AAMS (https://en.wikipedia.org/wiki/Surface-to-air_missile) proceeded to the intersection with Shakhtostroiteley Boulevard (<https://www.google.com/maps/@48.0023894,37.8554593,881m/data=!3m1!1e3>). The system was accompanied by a convoy that was composed of 1 gray Rav4 SUV, a camouflaged UAZ, and a dark blue Hyundai van with tinted windows. **As of 9:15am, the vehicle was located at the intersection of Shakhtostroiteley and Ilycha. The militants got out of their cars, blocking 2 of the far left lanes. Obviously, they were waiting for logistical guidance.**"*

Numerous features in the photograph were also visible in Google Street View and Yandex Panorama imagery of the same location, including the two trees in the foreground, a gate beneath the Buk's low-loader, a rock next to the nearest tree, and notches in the curb blocks.



Bellingcat @bellingcat

19 Oct

You can help us geolocate this #MH17 photograph on [@checkdesk](#). checkmedia.org/bellingcat/pro...
pic.twitter.com/DYni5BT68I



Bellingcat
@bellingcat

Our first guess is in Donetsk, at the intersection of Sakhtostroiteley and Ilych (near a beauty salon). Weigh in at the Check page. pic.twitter.com/1TlxxgEAtT

13:06 - 19 Oct 2017



32 28 people are talking about this

The walkway along the salon, where cameraman stood, is much lower than the curb, which explains low position of camera on the "BUK" picture. pic.twitter.com/xTb37YesAF (<https://t.co/xTb37YesAF>)

— Zitty (@zitty055) October 20, 2017

(https://twitter.com/zitty055/status/921339380123471877?ref_src=twsrc%5Etfw)



Bellingscat @bellingscat

19 Oct

You can help us geolocate this #MH17 photograph on [@checkdesk](https://checkmedia.org/bellingscat/pro...). checkmedia.org/bellingscat/pro...
pic.twitter.com/DYni5BT68I



Wout Mager

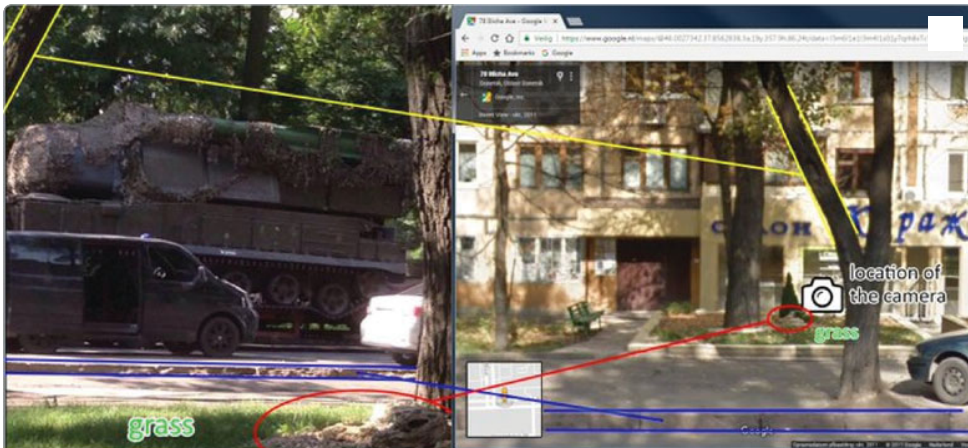
@Eworm_

One of the branches behind the hauler looks the same as a tree on Google Maps. pic.twitter.com/1pKh0N3eJq

14:05 - 19 Oct 2017



8 See Wout Mager's other Tweets



Roelard Smit
@ROELart

Looking the other side becomes even clearer; this is at the Illich Ave in Donetsk. #mh17

06:03 - 20 Oct 2017

13 See Roelard Smit's other Tweets



Bellingcat @bellingcat

19 Oct

The JIT has released a new photograph of Buk 332 in Ukraine on the day of the MH17 downing. We are preparing an article on the image now. pic.twitter.com/JEQmHh705Q



Lorenzo Romani
@lorenzoromani

99% a match pic.twitter.com/mbwHxG5ohE

17:31 - 19 Oct 2017



1 See Lorenzo Romani's other Tweets

Taking these tips together, the following comparisons show how some key details match between the two photographs, making the site worthy of further investigation to confirm the geolocation.



(https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/gate_geolocation.jpg).
Left: A part of a gate visible in an open space through the red low loader, just under the Buk missile launcher.
Right: the same type of gate visible on October 2011 Google Street View of Prospekt Illycha in Donetsk, Ukraine.



(<https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/notches.jpg>)

Left: The new Buk 332 photograph with a thick tree, a slanting branch of another tree, a little rock and notches in the curb, all marked in red.

Right: the same landmarks in Google Street View marked in red.

Conclusive Evidence

Today, at least one local in Donetsk snapped two photographs from this same location, attempting to confirm or refute a geolocation to Prospekt Ilycha in central Donetsk. These photographs were shared online by Christo Grozev and Rudy Bouma.



Christo Grozev @christogrozev

20 Oct

Replying to @christogrozev @bellingcat
At 3 pm yesterday, @JITMH17 published new BUM photo.
Couple hours later @bellingcat zeroed in on location:
twitter.com/bellingcat/sta...



Christo Grozev
@christogrozev

Photo from same location TODAY proves @bellingcat & global volunteers were on target pic.twitter.com/TyENG7qal
10:11 - 20 Oct 2017



38 30 people are talking about this



Christo Grozev @christogrozev

20 Oct

Replying to @christogrozev and 2 others

Photo from same location TODAY proves @bellingcat & global volunteers were on target pic.twitter.com/TyENG7qal



Christo Grozev

@christogrozev

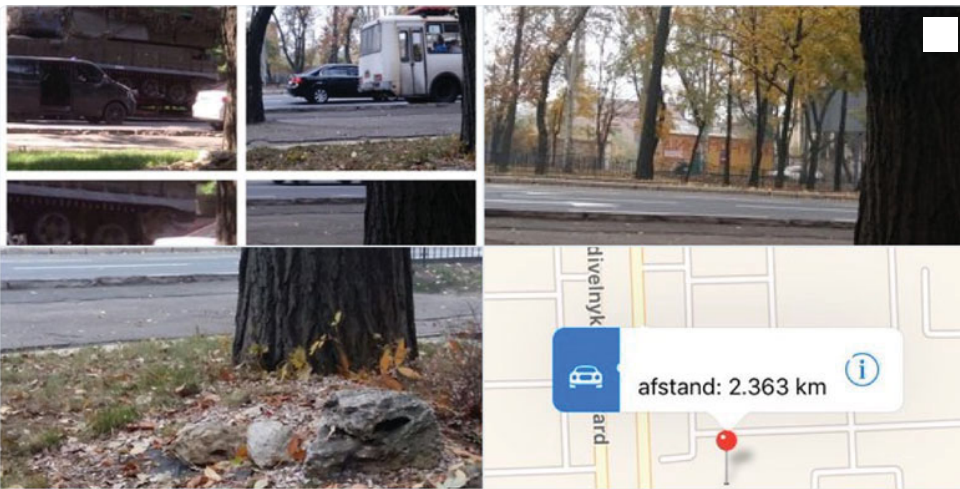
And here is a more comprehensive angle from today

pic.twitter.com/KiQL3aAras

10:33 - 20 Oct 2017



27 See Christo Grozev's other Tweets



Rudy Bouma
@rudybouma

(1) Pictures I had made today in DNR are placing new picture of [#Buk](#) in Donetsk, not in Makeevka like [@JITMH17](#) is suspecting. [#MH17](#)

11:09 - 20 Oct 2017

87 88 people are talking about this



Rudy Bouma

@rudybouma

(1) Gisteren vrijgegeven foto Buk lijkt op foto's die ik vandaag liet maken niet in Makeevka (zoals #JIT vermoedt) maar hier Donetsk. #MH17

10:49 - 20 Oct 2017

16 23 people are talking about this

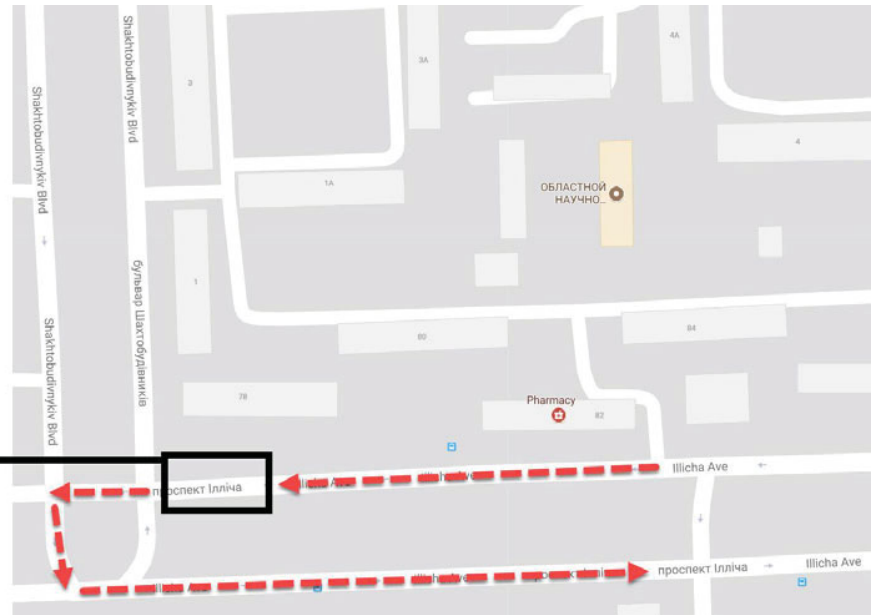


(https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/buk_comparison.jpg)

Conclusion

With this geolocation, we now have photographic evidence of a scene that was reported on by numerous locals: Buk 332, originating from Russia's 53rd Anti-Aircraft Missile Brigade, arrived in Donetsk from Makiivka around 9am on July 17, 2014, parked at the intersection of Prospekt Ilycha and Shakhtostroiteley,

and then eventually turned towards the east-bound Prospekt Ilycha towards the Motel roundabout in Donetsk. The movement is shown in the map below, with the photographer of the original Buk photo facing south from building number 78.



(<https://017qndpynh-flywheel.netdna-ssl.com/wp-content/uploads/2017/10/map-kurazh.jpg>)

Share:

<https://www.facebook.com/sharer/sharer.php?https%3A%2F%2Fwww.bellingcat.com%2Fnews%2Fuk-and-pe%2F2017%2F10%2F20%2Fnew-mh17-photograph-geolocated-donetsk%2F>)

<https://twitter.com/intent/tweet?https%3A%2F%2Fwww.bellingcat.com%2Fnews%2Fuk-and-pe%2F2017%2F10%2F20%2Fnew-mh17-photograph-geolocated-donetsk%2F&text=New+MH17+Photograph+Geolocated+to+Donetsk+via+%40bellingcat>)

[http://www.tumblr.com/share?&u=https%3A%2F%2Fwww.bellingcat.com%2Fnews%2Fuk-and-pe%2F2017%2F10%2F20%2Fnew-mh17-photograph-geolocated-donetsk%2F&t=New MH17 Photograph Geolocated to Donetsk](http://www.tumblr.com/share?&u=https%3A%2F%2Fwww.bellingcat.com%2Fnews%2Fuk-and-pe%2F2017%2F10%2F20%2Fnew-mh17-photograph-geolocated-donetsk%2F&t=New%20MH17%20Photograph%20Geolocated%20to%20Donetsk))

[mailto:?subject=New MH17 Photograph Geolocated to Donetsk&body='https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/'](mailto:?subject=New%20MH17%20Photograph%20Geolocated%20to%20Donetsk&body='https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/'))

(<https://www.bellingcat.com/author/bellingcat/>)

The Bellingcat Investigation Team is an award winning group of volunteers and full time investigators who make up the core of the Bellingcat's investigative efforts.



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11 Comments

ttb - [October 20, 2017 \(https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-135787\)](https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-135787)

It is a truly awesome piece of deduction and sleuthing. I do sincerely hope though it doesn't lead to the photographer being publicly identified. If they sent it anonymously to the JIT I'm sure they've their reasons.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=135787#respond>)

Aric Toler - [October 20, 2017 \(https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-135804\)](https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-135804)

Thankfully, the photograph was taken from outside of a beauty salon on a very busy sidewalk, and not an apartment or a house. The photo was clearly cropped on the sides when it was submitted, so the witness may have already removed identifying information about other people (or him/herself) in the photo.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=135804#respond>)

Tom Wonacott - [October 22, 2017 \(https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-136003\)](https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-136003)

Robert Parry at Consortium News writes in his September 2017 article "The Official and Implausible MH-17 Scenario" that the circuitous route taken by the Buk anti-missile battery was implausible yet he never addresses the geolocation of the Buk by Bellingcat or the Dutch investigation unit. He could have

investigated the same sources as Bellingcat yet did not even address the issue as if that visual evidence is just going to disappear. Parry simply obfuscates and deflects while accepting Russian accounts. Parry writes:

“.....After the MH-17 shoot-down, which killed 298 people, I’m told the Russian government did fear that somehow one of its field operatives might have been responsible and conducted an intensive investigation, including an inventory of its equipment, concluding that all its Buk missiles were accounted for.....”

Parry accepts the narrative of the Russians without question using an unidentified source(s) (“....I’m told....”). This is typical of the journalistic standards of Parry who treats the Russian and Syrian governments as clients. He then promotes an unsubstantiated conspiracy theory using a single source and the familiar “.....I was also told.....”:

“.....I was also told that at least some CIA analysts shared the doubts about Russia’s guilt and came to believe that the MH-17 shoot-down was the work of a rogue and out-of-control Ukrainian team with the possible hope that the airliner was a Russian government plane returning President Vladimir Putin from South America.....”

Pure bunk – and Parry knows it. Parry is an advocate. He provides zero evidence for his theories on MH17, but the goal isn’t the truth, but to promote doubt in the investigation to protect Russia.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=136003#respond>)

Govert - October 29, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-136701>)

Agree with the analysis, but Parry’s article is from September 29th, 2016 (not 2017)

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=136701#respond>)

Tom Wonacott - October 29, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-136765>)

Thanks. It’s a big error. I confused the date with the Consortium article on September 7, 2017 “A New Hole in Syria-Sarin Certainty”.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=136765#respond>)

Andrea - October 23, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-136130>)

I find it AMAZING how in a matter of hours an image can be reliably located (even tough you obviously had a specific route to check).

This image is really good cause it shows the Buk and his details, and the blue van too!

A timestamp would have been great too.... but if you are able to do 1+1 you probably don’t need the timestamp...

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=136130#respond>)

The Bird - November 1, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-137067>).

While this video did not draw too much attention (yet) I think it contains a nice piece of information: <https://www.youtube.com/watch?v=pplQUK4QT4E> (<https://www.youtube.com/watch?v=pplQUK4QT4E>).

Jump to 8:30. The DNR soldier was asked to tell what he believes what happened on the day of downing MH17. He did not say: "There was a Ukrainian fighter jet." He said that there were Ukrainian soldiers that sent a rocket towards MH17. This is the first time I see DNR people saying that a surface-to-air missile hit MH17. Of course he would not admit that it was done by DNR or Russian people – and so far I don't know who to blame for the downing (although I have an idea). Anyway, the important piece of information is that even DNR people say that MH17 was brought down by a BUK missile.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=137067#respond>)

Govert - November 3, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-137199>).

"AN-26 hit by a rocket, fired by militia" was also reported by TASS: <http://tass.ru/mezhdunarodnaya-panorama/1325017> (<http://tass.ru/mezhdunarodnaya-panorama/1325017>). July 17th, 2014 19:04. The story changed when they found out that it was not a military AN-26.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=137199#respond>)

Ilya Kuprik - December 12, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-140565>).

Any evidence, that photo was really taken on 17th July? Any evidence, it is not a digital manipulation?

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=140565#respond>)

KimmoK - December 19, 2017 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-141219>).

There is no evidence (or eyewitness) of any BUK TELAR being there on any other day.

There is even less evidence of that specific Russian BUK being there on any other day.

There is no evidence of any digital manipulation (not yet, not beyond cropping and resaving). So far all 9+ BUK TELAR photos/videos seem authentic.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=141219#respond>)

Walter Mitty - May 25, 2018 (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/#comment-157901>).

It is my opinion as an animation and compositing worker, that there is strong evidence that the Snizhne video, upon which part of the Buk launcher narrative is based, is likely a fake. On frames 55 – 72 (around 4-5 seconds) there is a hard, straight, vertical edge video artefact which develops on some foliage in front of the Buk launcher, and propagates above the foliage and launcher into the road, and down below the launcher too, cutting away some of the foliage. It is my contention that this artefact is very likely a product of where the foliage in the footage has been isolated and duplicated to create a foreground layer for the Buk launcher to pass behind.

The masking process for creating a foreground works like this: Duplicate the video layer, and using 'masks' cut out the area you require to be a foreground layer, in this case the foliage on the near side of the road. You can then place your middle ground object, in this case the Buk launcher, behind the foreground layer. In the case where the original source footage is video and the camera FOV is moving, it is often necessary to manually animate the mask position and shape of the foreground layer to ensure the correct area of the video remains in the foreground, a time consuming process. Done meticulously, this can be flawless, but since this was uploaded not long after the MH17 tragedy, corners seem to have been cut (literally and figuratively), and instead of perfectly cut out foliage we see a hard, straight mask edge emerge between frames 55 and 72, culminating in a large vertical cut line at 72 frames (Just shy of 5 seconds into the footage) of the video. I work in After Effects almost every single day, animating and compositing, and I have never seen video compression produce such a video artefact, and this artefact is unique in this footage in both it's scale and nature, and located exactly where we'd expect to see a line caused by a poorly animated mask layer – no other encoding artefact of the video produces a line so straight, nor so long. I am familiar with the difficulties of masking foliage on video footage, and of the appearance of poorly masked layers, and this video artefact looks to me to be an archetypal example a poorly executed foreground layer mask, due to it's straight edge, it's emergence with the camera movement, the lack of 'partial' pixels (pixels around the edge of an object that share the colour of an object, and of the object behind it) and the fact that it extends well past the object that is being masked: it is entirely consistent with an animated mask edge.

There are further interesting elements of the Snizhne video that raise questions too – each time the Buk passes behind a post (a relatively simple foreground layer masking task as compared to foliage, due to the straight edges of a post), it's angle visibly changes, as if it is being refracted by the post. Interestingly, this 'bending' of the Buk launcher actually occurs in a fashion incompatible with it's change of position relative to the camera: The bend is to the right, whereas an object moving away from the camera along that motion path would, if anything, bend slightly to the left, but imperceptibly over time: the right hand side of the launcher would grow less visible as the distance from the camera increases, whereas a rightward angle turn as we see in the video would in theory show us more of the right hand side of the launcher. The effect is both incorrect in it's direction, and far too pronounced for the distance travelled behind a narrow post. I've tested this theory in 3d software using map data of the location and the upper edge surface angle shifts to the left as the object moves away from the camera. This can be seen at it's most pronounced at 0-1 seconds, and again at around 17 seconds. The straight edge of the Buk launcher chassis above the tracks is bent rightwards as it passes behind each of the posts. Foreground elements which momentarily hide the object (Buk launcher) provide a compositor a good opportunity to shift the angle or perspective of an object in compositing software, especially if working with a static image of the object question, in this case the Buk launcher. From experience, achieving accurate perspective shifts on a 2D layer object in calculated 3D space is difficult, and it appears to me that the compositor in this instance has wrongly interpreted the perspective, and shifted the Buk launcher's perspective in the wrong direction under the cover of the roadside poles. Interesting too, that the video stops just before the Buk would have to make a turn up the hill – this would be very tricky to do without a different angle image of the Buk, and despite the presence of a post to hide the turn, I do not think it would be convincing: it would require considerably more time, a different angle image of the launcher consistent with the other image, and the more profound angle shift of the bend and incline would risk additional errors. Of additional interest, is that the video itself doesn't appear to be OF the Buk

launcher, rather its presence appears to be incidental to the video footage: One would expect that if the intention was to film a Buk launcher driving along a road, the Buk would largely be located in the centre area of the video shot – people tend to keep the focus of a video towards the centre of the FOV. That it is not further suggests that the Buk launcher was added later to a video shot out of an apartment building window. This last point is very circumstantial, I'll grant.

This all casts doubt on the veracity of this video, would provide an explanation for the rush to take it down from Youtube on 17th July 2014 (it's creator may have noticed their mistake): Even a relatively easy video compositing job such as this would likely require several hours to create and render; one must find the assets – video of the location, image(s) of a Buk at the correct angle(s), 3d motion track the footage to place the required object in calculated virtual 3D space (using After Effects 3D camera tracker feature – FYI – I was able to to successfully perform a 3D camera tracker 'solve' on the footage, which is not always possible – After Effects needs to be able to compute 3D depth and is not always capable of ascertaining sufficient data from footage. This would be far and away the easiest way of placing and moving a Buk launcher into 3D space given the amount of camera movement), successfully composite the elements, create foreground layers and mask the foreground elements (the step which appears to have been bodged due to the camera movement), colour correct the elements to 'glue' the aesthetic, add lens blur/Depth of Field shifts, and brightness & contrast changes – necessary in this video – and finally render and upload the video – I anticipate this would take, in the absolute best case scenario, a couple of hours for a competent After Effects user, but much likely more, even given the serious masking error in it. I'd be very interested to know if we know it's exact upload time on 17th July.

I'm not claiming to have answers, and there remains a possibility I am wrong and that there is some other logical explanation for what has every appearance of a poor foreground masking job and incorrect perspective changes, but I believe these issues deserve further attention and refutation, lest this key piece of evidence is later challenged. I highly recommend you download the footage yourself and go through it frame by frame to see what I refer to.

Reply (<https://www.bellingcat.com/news/uk-and-europe/2017/10/20/new-mh17-photograph-geolocated-donetsk/?replytocom=157901#respond>)

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Annex 459

Bellingcat Investigation Team, Russian Colonel General Identified as Key in deathMH17
Figure, bell;ngcat (8 December 2017)

Russian Colonel General Identified as Key MH17 Figure

[bellingcat.com/news/uk-and-europe/2017/12/08/russian-colonel-general-delfin](https://www.bellingcat.com/news/uk-and-europe/2017/12/08/russian-colonel-general-delfin)

December 8, 2017

the home of online investigations

December 8, 2017

By [Bellingcat Investigation Team](#)

Translations: [Русский](#)

Русская версия этого расследования опубликована изданием [The Insider](#).

Along with [The Insider](#), McClatchy DC Bureau was an investigative partner. Read their [article here](#).

A joint investigation between [The Insider](#) and Bellingcat used open source research, investigative journalism, and forensic voice analysis to determine the identity of “Delfin,” a key figure sought by the Joint Investigation Team (JIT), the Dutch-led criminal investigation into the downing of Malaysian Airlines Flight 17 (MH17). The investigation has identified, to a high degree of certainty, Delfin as Colonel General Nikolai Fedorovich Tkachev, currently serving as the Chief Inspector of the Central Military District of the Russian Federation.

Photographs, videos, and audio files related to this investigation can be found [here](#).

On 28 September 2016, the Dutch-led Joint Investigation Team (JIT), the criminal investigation into the downing of Malaysian Airlines Flight 17 (MH17), [published a call for witnesses](#) regarding two key individuals in the downing of the airliner: “Delfin” and “Orion,” with the first name and patronymics of (respectively) Nikolai Fedorovich and Andrei Ivanovich. In their call for witnesses, the JIT also published a number of intercepted telephone calls between these two individuals, where they address each other by their first names and patronymic (a transcript of the calls can be found in [English](#) and [Russian](#)).

There are a number of details surrounding Delfin and Orion that are unclear, including their exact role in the downing of MH17, but the fact that the JIT has specifically requested information on them implies how they are key persons of interest in the criminal investigation of the tragedy. Now, over a year after the JIT’s call for witnesses, a long-running investigation that combines open source research, investigative journalism, and two independent forensic analyses has determined Delfin’s identity: Colonel General Nikolai Fedorovich Tkachev, currently serving as the Chief Inspector of the Central Military District of the Russian Federation.

The Insider spoke with Colonel General Tkachev immediately prior to publication of this report.

He denied having been in Ukraine in 2014 or even traveling outside Yekaterinburg since 2012.

Forensic Voice Analysis

After concluding that Colonel General Tkachev was by far the most likely candidate to be Delfin (see the subsequent sections of this investigation for a detailed breakdown of this determination), Bellingcat and The Insider sought samples of Tkachev's voice among open source materials. The only publicly available voice sample was a brief utterance during a 2017 ceremony at the Yekaterinburg Suvorov Military School, accessible via two videos.

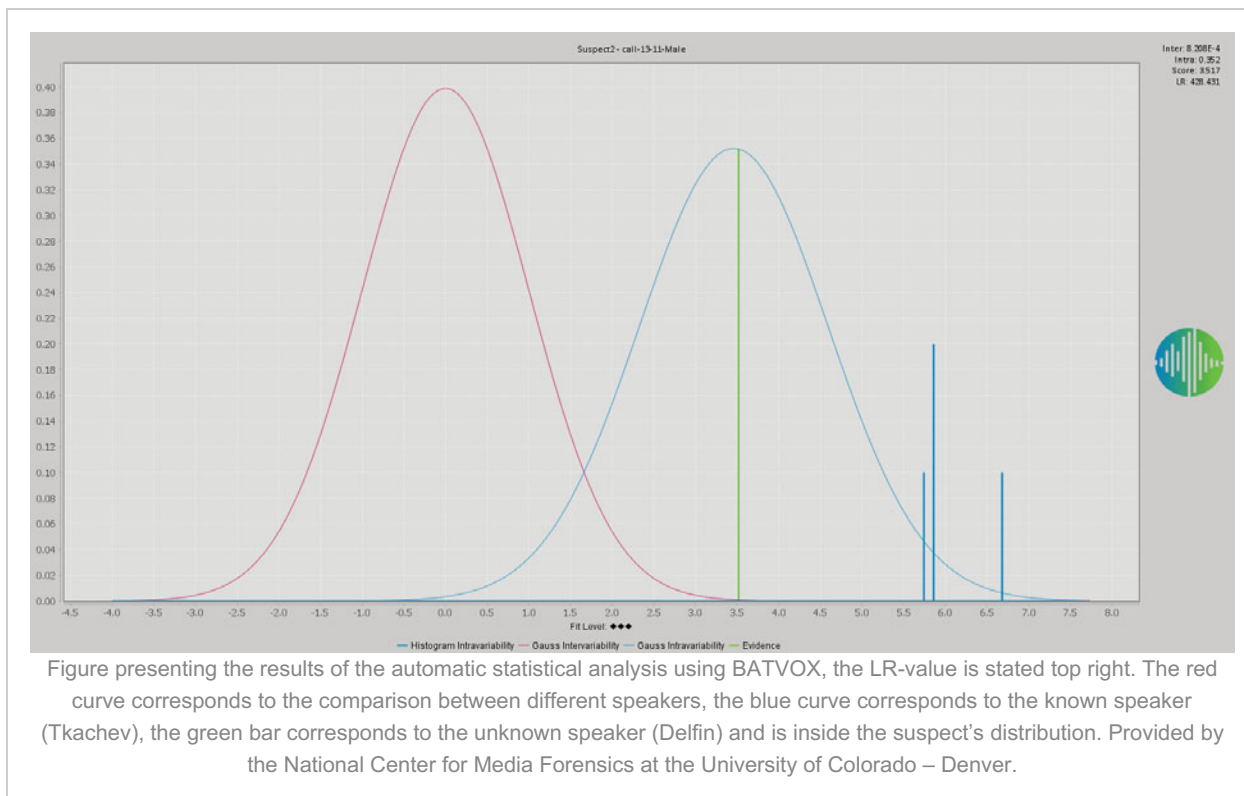
However, a far longer sample of Tkachev's voice was needed to cross-reference it against Delfin's voice in the JIT's call for witnesses. In order to obtain this audio, The Insider conducted two telephone conversations with Colonel General Tkachev under the cover of writing a story on the Yekaterinburg Suvorov Military School, where Tkachev serves as chairman of the newly established Board of Trustees for the school (archive). Below, you can listen to three audio tracks that have been cropped to isolate only the voice of Tkachev/Delfin: the JIT's call for witnesses, and the two calls between Tkachev and The Insider. Additionally, a video below comparing the two voices is embedded below. These files can also be accessed here.

Bellingcat and The Insider reached out to two organizations to perform forensic voice analysis: the **National Center for Media Forensics at the University of Colorado at Denver**(UC Denver) and the **Forensic Science Centre of Lithuania** (FSCL). The two organizations acted and reached their conclusions independently of one another.

UC Denver Analysis

The National Center for Media Forensics at the University of Colorado at Denver conducted a forensic speaker comparison based on the industry-standard Likelihood Ratio (LR) analysis. In their test, they used the software package BATVOX from AGNITIO/NUANCE. The analysis compared voice and phoneme characteristics of two sets of samples: Sample A included five conversation segments published by the JIT in September 2016, and Sample B included two conversations conducted by The Insider in the course of interviews with Colonel General Tkachev in October and November 2017.

The speaker comparison generated a Likelihood Ratio (LR) of 428.



The conclusion of the University of Colorado Denver speaker-comparison test was summarized as follows:

“It is 428 [times] more likely that the speaker Delfin is the same as the speaker in ‘call_13-11-46_OUT_8912256****.aac’ [note: filename of the first call between *The Insider* and Nikolai Tkachev. The final digits have been censored, as they are the telephone number of Col. General Tkachev], than the speaker Delfin is any other speaker. The analysis supports the hypothesis that the speaker Delfin is the same as the speaker in ‘call_13-11-46_OUT_8912256****.aac’.”

The value of 428 is a reference to the likelihood ratio of the two voices matching, providing what the European Network of Forensic Science Institutes would call “moderately strong support” for the hypothesis that Delfin and Tkachev are the same person behind the calls.

In real-life terms, it means that it is 428 times more likely that voice from Sample A (Delfin) matches the voice from Sample B (Tkachev), than that it matches any randomly selected person from the reference universe. In this case, the reference population is defined as “Russian-male speakers”, and is based on a representative group of 42 different speakers (against a minimum recommended sample of 30 different speakers per group).

Prior to conducting the comparison, the UC-Denver system was calibrated using samples from 100 different Russian speakers recorded in normal conversational style under different quality and noise conditions, all of them with a Signal to Noise Ratio (SNR) greater than 15 dB, and between 30 seconds and 2 minutes net speech. During such calibration, two measures were obtained: first, an inter-variability LR (i.e., the likelihood ratio that any two *random* voices among this reference group of 100 belong to the same speaker), and second, the intra-

variability LR (i.e. the computed likelihood ratio that any two voices *in fact belonging to the same speaker*, are the same). The inter-variability LR score was 78, while the intra-variability LR score was 181.

It is against the backdrop of this latter LR score (181), says Dr. Catalin Grigoras, director at National Center for Media Forensics, that the score of 428 should be assessed.

For reference, the voice segments from Sample B (Tkachev) were also tested against all male speakers in all other intercepted telephone conversations published by the Ukrainian Security Service (SBU) in the period of 2014 to 2016. In these reference tests, Tkachev's voice did not score a LR higher than 1 (i.e., no statistical relevance) with any sample except that of Delfin. As a reference test of what a definitive negative result would be in UC-Denver's analysis with BATVOX, a test was run comparing Tkachev's voice and the voice of The Insider's interviewer, producing a LR of 0.2043.

Dr. Grigoras stated that the LR from the BATVOX test must be evaluated in correlation with other evidence collected in the case, which may further increase its relevance. Based on a LR of 428, Dr. Grigoras exemplified this with the concept that if there were 428 potential randomly picked up suspects, a similar match would occur only once. If, however, the suspect population is restricted further, say to only Russian males aged over 50, holding a high military rank, and having the name and patronymic "Nikolai Fedorovich," the effective overall LR assessed by the investigators should rise sharply.

Dr. Grigoras added that it is always highly recommended to correlate one evidence (in this case, the automatic speaker recognition results) with some other forensic analysis (e.g. phonetics, fingerprint, DNA, etc.) or evidence (e.g. voice line ups, witnesses, GPS, etc.).

A write-up of the UC Denver analysis provided by the National Center for Media Forensics can be accessed [here](#). The full forensic report will be sent to the Dutch-led JIT.

FSCL Analysis

The Forensic Science Centre of Lithuania conducted analysis on each call individually to match them with the two calls conducted by The Insider. The analysis was conducted by, as described by the FSCL:

“The head [Dr. Bernardas Šalna] of the phonoscopic forensic examination department, with an expert qualification in ‘speech, voice and sound and their recording tools criminal investigation’ as well as 25 years of experience in forensic examination; as well as Žavinta Pikutienė and Elena Šalnaitė – department’s senior experts with higher education in physics, expertise in ‘speech, voice and sound and their recording tools criminal investigation’ with respectively 23 and 20 years of experience.”

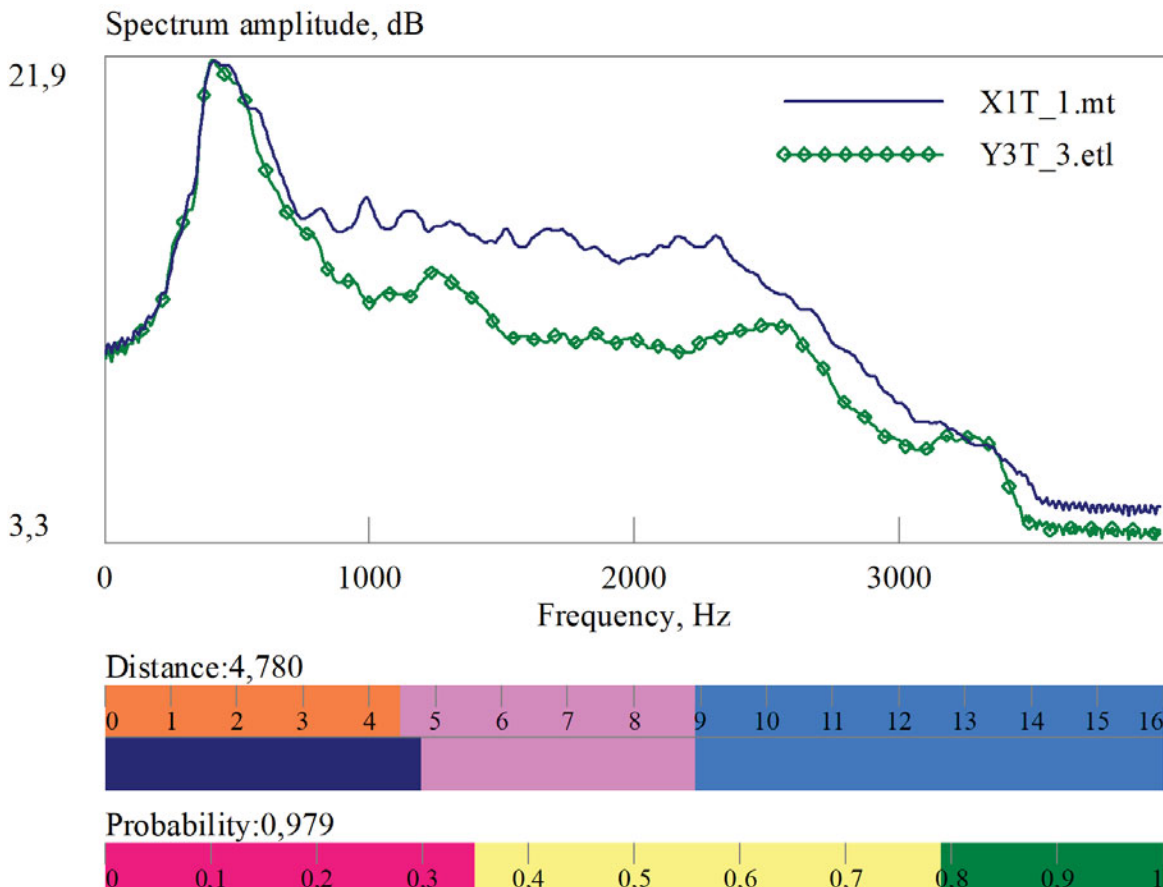
The team “compared the speech and voice peculiarities of persons X [note: *Delfin in the intercepted phone conversations*] and Y [note: *Col. General Tkachev in his two conversations with The Insider*].” The voice of Delfin was judged to be a **highly probable** match in the

second and fourth calls, and a **probable** match in the first and fifth calls. In the third call between Orion and an unidentified interlocutor, analysts at the FSCL determined it was **highly probable** that Tkachev was not the unidentified interlocutor, who was known to not be Delfin.

For the first call, from the beginning of the call for witnesses video until 0:48, the FSCL determined the following:

It is probable that in the recording **MH17 – Call for witnesses (v2).aac** from 0s to 48s, the participant of the recorded phone conversation (in the transcript Аудиофайл [audiofile] 1 marked as C) is the same person Y, whose voice and speech examples were provided in the recordings **call_11-25-36_OUT_8912256****.aac** [note: first call conducted between Tkachev and The Insider] and **call_13-11-46_OUT_8912256****.aac** [note: second call conducted between Tkachev and The Insider].

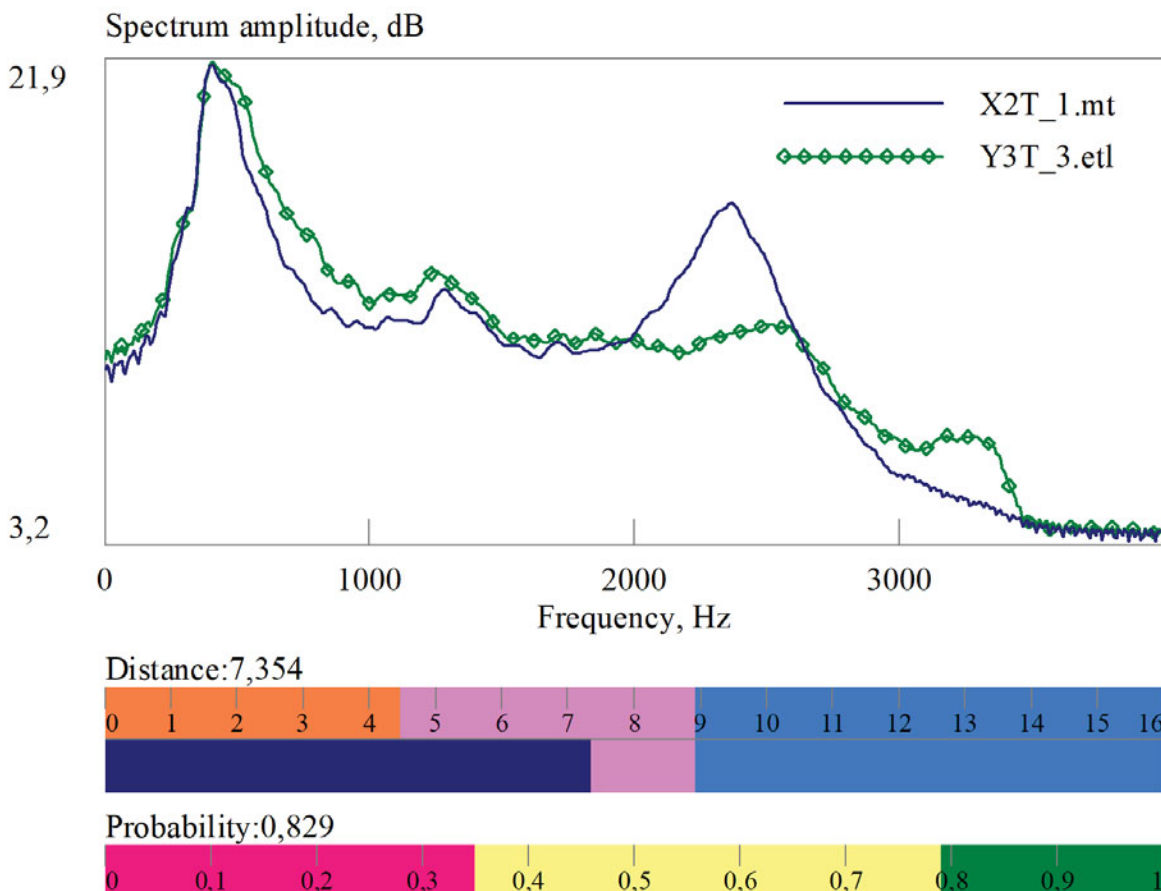
The following graphic was included in the FSCL’s report to demonstrate the spectrum of amplitude in the voices of Delfin (blue) in the first call and Tkachev (green).



For the second call, in the call for witnesses video from 0:48 to 2:04, the FSCL determined the following:

It is highly probable that in the recording **MH17 – Call for witnesses (v2).aac** between 48s and 2min 4s, the participant of the recorded phone conversation (in the transcript *Аудиофайл* [audiofile] 2 marked as B) is the same person Y, whose voice and speech examples were provided in the recordings **call_11-25-36_OUT_8912256****.aac** [note: first call conducted between *Tkachev and The Insider*] and **call_13-11-46_OUT_8912256****.aac** [note: second call conducted between *Tkachev and The Insider*].

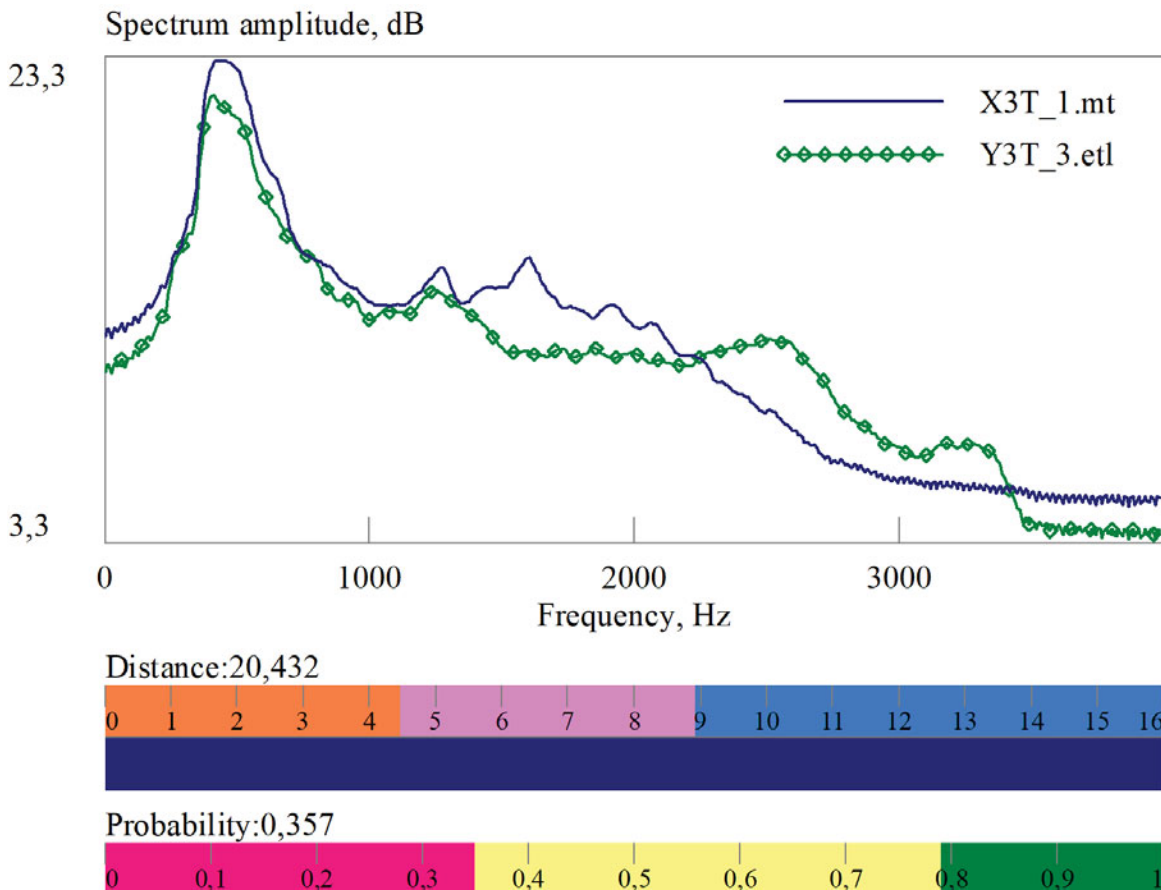
The following graphic was included in the FSCL’s report to demonstrate the spectrum of amplitude in the voices of Delfin (blue) in the second call and Tkachev (green).



For the third call, in the call for witnesses video from 2:04 to 3:06, the FSCL determined the following:

It is highly probable that in the recording **MH17 – Call for witnesses (v2).aac** between 2min 4s and 3 min 6s the participant of the recorded phone conversation (in the transcript *Аудиофайл* [audiofile] 3 marked as A) is **NOT** person Y, whose voice and speech examples were provided in the recordings **call_11-25-36_OUT_8912256****.aac** [note: first call conducted between *Tkachev and The Insider*] and **call_13-11-46_OUT_8912256****.aac** [note: second call conducted between *Tkachev and The Insider*].

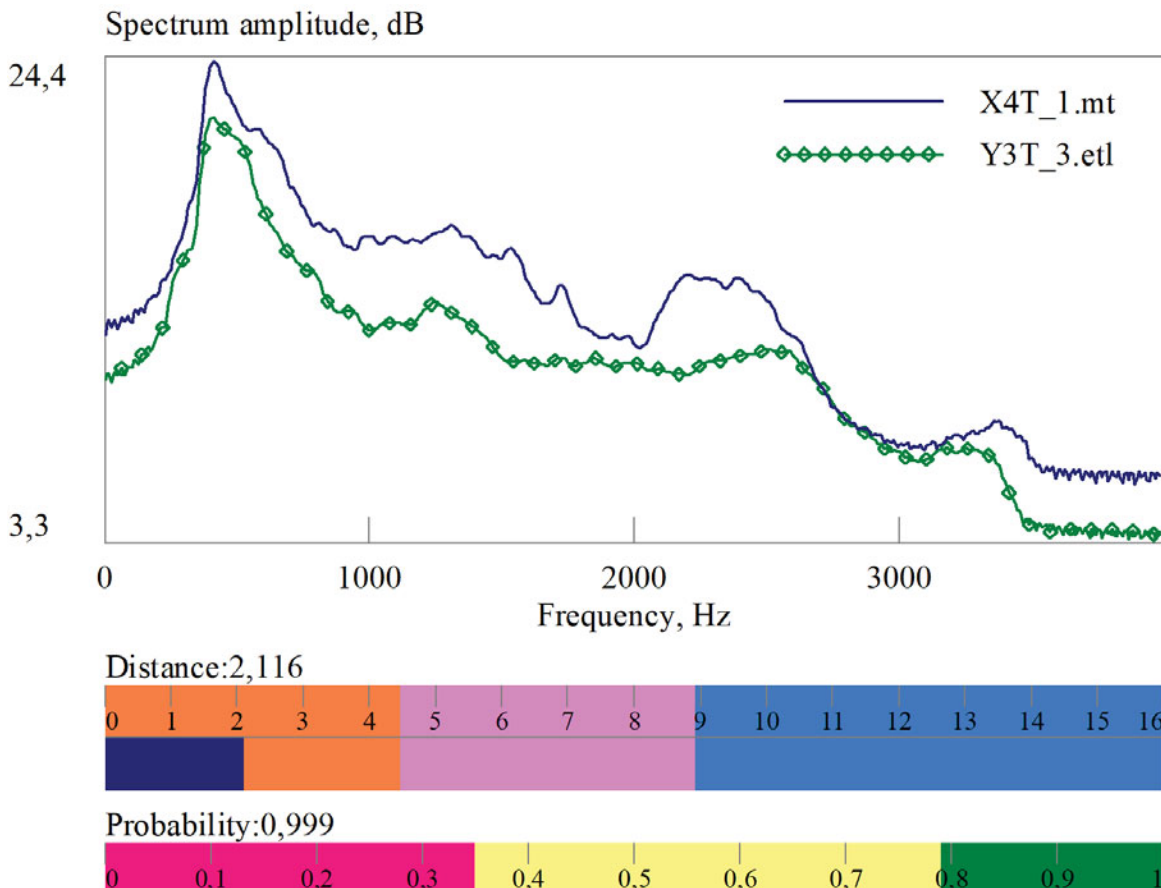
The following graphic was included in the FSCL’s report to demonstrate the spectrum of amplitude in the voices of the unidentified interlocutor of Orion (blue) in the second call and Tkachev (green).



For the fourth call, in the call for witnesses video from 3:06 to 3:46, the FSCL determined the following:

It is highly probable that in the recording MH17 – **Call for witnesses (v2).aac** between 3min 6s and 3 min 46s and in the recording **signal-2017-11-23-133239.wav** the participant of the recorded phone conversation (in the transcript Аудиофайл [audiofile] 4 marked as B) is the same person Y, whose voice and speech examples were provided in the recordings **call_11-25-36_OUT_8912256****.aac** [note: first call conducted between Tkachev and The Insider] and **call_13-11-46_OUT_8912256****.aac** [note: second call conducted between Tkachev and The Insider].

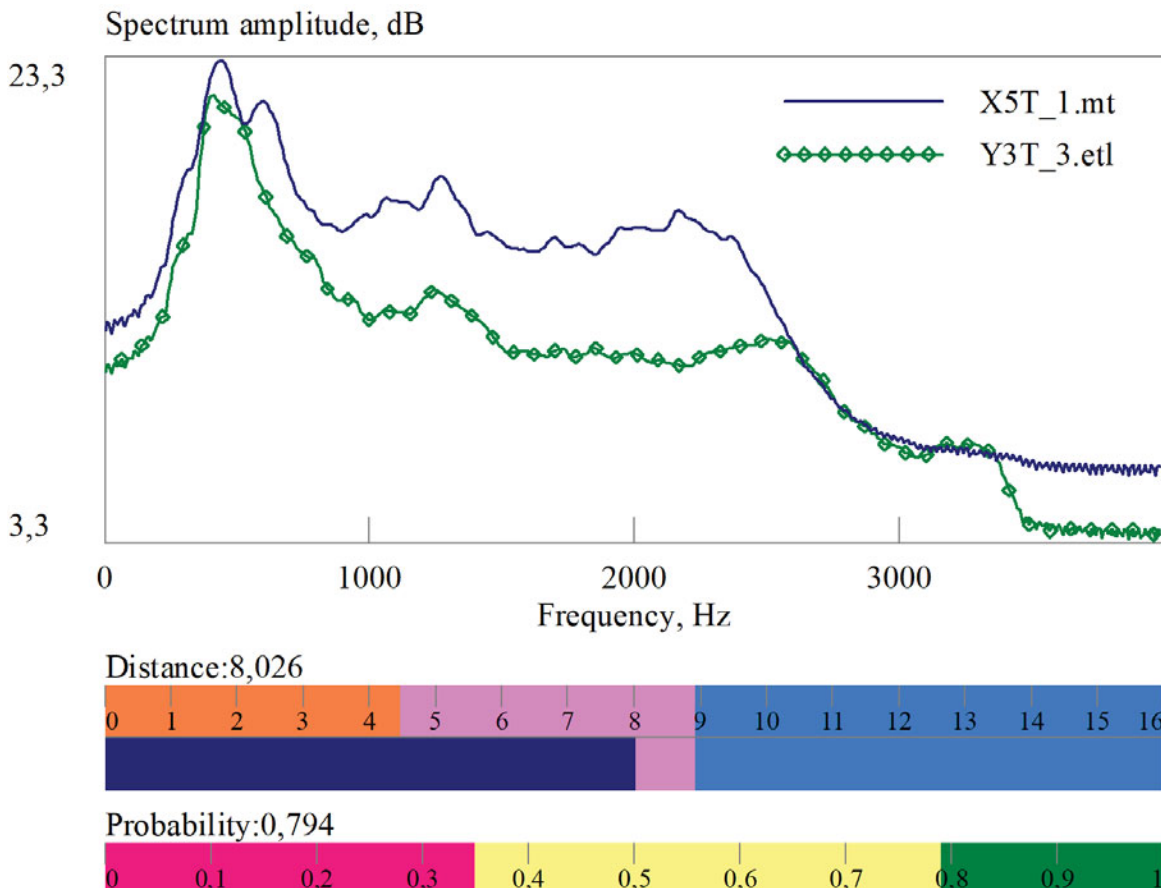
The following graphic was included in the FSCL’s report to demonstrate the spectrum of amplitude in the voices of Delfin (blue) in the fourth call and Tkachev (green).



For the fifth call, in the call for witnesses video from 3:46 to 5:57, the FSCL determined the following:

It is probable that in the recording **MH17 – Call for witnesses (v2).aac** between 3min 46s and 5min 5,57s, the participant of the recorded phone conversation (in the transcript Аудиофайл [audiofile] 5 marked as B) is the same person Y, whose voice and speech examples were provided in the recordings **call_11-25-36_OUT_8912256****.aac** [note: first call conducted between Tkachev and The Insider] and **call_13-11-46_OUT_8912256****.aac** [note: second call conducted between Tkachev and The Insider].

The following graphic was included in the FSCL’s report to demonstrate the spectrum of amplitude in the voices of Delfin (blue) in the fifth call and Tkachev (green).



The full report from the FSCL is expected to be published next week. The full forensic report will be sent to the Dutch-led JIT.

Delfin’s Role in Ukraine: The JIT’s Intercepted Calls

On the third anniversary of the downing of MH17, [Bellingcat called for a deeper, crowdsourced investigation](#) into establishing the identities of Delfin and Orion. Bellingcat and The Insider, followed a number of iterative steps in order to narrow down the potential candidates for the identity of Delfin before zeroing in on Colonel General Tkachev.

The starting point of this investigation was the JIT’s call for witnesses from 28 September 2016, where a man, addressed by the first name and patronymic Nikolai Fedorovich, was identified as using the call-sign “Delfin.” Notably, names used in communications between military commanders in the Donbass are often *noms de guerre*, and cannot be assumed to be authentic. For example, while he served as the military intelligence commander in Donetsk, Sergei Nikolaevich Dubinsky used interchangeably the call sign “Khmury” and the *nom de guerre* “Petrovsky,” despite “Petrovsky” not being part of his real name.

However, in the first of five intercepted calls published by the JIT, an atypical miscommunication occurs: Delfin’s interlocutor misaddresses him as “Fedor Nikolaevich,” reversing his name and patronymic. Seemingly instinctively and tersely, Delfin corrects him, suggesting it is likely his real first name and patronymic. Additionally, throughout each of the calls with Delfin, there is a consistent context of Delfin being the superior commanding officer,

as each interlocutor refers to Delfin in the courteous Russian plural (*vy*), while Delfin refers to them in the singular (*ty*) form. Below, the Russian transcript (provided by the JIT) shows this exchange between Delfin and Orion, along with an English translation [*note: The JIT's English translation lacks some key nuances, such as a mistranslation the Fedor Nikloaevich – Nikolai Fedorovich mix-up*].

Аудиофайл 1

С: Алло?

В: Да, добрый день!

С: Андрей Иванович?

В: Здравствуйте, Фёдор Николаевич!

С: Это - Николай Фёдорович. Приветствую тебя.

В: Николай Фёдорович, да... рад вас слышать.

С: Ну что? Как... как там дела? Ты готов ...[неразборчиво] встретить?

В: А вы, что, собираетесь сюда?

С (Nikolai Fedorovich, **Delfin**): Hello?

В (Andrei Ivanovich, **Orion**): Yes, good day!

С: Andrei Ivanovich?

В: Hello, Fedor Nikolaevich!

С: It's Nikolai Fedorovich. Greetings [using *ty*].

В: Nikolai Fedorovich, yes... good to hear you [*vy*].

С: Well, so? How are things there? Are you [*ty*] ready to meet [inaudible]?

В: And you [*vy*], are you getting ready to come here?

Throughout the other calls with Delfin, his outranking of his interlocutors can be heard in his tone and manner of speaking, along with the grammatical markers. Furthermore, we know that he was not familiar with the geographic circumstances around the current battles. At one point in a conversation, Orion has to correct a geographic assumption that Delfin made related to an airfield (likely the Luhansk Airport, which saw heavy fighting in mid-July 2014).

А передает трубку С:

С: Да, Николай Федорович.

В: Так, колонна подтвердилась. Это откуда колонна может быть?

С: Я не знаю, откуда она идет. С запада что ли?

В: Да че то с запада идет. С запада. Полтора километра, блядь, от аэродрома.

С: От аэродрома?

В: Да.

С: От аэродрома не может быть полтора километра, потому что... там населенный пункт, там позиции. Наверное... не знаю. Сейчас что-то будем пытаться. У нас связи до сих пор нет, к сожалению. Алло.

В: Ага. Да, да, да.

C (Andrei Ivanovich, **Orion**): Yes, Nikolai Fedorovich.

B (Nikolai Fedorovich, **Delfin**): So, the convoy has been confirmed. Where can the convoy come from?

C: I don't know where it's coming from. Maybe from the west?

B: Yes somehow from the west. From the west. A fucking kilometer and a half from the airport.

C: From the airport?

B: Yes.

C: It can't be a kilometer and a half from the airport because there's a village there, there are positions there. Probably... I don't know. We'll try something now. We didn't have a signal until now, unfortunately. Hello.

B: Aha. Yes, yes yes.

Delfin's Role in Ukraine: Separatist Digital Sources

A separate channel for gathering information about Delfin's involvement in the war in the Donbas was through a number of pro-Russian/separatist sources, most notably the blogger "Colonel Cassad," or Boris Rozhin, and an interview with Igor "Strelkov" Girkin, published in 2014-2015. These sources indicate that Delfin was a high-ranking Russian commander who was stationed, at least part-time, in Krasnodon for a brief period in the summer of 2014. Delfin was described as having been tasked with the re-organization and consolidation of the decentralized military units in the self-declared Luhansk People's Republic (LNR).

The city of Krasnodon is notable in the context of MH17 due to the fact that the Buk that downed the passenger plane reportedly crossed the Russian border near Krasnodon both on its way into and out of Ukraine, making the logistical and organization role in Krasnodon potentially key in the procurement and transport of the weapon.

In a [5 November 2014 interview \(archive\)](#) between infamous separatist commander Igor “Strelkov” Girkin and controversial Swedish-Russian commentator Israel Shamir, Girkin describes meeting Delfin and details his background and duties. At the end of the interview, Rozhin/Cassad added further notes about Delfin and his colleague “Elbrus.”

Interviewer: But there was a military leader known under the call sign ‘Delfin.’

Girkin: I met him in Krasnodon a month before my departure. He, of course, is a good military specialist, but all of his military experience is in commanding regular troops, where there’s discipline, unconditional submission. And here, there is partisan warfare, scattered units. He did all that he could, but he was not able to take full command. He was only able to coordinate between separate units.

[from Colonel Cassad] **P.S.** I can clarify that ‘Delfin’ and ‘Elbrus’ were involved in the coordination of separatist units in the LNR and partly in the DNR [*self-proclaimed Donetsk People’s Republic*]. One was in Krasnodon, the other in Luhansk. This coordinating headquarters started working openly after a Bezler [*note: separatist commander Igor ‘Bes’ Bezler*] visit to Moscow. As far as I know, ‘Delfin’ himself came with the rank of kombrig later ‘on vacation.’

Girkin himself “[retired](#)” from the DNR on 14 August 2014 and [left Ukraine for Russia soon after](#), meaning that Girkin met Delfin in mid-July, around the time when MH17 was downed.

The Insider contacted Igor Girkin in order to obtain more information on the situation in Krasnodon in summer 2014 and, in particular, Delfin and his role in eastern Ukraine in the summer of 2014.

When asked about the situation in Krasnodon, Girkin confirmed that there was a base in the city that was established in early July. This base was comprised of “*senior, retired ‘General staff’ experienced generals,*” including Delfin, who Girkin believes were likely independent from the directives of Vladislav Surkov, Russia’s envoy to the Minsk agreements who is widely regarded as a lead Kremlin overseer of the so-called “republics” of eastern Ukraine. When asked about Delfin in particular, Girkin said that he believes that he was “*some kind of a general*” who is no longer involved in the conflict in eastern Ukraine.

In a [3 January 2015 blog post \(archive\)](#), Colonel Cassad described the chaotic situation in the LNR during summer 2014, describing Delfin as a figure sent by Moscow to bring order to the situation in Luhansk.

“The shooting and murders in the LNR are an entirely logical reflection of the more anarchic nature of the local republic (in comparison with the DNR), where in the summer there were more than twenty different military formations in Luhansk that were not subordinate to anyone. Neither Bolotov [*note: now-deceased leader of the LNR from May to August 2014*] nor those who were sent from Moscow (this was in fact the reason why ‘Elbrus’ and ‘Delfin’ failed) were able to handle this. “

In a [24 May 2015 blog post \(archive\)](#), Colonel Cassad described Delfin as a “vacationer-curator” who came from Russia and whose task was to “mold out, from the amorphous separatist units, a more-or-less functioning army structure” in the LNR [*self-declared Luhansk People’s Republic*]. In a [14 September 2015 blog post \(archive\)](#), Colonel Cassad mentions that Delfin and Elbrus failed in their attempts to coordinate the disparate LNR military units through Krasnodon.

“Of course, there were failures along the way. An attempt to coordinate the actions of the separatist militias through Krasnodon failed when Delfin and Elbrus couldn’t handle the huge conglomeration of ragtag militias.”

Note that vacationer is a term used for Russian “volunteers” in the Donbas, often active Russian servicemen; curator is a term for Russian military and intelligence officials involved in shaping and providing guidance to the self-declared separatist republics in eastern Ukraine. Speaking with The Insider about Delfin, Rozhin gave further details about the functions of these “vacationers”:

“These high-ranking ‘vacationers’, that is to say officers who were officially on vacation, came in order to improve the organization [of the separatists]. ‘Delfin’ and ‘Elbrus’ were among them. ‘Delfin,’ as far as I remember, was of the rank of general and was involved in the operational management of separatist units from Krasnodon. At the time, it turned out badly there due to the fact that the army was at the time still not in its full form.

When they tried to break down the units into one grouping, they came up against opposition from the commanders themselves. Based on this experience, which weren’t the best, conclusions were drawn and when the separatists were reorganized to a brigade level, they began a very severe selection of staff structures. The most sensible ones were made the heads of the staff brigades and gradually the vertical [leadership structure] was set. It took a year, and another year.

But all of this was already after ‘Delfin,’ who actively led in the period of August-September, when the ‘Northern Wind’ was actively blowing [*note: the ‘Northern Wind’ refers to the period of massive Russian military intervention in the war in the Donbas*]. Somewhere around October-November, ‘Tambov’ had already appeared — the very same general who led the encirclement of Debaltseve. If you wish, you can now find this person. He now leads the Combined Arms Army in Russia.”

Here, Rozhin is speaking about Lieutenant General Sergey Kuzovlev, born in the Tambov Oblast, giving rise to his eponymous call sign. In the beginning of 2014, he was [awarded the rank of Major General](#). At the end of August 2015, the Ukrainian SBU [state security service] [stated](#) that Kuzovlev led the 1st Army Corps of Russian troops in the armed conflict in eastern Ukraine from the autumn of 2014 until the winter of 2015. In March 2017, he [was appointed](#) as commander of the newly formed 8th Guard Combined Arms Army of the Southern Military District. The fact that Lieutenant General Kuzovlev [was publicly named as a commander of armed forces in eastern Ukraine](#) and then continued to rise in the ranks of the Russian military was instrumental in Bellingcat and The Insider’s search for the identity of Delfin, as it implied it

was not only reasonable, but likely that a high-ranking general of the Russian Armed Forces would have had a direct role in the management of the so-called DNR and LNR in the summer of 2014.

The Most Likely Candidate Emerges

Combined with the open source references to Delfin from the Colonel Cassad and Igor “Strelkov” Girkin materials, we were able to make further conclusions about who Delfin was: a fairly high-ranking Russian military commander and likely a general, thus likely over 40-50 years old. Furthermore, he served a short stint with at least an occasional physical presence in Krasnodon, but was unsuccessful due to his experience being incompatible with the task. Though Girkin clearly had respect for Delfin’s expertise and experience, he found it lacking for the specific circumstances of the Donbas.

Our working hypothesis in the search for Delfin led us to a number of likely details that would narrow down the search:

- A Russian officer with the first name and patronymic Nikolai Fedorovich, who may be active, retired, or in reserve.
- Most likely holding a rank of general due to the seniority expressed to him in the telephone conversations and from Igor Girkin, who is otherwise generally derogatory towards other military commanders. With the reference that Delfin was a “kombbrig” (brigade commander), reflecting Cassad’s specific recollection of Delfin as a general. There are a number of Russian generals (including Lieutenant and Colonel Generals) who served roles very similar to that of Delfin in the Donbas, including Colonel General Istrakov and Lieutenant General Kuzovlev.
- A commander with significant high-level military experience that may have appeared to be applicable to the Donbas, but did not suit the circumstances of the disorganized state of Luhansk-based units in the summer of 2014.
- A man who clearly had the trust of high Russian military and/or political command, suitable for receiving a role of such a military restructuring mission in the notoriously disorganized self-declared Luhansk People’s Republic.

Among the open source information accessible online, there is only one living Russian army general with the first name Nikolai and the patronymic Fedorovich: Colonel General Nikolai Fedorovich Tkachev.

Tkachev’s Timeline: 1980-2010

Tkachev’s official biography and his Russian Wikipedia page (the veracity of which he has confirmed in his interview to The Insider, with small corrections) describes a long military career starting in 1980. During the Soviet period, Tkachev rose through the ranks in commanding positions in East Germany, western Ukraine, and the Soviet Far East. As of 1992, he served as infantry division commander in the Leningrad military district.

Per his official biography, Tkachev took part in both the first (1994-1996) and second (1999-2000) Chechen wars. Limited public available links Tkachev to the [131st Separate Motor Rifle Brigade](#), the Russian unit that spearheaded the New Year's Eve assault on Grozny during which it lost 215 members, including 24 officers. A photo dated 1998 on the Russian Wikipedia's entry for the 131st Brigade shows Tkachev alongside other commanders at the 80th anniversary of the brigade's founding in Maikop.



Tkachev standing to immediate left of Anatoly Dorofeev (middle, white hat), among commanders. [Source: Wikipedia / ALDOR46](#)

Public corporate records show Gen. Tkachev lists as “chief executive officer” of military unit 20650 founded on 15 September 1995 and liquidated on 8 September 2014. Unit 20650, headquartered in Krasnodar, was indeed part of the 131st Brigade, as can be seen from [casualties records](#). While military units in Russia are rarely incorporated, military unit 20650 was party to [a legal dispute](#) over land use, in which its entitlement to perpetual use of land was challenged, and it is plausible that it was incorporated to facilitate the legal position of the Ministry of Defense.

As of 2000, Tkachev served as deputy commander of the Urals District armed forces, and in 2005 he became deputy commander and Chief of Military Staff of the Siberian Military Unit. From 2006 to 2008, Tkachev was chief commander of the Vostok (East) Regional Arms Command Center, an experimental supra-regional command structure that was discontinued

after 2008.



Colonel General Tkachev (far left) with Russian President Vladimir Putin in 2007. [Source: Kremlin.ru](http://www.kremlin.ru)

During his term at Vostok, Tkachev took part in the 2007 elections for local parliament in the Republic of Buryatia, on a ticket of the ruling United Party.

Tkachev's Timeline: 2010-2013

The Kremlin press service announced in 2010 ([archive](#)) that Colonel General Nikolai Fedorovich Tkachev was officially dismissed from military service, accompanied by decree №1532 ([archive](#)) signed by then-president Dmitry Medvedev on 10 December 2010. However, Tkachev did not truly retire, as he continued to fulfill military duties elsewhere. In 2011, Colonel General Tkachev became Russia's Head Military Advisor in Syria until the advising apparatus was dissolved in 2012. The Russian Wikipedia page on Russian military advisers to Syria lists Tkachev's service starting in 2010, but Tkachev clarified in a call with The Insider that he actually served from March 2011 to August 2012, consequently also confirming his role in Syria.

The well-known Russian military blogger el-murid (Anatoly Nesmeyan) wrote on Tkachev in a 2015 post ([archive](#)), saying that "The last leader [of the Russian military advising apparatus in Syria] was Colonel General Tkachev." In a 7 August 2012 video from the anti-Assad group "Damascus area military command," a photograph appears at 1:19 of Colonel General Tkachev alongside Russian Major General Vladimir Kuzheev and assassinated Syrian Minister of Defense Dawoud Rajha. In the video, anti-Assad rebels claim to have killed Major General Kuzheev, showing his identification card, but with Kuzheev giving an interview shortly after his "death," it became clear that this claim was false. Like Tkachev, Kuzheev was dismissed from military service in 2010 before working in Syria.



Russian Colonel General Tkachev (left), former Syrian Minister of Defense Dawoud Rajha (middle), Russian Major General Kuzheev (right). Screenshot from [video](#) uploaded by anti-Assad group "Damascus area military command"

Colonel General Tkachev's service in Syria ended soon after the assassination of the Syrian Defense Minister in August 2012. In a conversation with The Insider, Tkachev said that he became the Chief Inspector of the Central Military District after arriving back in Russia from Syria in 2012. There is no open source information regarding Tkachev's activities throughout 2013.

Tkachev's Timeline: 2014

There are no media appearances or official statements related to Tkachev from his return from Syria until 9 May 2014, when he was visible in [two videos](#) showing the Yekaterinburg Victory Day parade.

Left/Top-Right: Tkachev at the Yekaterinburg Victory Day Parade in 2014; Bottom-Right: [Tkachev in 2016](#)

Afterward, there are no sightings of Tkachev in Russia until 23 August 2014 ([archive](#)), where the Colonel General was photographed at a meeting for the Ataman of the Orenburg Cossack Host Society. In the description of the meeting, Tkachev is named as the “Chief Military Inspector of the Central Military District.” This marks the first time that Tkachev has been publicly mentioned in this role, though he assumed the position in 2012 after his return from Syria.



Tkachev attended another meeting with the Cossack Host Society on 20 September 2014 ([archive](#)), where he was in a more formal military uniform. He made an additional visit to the organization on 18 December 2014 ([archive](#)) for a cadet reception.



There are no public appearances by Tkachev from Victory Day in 2014 until his reappearance in August and September 2014, where he was fairly frequently noted at gatherings in the Central Military District. During this gap, Tkachev, using the call sign Delfin, attempted to organize and command military formations in the LNR, working at least part-time in Krasnodon.

Tkachev's Timeline: 2015-2017

From 2015 until the current day, Tkachev has made frequent appearances in regional media. For example, on 21 June 2015 ([archive](#)), he appeared at a graduation ceremony at the Yekaterinburg Suvorov Military School, and later gave a speech at the same school on 6 May 2016 ([archive](#)). On 24 November 2016 ([archive](#)), a report was published showing Tkachev in a regular military uniform and his name and rank of Colonel General displayed. On 25 June 2017 ([archive](#)), Tkachev held a speech for graduates at the Yekaterinburg Suvorov Military School, with a description and series of photographs of the events published in the Russian Ministry of Defense's website. No public recordings of his speeches could be found during the investigation.



Tkachev in Yekaterinburg in 2016, with enhancements showing his name and the colonel general insignia (three stars).



Tkachev giving a speech to graduates at a Yekaterinburg military school in 2017.

Clearly, Colonel General Nikolai Tkachev is still active in his service to Russia and its military, and has been since he served as a commander and organizer of “LNR” separatist forces in the summer of 2014.

Concluding Remarks

Colonel General Nikolai Fedorovich Tkachev, “Delfin”, is the senior-most Russian officer who has been linked to the downing of MH17. Unlike Sergey Dubinsky and Igor Girkin, Tkachev was, and still is, an active functionary in the Russian military through his ongoing role as Chief Inspector of the Central Military District. His exact role and importance for the MH17 case has not been made public so far by the JIT.

Available open source information suggests that person behind the pseudonym “Delfin” is a former or current Russian army officer of higher rank, likely a general. Furthermore, his words indicate that his name is Nikolai Fedorovich. Only Colonel General Nikolai Fedorovich Tkachev matched these characteristics; however, before conducting forensic audio analysis, there was no direct evidence showing Tkachev’s direct link to the LNR and the war in the Donbas. The voice sample collected by The Insider was analyzed to firmly establish the link between Delfin and Tkachev. As shown by multiple reports, his collaboration with the Luhansk People’s Republic took place during the period when MH17 was downed.

Per his own words in the recent telephone conversation with the Insider, Tkachev served the Russian Armed Forces on 17 July 2014 as the Chief Inspector of Russia’s Central Military District, and continued these duties immediately after the downing and his permanent return to Russia.

If you have any information about Delfin or Orion, please contact the Dutch-led Joint Investigation Team.

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The Bellingcat Investigation Team is an award winning group of volunteers and full time investigators who make up the core of the Bellingcat's investigative efforts.



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Annex 460

European Convention on Mutual Assistance in Criminal Matters (12 June 1962)



European Convention on Mutual Assistance in Criminal Matters

Strasbourg, 20.IV.1959

Preamble

The governments signatory hereto, being members of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Believing that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the attainment of this aim;

Considering that such mutual assistance is related to the question of extradition, which has already formed the subject of a Convention signed on 13th December 1957,

Have agreed as follows:

Chapter I – General provisions

Article 1

- 1 The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.
- 2 This Convention does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law.

Article 2

Assistance may be refused:

- a if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence;
- b if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country.

Chapter II – Letters rogatory

Article 3

- 1 The requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents.
- 2 If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request, and the requested Party shall comply with the request if the law of its country does not prohibit it.
- 3 The requested Party may transmit certified copies or certified photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request.

Article 4

On the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.

Article 5

- 1 Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of the following conditions:
 - a that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party;
 - b that the offence motivating the letters rogatory is an extraditable offence in the requested country;
 - c that execution of the letters rogatory is consistent with the law of the requested Party.
- 2 Where a Contracting Party makes a declaration in accordance with paragraph 1 of this article, any other Party may apply reciprocity.

Article 6

- 1 The requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.
- 2 Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting Party to the requested Party as soon as possible unless the latter Party waives the return thereof.

Chapter III – Service of writs and records of judicial verdicts – Appearance of witnesses, experts and prosecuted persons

Article 7

- 1 The requested Party shall effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting Party.

Service may be effected by simple transmission of the writ or record to the person to be served. If the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law.

- 2 Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Party that service has been effected and stating the form and date of such service. One or other of these documents shall be sent immediately to the requesting Party. The requested Party shall, if the requesting Party so requests, state whether service has been effected in accordance with the law of the requested Party. If service cannot be effected, the reasons shall be communicated immediately by the requested Party to the requesting Party.
- 3 Any Contracting Party may, by a declaration addressed to the Secretary General of the Council of Europe, when signing this Convention or depositing its instrument of ratification or accession, request that service of a summons on an accused person who is in its territory be transmitted to its authorities by a certain time before the date set for appearance. This time shall be specified in the aforesaid declaration and shall not exceed 50 days.

This time shall be taken into account when the date of appearance is being fixed and when the summons is being transmitted.

Article 8

A witness or expert who has failed to answer a summons to appear, service of which has been requested, shall not, even if the summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently he voluntarily enters the territory of the requesting Party and is there again duly summoned.

Article 9

The allowances, including subsistence, to be paid and the travelling expenses to be refunded to a witness or expert by the requesting Party shall be calculated as from his place of residence and shall be at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place.

Article 10

- 1 If the requesting Party considers the personal appearance of a witness or expert before its judicial authorities especially necessary, it shall so mention in its request for service of the summons and the requested Party shall invite the witness or expert to appear.

The requested Party shall inform the requesting Party of the reply of the witness or expert.

- 2 In the case provided for under paragraph 1 of this article the request or the summons shall indicate the approximate allowances payable and the travelling and subsistence expenses refundable.

- 3 If a specific request is made, the requested Party may grant the witness or expert an advance. The amount of the advance shall be endorsed on the summons and shall be refunded by the requesting Party.

Article 11

- 1 A person in custody whose personal appearance as a witness or for purposes of confrontation is applied for by the requesting Party shall be temporarily transferred to the territory where the hearing is intended to take place, provided that he shall be sent back within the period stipulated by the requested Party and subject to the provisions of Article 12 in so far as these are applicable.

Transfer may be refused:

- a if the person in custody does not consent;
 - b if his presence is necessary at criminal proceedings pending in the territory of the requested Party;
 - c if transfer is liable to prolong his detention, or
 - d if there are other overriding grounds for not transferring him to the territory of the requesting Party.
- 2 Subject to the provisions of Article 2, in a case coming within the immediately preceding paragraph, transit of the person in custody through the territory of a third State, Party to this Convention, shall be granted on application, accompanied by all necessary documents, addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the Party through whose territory transit is requested.

A Contracting Party may refuse to grant transit to its own nationals.

- 3 The transferred person shall remain in custody in the territory of the requesting Party and, where applicable, in the territory of the Party through which transit is requested, unless the Party from whom transfer is requested applies for his release.

Article 12

- 1 A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.
- 2 A person, whatever his nationality, summoned before the judicial authorities of the requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts or convictions anterior to his departure from the territory of the requested Party and not specified in the summons.
- 3 The immunity provided for in this article shall cease when the witness or expert or prosecuted person, having had for a period of fifteen consecutive days from the date when his presence is no longer required by the judicial authorities an opportunity of leaving, has nevertheless remained in the territory, or having left it, has returned.

Chapter IV – Judicial records

Article 13

- 1 A requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case.
- 2 In any case other than that provided for in paragraph 1 of this article the request shall be complied with in accordance with the conditions provided for by the law, regulations or practice of the requested Party.

Chapter V – Procedure

Article 14

- 1 Requests for mutual assistance shall indicate as follows:
 - a the authority making the request,
 - b the object of and the reason for the request,
 - c where possible, the identity and the nationality of the person concerned, and
 - d where necessary, the name and address of the person to be served.
- 2 Letters rogatory referred to in Articles 3, 4 and 5 shall, in addition, state the offence and contain a summary of the facts.

Article 15

- 1 Letters rogatory referred to in Articles 3, 4 and 5 as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.
- 2 In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.
- 3 Requests provided for in paragraph 1 of Article 13 may be addressed directly by the judicial authorities concerned to the appropriate authorities of the requested Party, and the replies may be returned directly by those authorities. Requests provided for in paragraph 2 of Article 13 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party.
- 4 Requests for mutual assistance, other than those provided for in paragraphs 1 and 3 of this article and, in particular, requests for investigation preliminary to prosecution, may be communicated directly between the judicial authorities.
- 5 In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organisation (Interpol).

- 6 A Contracting Party may, when signing this Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, give notice that some or all requests for assistance shall be sent to it through channels other than those provided for in this article, or require that, in a case provided for in paragraph 2 of this article, a copy of the letters rogatory shall be transmitted at the same time to its Ministry of Justice.
- 7 The provisions of this article are without prejudice to those of bilateral agreements or arrangements in force between Contracting Parties which provide for the direct transmission of requests for assistance between their respective authorities.

Article 16

- 1 Subject to paragraph 2 of this article, translations of requests and annexed documents shall not be required.
- 2 Each Contracting Party may, when signing or depositing its instrument of ratification or accession, by means of a declaration addressed to the Secretary General of the Council of Europe, reserve the right to stipulate that requests and annexed documents shall be addressed to it accompanied by a translation into its own language or into either of the official languages of the Council of Europe or into one of the latter languages, specified by it. The other Contracting Parties may apply reciprocity.
- 3 This article is without prejudice to the provisions concerning the translation of requests or annexed documents contained in the agreements or arrangements in force or to be made between two or more Contracting Parties.

Article 17

Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication.

Article 18

Where the authority which receives a request for mutual assistance has no jurisdiction to comply therewith, it shall, *ex officio*, transmit the request to the competent authority of its country and shall so inform the requesting Party through the direct channels, if the request has been addressed through such channels.

Article 19

Reasons shall be given for any refusal of mutual assistance.

Article 20

Subject to the provisions of Article 10, paragraph 3, execution of requests for mutual assistance shall not entail refunding of expenses except those incurred by the attendance of experts in the territory of the requested Party or the transfer of a person in custody carried out under Article 11.

Chapter VI – Laying of information in connection with proceedings

Article 21

- 1 Information laid by one Contracting Party with a view to proceedings in the courts of another Party shall be transmitted between the Ministries of Justice concerned unless a Contracting Party avails itself of the option provided for in paragraph 6 of Article 15.
- 2 The requested Party shall notify the requesting Party of any action taken on such information and shall forward a copy of the record of any verdict pronounced.
- 3 The provisions of Article 16 shall apply to information laid under paragraph 1 of this article.

Chapter VII – Exchange of information from judicial records

Article 22

Each Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year. Where the person concerned is considered a national of two or more other Contracting Parties, the information shall be given to each of these Parties, unless the person is a national of the Party in the territory of which he was convicted.

Chapter VIII – Final provisions

Article 23

- 1 Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.
- 2 Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
- 3 A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

Article 24

A Contracting Party may, when signing the Convention or depositing its instrument of ratification or accession, by a declaration addressed to the Secretary General of the Council of Europe, define what authorities it will, for the purpose of the Convention, deem judicial authorities.

Article 25

- 1 This Convention shall apply to the metropolitan territories of the Contracting Parties.
- 2 In respect of France, it shall also apply to Algeria and to the overseas Departments, and, in respect of Italy, it shall also apply to the territory of Somaliland under Italian administration.
- 3 The Federal Republic of Germany may extend the application of this Convention to the Land of Berlin by notice addressed to the Secretary General of the Council of Europe.

- 4 In respect of the Kingdom of the Netherlands, the Convention shall apply to its European territory. The Netherlands may extend the application of this Convention to the Netherlands Antilles, Surinam and Netherlands New Guinea by notice addressed to the Secretary General of the Council of Europe.
- 5 By direct arrangement between two or more Contracting Parties and subject to the conditions laid down in the arrangement, the application of this Convention may be extended to any territory, other than the territories mentioned in paragraphs 1, 2, 3 and 4 of this article, of one of these Parties, for the international relations of which any such Party is responsible.

Article 26

- 1 Subject to the provisions of Article 15, paragraph 7, and Article 16, paragraph 3, this Convention shall, in respect of those countries to which it applies, supersede the provisions of any treaties, conventions or bilateral agreements governing mutual assistance in criminal matters between any two Contracting Parties.
- 2 This Convention shall not affect obligations incurred under the terms of any other bilateral or multilateral international convention which contains or may contain clauses governing specific aspects of mutual assistance in a given field.
- 3 The Contracting Parties may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.
- 4 Where, as between two or more Contracting Parties, mutual assistance in criminal matters is practised on the basis of uniform legislation or of a special system providing for the reciprocal application in their respective territories of measures of mutual assistance, these Parties shall, notwithstanding the provisions of this Convention, be free to regulate their mutual relations in this field exclusively in accordance with such legislation or system. Contracting Parties which, in accordance with this paragraph, exclude as between themselves the application of this Convention shall notify the Secretary General of the Council of Europe accordingly.

Article 27

- 1 This Convention shall be open to signature by the members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary General of the Council.
- 2 The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.
- 3 As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of the deposit of its instrument of ratification.

Article 28

- 1 The Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, provided that the resolution containing such invitation obtains the unanimous agreement of the members of the Council who have ratified the Convention.
- 2 Accession shall be by deposit with the Secretary General of the Council of an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 29

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary General of the Council received such notification.

Article 30

The Secretary General of the Council of Europe shall notify the members of the Council and the government of any State which has acceded to this Convention of:

- a the names of the signatories and the deposit of any instrument of ratification or accession;
- b the date of entry into force of this Convention;
- c any notification received in accordance with the provisions of Article 5 – paragraph 1, Article 7 – paragraph 3, Article 15 – paragraph 6, Article 16 – paragraph 2, Article 24, Article 25 – paragraphs 3 and 4, Article 26 – paragraph 4;
- d any reservation made in accordance with Article 23, paragraph 1;
- e the withdrawal of any reservation in accordance with Article 23, paragraph 2;
- f any notification of denunciation received in accordance with the provisions of Article 29 and the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 20th day of April 1959, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory and acceding governments.

Annex 461

Minsk Convention on Legal Aid and Legal Relations on Civil, Family and Criminal Matters of
1993 (22 January 1993)

**CONVENTION ON LEGAL AID AND LEGAL RELATIONS IN CIVIL,
FAMILY AND CRIMINAL CASES**

Adopted in Minsk on 22 January 1993

Entry into force: 19 May 1994, in accordance with Article 83

Members States of the Commonwealth of Independent States, participants of the present Convention, named hereafter Contracting Parties,

Being guided by the desire to provide to citizens of the Contracting Parties and persons residing on their territories legal defence of personal and property rights similar to those of the native inhabitants of all Contracting Parties,

Attaching great importance to the development of cooperation in the sphere of granting legal assistance in civil, family and criminal cases by judicial organs,

Have agreed on the following:

PART I

GENERAL PROVISIONS

SECTION I

LEGAL DEFENSE

Article 1

Granting legal defence

1. Citizens of each Contracting Party and persons residing on its territory, have the right to use the same legal defence of their personal and property rights on territories of all Contracting Parties as native citizens.
2. Citizens of each Contracting Party and persons residing on its territory, have the right to turn freely and without obstacles to courts, prosecutor's offices and other agencies, whose competence covers civil, family and criminal cases (judicial organs, in what follows), they may make speeches there, hand petitions, bring suits and fulfil other procedural activities on the same conditions as native citizens.
3. The clauses of this Convention are also valid for juridical persons created corresponding to the laws of the Contracting Parties.

Article 2

Exemption from fees and expenses

1. Citizens of each Contracting Party and persons residing on its territory are exempted from paying fees, court and notary expenses and have the right for free juridical aid along with the native citizens.
2. Privileges stipulated by item 1 of this Article are extended to all procedural actions during a case, including taking the resolution.

Article 3

Presenting documents on family and property states

1. The privileges, stipulated in Article 2, are granted on the basis of documents on family and property states of the person handing the petition. These documents are issued by a competent organ of the Contracting Party, on whose territory the claimant resides permanently or temporarily.

2. If the claimant is not a permanent or temporary resident of the Contracting Party, then it is sufficient to present the documents issued by the diplomatic representation or consular office of the claimant's native country.
3. The establishment taking the decision of granting privileges may request some additional data or explanations from the agency that issued the documents.

SECTION II

LEGAL AID

Article 4

Granting legal aid

1. Judicial organs of the Contracting Parties grant legal aid in civil, family and criminal cases according to this Convention.
2. Judicial organs of the Contracting Parties grant legal aid to other organizations in the cases indicated in item 1 of the present article.

Article 5

Communication procedure

While fulfilling the norms of the present Convention the competent judicial organs of the Contracting Parties communicate with each other through their central organs, unless this Convention presupposes another way of communication.

Article 6

Range of legal aid

The Contracting Parties grant legal aid to each other by way of carrying out procedural and other actions envisaged by laws of the Contracting Party, in particular: compiling and sending documents, conducting searches, requisition, sending and delivery of exhibits, conducting expertise and interrogations of the parties, accused, witnesses, experts, as well as starting criminal persecution, search of the wanted persons and their delivery, recognition and fulfilment of court decisions in civil cases, verdicts on civil claims, writs of execution, and by way of handing documents.

Article 7

The content and form of commission on granting legal aid

1. The commission on granting legal aid must contain:
 - (a) Name of the organization representing the object of the commission;
 - (b) Name of the organization ordering the commission;
 - (c) Name of the case, in which the legal aid is requested;
 - (d) Names and surnames of the parties, witnesses, suspected, accused, convicted and victims, their addresses, citizenship, occupation, in criminal cases also the place and date of birth, names and surnames of their parents (of available); for juridical persons their name and location;
 - (e) If the persons mentioned in sub-item (d) have representatives, then names, surnames and addresses of the latter;
 - (f) Essence of the commission and other data needed for its fulfilment;
 - (g) In criminal cases also the description and qualification of the committed action and the data on the damage size, if any damage was inflicted by the action.

2. The commission on the delivery of the document must also contain the exact address of the recipient and the name of the document.
3. The commission must be signed and certified by the official seal of the organization ordering the commission.

Article 8

Fulfilment procedure

1. Fulfilling the commission on rendering legal aid, the organization representing the object of the commission applies laws of its country. On the request of the ordering organization the fulfilling organization may also apply the procedural norms of the ordering Contracting Party, if the norms do not contradict laws of the fulfilling Contracting Party.
2. If the requested organization is incompetent to fulfil the order, it must pass the request to a competent organization and to inform the requesting organization about this.
3. On the request of the ordering organization the fulfilling organization must inform on the due time the requesting organization and interested sides about the time and the place of the fulfilment of the order, thus enabling them to be present at the fulfilment process, according to laws of the fulfilling Contracting Party.
4. In cases, where the exact address of the person mentioned in the commission is unknown, the requested organization takes the appropriate measures for finding the address, according to laws of the Contracting Party, on whose territory the requested organization is located.
5. After the fulfilment of the commission the requested organization returns the documents to the requesting organization; in case, where the legal aid could not be rendered, the requested organization must inform in due time about the obstacles that impede the fulfilment of the commission and return the documents to the requesting organization.

Article 9

Summons of witnesses, victims, civil plaintiffs, civil defendants, their representatives and experts

1. Witnesses, victims, civil plaintiffs, civil defendants, their representatives and experts, who are summoned by the requested organization to a judicial organ of the Contracting Party ordering the commission, may not be, independent of their citizenship, brought to civil or criminal responsibility, detained or punished for an act committed before crossing the state border. These persons may not be either brought to responsibility, detained or punished in connection with their evidence or conclusions in the capacity of experts concerning the criminal case, which is the object of the court examination.
2. Persons listed in item 1 of this Article lose the guarantee given by this item, if they do not leave the territory of the Contracting Party ordering the commission (having the opportunity to do this) before expiration of 15 days since the day, when the judicial organization interrogating him/her informs that it completed the proceedings.
3. The requesting Contracting Party must pay the witnesses, experts, victims and his legal representatives the expenses of transportation to and sojourn in the requesting country, as well as the compensation for the pay that could be earned during the time of absence from one's job; the expert also has the right to be paid for the expertise. The summon must contain the information which payments must obtain the summoned persons; the judicial organ of the requesting party must, having received their petition, pay the advance for covering the corresponding expenses.
4. A summon of a witness or an expert residing on the territory of one of the Contracting Parties to a judicial organ of the requesting party must not contain any threats of coercion in the case of non-appearance.

Article 10

Order on handing documents

1. The requested judicial organ hands documents according to the procedure valid in its state, if the documents are written in its native language or in Russian, or are appended with the authorized translation to these languages. Otherwise, it hands the documents to the receiver only if the latter agrees to accept them.
2. If it is impossible to hand the documents to the address mentioned in the order, the requested judicial organ carries out, by its own initiative, the needed measures in order to find the address. If it is impossible to find the address, the requested judicial organ must inform about this to the requesting judicial organ and return the documents.

Article 11

Confirmation of handing the documents

Handing the document must be confirmed with a message signed by the person, who received the document, and certified by the official seal of the requested organ. The message must also contain the date of reception and the signature of the clerk of the organ, who handed the document. The reception of the document may be confirmed by another message, which must contain the method, place and time of handing.

Article 12

Rights of diplomatic representations or consular offices

1. The Contracting Parties have the right to hand documents to their citizens through their diplomatic representations or consular offices.
2. The Contracting Parties have the right to interrogate their citizens through their diplomatic representations or consular offices on behalf of the competent organs.
3. In the cases described in items 1 and 2 of the present article it is forbidden to apply coercive methods or threat thereof.

Article 13

Validity of documents

1. Documents, which are issued or authorized by an organ or special entrusted person within their competence, that conform to the established form and are confirmed with the official seal, must be accepted on the territories of other Contracting Parties with any special authorization.
2. Documents, which are regarded as official on the territory of one Contracting Party, have the status of official documents on the territories of other Contracting Parties.

Article 14

Mailing documents on civil status and other documents

The Contracting Parties are obliged to satisfy the requests of mailing without translation and free of charge certificates on registering acts of civil status, documents about education, duration of labour and other documents concerning personal or property rights of citizens of the requested Contracting Party or other persons residing on its territory.

Article 15

Information on legal questions

Central judicial organs of the Contracting Parties send to each other, by request, the information about laws operated or operating on their territories and on the practical appliance of these laws by judicial organs.

Article 16

Finding addresses and other data

1. The Contracting Parties are obliged, if requested, to render assistance, according to their laws, in finding addresses of persons residing on their territories, if it is needed for implementing the rights of their citizens. In this case the requesting party passes available data for assisting the search.
2. The judicial organs of the Contracting Parties are obliged to render to each other the assistance in finding out the places of employment and incomes of the residents of the requested party, to whom judicial organs of the requesting Contracting Party make demands concerning civil, family and criminal cases.

Article 17

Language

In their interrelations in the fulfilment of the present Convention the judicial organs of the Contracting Parties use the state languages of the Contracting Parties or the Russian language.

Article 18

Expenses connected with granting legal aid

The requested Contracting Party shall not demand the compensation of the expenses connected with granting legal aid. The Contracting Parties pay themselves all the expenses connected with granting legal aid on their territories.

Article 19

Refusal in granting legal aid

The request about granting legal aid may be rejected, if granting such aid may inflict damage to the sovereignty or security, or contradicts the legislation of the requested Contracting Party.

PART II

LEGAL RELATIONS IN CIVIL AND FAMILY CASES

SECTION I

COMPETENCE

Article 20

Common

1. If sections II-V of the current part do not stipulate otherwise, the suits against residents of a Contracting Party are brought, independently of their citizenship, to a court of this Contracting Party, and the suits against juridical persons are brought to a court of the Contracting Party, on whose territory the administration organ, representation or branch of this juridical person is placed.

If the case concerns several defendants, residing on the territories of different Contracting Parties, the case is considered in any involved country on the choice of the plaintiff.

2. Courts of a Contracting Party are competent also in cases where on the territory of this party:
 - (a) Trade, industrial or other economic activities of the enterprise (branch) of the defendant is carried out;
 - (b) The obligations of the contract, which is the object of controversy, was fulfilled or must be fulfilled partly or entirely;

- (c) The plaintiff in the case of protecting honour, dignity and business reputation resides permanently or temporarily.
3. In cases about property rights and other material rights for real estate only courts situated where the property is are competent.

Claims against transport agents following from contracts on transportation of loads, passengers and luggage are handed where the administration of the transport organization, to which the pretensions are made according to the proper procedure, is placed.

Article 21

Agreements on places of jurisdiction

1. Controversies may be resolved in other courts of the Contracting Parties, if a written agreement was taken by the sides involved.
- Yet, the exclusive competence, following from item 3 of Article 20 and other norms stipulated by sections II-V of the present part, as well as from the internal legislation of the concerned Contracting Party, may be changed by an agreement of the sides.
2. If there is an agreement on passing the case to another court, the original court stops considering the case on the defendant's request.

Article 22

Interrelation of court processes

1. If a case about the same conflict of the same sides is considered by courts of two Contracting Parties, both courts being competent according to the present Convention, then the court that started the court process later must stop the legal proceedings.
2. Counter-claim and the demand of compensation, following from the same legal relationship that has the basic suit, must be considered by the same court that considered the basic suit.

SECTION II

PERSONAL STATUS

Article 23

Legal capacity and capability

1. Capability of a physical person is determined in the legislation of the Contracting Party, whose citizen is the person.
2. Capability of a person without citizenship is determined by the legislation of the country, in which the person resides.
3. Legal capacity of a juridical person is determined by the legislation of the state, according to whose laws it was established.

Article 24

Recognition as partly capable or incapable. Restoration of capability

1. In the affairs of recognition a person as party capable or incapable, except the cases described in items 2 and 3 of the present Article, a court of that Contracting Party is competent, whose citizen is the person.
2. In the case, where a court of a Contracting Party learn the reasons of recognizing as partly capable or incapable a person residing in this country and being a citizen of another Contracting Party, then the court must inform about this a court of the Contracting Party, whose citizen is the person.

3. If the court of a Contracting Party, which was informed about the reasons of recognizing a person as partly capable or incapable, did not start proceedings or did not inform about its opinion within three months, then the case about the recognition as partly capable or incapable will be considered by a court of that Contracting Party, where the person resides. The decision about the recognition of a person as partly capable or incapable is mailed to a competent court of the Contracting Party, whose citizen is the person.
4. The clauses of items 1-3 of the present article are also applied to the restoration of capability.

Article 25

Recognizing a person missing and declaring dead. Establishing the fact of death

1. In cases of recognizing a person missing and declaring dead and in cases of establishing the fact of death the competent judicial organs are the organs of the Contracting Party, whose citizen was the person, when he/she was alive according to the latest information; as to other persons, the competence is passed to the judicial organs of the country, where the person resided at latest.
2. Judicial organs of each of the Contracting Parties may recognize dead or missing, or establish the fact of death of a citizen of another Contracting Party or some other person residing on its territory on the request of interested sides residing on its territory, whose rights and interests are based on laws of this country.
3. While considering the cases of recognizing a person missing and declaring dead and in cases of establishing the fact of death judicial organs of the Contracting Parties apply laws of their state.

SECTION III

FAMILY CASES

Article 26

Marriage

The conditions of marriage are determined for each of the future spouses by the legislation of the Contracting Party, of which he/she is a citizen; for persons without citizenship the procedure is determined by the legislation of the country, where they permanently reside. What concerns the obstacles to the marriage, the laws must be obeyed of that Contracting Party, where the marriage is registered.

Article 27

Legal relations between spouses

1. Personal and property legal relations between spouses are determined by the legislation of the Contracting Party, on whose territory the spouses jointly reside.
2. If one of the spouses resides in one Contracting Party, and another – in another Contracting Party, and both spouses have the same citizenship, then their personal and property legal relations are determined by the legislation of that Contracting Party, whose citizens they are.
3. If one of the spouses is a citizen of one Contracting Party, and another – of another Contracting Party, and one of them resides in one Contracting Party, and another – in another Contracting Party, then their personal and property legal relations are determined by the legislation of the Contracting Party, on whose territory they had their last joint residence.
4. If persons mentioned in item 3 of the present article had no joint residence on the territories of the Contracting Parties, then the legislation is applied of that Contracting Party, whose judicial organs consider the controversy.
5. The legal relations of the spouses concerning their real estate are determined by the legislation of the Contracting Party, on whose territory the real estate is.
6. The judicial organs of the Contracting Party defined in items 1-3 and 5 of the present article are competent in the affairs concerning personal and property legal relations of spouses.

Article 28

Divorce

1. In the affairs concerning divorce the legislation is applied of that Contracting Party, whose citizens at the moment of handing their application are the spouses.
2. If one of the spouses is a citizen of one Contracting Party, and another – of another Contracting Party, then the legislation is applied of that Contracting Party, whose judicial organ considers the case of divorce.

Article 29

Competence of judicial organs of the Contracting Parties

1. In the affairs concerning divorce, to which item 1 of Article 28 is applicable, the judicial organs are competent of the Contracting Party, whose citizens at the moment of handing their application are the spouses. If at the moment of handing in their application the both spouses reside on the territory of another Contracting Party, then the judicial organs of the latter are also competent.
2. In the affairs concerning divorce, to which item 2 of Article 28 is applicable, the judicial organs are competent of the Contracting Party, on whose territory the both spouses reside. If one of the spouses resides in one Contracting Party, and another – in another Contracting Party, then the judicial organs of the both Contracting Parties are competent.

Article 30

Acknowledging a marriage null and void

1. In the affairs concerning acknowledging a marriage null and void the legislation is applied of that Contracting Party, where, according to Article 26, the marriage was registered.
2. Competence of judicial organs in the affairs concerning acknowledging a marriage null and void is determined according to Article 27.

Article 31

Establishing and contesting paternity or maternity

Establishing and contesting paternity or maternity are determined by the legislation of that Contracting Party, whose citizen is the child by birth.

Article 32

Legal relations between parents and children

1. The legal relations between parents and children are determined by the legislation of that Contracting Party, on whose territory the children permanently reside.
2. In the affairs of taking alimony from adult children the legislation is applied of that Contracting Party, on whose territory the claimant resides.
3. In the affairs concerning the legal relations between parents and children the court is competent of that Contracting Party, whose legislation is applicable according to items 1 and 2 of the present article.

Article 33

Guardianship or trusteeship

1. Establishment or cancellation of guardianship or trusteeship is done according to the legislation of that Contracting Party, whose citizen is the person, for whom the guardianship or trusteeship are established or cancelled.

2. The legal relations between guardian or trustee and the person under wardship are regulated by the legislation of that Contracting Party, whose judicial organ appointed the guardian or trustee.
3. The duty to accept guardianship or trusteeship is determined by the legislation of that Contracting Party, whose citizen is the person appointed as guardian or trustee.
4. Guardian or trustee of a person, who is a citizen of one of the Contracting Parties, may be appointed a citizen of another Contracting Party, if he/she resides on the territory of the Party, where the guardianship or trusteeship will be carried out.

Article 34

Competence of judicial organs of the Contracting Parties in the questions of guardianship or trusteeship

In the affairs of establishment or cancellation of guardianship or trusteeship the judicial organs are competent of that Contracting Party, whose citizen is the person, for whom the guardianship or trusteeship are established or cancelled, if the present Convention does not stipulate otherwise.

Article 35

Procedure of taking measures concerning guardianship or trusteeship

1. In case, where measures concerning guardianship or trusteeship must be applied in interests of a citizen of a Contracting Party, who permanently or temporarily resides, or has property on the territory of another Contracting Party, a judicial organ of this Contracting Party must inform without delay the organ competent according to Article 34.
2. In urgent cases the judicial organ of another Contracting Party may take the needed temporary measures according to its legislation. If doing so it must inform about this without delay the organ competent according to Article 34. These measures remain valid until the organ mentioned in Article 34 takes its decision.

Article 36

Procedure of passing guardianship or trusteeship

1. The organ competent according to Article 34 may pass the guardianship or trusteeship to an organ of another Contracting Party in the case, where the person, being under guardianship or trusteeship, permanently or temporarily resides, or has property on the territory of this Contracting Party. Passing guardianship or trusteeship becomes valid from the moment, when the requested organ takes on itself the guardianship or trusteeship and informs about this the requesting organ.
2. The organ, which, according to item 1 of the present article, took on itself the guardianship or trusteeship, carries them out according to the legislation of its state.

Article 37

Adoption

1. The adoption or its cancellation is determined by the legislation of the Contracting Party, whose citizen is the adopting parent at the moment of handing the application about the adoption or its cancellation.
2. If the child is a citizen of another Contracting Party, then for the adoption or its cancellation it is necessary to get the consent of a legal representative or a competent state organ, as well as the consent of the child, if it is demanded by the legislation of the Contracting Party, whose citizen is the child.
3. If the child is being adopted by spouses, one of whom is a citizen of one Contracting Party and another – of another Contracting Party, then the adoption or its cancellation must be carried out in accordance with the procedures stipulated by the legislation of the both Contracting Parties.
4. In the affairs connected with the adoption or its cancellation the organ is competent of that Contracting Party, whose citizen is the adopting parent at the moment of handing the application about the adoption or its

cancellation; in the case envisaged in item 3 of the present article the organ is competent of that Contracting Party, on the territory of which the spouses had or have their last joint temporary or permanent residence.

SECTION IV LEGAL PROPERTY RELATIONS

Article 38

Property rights

1. The property rights for real estate are determined by the legislation of the Contracting Party, on whose territory the real estate is. The question whether some property is real estate is solved according to the legislation of the country, on whose territory the property is.
2. The property rights for transport vehicles, which had to be included into the state registers, are determined according to the legislation of the Contracting Party, on whose territory the organ is situated that registered the vehicle.
3. Appearance or cessation of property rights or other material rights for property are determined by the legislation of the Contracting Party, on whose territory the property was at the moment, when an action or another circumstance occurred that caused the appearance and cessation of such rights.
4. Appearance or cessation of property rights or other material rights for property, which is the object of a deal, are determined by the legislation of the country, where the deal is concluded, if the involved sides did not decide otherwise.

Article 39

Form of a deal

1. The form of a deal is determined according to the legislation of the country, where the deal is concluded.
2. The form of the deal concerning real estate and rights for it is determined according to the legislation of the Contracting Party, on whose territory the real estate is.

Article 40

Proxy

The form and the expiration date of a proxy are defined according to the legislation of the Contracting Party, on whose territory the proxy is given.

Article 41

Rights and obligations of the sides of a deal

Rights and obligations of the sides of a deal are determined by the legislation of the country, where the deal is concluded, if the involved sides did not decide otherwise.

Article 42

Compensation of a damage

1. Obligations on the compensation of a damage, except those, which follow from the contracts and other legal actions, are determined by the legislation of the Contracting Party, on whose territory the action or other circumstances occurred that caused the demand on the compensation.
2. If the tortfeasor and the aggrieved side are citizens of the same country, then the legislation of this country is applicable.

3. In the cases mentioned in items 1 and 2 of the present article a court is competent of that Contracting Party, on whose territory the action or other circumstances occurred that caused the demand on the compensation. The aggrieved side may hand a claim also in a court of the Contracting Party, where the defendant resides.

Article 43

Time limitation of action

The questions of the time limitation of action are solved according to the legislation used for regulating such legal relations.

SECTION V

INHERITANCE

Article 44

The equality principle

Citizens of all Contracting Parties may inherit on the territories of other Contracting Parties property or rights according to laws or testament under equal conditions and in same volume as native citizens of this country.

Article 45

Inheritance rights

1. The rights for inheritance of property, except the case determined by item 2 of the present article, are determined by the legislation of that Contracting Party, on whose territory the testator had his/her latest permanent residence.
2. The rights for inheritance of real estate are determined by the legislation of that Contracting Party, on whose territory the real estate is.

Article 46

Passing the inheritance to the state

If, by the legislation of the Contracting Party applicable while inheritance, the heir is the state, then the inherited movables pass to the state, whose citizen was the testator at the moment of his death; inherited real estate passes to the state, on whose territory the real estate is.

Article 47

Testament

The person's ability to compile or cancel the testament, as well as the form of the testament and its cancellation are determined by the legislation of that Contracting Party, on whose territory the testator permanently resided at the moment of compiling the act. Yet, the testament and its cancellation may not acknowledged as invalid because of imperfect form, if the form satisfies the demands of the legislation of the state, where the testament was compiled.

Article 48

Competence in the cases concerning inheritance

1. Proceedings of the cases concerning inheritance of movables must be conducted by judicial organs of that Contracting Party, on whose territory the testator resided at the moment of his death.

2. Proceedings in the cases concerning inheritance of real estate must be conducted by judicial organs of that Contracting Party, on whose territory the real estate is.
3. Clauses of items 1 and 2 of the present article are also applicable when considering the controversies concerning inheritance.

Article 49

Competence of diplomatic representations or consular offices in inheritance affairs

In inheritance affairs, including inheritance controversies, diplomatic representations or consular offices are competent to represent (except the right for refusal from the inheritance) citizens of their state without a special proxy in judicial organs of other Contracting Parties, if the citizens are absent or did not appoint their attorney.

Article 50

Measures on guarding the inheritance

1. The judicial organs of the Contracting Parties take measures, according to their legislation, needed for guarding the inheritance left on their territories by citizens of other Contracting Parties or for administrating the inheritance.
2. The diplomatic representation or consular office of the Contracting Party, whose citizen is the heir, must be immediately informed about the measures taken according to item 1 of the present article. The mentioned organizations may take part in the implementation of these measures.
3. According to the request of the judicial organs competent to conduct proceedings in the inheritance affair, as well as of the diplomatic representations or consular offices, the measures taken according to item 1 of the present article may be changed, cancelled or postponed.

PART III

RECOGNITION AND EXECUTION OF DECISIONS

Article 51

Recognition and execution of decisions

Each of the Contracting Parties, under the conditions determined by the present Convention, must recognize and execute the following decisions, taken on the territories of other Contracting Parties:

- (a) Decisions of judicial organs on civil and family affairs, including agreements of peace confirmed by a court and notarial acts concerning financial obligations (decisions, in what follows);
- (b) Court decisions on criminal cases of recompensing damage.

Article 52

Recognition of decisions not requiring execution

1. The decisions not requiring execution, that were taken by judicial organs of each Contracting Party and came into effect, are recognized on the territories of all Contracting Parties without special proceedings provided that:
 - (a) Judicial organs of the requested Contracting Party had not taken before a decision in this case that came into effect;
 - (b) The case, according to the present Convention or, if it is not covered by the Convention, according to the legislation of the country, on whose territory the decision must be recognized, is not related to the exclusive competence of judicial organs of the Contracting Party.

2. The clauses of item 1 of the present article are also related to decisions on guardianship and trusteeship, as well as to decisions on divorce, taken by organs competent according to the legislation of the Contracting Party, on whose territory the decision was taken.

Article 53

Petition on the permission for coercive execution of a decision

1. The petition on the permission for coercive execution of a decision is handed to a competent court of the Contracting Party, where the decision must be executed. The petition may be also handed to the court that took the decision in the first instance. This court passes the petition to a court competent to take the decision on the petition.
2. The petition is appended by:
 - (a) The decision or its authorized copy, as well as the official document confirming that the decision came into effect and must be executed or that it must be executed before coming into effect, if it does not follow from the decision itself;
 - (b) The document confirming that the side, against which the decision was taken and which did not participate in the process and was not properly represented, was summoned to the court in time and in the proper order;
 - (c) The document confirming the partial execution of the decision at the moment of its sending;
 - (d) The document confirming the agreement of the sides about their turning to court.
3. The petition on the permission for coercive execution of a decision and the appended documents must be supplied with the authorized translation to the language of the requested Contracting Party of to Russian.

Article 54

Procedure of recognition and coercive execution of decisions

1. The petition on the recognition and permission for coercive execution of decisions envisaged in Article 51 must be considered by courts of the Contracting Party, on whose territory the coercive execution is to be taken.
2. The court considering the petition on the recognition and permission for coercive execution confines its decision to checking the conditions stipulated by the present Convention. In the case, where the conditions are observed, the court takes a decision on the coercive execution.
3. The procedure of the coercive execution is determined by the legislation of the Contracting Party, on whose territory the coercive execution is to be taken.

Article 55

Refusal to recognize or execute decisions

The recognition of the decisions mentioned in Article 52 and the issue of the permission for coercive execution may be refused in cases, where:

- (a) According to the legislation of the Contracting Party, on whose territory the decision was taken, it did not come into effect or does not requires execution, except the decisions that must be executed before coming into effect;
- (b) The defendant did not participate in the process because he/she or his/her attorney did not receive the summon to the court in the proper time and order;
- (c) Another decision was taken beforehand on the territory of the Contracting Party, where the decision must be recognized and executed, that had already come into effect by the same case between the same sides, on the same subject and on the same reasons, or in case, where there is a recognized decision of a court of the third party, or if a judicial organs of the Contracting Party had started before the proceedings on this case;

- (d) According to the clauses of the present Convention or, if it is not covered by the Convention, according to the legislation of the Contracting Party, on whose territory the decision must be recognized and executed, the case is related to the exclusive competence of its judicial organs;
- (e) The document, which confirms the agreement of the sides about their turning to court, is absent;
- (f) The term of the coercive execution stipulated by the legislation of the Contracting Party, whose court executes the order, has expired.

PART IV

LEGAL AID IN CRIMINAL CASES

SECTION I

EXTRADITION

Article 56

Obligations for extradition

1. The Contracting Parties take on obligation, according to the conditions determined by the present Convention, to extradite to each other by the request the persons, who are on their territories, for bringing to criminal responsibility or for executing a verdict.
2. The extradition for bringing to criminal responsibility is performed for the actions that, by laws of the both Contracting Parties, are considered to be punishable by an imprisonment not shorter than one year.
3. The extradition for executing a verdict is performed for the actions that, by laws of the both Contracting Parties, are considered to be punishable, and for which the person, who must be extradited, was condemned for the term not shorter than six months.

Article 57

Refusal in extradition

1. The extradition is not performed if:
 - (a) The person to be extradited is a citizen of the requested Contracting Party;
 - (b) At the moment of receiving the request the criminal persecution, according to the legislation of the requested Contracting Party, cannot be started, or the verdict cannot be executed because of expiration of the term or by other legal reasons;
 - (c) The person to be extradited was already tried in the requested Contracting Party for the same crime, and the verdict was issued or the case was closed by a decision that already came into effect;
 - (d) The criminal persecution, according to the legislation of the requested or requesting Contracting Party, is conducted in the capacity of a private accusation (after the claim of the victim).
2. The extradition may be refused if the crime, in connection with which the extradition is required, was committed on the territory of the requested country.
3. In case of the refusal in extradition the requesting Contracting Party must be informed on the reasons of the refusal.

Article 58

Demand of extradition

1. The demand of extradition must contain:
 - (a) Name of the requested organ;
 - (b) Description of the actual circumstances of the action and the text of the law of the requesting Contracting Party, after which the action is considered to be a crime;
 - (c) Surname, first name and patronymic of the person to be extradited, his/her citizenship, place of permanent or temporary residence, description of the person and other personal data, if possible;

- (d) Description of the size of damage caused by the action.
2. The demand of extradition must be appended with the authorized copy of the detention warrant.
 3. The demand of extradition for executing the verdict must be appended with the authorized copy of the verdict with the mark about its coming into effect, as well as the text of the criminal law, according to which the person was found guilty. If the condemned has already done a part of his term, the information about it is given too.
 4. The demand of extradition and the appended documents must be compiled according to Article 17.

Article 59

Additional information

1. If the demand of extradition does not contain all the needed information, then the requested Contracting Party may demand the additional information, giving the term of one month. This term may be doubled on the petition of the requesting Party.
2. If the requesting Contracting Party do not present the additional information within the prescribed term, then the requested Contracting Party must release the detained person.

Article 60

Detention for extradition

Having received the demand of extradition the requested Contracting Party must immediately take measures for detention of the person to be extradited, except in cases, where the extradition may not be performed.

Article 61

Detention before receiving the demand of extradition

1. The person to be extradited may be detained before receiving the demand of extradition, by special request. The request must contain reference to the detention warrant or the verdict that came to effect, and the promise to send additionally the demand of extradition. The request for the detention may be sent by mail, telegraph, telex or facsimile.
2. The person may be detained without the request described in item 1 of the present article, if there are doubts envisaged by law that the person committed a crime, implying extradition, on the territory of other Contracting Party.
3. The second Contracting Party must be immediately informed about taking into custody or the detention before receiving the demand of extradition.

Article 62

Releasing the detained person

1. The person detained according to item 1 of Article 61 must be released, if the demand of extradition is not received within one month since the detention.
2. The person detained according to item 2 of Article 61 must be released, if the demand of extradition is not received within the term determined for detention in the legislation.

Article 63

Postponement of extradition

If the person to be extradited was brought to criminal responsibility or condemned for some other crime on the territory of the requested Contracting Party, his/her extradition may be postponed until finishing the criminal persecution, executing the verdict or until the release.

Article 64

Temporary extradition

1. If the postponement of extradition envisaged by Article 63 may imply the expiration of the term of the criminal responsibility or to hamper the investigation, then the person to be extradited may be extradited temporarily.
2. The temporarily extradited person must be returned after the completion of the actions concerning the criminal case, for which he/she was extradited, but not later than three months after the extradition. If there are well-grounded reasons, this term may be prolonged.

Article 65

Collision of demands of extradition

If the demands of extradition come from several states, the requested Contracting Party selects itself, which of the demands to satisfy.

Article 66

Limits of criminal persecution of the extradited person

1. The extradited person may not be brought to criminal responsibility or punished for the crime committed before the extradition, which was not the reason of the extradition without the consent of the requested Contracting Party.
2. The extradited person may not be transferred to the third party without the consent of the requested Contracting Party.
3. The consent of the requested Contracting Party is not required if the extradited person will not leave the territory of the requesting Contracting Party or will return there voluntarily within one month after finishing the trial or, in case of conviction, within one month after the release. This term does not include the time during which the extradited person could not leave the territory of the requesting Contracting Party independently of his/her will.

Article 67

Transfer of the extradited person

The requested Contracting Party informs the requesting Contracting Party about the place and time of the extradition. If the requesting Contracting Party does not accept the person to be extradited during 15 days after the appointed date of the transfer, the person must be released.

Article 68

Repeated extradition

If the extradited person dodges the criminal persecution or punishment and returns on the territory of the requested Contracting Party, then the person must be extradited on the repeated demand without presenting documents mentioned in Articles 58 and 59.

Article 69

Notification on the results of proceedings on the criminal case

The Contracting Parties notify each other about the results of the proceedings on the criminal case of the extradited person. If requested, the copy of the final decision is sent.

Article 70

Transit transportation

1. A Contracting Party, by the request of another Contracting Party, permits the transit transportation through its territory of persons, extradited to the latter by a third country.
2. The request for the transit is considered in the same manner as the demand of extradition.
3. The requested Contracting Party permits the transit transportation in the manner, which it considers more reasonable.

Article 71

Expenses of the extradition and transit transportation

The expenses of extradition must be paid by that Contracting Party, on whose territory the expenses are made, and the expenses of transit transportation must be paid by the Contracting Party requesting the transportation.

SECTION II

CRIMINAL PERSECUTION

Article 72

Obligation to carry out criminal persecution

1. Each Contracting Party is obliged, by the commission of another Contracting Party, to carry out the criminal persecution against its own citizens, suspected in committing a crime on the territory of the requesting Contracting Party.
2. If the crime, after which the case is started, implies civil and legal demands of the persons, to whom the damage was inflicted by the crime, then these demands must be considered within this case, if the petition about the damage compensation is available.

Article 73

Commission to carry out the criminal persecution

1. The commission to carry out the criminal persecution must contain:
 - (a) Name of the requesting organ;
 - (b) Description of the action that caused the commission to carry out the criminal persecution;
 - (c) Information, as correct as possible, on the place and time of the action;
 - (d) Text of the law of the requesting Contracting Party, which qualifies the action as a crime, as well as the texts of other legal acts, which are essential for the proceeding on the case;
 - (e) Surname and first name of the suspect, his/her citizenship and other personal data;
 - (f) Complaints of the victims in connection with criminal cases started by victim's complaint and petitions about the damage compensation;
 - (g) Estimation of the size of the damage inflicted by the action.

The commission must be appended with the documents concerning the criminal persecution and proofs that the requesting Contracting Party has.

2. If the requesting Contracting Party sends a started criminal case to the requested Contracting Party, the latter must continue the crime investigation using its own legislation. Each document on the case must be authorized and stamped with the official seal of the competent judicial organs of the requesting Contracting Party.
3. The commission and the appended documents must be compiled according to the clauses of Article 18.

4. If the accused is under custody on the territory of the requesting Contracting Party at the moment of sending the commission to carry out the criminal persecution, he/she must be transported to the territory of the requested Contracting Party.

Article 74

Notification in the results of the criminal persecution

Requested Contracting Party must notify the requesting Contracting Party about the final decision. If requested, the copy of the final decision is sent.

Article 75

Consequences of taking the decision

If the requested Contracting Party received, according to Article 72, the commission to carry out the criminal persecution after the verdict came into effect or after a judicial organ of the requested party took some other decision, the criminal case may not be started by the judicial organs of the requesting Contracting Party; if the case was already started, it must be closed.

Article 76

Mitigating and aggravating circumstances

Each Contracting Party, while investigating crimes and considering criminal cases in court, takes account of mitigating and aggravating circumstances, stipulated by laws of the Contracting Parties, regardless of the territory, where the circumstances occurred.

Article 77

Procedure of consideration of the cases within jurisdiction of courts of two or more Contracting Parties

If a person or a group of persons are accused of committing several crimes within jurisdiction of courts of two or more Contracting Parties, a court is competent of that Contracting Party, on whose territory the preliminary investigation has been finished. In such a case the affair is considered according to the juridical procedures of that Contracting Party.

SECTION III

SPECIAL REGULATIONS OF LEGAL AID IN CRIMINAL CASES

Article 78

Passing exhibits

1. By the request the Contracting Parties are obliged to pass to each other the following exhibits:
 - (a) Objects used in committing the crime, which implied the extradition of the person according to the present Convention, including tools and weapons of the crime; objects that were acquired as a result of the crime or as a remuneration for it, or the objects, which the criminal got in exchange for objects acquired in such a manner;
 - (b) Objects that may be used as proof of the crime; these objects must be passed also if the criminal cannot be extradited because of his death, escape or other reasons.
2. If the requested Contracting Party needs as proof the objects mentioned in item 1 of the present article, then the passing may be postponed until the proceedings are finished.
3. The rights of third sides for the passed objects remain valid. After finishing the proceedings these objects must be returned gratis.

Article 79

Notification about verdicts and information on criminal records

1. Each Contracting Party must annually inform other Contracting Parties about the verdicts of guilty that came into effect, which were issued by its courts against the citizens of the corresponding Contracting Party, sending also fingerprints of the convicted.
2. Each Contracting Party must inform other Contracting Parties gratis, if requested, about the criminal records of persons, who were tried in its courts and found guilty, if these persons are brought to criminal responsibility on the territory of the requesting Contracting Party.

Article 80

Procedure of communications concerning extradition and criminal persecution

The communications concerning extradition and criminal persecution, as well as concerning the execution of investigation commissions, which infringe citizens' rights and require prosecutor's sanction, are conducted by general prosecutors (prosecutors) of the Contracting Parties.

SECTION IV

CONCLUDING REMARKS

Article 81

Problems arising in implementing the Convention

The problems arising in implementing the Convention are solved by competent organs of the Contracting Parties on their mutual agreement.

Article 82

Compatibility with other international agreements

The present Convention does not collide with clauses of other international agreements, whose participants are the Contracting Parties.

Article 83

Procedure of coming into effect

1. The present Convention must be ratified by the states, which signed it. Instruments of ratification are handed for keeping the Belarus Government that plays the function of the bailee of the Convention.
2. The present Convention comes into effect on the 30th day, counting from the day of handing the bailee the third instrument of ratification. For the state, which hands in its instrument of ratification after the Convention comes into effect, it will come into effect on the 30th day, counting from the day of handing the bailee its instrument of ratification.

Article 84

Term of expiration of the Convention

1. The present Convention is operable during five years since the day of coming into effect. After the expiration of this term the Convention will be automatically prolonged for other five years.
2. Each Contracting Party may leave the present Convention having sent the written notification to the bailee not later than 12 months before the expiration of the consecutive five-year term.

Article 85

Retroactive force

The present Convention is valid also for the legal relations occurred before its coming into effect.

Article 86

Procedure of joining the Convention

Other states may join the present Convention after its coming into effect, if all the Contracting Parties agree, by way of handing the bailee the documents about the wish to join. The joining becomes valid after 30 days after the bailee received the last notification of agreement from the member-countries.

Article 87

Bailee's obligations

The bailee shall inform without delay all the states, which signed the present Convention or joined it later, about the date of handing each instrument of ratification or document about joining, about the date of the Convention coming into effect, as well as about reception of other notifications.

Compiled in the city of Minsk on 22 January 1993 in one original in the Russian language. The original is stored in the Archive of the Government of Belarus, which will direct one authorized copy of the Convention to each member-state.

THE LAW OF UKRAINE

**On the ratification of the Convention on legal aid and legal relations in civil,
family and criminal cases**

The Supreme Rada of Ukraine rules:

To ratify the Convention on legal aid and legal relations in civil, family and criminal cases (Convention, in what follows) signed on behalf of Ukraine in Minsk on 22 January 1993 with the following reservations:

1. Ukraine takes the obligations about rendering legal aid as it is determined by Article 6 of the Convention, except acknowledgement and fulfilment of writs of execution.
2. Ukraine takes the obligations to recognize and execute the decisions taken on the territories of the member-states envisaged by item 'a' of Article 51 of the Convention, except notarial acts on financial obligations.

Head of the Supreme Rada of Ukraine
The City of Kyiv, 10 November 1994 O. MOROZ
No. 240/94-BP

Annex 462

Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo, Case No. IT-96-21-T,
Trial Chamber Judgment, p. 372, para. 109 (16 November 1998)



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

Case No.: IT-96-21-T
Date: 16 November 1998
Original: English

IN THE TRIAL CHAMBER

Before: Judge Adolphus G. Karibi-Whyte, Presiding
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 16 November 1998

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as “PAVO”
HAZIM DELIĆ
ESAD LANDŽO also known as “ZENGA”

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Rešidović, Mr. Eugene O’Sullivan, for Zejnil Delalić
Ms. Nihada Buturović, Mr. Howard Morrison, for Zdravko Mucić
Mr. Salih Karabdić, Mr. Thomas Moran, for Hazim Delić
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Landžo

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I. INTRODUCTION

The trial of Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (hereafter “accused”), before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter “International Tribunal” or “Tribunal”), commenced on 10 March 1997 and came to a close on 15 October 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor (hereafter “Prosecution”) and the Defence for each of the accused (hereafter, collectively, “Defence”), the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. The International Tribunal

1. The International Tribunal is governed by its Statute (hereafter “Statute”), which was adopted by the United Nations Security Council on 25 May 1993,¹ and by its Rules of Procedure and Evidence (hereafter the “Rules”), adopted by the Judges on 11 February 1994, as subsequently amended.² Under the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.³ Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

B. The Indictment

2. The Indictment against the four accused (hereafter “Indictment”) was issued on 19 March 1996 by Richard J. Goldstone, being, at that time, the Prosecutor of the International Tribunal, and was confirmed by Judge Claude Jorda on 21 March 1996.⁴ Four of the original forty-nine counts were subsequently withdrawn at trial, at the request of the Prosecution.⁵ The Indictment is set forth in full in Annex B to this Judgement. At the time of the alleged commission of the crimes charged therein, the accused were citizens of the former Yugoslavia and residents of Bosnia and Herzegovina.⁶

3. The Indictment is concerned solely with events alleged to have occurred at a detention facility in the village of Čelebići (hereafter “Čelebići prison-camp”), located in the Konjic municipality, in central Bosnia and Herzegovina, during certain months of 1992. The Indictment charges the four accused with grave breaches of the Geneva Conventions of 1949, under Article 2 of the Statute, and

¹ S/RES/827 (1993).

² The Rules have been successively amended on 5 May 1994, 4 Oct. 1994, 30 Jan. 1995, 3 May 1995, 15 June 1995, 6 Oct. 1995, 18 Jan. 1996, 23 April 1996, 25 June and 5 July 1996, 3 Dec. 1996, 25 July 1997, revised 20 Oct. and 12 Nov. 1997, 9 and 10 July 1998.

³ Article 1 of the Statute.

⁴ Review of the Indictment, Case No. IT-96-21-I, 21 March 1996 (RP D282-D284).

⁵ Counts 9 and 10, and counts 40 and 41 of the original Indictment were withdrawn on 21 April 1997 (RP D3254-D3255) and 19 Jan. 1998 (RP D5385-D5386) respectively.

1045. The Trial Chamber notes, however, that there is no allegation in the Indictment with respect to the incidents recounted by these witnesses. Conversely, the Prosecution has presented no evidence in relation to the alleged placing of a burning fuse cord around the genital area of Duško Bendo. As discussed above, where evidence has been led at trial in relation to alleged criminal acts not specified in the Indictment, the Trial Chamber, in fairness to the accused, does not consider the unspecified acts to form part of the charges against the accused. In the instant case, the Prosecution has failed to present any evidence in support of the acts specifically alleged in the Indictment. Accordingly, the Trial Chamber must conclude that the present charge of wilfully causing great suffering or serious injury to body or health, and cruel treatment, as alleged in the Indictment, has not been proven.

(e) Responsibility of the Accused

1046. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. As set out above, Zejnil Delalić and Hazim Delić have been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić and Hazim Delić not guilty of wilfully causing great suffering or serious injury to body or health and cruel treatment, as charged in counts 38 and 39 of the Indictment.

1047. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić, in this position, knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the finding made above, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Dragan Kuljanin and Vukašin Mrkajić, and the inhuman treatment and cruel treatment of Mirko Kuljanin. On the basis of the finding made above, the Trial Chamber finds that Zdravko Mucić is not responsible for the acts alleged in the Indictment in respect of Duško Bendo.

1048. In his position as a superior, Zdravko Mucić is further responsible for wilfully causing great suffering or serious injury to body or health to, and cruel treatment of, Nedeljko Draganić, as alleged in Paragraph 30 of the Indictment, and found proven by the Trial Chamber above.

17. Inhumane Acts Involving the Use of Electrical Device - Counts 42 and 43

1049. Paragraph 33 of the Indictment states that:

Sometime beginning around 30 May 1992 and continuing until the latter part of September 1992, **Hazim DELIĆ** used a device emitting electrical current to inflict pain on many detainees, including Milenko KULJANIN and Novica ĐORĐIĆ.

In relation to this factual allegation, Hazim Delić is charged as direct participant as follows:

Count 42. A Grave Breach punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and

Count 43. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

1050. In seeking to prove these counts of the Indictment, the Prosecution relies upon the evidence of the following witnesses: Stevan Gligorević, Novica Đorđić, Witness P, Witness B, Milenko Kuljanin and Witness R. The Prosecution alleges that, during the months of July and August 1992, Hazim Delić frequently used a painful device which emitted an electrical current, upon a great number of detainees in the Čelebići prison-camp including Milenko Kuljanin and Novica Đorđić. It contends that the shocks that this device emitted were so severe that victims suffered convulsions and burns. In addition, it submits that Hazim Delić derived pleasure from the use of this device. On the basis of the foregoing, the Prosecution submits that Mr. Delić inflicted severe pain, suffering and indignity, out of proportion to the treatment expected of one human being of another.

(b) Defence Case

1051. Hazim Delić is the only accused charged as a direct participant in the acts alleged in this section of the Indictment. In the Motion to Dismiss, his Defence submits that the Prosecution has

failed to satisfy the general requirements of Articles 2 and 3 of the Statute.⁹²⁵ In his interview with Prosecution investigators, on 19 July 1996, Mr. Delić claimed that there never was an electrical device such as that described in the Čelebići prison-camp.⁹²⁶ However, apart from general attempts to impeach the credibility of Prosecution witnesses, no other direct factual allegations have been specifically made by the Defence in respect of these counts.

(c) Discussion and Findings

1052. The Trial Chamber is persuaded by the volume and consistency of the Prosecution evidence in relation to these counts. It finds that, during the months of July and August 1992, Hazim Delić used a device which emitted an electrical current and inflicted pain and injury upon detainees in the Čelebići prison-camp.

1053. The device used by Mr. Delić, which emitted electric shocks, was variously described as “an electric prod for cattle”,⁹²⁷ “a device used ...when cattle were slaughtered”,⁹²⁸ “a device for horses ... it produces strong electrical shocks”,⁹²⁹ “a gadget which produced electric shocks”,⁹³⁰ and “a device that causes electrical shocks”.⁹³¹ Witness P described the device as an electric stick about the size of two cigarette packets, with a button. Milenko Kuljanin, upon whom this device was used, described it in the most detail and stated that it was an electrical device in the form of a packet of cigarettes but much larger, with two wires on the top that were connected to a button.

1054. The Trial Chamber finds that this device was used on both Milenko Kuljanin and Novica Đorđić. On one occasion Mr. Delić walked into Tunnel 9 and gave Milenko Kuljanin two electric shocks on his chest just below his neck. On another occasion, Mr. Delić took prisoners from Tunnel 9 outside and selected Novica Đorđić, who was made to sit on a stone block, naked from the waist up, while Delić applied the device to his chest, despite his pleas for mercy. After the shock, the victim fell off the block whereupon Mr. Delić caught him by the leg and kept the device on his chest for a prolonged period of time.

⁹²⁵ Motion to Dismiss, RP D5528-D5527.

⁹²⁶ Exhibit 103-1, p. 93.

⁹²⁷ T. 7782, Witness R.

⁹²⁸ T. 4560, Witness P.

⁹²⁹ T. 4197, Novica Đorđić.

⁹³⁰ T. 1455, Stevan Gligorević.

1055. In addition, Witness B stated that Hazim Delić had used the device upon him. Stevan Gligorević and Witness R testified that he had used it upon Davor Kuljanin and Novica Đorđić stated that the device was inflicted upon Vukašin Mrkajić. Witness P, testified of its use by Mr. Delić upon Risto Žuža. Milenko Kuljanin also stated that Delić used this device on five named detainees from Tunnel 9. This was supported by the evidence of Witness B, who said that Mr. Delić used the device on many prisoners; Novica Đorđić, who testified that Mr. Delić used the device on most of the prisoners in Tunnel 9; and Witness R, who stated that Mr. Delić had developed a habit or custom of placing it against the shoulder or neck of prisoners and turning it on. Thus, the evidence before the Trial Chamber consistently shows that Hazim Delić inflicted this electrical device on numerous prisoners, primarily from Tunnel 9, and on numerous occasions in the Čelebići prison-camp.

1056. The electric shocks emitted by the device caused pain, burns, convulsions and scarring, and frightened the victims and other prisoners. Novica Đorđić testified that the device inflicted a small burn, like the burn from a cigarette, but that the electrical charge was very high and would frighten the victim to the point where he felt he would not be able to survive. In relation to the occasion when the device was used on Novica Đorđić, the victim testified that Hazim Delić kept the device on his skin for a long time. This caused a large burn, which subsequently became infected and as a result of which he bears a scar. Milenko Kuljanin also stated that the device caused horrible and terribly unpleasant pain, convulsions and twitching, and that he suffered a burn and scarring as a result of its use on him. In addition, Witness B testified that when Mr. Delić used the device on prisoners, they would go into spasms. This is supported by Witness P, who testified that when Mr. Delić used the device on Risto Žuža he had a spasm and was thrown into the corner of Tunnel 9.

1057. The evidence further establishes that Hazim Delić derived sadistic pleasure from the use of this device. Novica Đorđić, stated that it was like a “toy” for Mr. Delić⁹³² and Witness B testified that Delić found the use of this device “very amusing”.⁹³³ Milenko Kuljanin testified that when Mr. Delić was using the device on him, he laughed and found it funny. In addition, he stated that

⁹³¹ T. 5047, Witness B.

⁹³² T. 4197.

⁹³³ T. 5047.

when Delić was using the device on some of the other prisoners he,

talked during this and laughed at them as he was applying the device. Some of them begged him as they were in pain and unpleasant pain not to torture them, not to maltreat them, but he even hit some of them when they begged him to cease torturing them. *He merely laughed.*⁹³⁴

1058. The Trial Chamber finds that Hazim Delić deliberately used an electric shock device on numerous prisoners in the Čelebići prison-camp during the months of July and August 1992. The use of this device by Mr. Delić caused pain, burns, convulsions, twitching and scaring. Moreover, it frightened the victims and reduced them to begging for mercy from Mr. Delić, a man who derived sadistic pleasure from the suffering and humiliation that he caused. Accordingly, the Trial Chamber finds that Mr. Delić, by his acts, intentionally caused serious physical and mental suffering, which also constituted a clear attack upon the human dignity of his victims.

1059. For these reasons, the Trial Chamber finds Hazim Delić guilty of inhuman treatment, under count 42 of the Indictment and of cruel treatment, under count 43 of the Indictment, with respect to the use of a device emitting an electrical current on Milenko Kuljanin and Novica Đorđić.

18. Responsibility of Superiors for Inhumane Acts - Counts 44 and 45

1060. Paragraph 34 of the Indictment contains the following factual allegations:

With respect to the incidents of inhuman acts committed in Čelebići camp, including forcing persons to commit fellatio with each other, forcing a father and son to slap each other repeatedly, and including those acts described above in paragraph thirty-three, **Zejnir DELALIĆ, Zdravko MUCIĆ and Hazim DELIĆ** knew or had reason to know that subordinates were about to commit those acts or had done so, and failed either to take the necessary or reasonable steps to prevent those acts or to punish the perpetrators.

In connection with the foregoing allegations, Zejnir Delalić, Zdravko Mucić and Hazim Delić are charged as superiors as follows:

Count 44. A Grave Breach punishable under Article 2(b)(inhuman treatment) of the Statute of the Tribunal; and

⁹³⁴ T. 5455 (Emphasis added).

Count 45. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

1061. The Trial Chamber's findings as to the offences described in paragraph 33 of the Indictment, as charged here, are set out above. Further, as discussed above, the Trial Chamber restricts itself to addressing the specific allegations in the Indictment and therefore will not consider the other numerous acts of ill-treatment alleged to have occurred at the Čelebići prison-camp, but not specifically alleged in the Indictment. Accordingly, the Trial Chamber here limits itself to considering the factual allegations as they relate to the incidents wherein persons were forced to commit fellatio with each other and where a father and son were forced to slap each other repeatedly.

(a) Forcing Persons to Commit Fellatio with Each Other

1062. The Indictment alleges that, on one occasion, certain of the detainees were forced to perform fellatio on each other. In order to establish the facts in relation to this count, the Prosecution relies on the testimony of eleven witnesses, in addition to the testimony of the accused, Esad Landžo. Vaso Đorđić gave an account of the incident, whereby Esad Landžo allegedly forced him and his brother to commit fellatio with each other in Hangar 6 in full view of the other detainees. The Prosecution submits that this account is supported by the testimony of various other witnesses, including Witness N, Mladen Kuljanin, Witness R, Rajko Draganić, Dragan Kuljanin, Mirko Đorđić, Witness M, Witness B, Witness F and Risto Vukalo. In addition, the Prosecution relies on the admission of the accused, Esad Landžo, that he forced the Đorđić brothers to commit fellatio with one another and that he put a burning fuse around their genitals. The Prosecution also relies on the testimony of Esad Landžo and the supporting testimony of Rajko Draganić to prove that Hazim Delić was present during the incident, giving instructions to Esad Landžo.

1063. The Defence notes that the accounts of the Prosecution witnesses are inconsistent as to the date on which this incident is alleged to have occurred.

1064. The Trial Chamber finds the testimony of the victim and the supporting evidence of Witness F, Witness N, Dragan Kuljanin, Witness B, Risto Vukalo, Rajko Draganić, Witness R and Mirko Đorđić to be trustworthy as regards the act of forcing two brothers to commit fellatio as alleged in these counts. This incident is alleged to have taken place inside Hangar 6, and as such,

many of the former detainees who testified were able to observe the incident from their vantage point inside the Hangar. Further, Esad Landžo, provided a full confession as to his participation in this incident in his testimony before this Trial Chamber. The Trial Chamber has previously stated that it finds the testimony of Esad Landžo to be generally unreliable. However, in relation to the present count, where his testimony is consistent with that of so many additional witnesses, the Trial Chamber accepts Mr. Landžo's admission.

1065. Accordingly, on the basis of the foregoing evidence, the Trial Chamber finds that, on one occasion, Esad Landžo ordered Vaso Đorđić and his brother, Veseljko Đorđić, to remove their trousers in front of the other detainees in Hangar 6. He then forced first one brother and then the other to kneel down and take the other one's penis into his mouth for a period of about two to three minutes. This act of fellatio was performed in full view of the other detainees in the Hangar.

1066. The Trial Chamber finds that the act of forcing Vaso Đorđić and Veseljko Đorđić to perform fellatio on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhuman treatment under Article 2 of the Statute, and cruel treatment under Article 3 of the Statute. The Trial Chamber notes that the aforementioned act could constitute rape for which liability could have been found if pleaded in the appropriate manner.

(b) Forcing a Father and Son to Slap Each Other Repeatedly

1067. The Prosecution alleges that, on one occasion, a father and son, Danilo and Miso Kuljanin, were forced to slap each other repeatedly. In order to establish the facts in relation to this count, the Prosecution relies on the testimony of Mirko Đorđić.

1068. The Defence has made no submissions in relation to this factual allegation in the Indictment.

1069. The Trial Chamber finds the testimony of Mirko Đorđić in relation to this count to be trustworthy. Accordingly, it finds that, on one occasion, Esad Landžo came into Hangar 6 and ordered a father and son, Danilo and Miso Kuljanin, to get up and start hitting each other. Esad Landžo then ordered them to hit each other harder and so, for a period of at least ten minutes, Mr. Kuljanin and his son were forced to beat each other.

1070. The Trial Chamber finds that, through being forced to administer a mutual beating to one another, Danilo and Miso Kuljanin were subjected to serious pain and indignity. Accordingly, the Trial Chamber finds that the deliberate act of forcing Danilo Kuljanin and Miso Kuljanin, father and son, to beat one another repeatedly over a period of at least ten minutes constitutes inhuman treatment under Article 2 of the Statute and cruel treatment under Article 3 of the Statute.

(c) Responsibility of the Accused

1071. Under the counts of the Indictment here under consideration, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors pursuant to Article 7(3) of the Statute. As set out above, Zejnil Delalić and Hazim Delić have been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds Zejnil Delalić and Hazim Delić not guilty of inhuman and cruel treatment, as charged in counts 44 and 45 of the Indictment.

1072. The Trial Chamber has above established that Zdravko Mucić was in a *de facto* position of superior authority over the Čelebići prison-camp. It has further found that Zdravko Mucić, in this position, knew or had reason to know of the violations of international humanitarian law committed in the Čelebići prison-camp, but failed to prevent these acts or punish the perpetrators thereof. For this reason, and on the basis of the findings made above, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for inhuman treatment and cruel treatment of Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin and Miso Kuljanin. In his position as a superior, Zdravko Mucić is further responsible for inhuman treatment and cruel treatment of Milenko Kuljanin and Novica Đorđić, alleged in paragraph 33 of the Indictment and found proven by the Trial Chamber above.

19. Inhumane Conditions - Counts 46 and 47

1073. Paragraph 35 of the Indictment sets forth the following factual allegation:

Between May and October 1992, the detainees at Čelebići camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as

sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma...

In connection with this factual allegation, Zdravko Mucić, Hazim Delić and Esad Landžo are charged with responsibility pursuant to Article 7(1) of the Statute for having directly participated in creating the alleged conditions. In addition, Zejnil Delalić, Zdravko Mucić and Hazim Delić are charged with responsibility as superiors, pursuant to Article 7(3) of the Statute. The accused are charged in these capacities as follows:

Count 46. A Grave Breach punishable under Article 2(c)(wilfully causing great suffering) of the Statute of the Tribunal; and

Count 47. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

(a) Prosecution Case

1074. In support of the allegation contained in the Indictment, the Prosecution relies on a large body of evidence given by former detainees who, in their testimony before the Trial Chamber, described the conditions under which they were detained in the Čelebići prison-camp. Based upon this evidence, the Prosecution, in its submissions, more specifically identified the following factors, which it alleges contributed to the inhumane conditions that have prevailed in the Čelebići prison-camp.

1075. According to the Prosecution, a fundamental aspect of the inhumane conditions in the prison-camp was the all-pervasive atmosphere of terror to which the detainees were constantly subjected. In this respect, it is submitted that, even when not themselves subjected to such treatment, detainees frequently witnessed the mistreatment or killing of other prisoners. The Prosecution contends that ample evidence demonstrates that this atmosphere of terror was purposely maintained, and that this element by itself, even without the other inadequacies in the conditions prison-camp, would be sufficient to constitute inhumane conditions.

1076. With respect to the alleged deprivation of food and water, the Prosecution notes that many witnesses testified about the inadequacy of the food provided to the detainees, and that there were some protracted periods in which no food was provided at all. Similarly, it is submitted that the evidence demonstrates that, while there was no shortage of water, prisoners were denied access to

drinking water in sufficient quantities. It further notes that, according to some witnesses, the detainees were forced to drink non-potable water. It is contended that, as a result of these conditions, many detainees suffered serious weight loss and a weakened physical state during their detention.

1077. According to the Prosecution, the testimony from the detainees further demonstrates that there was little medical care provided in the prison-camp. It submits that, although the prison-camp had a makeshift infirmary, it was very poorly equipped and was clearly inadequate to meet the substantial medical needs of the detainees. Further, the Prosecution contends that the evidence demonstrates that the detainees were often denied access to the limited medical facilities that were in fact available.

1078. The Prosecution further alleges that the sleeping conditions provided for the detainees were seriously inadequate. More specifically, it submits that the evidence demonstrates that the detainees imprisoned in Hangar 6 sat and slept in their assigned positions, on a concrete floor. They were not provided with beds or mattresses, and blankets were scarce. It is contended that the situation in Tunnel 9 was even more difficult and that conditions there were so cramped that it was almost impossible for the detainees to lie down. As in Hangar 6, no bedding was provided.

1079. The Prosecution also asserts that the detainees' access to toilet facilities was limited and, more generally, that the standard of hygiene in the prison-camp fell seriously below acceptable standards. In this respect, it submits that the evidence shows that the toilet facilities available to the detainees in Hangar 6 consisted of an outside septic tank and a ditch, to which the detainees were allowed only restricted access during the day. It is further noted that, at some stage at least, one or two buckets were provided for the detainees to use as toilet facilities during the night, the capacities of which were clearly inadequate. As to the conditions in Tunnel 9, it is submitted that the evidence shows that the detainees were forced to relieve themselves at the bottom of the tunnel, with some of the prisoners being compelled to sit in the rising tide of excrement.

1080. The Prosecution further maintains that the arguments raised by the Defence cannot provide any defence to the charges of inhumane conditions. It thus submits, as a matter of law, that a detaining power which is not in a position to comply with the minimum standards of detention as prescribed by international humanitarian law, is under an obligation to release some, or all, of the prisoners in order to allow humane conditions to be created for those detained. Furthermore, it submits that the evidence contradicts the Defence claim that the conditions in the Čelebići prison-

camp were in fact the best that could be provided at the time. In this respect it notes that no justification based on lack of resources could possibly be provided for the constant physical abuse, the refusal to allow the detainees to avail themselves of the existing water supply, or the failure to provide acceptable toilet and hygiene facilities.

(b) Defence Case

1081. In response to the allegations made in the Indictment, the Defence contends that a State may lawfully detain individuals under conditions which fall below the minimum requirements of international humanitarian law, provided that a good faith effort is made to ensure that the conditions of detention are as humane as possible under the circumstances. It accordingly asserts that if, in view of the available resources, the conditions of confinement are the best that can be provided, no criminal liability can attach to the individuals who act on behalf of the detaining State. On this basis, the Defence contends that the standard by which the acts of the accused should be measured is whether they acted reasonably in providing food, shelter and other facilities to the detainees in the Čelebići-prison-camp. Noting the very difficult conditions which prevailed in the Konjic municipality at the time, it submits that the Prosecution has failed to demonstrate that the quantities of food supplied to the detainees of the Čelebići prison-camp, or the physical facilities available to them, could reasonably have been increased or improved at the time the prison-camp was in operation.

1082. With respect to the actual conditions of confinement in the Čelebići prison-camp, the Defence notes that several witnesses testified to the efforts made to ensure that the detainees were properly fed, despite the extremely difficult situation which existed in Konjic in 1992. The Defence relies in this respect on the evidence of Šefkija Kevrić, the assistant commander of logistics in the Municipal TO staff in Konjic, Zlatko Ustalić, a driver who delivered food to the Čelebići prison-camp, and Emir Džajić, a driver for the MUP who was stationed in the prison-camp in May and June 1992. In particular, the Defence observes that, according to the latter of these two witnesses, food for the staff and detainees of the Čelebići prison-camp was delivered three times a day. According to the Defence, the two groups ate the same food, which for breakfast consisted of tea, coffee with milk, some eggs and for a while some honey. For lunch there were such things as lentils and beans. Further, it submits that each detainee received one quarter loaf of bread per day, and that the food supplies delivered to the prison-camp also included rice, macaroni and tins of meat.

1083. In response to the allegation that the health care provided for the detainees in the prison-camp was inadequate, the Defence observes, *inter alia*, that an infirmary was established in the Čelebići prison-camp. This was situated in Building 22 and was staffed by two doctors, Dr. Petko Grubač and Witness P. The Defence further submits that the logistics body of the Municipal TO in Konjic provided the prison-camp with medicine. This was done through the Health Centre in Konjic, which Hazim Delić personally visited once a week to collect medication and bandages for the infirmary.

1084. More generally, the Defence notes that the Čelebići barracks were not designed to accommodate a large number of people. This complex of buildings was intended as a storage facility, manned by a relatively small number of troops and, consequently, had only a limited number of toilets, showers and other facilities. Relying on the testimony of Emir Džajic and Nurko Tabak, the Defence submits that, despite these limitations, conditions in the camp were not of the character alleged by the Prosecution. Thus, the Defence contends that the detainees in the so-called infirmary in Building 22 and the women in Building A used the toilet facilities in Building 22, and that the toilet facilities outside Hangar 6 and Tunnel 9 were similar to field toilets used in the military. It submits that there was a sufficient supply of clean water in the prison-camp, and that the same water was supplied both to the personnel and the detainees. Similarly, it asserts that the sleeping facilities for the detainees were not crowded. With reference to the conditions in Tunnel 9, the Defence asserts that the detainees there had blankets, food and water, and were permitted to use the toilet upon request. In addition, it is contended that family members were allowed to visit the prison-camp three times a week to bring food and clothing to the detainees.

(c) Discussion and Findings

1085. The Indictment characterises the conditions prevailing in the Čelebići prison-camp as “inhumane” and alleges that the exposure of the detainees to these conditions constitutes the offences of wilfully causing great suffering or serious injury to body or health, and cruel treatment. The Trial Chamber here considers the different aspects of these alleged conditions in turn.

(i) Atmosphere of terror

1086. During the course of these proceedings, the Trial Chamber was presented with extensive evidence regarding the physical and psychological abuse to which the detainees in the Čelebići

prison-camp were continually subjected. This evidence clearly demonstrates that those individual acts specifically alleged in the Indictment, and found proven by the Trial Chamber, in no way represent the totality of the cruel and oppressive acts committed against the detainees in the Čelebići prison-camp. However, from the evidence reviewed above, it is already clear that the detainees in the Čelebići prison-camp were continuously witnessing the most severe physical abuse being inflicted on defenceless victims. This evidence further demonstrates how the detainees in crowded conditions of detention were obliged to helplessly observe the horrific injuries and suffering caused by this mistreatment, as well as the bodies of detainees who had died from the abuse to which they were subjected. In his testimony, Mirko Đorđić gave the following description of how he was in this way confronted with the lifeless body of Željko Čećez, who had died as a result of the ill-treatment to which he was subjected: “We were all shivering with fear. We didn’t dare even look, because few of us had contact with dead people. We are [sic] afraid of corpses. He lay there in our midst for three or four hours, maybe even longer”.⁹³⁵

1087. It is clear that, by their exposure to these conditions, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse. This psychological terror was compounded by the fact that many of the detainees were selected for mistreatment in an apparently arbitrary manner, thereby creating an atmosphere of constant uncertainty. For example, Witness M, when asked whether he was generally given a reason as to why he had been selected for mistreatment responded: “Sometimes yes, sometimes no.”⁹³⁶ Similarly, Witness N, who in his testimony described how he repeatedly was subjected to severe physical abuse, declared that he had no knowledge as to why he, in particular, was subjected to this kind of mistreatment.⁹³⁷ Further, Branko Sudar, in his evidence, explained that “[t]he guards beat us to tell you the truth. They beat us, it depended. Sometimes somebody would go out and get hit, someone else would not get hit. It all depended.”⁹³⁸

1088. Many of the former detainees testified directly as to the fear they had experienced during their detention in the Čelebići prison-camp on account of the frequency with which ill-treatment was arbitrarily meted out. In his evidence, Witness F; stated: “I was afraid of everyone down there. Whoever walked in, I was afraid of them, and prayed to God not to be taken out, because I was not

⁹³⁵ T. 4780-T. 4781.

⁹³⁶ T. 4901.

⁹³⁷ T. 1902.

⁹³⁸ T. 558.

sure that I would come back alive if I were taken out”.⁹³⁹ This witness further testified that whenever the detainees in Hangar 6 heard the voice of Esad Landžo they grew terrified: “When he [Esad Landžo] was speaking outside, we knew immediately that he was coming, and we were already in fear”.⁹⁴⁰ Witness N provided supporting testimony as to the fear inspired amongst the detainees by Esad Landžo: “I just know that he [Esad Landžo] beat people, that he came, that he was there during that period non-stop. We were all afraid.”⁹⁴¹ Similarly, Mirko Babić, speaking of Hazim Delić’s daily visits to Hangar 6, testified that when Hazim Delić entered the Hangar “everybody was in fear. Almost - your heart would almost burst”.⁹⁴² Grozdana Čećez and Risto Vukalo also gave accounts of the fear experienced during their detention, the latter declaring that he was “terrified and thinking only how I could avoid beatings”.⁹⁴³

1089. The evidence further demonstrates that the guards in the Čelebići prison-camp would often threaten to kill the detainees, thereby aggravating their sense of physical insecurity and fear. For example, Witness M stated: “I was mistreated and threatened with death, that I would be sentenced to death.”⁹⁴⁴ Similarly, Risto Vukalo testified to one occasion on which he and Damir Gotovac were called out of the hangar. He described how he

saw Damir there, Zenga [Esad Landžo] was hitting him and he fainted and fell to the ground. Then Zenga told me to kill him, I mean to beat him to death. I said I could not do that. Let him kill me. Then they started hitting me, Zenga was there and Osman Dedic as well. They started hitting me and then they ordered Damir to kill me.⁹⁴⁵

Novica Đorđić described one occasion on which he went to collect food for the detainees in Tunnel 9 and where he lost consciousness after being kicked by a guard. He further testified: “I couldn’t fully comprehend that this was happening and the guard threatened to kill me if I didn’t get up.”⁹⁴⁶ A further example of such threatening behavior was provided by Witness R who, in his testimony, described how, when confronted with a request for medical care by a detainee, Hazim Delić would respond “sit down, you have to die anyway, whether you are given medical assistance or not”.⁹⁴⁷

⁹³⁹ T. 1348.

⁹⁴⁰ T. 1378.

⁹⁴¹ T. 2038.

⁹⁴² T. 281.

⁹⁴³ T. 6371.

⁹⁴⁴ T. 4902.

⁹⁴⁵ T. 6285.

⁹⁴⁶ T. 4150.

1090. The atmosphere of terror which pervaded the Čelebići prison-camp, is further demonstrated by evidence showing that the detainees were afraid to report or complain about the mistreatment they received. Thus, Witness J described how he and other detainees, during the visit to the prison-camp by a delegation of the International Committee of the Red Cross, denied having been subjected to beatings: “[A]s soon as we saw them [the ICRC delegation], we all went numb. We were terrified, because we thought it would have been better if they had not come, because we thought we would be beaten again”.⁹⁴⁸ In his evidence, Witness N similarly described how detainees would be beaten if they complained about their treatment, and how as a result “nobody dared say that they were beaten up to anyone”.⁹⁴⁹ This account is consistent with the testimony of Miro Golubović and Milovan Kuljanin, who both described how they, when asked by Zdravko Mucić, were too afraid to identify those who had mistreated them.⁹⁵⁰ Further, Witness P, who worked as a doctor in the so-called infirmary, testified how his fear of mistreatment affected his ability to fulfill this role: “I was unable to do any X-rays. That was not allowed, because I too was a detainee, and if I asked for anything, I would get beaten more, so that I had to protect myself too”.⁹⁵¹

1091. Accordingly, the Trial Chamber finds that the detainees in the Čelebići prison-camp were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse. Through the frequent cruel and violent deeds committed in the prison-camp, aggravated by the random nature of these acts and the threats made by guards, the detainees were thus subjected to an immense psychological pressure which may accurately be characterised as “an atmosphere of terror”.

(ii) Inadequacy of Food

1092. Many of the witnesses who appeared before the Trial Chamber provided testimony concerning the inadequacy of the food provided to the detainees in the Čelebići prison-camp. Although it appears from this evidence that the size and quality of the rations varied somewhat during the relevant time-period, the Trial Chamber has been left in no doubt that the food supplied to the detainees fell far short of any acceptable standard. In their consistent testimonies, Witness F, Grozdana Čećez, Witness R, Milenko Kuljanin, Stevan Gligorević, Mirko Đorđić, Branko Gotovac,

⁹⁴⁷ T. 7774.

⁹⁴⁸ T. 7501.

⁹⁴⁹ T. 1900.

⁹⁵⁰ T. 2123, T.7120.

Mirko Kuljanin, Mladen Kuljanin, Witness J, Nedeljko Draganić and Risto Vukalo, all variously described how the food given to the detainees mostly consisted of small amounts of bread, with one loaf being divided between as many as 15 to 17 persons. This was complemented by small quantities of thin soup, vegetables or other cooked food of inferior quality. It is clear that the absence of adequate food was further aggravated by the lack of acceptable facilities for eating. As described by Witness R: “Occasionally we would get some cold soup, which would be several days old, but the problem was how to eat the soup in Hangar number 6 in which there were between 250 and 270 prisoners; there were only five spoons”. Similarly, Mirko Babić testified that,

there were five spoons for the 250 of us [the detainees in Hangar 6]. Five would go and eat. Sometimes it was something cooked, and this meal took about two hours. Somebody would take a little more. Then the next person had nothing. There was very little bread. We were all hungry.⁹⁵²

These accounts are further supported by the evidence of Stevan Gligorević and Nedeljko Draganić.

1093. On the basis of the evidence on record, it is further clear that, on at least one occasion, no food at all was provided to the detainees for a period of several days. In their testimony, Mirko Babić, Milojka Antić, Stevan Gligorević, Mirko Đorđić, Witness J, Nedeljko Draganić and Dr. Petko Grubač all recalled having experienced an incident where there was no food for about three days. In this regard, Milojka Antić described how “[f]or three days we did not eat anything. So that I was completely weakened, and I was unable to stand up on my feet. Grozda [Grozdana Čećez] had to take me to the toilet”.⁹⁵³ Similarly, Stevan Gligorević stated that “[p]eople turned into skeletons. You could hardly recognise them. Many could not even stand up. They had to lean against something, and if they stood up against something, they would fall down”.⁹⁵⁴ This evidence is further consistent with the evidence of Vaso Đorđić, who recalled several occasions upon which the detainees were forced to go without food for two days in a row.

1094. The effects of this insufficient diet were described by a number of witnesses who, in their testimony, gave consistent accounts of the weight loss and weakened physical states suffered by themselves and other detainees. According to the testimony of Witness J, “the conditions were poor, so that we almost starved. We could not even move in the end. I weighed 95 kilos when I

⁹⁵¹ T. 4536.

⁹⁵² T. 274.

⁹⁵³ T. 1798.

⁹⁵⁴ T. 1440.

was brought in and then, when I finally left the camp, I weighed 58 kilos, so it was terrible”.⁹⁵⁵ Similarly, Witness B testified that his weight was 90 kilograms before the war, and some 50 kilograms when he was released from the prison-camp. This witness also described the detainees as “living corpses”, and stated that many were so weakened by the lack of food that they would faint when they got up to go to the toilet.⁹⁵⁶ In their evidence, Grozdana Čećez and Branko Sudar provided similar accounts, and stated that they lost around 30 kilograms in weight during their detention.

1095. In light of the consistent evidence of these witnesses, the Trial Chamber cannot accept the accounts given by Defence witnesses, Šefkija Kevrić, Zlatko Ustalić and Emir Džajić concerning the quantity and type of food provided to the detainees in the Čelebići prison-camp. Further, to the extent that the Defence is arguing that the unsatisfactory diet provided by the prison-camp authorities was sufficiently compensated by the fact that family members were permitted to bring food to the detainees, the Trial Chamber finds that the evidence is to the contrary. In this respect, the evidence of Witness F, Witness P and Grozdana Čećez indicates that such food did not always reach the intended recipients. In any event, the evidence on record clearly demonstrates that any such extra supplies that in fact were made available in this way to the detainees, were insufficient to ensure that they received adequate nourishment during their detention in the prison-camp.

1096. Based upon the evidence reviewed above, the Trial Chamber accordingly finds that the detainees in the Čelebići prison-camp were deprived of adequate food.

(iii) Lack of Access to Water

1097. The Trial Chamber heard compelling evidence from numerous witnesses as to the restrictions placed on the detainees’ access to water inside the Čelebići prison-camp. Witness R, a former detainee in the Čelebići prison-camp, testified that, although at first people were allowed to keep water in plastic bottles inside Hangar 6, after a while this practice was abolished. He further testified that, thereafter, access to water was increasingly restricted until it reached a stage where “under threat of heavy beatings and even death, not a drop of water could be brought in without the knowledge and permission of the deputy commander Hazim Delić.”⁹⁵⁷ Mirko Đorđić testified that during this latter period, water was distributed to the detainees in Hangar 6 twice or three times a

⁹⁵⁵ T. 7445.

⁹⁵⁶ T. 5037.

Annex 463

Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, p. 99, para. 220 (15 July 1999)



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

Case No.: IT-94-1-A
Date: 15 July 1999
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 15 July 1999

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

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I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II¹ on 7 May 1997 in the case of *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T ("Judgement")² and the subsequent Sentencing Judgment of 14 July 1997 ("Sentencing Judgement").³ With the exception of the Appeals Chamber's judgement in *The Prosecutor v. Dražen Erdemovic*⁴ where the accused had entered a plea of guilty, this is the first time that the Appeals Chamber is deciding an appeal from a final judgement of a Trial Chamber.

2. The Indictment (as amended) charged the accused, Duško Tadic, with 34 counts of crimes within the jurisdiction of the International Tribunal. At his initial appearance before the Trial Chamber on 26 April 1995, the accused pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial. Of the remaining 31 counts, the Trial Chamber found the accused guilty on nine counts, guilty in part on two counts and not guilty on twenty counts.

3. Both Duško Tadic ("Defence" or "Appellant") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively).⁵ Additionally, the Defence appeals against the Sentencing Judgement ("Appeal against Sentencing Judgement"). Combined, these appeals are referred to as "the Appeals".

¹ Composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Ninian Stephen and Judge Lal Chand Vohrah.

² "Opinion and Judgment", *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997. (For a list of designations and abbreviations used in this Judgement, see Annex A – Glossary of Terms).

³ "Sentencing Judgment", *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.

⁴ "Judgement", *The Prosecutor v. Dražen Erdemovic*, Case No.: IT-96-22-A, Appeals Chamber, 7 October 1997.

⁵ It should be observed that Duško Tadić in the present proceedings is appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity of presentation,

4. Oral argument on the Appeals was heard by the Appeals Chamber on 19, 20 and 21 April 1999. On 21 April 1999, the Appeals Chamber reserved its judgement to a later date.

5. Having considered the written and oral submissions of the Prosecution and the Defence, the Appeals Chamber,

HEREBY RENDERS ITS JUDGEMENT.

1. The Appeals

(a) Notices of Appeal

6. A notice of appeal against the Judgement was filed on behalf of Duško Tadic on 3 June 1997. Subsequently, on 8 January 1999, the Defence filed an amended notice of appeal ("Amended Notice of Appeal against Judgement").⁶ Leave to amend the notice of appeal was granted, in part, by the Appeals Chamber in an oral order made on 25 January 1999.⁷

7. On 6 June 1997, the Prosecution filed a notice of appeal against the Judgement ("Notice of Cross-Appeal").⁸

8. After the notices of appeal against the Judgement were filed, proceedings continued before the Trial Chamber in relation to sentencing, and on 14 July 1997 the Trial Chamber delivered its Sentencing Judgement. Sentences were imposed for each of the 11 counts on which the Appellant had been found guilty or guilty in part, to be served concurrently. On 11 August 1997, the Defence filed a notice of appeal against the Sentencing Judgement. The Prosecution has not appealed against the Sentencing Judgement.

however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant" will be employed throughout this Judgement.

⁶ "Amended Notice of Appeal", Case No.: IT-94-1-A, 8 January 1999.

⁷ Transcript of hearing in *The Prosecutor v Duško Tadic*, Case No.: IT-94-1-A, 25 January 1999, p. 307 (T. 307 (25 January 1999)). (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).

⁸ "Notice of Appeal", Case No.: IT-94-1-A, 6 June 1997.

(b) Filing of Briefs

9. As set out in further detail below, the present proceedings were significantly delayed by repeated applications for extension of time in relation to an application for admission of additional evidence first made by the Defence on 6 October 1997.⁹ In January 1998, the Appeals Chamber suspended the timetable for filings in the Appeals until the determination of the Appellant's application.¹⁰ Following the Appeals Chamber's decision of 15 October 1998 on the matter,¹¹ the normal appeals sequence resumed. In view of the rather complicated pattern formed by the parties' briefs on the Appeals, it is useful to refer to the written submissions filed by the parties.

10. The Defence filed separate briefs for the Appeal against Judgement ("Appellant's Brief on Judgement") and the Appeal against Sentencing Judgement ("Appellant's Brief on Sentencing Judgement"). These briefs were filed on 12 January 1998.¹² The Prosecution responded to the briefs of the Appellant on 16 and 17 November 1998 ("Prosecution's Response to Appellant's Brief on Judgement" and "Prosecution's Response to Appellant's Brief on Sentencing Judgement", respectively).¹³

11. As a consequence of filing an Amended Notice of Appeal against Judgement, the Defence filed an Amended Brief of Argument (with annexes) on 8 January 1999 ("Appellant's Amended Brief on Judgement").¹⁴ This subsequent brief was accepted by order of the Appeals Chamber on 25 January 1999.¹⁵

12. Alongside the filings in relation to the Appellant's Appeal against Judgement and Appeal against Sentencing Judgement, both parties filed written submissions in relation to the Prosecution's Cross-Appeal. The Prosecution's brief in relation to the Cross-Appeal

⁹ "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.

¹⁰ T. 105 (22 January 1998).

¹¹ "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.

¹² "Appellants Brief on Appeal Against Opinion and Judgement of 7 May 1997", Case No.: IT-94-1-A, 12 January 1998, with accompanying appendices separately filed; "Appellant's Brief on Appeal Against Sentencing Judgement" Case No.: IT-94-1-A, 12 January 1998.

¹³ "Cross-Appellant's Response to Appellant's Brief on Appeal against Opinion and Judgement of May 7, 1997, Filed on 12 January 1998", Case No.: IT-94-1-A, 17 November 1998; "Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998", Case No.: IT-94-1-A, 16 November 1998.

¹⁴ "Amended Brief of Argument on behalf of the Appellant", Case No.: IT-94-1-A, 8 January 1999.

¹⁵ T. 308 (25 January 1999).

was filed on 12 January 1998 ("Cross-Appellant's Brief").¹⁶ A response to the Prosecution's brief was filed by the Defence on 24 July 1998.¹⁷ The Prosecution filed a brief in reply on 1 December 1998 ("Cross-Appellant's Brief in Reply").¹⁸ The Defence subsequently filed a further response to the Cross-Appellant's Brief ("Defence's Substituted Response to Cross-Appellant's Brief").¹⁹ The filing of this further brief was accepted by order of the Appeals Chamber on 4 March 1999.²⁰

13. Skeleton arguments consolidating and clarifying the parties' respective positions in relation to the Appeals were filed by both parties on 19 March 1999.²¹

2. Applications for Admission of Additional Evidence under Rule 115

14. A confidential motion for the admission of a significant amount of additional evidence was filed by the Defence on 6 October 1997.²² In the motion, as supplemented by subsequent submissions, the Defence sought leave under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to present additional documentary material and to call more than 80 witnesses before the Appeals Chamber.²³ In addition, or in the alternative, the Defence requested that the motion be considered as a

¹⁶ "Brief of Argument of the Prosecution (Cross-Appellant)", Case No.: IT-94-1-A, 12 January 1998 and accompanying "Book of Authorities", Case No.: IT-94-1-A, 22 January 1998. (See also "Corrigendum to Prosecutor's Brief of Argument filed on 12 January 1998 and Book of Authorities filed on 22 January 1998" Case No.: IT-94-1-A, 9 September 1998).

¹⁷ "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 12, 1998", Case No.: IT-94-1-A, 24 July 1998.

¹⁸ "Prosecution (Cross-Appellant) Brief in Reply", Case No.: IT-94-1-A, 1 December 1998.

¹⁹ "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.

²⁰ "Order Accepting Filing of Substitute Brief", Case IT-94-1-A, 4 March 1999. (See also "Opposition to the Appellant's 19 January 1999 filing entitled 'The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of 19 January, 1999 (sic)'" , Case No.: IT-94-1-A, 21 January 1999; "Submission in relation to Appellant's 'Substitute Brief' filed on 19 January 1999", Case No.: IT-94-1-A, 24 February 1999).

²¹ "Skeleton Argument – Appellant's Appeal Against Conviction", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument – Appellant's Appeal Against Conviction"); "Skeleton Argument – Appeal Against Sentence", Case No.: IT-94-1-A, 19 March 1999; "Skeleton Argument of the Prosecution", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument of the Prosecution"). See also "Skeleton Argument – Prosecutor's Cross-Appeal", Case No.: IT-94-1-A, originally filed by the Defence on 19 March 1999 and subsequently re-filed on 20 April 1999 ("Defence's Skeleton Argument on the Cross-Appeal").

²² "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.

²³ Rule 115 provides:

"(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the

motion for review of the Judgement on the basis of a “new fact” within the meaning of Rule 119 of the Rules.²⁴

15. The proceedings in relation to the motion continued for just under twelve months. A substantial number of extensions of time was sought by both parties.²⁵

16. By decision of the Appeals Chamber on 15 October 1998 and for the reasons stated therein, the Defence motion for the admission of additional evidence was dismissed (“Decision on Admissibility of Additional Evidence”).²⁶ Considering the motion under Rule 115 of the Rules, the Appeals Chamber expressed its view that additional evidence should not be admitted lightly at the appellate stage. Construing the standard established by this Rule, it was noted that additional evidence is not admissible in the absence of a reasonable explanation as to why the evidence was not available at trial. The Appeals Chamber held that such unavailability must not result from the lack of due diligence on the part of counsel who undertook the defence of the accused before the Trial Chamber. Commenting further on the second criterion of admissibility under Rule 115, it was considered that for the purposes of the present case, the interests of justice required admission of additional evidence only if (a) the evidence was relevant to a material issue,

Registrar not less than fifteen days before the date of the hearing. (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.”

²⁴ Rule 119 provides:

“Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.”

²⁵ “Motion to Extend the Time Limit”, Case No.: IT-94-1-A, 10 September 1997; “Motion for the Extension of the Time Limit” (Confidential), Case No.: IT-94-1-A, 6 October 1997; “The Motion for the Extension of Time”, Case No.: IT-94-1-A, 17 March 1998; “Application for Extension of Time to File Additional Evidence on Appeal”, Case No.: IT-94-1-A, 1 May 1998; “Motion for Extension of Time to File Reply to Cross-Appellant’s Response to Appellant’s Submissions since 9th March 1998 on the Motion for the Presentation of Additional Evidence under Rule 115”, Case No.: IT-94-1-A, 15 June 1998; “Request for an Extension of Time to File a Reply to the Appellant’s Motion Entitled ‘Motion for the Extension of the Time Limit’”, Case No.: IT-94-1-A, 9 October 1997; “Request for a Modification of the Appeals Chamber Order of 22 January 1998”, Case No.: IT-94-1-A, 13 February 1998; “Request for a Modification of the Appeals Chamber Order of 2 February 1998”, Case No.: IT-94-1-A, 7 May 1998. The following orders were made in relation to these applications: “Scheduling Order”, Case No.: IT-94-1-A, 24 November 1997; “Order Granting Request for Extension of Time”, Case No.: IT-94-1-A, 23 March 1998; “Order Granting Requests for Extension of Time”, Case No.: IT-94-1-A, 13 May 1998; “Order Granting Extension of Time”, Case No.: IT-94-1-A, 10 June 1998; “Order Granting Extension of Time”, Case No.: IT-94-1-A, 17 June 1998; “Order Granting Request for Extension of Time”, Case No.: IT-94-1-A, 9 October 1997; “Order Granting Request for Extension of Time”, Case No.: IT-94-1-A, 19 February 1998; “Order Granting requests for Extension of Time”, Case No.: IT-94-1-A, 13 May 1998.

²⁶ “Decision on Appellant’s Motion for the Extension of the Time-limit and Admission of Additional Evidence”, Case No.: IT-94-1-A, 15 October 1998.

(b) the evidence was credible, and (c) the evidence was such that it would probably show that the conviction was unsafe. Applying these criteria to the evidence sought to be admitted, the Appeals Chamber was not satisfied that the interests of justice required that any material which was not available at trial be presented on appeal.

17. Further motions for the admission of additional evidence pursuant to Rule 115 were made by the Defence on 8 January and 19 April 1999.²⁷ By oral orders of 25 January and 19 April 1999, the motions were rejected by the Appeals Chamber.²⁸

3. Contempt proceedings

18. In the course of the appeal process, proceedings were initiated by the Appeals Chamber against Mr. Milan Vujin, former lead counsel for the Appellant, relating to allegations of contempt of the International Tribunal.²⁹ These allegations are subject to proceedings separate from the Appeals.

19. A hearing on the contempt proceedings commenced on 26 April 1999. The matter is currently pending before the Appeals Chamber.

²⁷ "Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Tribunal's Rules", Case No.: IT-94-1-A, 8 January 1999; "Motion (3) to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Rules of Procedure and Evidence", Case No.: IT-94-1, 19 April 1999.

²⁸ T. 307-308 (25 January 1999); T. 20 (19 April 1999).

²⁹ See "Scheduling Order Concerning Allegations against Prior Counsel", Case No.: IT-94-1-A, 10 February 1999. At the outset of the appellate process, Mr. Milan Vujin acted as lead counsel for the Defence, with the assistance of Mr. R. J. Livingston. By a decision of the Deputy Registrar on 19 November 1998, Mr. Milan Vujin was withdrawn as counsel for the accused and replaced by Mr. William Clegg as lead counsel (See "Decision of Deputy Registrar regarding the Assignment of Counsel and the Withdrawal of Lead Counsel for the Accused", Case No.: IT-94-1-A, 19 November 1998).

B. Grounds of Appeal

1. The Appeal against Judgement

20. As set out in the Appellant's Amended Notice of Appeal against Judgement and Appellant's Amended Brief on Judgement, the Defence advances the following two grounds of appeal against Judgement:

Ground (1): The Appellant's right to a fair trial was prejudiced as there was no "equality of arms" between the Prosecution and the Defence due to the prevailing circumstances in which the trial was conducted.³⁰

Ground (3): The Trial Chamber erred at paragraph 397 of the Judgement when it decided that it was satisfied beyond reasonable doubt that the Appellant was guilty of the murders of Osman Didovic and Edin Be{i}.³¹

21. The Defence sought leave to amend its Notice of Appeal to include a further ground of appeal ("Ground 2"), alleging that the Appellant's right to a fair trial was gravely prejudiced by the conduct of his former counsel, Mr. Milan Vujin.³² Leave to amend the Notice of Appeal to include this ground was denied by the Appeals Chamber on 25 January 1999,³³ thus leaving only Grounds 1 and 3 in the Appellant's Appeal against Judgement.

2. The Cross-Appeal

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

³⁰ Appellant's Amended Notice of Appeal against Judgement, paras. 1.1–1.4; Appellant's Amended Brief on Judgement, paras. 1.1-1.12.

³¹ Appellant's Amended Notice of Appeal against Judgement, paras. 3.1–3.6; Appellant's Amended Brief on Judgement, paras. 3.1-3.11.

³² Amended Notice of Appeal, paras. 2.1-2.4.

³³ T. 307 (25 January 1999).

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").³⁴

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.³⁵

Ground (3): The Trial Chamber erred when it held that in order to be found guilty of a crime against humanity, the Prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of a widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict.³⁶

Ground (4): The Trial Chamber erred when it held that discriminatory intent is an element of all crimes against humanity under Article 5 of the Statute of the International Tribunal.³⁷

Ground (5): The majority of the Trial Chamber erred in a decision of 27 November 1996 in which it denied a Prosecution motion for production of defence witness statements ("Witness Statements Decision").³⁸

3. The Appeal against Sentencing Judgement

23. The Defence raises the following grounds of appeal against the Sentencing Judgement:

Ground (1): The total sentence of 20 years decided by the Trial Chamber is unfair.³⁹

(i) The sentence is unfair as it was longer than the facts of the case required or demanded.⁴⁰

³⁴ Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 2.1-2.88.

³⁵ Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 3.1-3.33.

³⁶ Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 4.1-4.23.

³⁷ Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 5.1-5.28.

³⁸ Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 6.1-6.32 with reference to "Decision on Prosecution Motion for Production of Defence Witness Statements", Case No.: IT-94-1-T, Trial Chamber II, 27 November 1996.

³⁹ T. 306 (21 April 1999).

(ii) The Trial Chamber erred by failing to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal. Under this practice, a 20-year sentence is the longest sentence that can be imposed, but only as an alternative to the death penalty.⁴¹

(iii) The Trial Chamber paid insufficient attention to the personal circumstances of Duško Tadić.⁴²

Ground (2): The Trial Chamber erred by recommending that the calculation of the minimum sentence should commence “from the date of this Sentencing Judgement or of the final determination of any appeal, whichever is the latter”.⁴³

Ground (3): The Trial Chamber erred in not giving the Appellant credit for the time spent in confinement in Germany before the International Tribunal requested deferral in this case.⁴⁴

C. Relief Requested

1. The Appeal against Judgement

24. In the Appeal against Judgement the Defence seeks the following relief:⁴⁵

(i) That the decision of the Trial Chamber that the Appellant is guilty of the crimes proved against him be set aside.

(ii) That a re-trial of the Appellant be ordered.

(iii) In the alternative to the relief sought under (i) and (ii) above, that the decision of the Trial Chamber at paragraph 397 of the Judgement that the Appellant is guilty of the murders of Osman Didovic and Edin Bećić be reversed.

⁴⁰ T. 303 (21 April 1999).

⁴¹ Appellant’s Brief on Sentencing Judgement, pp. 4–6; T. 304 (21 April 1999).

⁴² Appellant’s Brief on Sentencing Judgement, pp. 9-10; T. 305 (21 April 1999).

⁴³ Sentencing Judgement, para. 76. See Appellant’s Brief on Sentencing Judgement, p. 10.

⁴⁴ *Ibid.*, p. 14.

⁴⁵ Appellant’s Amended Notice of Appeal against Judgement, p. 3.

(iv) That the sentence of the Appellant be reviewed in the light of the relief sought under (iii) above.

2. The Cross-Appeal

25. In the Cross-Appeal the Prosecution seeks the following relief:

(i) That the majority decision of the Trial Chamber at page 227, paragraph 607 of the Judgement, holding that the victims of the acts ascribed to the Appellant in Section III of the Judgement did not enjoy the protection of the prohibitions prescribed by the grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals (which falls under Article 2 of the Statute of the Tribunal), be reversed.⁴⁶

(ii) That the finding of the Trial Chamber at page 132, paragraph 373 of the Judgement, that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had played any part in the killing of any of the five men from the village of Jaskici, be reversed.⁴⁷

(iii) That the decision of the Trial Chamber at pages 252-253, paragraph 656 of the Judgement, that in order to be found guilty of a crime against humanity the Prosecution must prove beyond reasonable doubt that the Appellant not only formed the intent to commit the underlying offence but also knew of the context of the widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict, be reversed.⁴⁸

(iv) That the decision of the Trial Chamber at page 250, paragraph 652 of the Judgement, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute, be reversed.⁴⁹

(v) That the Witness Statements Decision be reviewed.⁵⁰

⁴⁶ Notice of Cross-Appeal, p. 3.

⁴⁷ Ibid., p. 4.

⁴⁸ Ibid.

⁴⁹ Ibid.

3. The Appeal against Sentencing Judgement

26. By the Appeal against Sentencing Judgement, the Defence would appear to seek the following relief:

(i) That the sentence imposed by the Trial Chamber be reduced.

(ii) That the calculation of the minimum sentence imposed by the Trial Chamber be altered to run from the commencement of the Appellant's detention.

(iii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal in this case.

D. Sentencing Procedure

27. The Appeal against Sentencing Judgement was the subject of oral argument by the parties. However, in the view of the Appeals Chamber, that appeal may be conveniently considered in connection with the appeal by the Prosecution relating to certain counts of the Indictment in respect of which the accused was acquitted. Both the Prosecution and the Appellant agreed that, if the Appellant were found guilty on those counts, there should be a separate sentencing procedure relating thereto. As will appear below, the Appellant is found guilty on those counts, with the consequence that there will have to be a separate sentencing procedure in relation to those counts. The Appeals Chamber considers that its decision on the Appeal against Sentencing Judgement should correspondingly be deferred to the stage of a separate sentencing procedure.

28. An earlier procedure provided for a sentencing hearing to take place subsequent to conviction; that procedure was replaced, in July 1998, by Sub-rule 87(C) of the Rules, which provides for sentence to be imposed when conviction is ordered. The earlier procedure was applied when the Appellant was originally sentenced and was in force when the Appeals were brought. In respect of the change, Sub-rule 6(D) provides as follows:

⁵⁰ Ibid.

An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

In the particular circumstances of the case, the Appeals Chamber considers that the rights of the Appellant would be prejudiced if his appeal were to be determined under the new Rule. The Appeals Chamber will therefore follow the previous procedure in respect of the counts on which the Appellant was acquitted by the Trial Chamber but on which he is now found guilty. Correspondingly, the Appeal against Sentencing Judgement will be determined at the separate sentencing stage.

II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

A. Submissions of the Parties

1. The Defence Case

29. In the first ground of the Appeal against Judgement, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the Republika Srpska and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial.⁵¹ The Defence contends that, whilst most Defence witnesses were Serbs still residing in the Republika Srpska, the majority of the witnesses appearing for the Prosecution were Muslims residing in countries in Western Europe and North America whose governments cooperated fully. It avers that the lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence. It is accordingly submitted that there was no "equality of arms" between the Prosecution and the Defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant's right to a fair trial.⁵² The Defence therefore, requests the Appeals Chamber to set aside the Trial Chamber's findings of guilt and to order a re-trial.⁵³

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms.⁵⁴ The Defence

⁵¹ Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).

⁵² Appellant's Amended Brief on Judgement, para 1.11.

⁵³ Appellant's Amended Notice of Appeal against Judgement, p. 6.

⁵⁴ *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274; *Neumeister v. Austria*, Eur. Court H. R., judgement of 27 June 1968, Series A, no. 8; *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11; *Borgers v. Belgium*, Eur. Court H. R., judgement of 30 October 1991, Series A, no. 214; *Albert and Le Compte v. Belgium*, Eur. Court H. R., judgement of 10 February 1983, Series A, no. 58; *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284; *Kaufman v. Belgium*, Application No. 10938/84, 50 Decisions and

accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms.⁵⁵ However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial.⁵⁶

31. Relying on the same cases decided under the ECHR, the Defence further claims that the principle of equality of arms embraces the minimum procedural guarantee, set down in Article 21(4)(b) of the Statute, to have adequate time and facilities for the preparation of the defence. It contends that the uncooperative stance of the authorities in the Republika Srpska had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial.

32. In support of its submissions, the Defence cites paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible.⁵⁷

Reports of the European Commission of Human Rights ("DR") 98; X and Y v. Austria, Application No. 7909/74, 15 DR 160.

⁵⁵ T. 30-31 (19 April 1999).

⁵⁶ T. 31 (19 April 1999).

⁵⁷ Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999).

33. The Defence contends that the Appeals Chamber should adopt the following two-fold test to determine whether, on the facts, a violation of the principle of equality of arms, broadly construed, has been established.

1) Did the Defence prove on the balance of probabilities that the failure of the civic authorities in Prijedor and the government of the Republika Srpska to cooperate with the Tribunal led to relevant and admissible evidence not being presented by trial counsel, despite their having acted with due diligence, because significant witnesses did not appear at trial?

2) If so, was the imbalance created between the parties sufficient to frustrate the Appellant's right to a fair trial?

34. With respect to the first branch of this test, the Defence asserts that the Appeals Chamber in its Decision on Admissibility of Additional Evidence recognised that certain Defence witnesses were intimidated into not appearing before the Trial Chamber. While acknowledging that the Appeals Chamber denied the admission of the evidence in question on the ground that it found that trial counsel did not act with due diligence to secure attendance of those witnesses at trial, it contends that what is important is that the Appeals Chamber accepted the allegations of intimidation. It adds that the Appeals Chamber in this decision also accepted that there were witnesses unknown to trial counsel during trial proceedings, despite counsel having acted with due diligence in looking for witnesses. From this the Defence draws the conclusion that, had there been some measure of cooperation, trial counsel could have called at least some of these witnesses. Thus, it is argued that relevant and admissible evidence helpful to the case for the Defence was not presented to the Trial Chamber. It is further asserted that the reason why so many witnesses could not be found was due to lack of cooperation on the part of the authorities in the Republika Srpska.⁵⁸

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume

⁵⁸ T. 38-41 (19 April 1999).

and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.⁵⁹

36. Finally, the Defence contends that the fact that trial counsel did not file a motion seeking a stay of trial proceedings should not be held to prevent the Defence from raising the matter of denial of a fair trial on appeal. In this respect, the Defence maintains that trial counsel might have been unaware of the degree of obstruction by the Bosnian Serb authorities in preventing the discovery of witnesses helpful to the Defence case.⁶⁰ It is further pointed out that lead trial counsel in his opening statement emphasised that the prevailing conditions might frustrate the fairness of the trial. Defence counsel opined that trial counsel's decision not to seek an adjournment of the proceedings could be attributed to the wish not to prolong the extended period of the Appellant's pre-trial detention.⁶¹

2. The Prosecution Case

37. The Prosecution argues that equality of arms means procedural equality. According to the Prosecution, this principle entitles both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases. However, in its view, the principle does not call for equalising the material and practical circumstances of the two parties. Accordingly, it is contended that the claim of the Defence that it was unable to secure the attendance of important witnesses at trial does not demonstrate that there has been an inequality of arms, unless that inability was due to a relevant procedural disadvantage suffered by the Defence. It is asserted that while the obligation of the Trial Chamber is to place the parties on an equal footing as regards the presentation of the case, that Chamber cannot be responsible for factors which are beyond its capacity or competence.⁶²

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or "manifest injustice" to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this

⁵⁹ T. 52-53 (19 April 1999).

⁶⁰ T. 50-51 (19 April 1999).

⁶¹ T. 45-49(19 April 1999).

⁶² Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8–3.16, 3.30.

is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.⁶³

39. In the view of the Prosecution, the issue raised by the present ground of appeal is whether the degree of lack of cooperation and obstruction by the authorities in the Republika Srpska was such as to deny the Appellant a fair trial.⁶⁴ It submits that the Defence must prove that the result of such non-cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity.⁶⁵ In addition, it is noted that the Defence was helped by the broad disclosure obligation on the Prosecution under the Rules, which extends an obligation upon the Prosecution to disclose all exculpatory evidence of which it is aware. Furthermore, it is submitted that, whereas the Defence received some measure of cooperation from the authorities in the Republika Srpska, the Prosecution in fact received no such cooperation at all.⁶⁶ Finally, it is alleged that the Defence has not substantiated its claim that any lack of cooperation substantially disadvantaged the Defence as compared to the Prosecution.⁶⁷

40. The Prosecution further argues that the standard which the Defence advocates for establishing a violation of the principle of equality of arms or the right to a fair trial is set too low. It claims that the Defence does not prove a violation of this principle merely by showing that relevant evidence was not presented at trial. In its view, a higher standard is called for, according to which the burden is on the Defence to prove an "abuse of discretion" by the Trial Chamber. The Prosecution maintains that the Defence has not satisfied this burden, as it has not shown that the Trial Chamber acted inappropriately in proceeding with the trial.⁶⁸

⁶³ Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).

⁶⁴ T. 90-91 (20 April 1999).

⁶⁵ T. 97 (20 April 1999).

⁶⁶ T. 90, 98-99 (20 April 1999).

⁶⁷ Skeleton Argument of the Prosecution, para.10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.

⁶⁸ Skeleton Argument of the Prosecution, para. 6.

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the Republika Srpska.⁶⁹

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the Republika Srpska. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant's right to a fair trial had been violated.⁷⁰

B. Discussion

1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"),⁷¹ the European Convention on

⁶⁹ T. 96 (20 April 1999).

⁷⁰ T. 100 (20 April 1999).

⁷¹ Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]."

Human Rights (1950),⁷² and the American Convention on Human Rights (1969).⁷³ The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.⁷⁴

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee (“HRC”) under the ICCPR. The HRC stated in *Moraël v. France*⁷⁵ that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms. Similarly, in *Robinson v. Jamaica*⁷⁶ and *Wolf v. Panama*⁷⁷ the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.⁷⁸ In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the

⁷² Article 6(1) of the ECHR provides in part: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

⁷³ Article 8(1) of the American Convention on Human Rights provides in part:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.”

⁷⁴ T. 29-35 (19 April 1999).

⁷⁵ *Moraël v. France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416.

⁷⁶ *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.

⁷⁷ *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.

⁷⁸ T. 29-35 (19 April 1999).

parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the Republika Srpska could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the Republika Srpska failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*,⁷⁹ a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".⁸⁰ In *Dombo Beheer B.V. v. The Netherlands*,⁸¹ another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".⁸² The Court decided in a criminal proceeding, *Delcourt v. Belgium*,⁸³ that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused

⁷⁹ *Kaufman v. Belgium*, 50 DR 98.

⁸⁰ *Ibid.*, p. 115.

⁸¹ *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.

⁸² *Ibid.*, para. 40.

⁸³ *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.

unfairly at a disadvantage.”⁸⁴ It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

49. There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.⁸⁵

50. The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are procedural in nature. The HRC observed in *B.d.B. et al. v. The Netherlands*,⁸⁶ a civil case, that Article 14 of the ICCPR “guarantees procedural equality” to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(1).⁸⁷ The communications decided under the ICCPR are silent as to whether the principle extends to cover a party’s inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States

⁸⁴ *Ibid.*, para. 34.

⁸⁵ In *Kaufman v. Belgium*, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In *Neumeister v. Austria*, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant’s request for provisional release, despite the prosecutor having been heard *ex parte*. In *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank’s witness was heard.

⁸⁶ *B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442.

⁸⁷ *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

without having the power to compel them to cooperate through enforcement measures.⁸⁸ The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59bis, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.⁸⁹

52. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

- (1) adopt witness protection measures, ranging from partial to full protection;
- (2) take evidence by video-link or by way of deposition;
- (3) summon witnesses and order their attendance;

⁸⁸ See "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-AR108bis, Appeals Chamber, 29 October 1997, para. 26.

⁸⁹ *Ibid.*, para. 33.

(4) issue binding orders to States for, inter alia, the taking and production of evidence; and

(5) issue binding orders to States to assist a party or to summon a witness and order his or her attendance under the Rules.

A further important measure available in such circumstances is:

(6) for the President of the Tribunal to send, at the instance of the Trial Chamber, a request to the State authorities in question for their assistance in securing the attendance of a witness.

In addition, whenever the aforementioned measures have proved to be to no avail, a Chamber may, upon the request of a party or proprio motu:

(7) order that proceedings be adjourned or, if the circumstances so require, that they be stayed.

53. Relying on the principle of equality of arms, the Defence is submitting that the Appellant did not receive a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the Republika Srpska in securing the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber was negligent in responding to a request for assistance. The Appeals Chamber finds that the Defence has not substantiated its claim that the Appellant was not given a reasonable opportunity to present his case. There is no evidence to show that the Trial Chamber failed to assist him when seised of a request to do so. Indeed, the Defence concedes that the Trial Chamber gave every assistance it could to the Defence when asked to do so, and even allowed a substantial adjournment at the close of the Prosecution's case to help Defence efforts in tracing witnesses.⁹⁰ Further, the Appellant acknowledges that the Trial Chamber did not deny the Defence attendance of any witness but, on the contrary, took virtually all steps requested and necessary within its authority to assist the Appellant in presenting witness testimony. Numerous instances of the granting of such motions and orders by the Trial Chamber, on matters such as protective measures for witnesses, approving the giving

⁹⁰ T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 [...]").

of evidence via video-conference link from Banja Luka in the Republika Srpska, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.⁹¹ Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.⁹² She requested the President of the International Tribunal to send a letter to the Acting President of the Republika Srpska, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia*, of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."⁹³

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

⁹¹ Judgement, paras. 29-35.

⁹² T. 59, 60 (20 April 1999).

⁹³ Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid.*).

would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

III. THIRD GROUND OF APPEAL BY THE DEFENCE: ERROR OF FACT LEADING TO A MISCARRIAGE OF JUSTICE

A. Submissions of the Parties

1. The Defence

57. The Trial Chamber made the factual finding that the Appellant was guilty of the murder of two Muslim policemen, Edin Besi} and a man identified at trial by the name of Osman, based on the testimony of only one witness, Nihad Seferovi}. The Defence contends that the Trial Chamber erred in deciding that it was satisfied beyond reasonable doubt that he was guilty of the two murders because the Chamber relied on the uncorroborated evidence of Mr. Seferovi}. The Defence maintains that Mr. Seferovi} is an unreliable witness because he was introduced to the Prosecution by the government of Bosnia and Herzegovina, a source which the Defence alleges the Trial Chamber found to be tainted for having planted another Prosecution witness, Dragan Opaci}. The latter was found to be untruthful at trial and, consequently, withdrawn by the Prosecution.

58. The Defence argues that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it is implausible. Mr. Seferovi}, a Muslim who lived in an area under bombardment by Serbian paramilitary forces, fled to the mountains for safety. He testified at trial that he was so concerned about the welfare of his pet pigeons that he returned to town to feed them while the Serbian paramilitaries were still there. On his return to town, he saw Mr. Tadi} kill two policemen. Defence counsel contended at trial that the witness was never in town at the time of the killings.

59. The Defence maintains that the Appeals Chamber, in reviewing the factual finding of the Trial Chamber, is entitled to consider all relevant evidence and can reverse the Chamber's finding if it is satisfied that no reasonable person could conclude that the evidence of Mr. Seferovi} proved that the Appellant was responsible for the killings.

60. The Defence asks the Appeals Chamber to reverse the Trial Chamber's finding that the Appellant is guilty of the murders of Edic Besi} and the man identified by the name of Osman.⁹⁴

2. The Prosecution

61. The Prosecution argues that the Appeals Chamber, being an appellate body, cannot reverse the Trial Chamber's findings of fact unless it were to conclude that the Defence has proved that no reasonable person could have come to the conclusion reached by the Trial Chamber based on the evidence cited by it.⁹⁵

62. The Prosecution claims that the Defence misrepresented the Trial Chamber's findings with respect to Dragan Opaci} in order to taint Mr. Seferovi} by association as an unreliable witness. Having lied about his family situation, Mr. Opaci} had clearly aroused the Prosecution's fears about his credibility. Consequently, he was withdrawn as a witness as a precautionary measure. The Trial Chamber asked the Prosecution to investigate this matter and, having examined the situation, the Prosecution found that the investigation did not support the Defence allegation that Mr. Opaci} was planted by the Bosnian government.

63. The Prosecution submits that the attempt to taint Mr. Seferovi}'s credibility by assimilating his position to that of Mr. Opaci} fails because the Trial Chamber concluded that the circumstances surrounding the testimony of the latter were unique to him. The situation of Mr. Seferovi} was not similar to that of Mr. Opaci}. There was no need to require corroboration of his testimony because the Trial Chamber concluded that he was a reliable witness.

B. Discussion

64. The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a

⁹⁴ In its submissions, the Defence refers to the victim identified by the Trial Chamber only as one "Osman", by the name "Osman Didovic". The Appeals Chamber is not here called upon to determine whether the name thus given by the Defence is accurate.

conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")⁹⁶ to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferovi} cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opaci}, who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferovi}'s association with the Bosnian government does not taint him. The circumstances of Mr. Seferovi} and Mr. Opaci} are different. Mr. Opaci} was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferovi}'s introduction was made through the Bosnian embassy in Brussels. Mr. Seferovi} was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not recall him after learning of the withdrawal of Mr. Opaci} as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferovi}'s testimony be disregarded on the ground that he, like Mr. Opaci}, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovi}.

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it was implausible. Here, it is claimed that the Trial Chamber did not

⁹⁵ Prosecution's Response to Appellant's Brief on Judgement, para. 2.14.

⁹⁶ More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

act reasonably in concluding from the evidence of Mr. Seferovi} that the Appellant was responsible for the killing of the two policemen. The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk. The Trial Chamber, after seeing the witness, hearing his testimony, and observing him under cross-examination, chose to accept his testimony as reliable evidence. There is no basis for the Appeals Chamber to consider that the Trial Chamber acted unreasonably in relying on that evidence for its finding that the Appellant killed the two men.

C. Conclusion

67. The Appellant has failed to show that Nihad Seferovi}'s reliability as a witness is suspect, or that his testimony was inherently implausible. Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.

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.⁹⁷

69. The Prosecution maintains that all relevant criteria under Article 2 of the Statute were met. Consequently, the Trial Chamber erred by relying exclusively upon the "effective control" test derived from the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)⁹⁸ in order to determine the applicability of the grave breach provisions of the relevant Geneva Convention. The Prosecution submits that the Chamber should have instead applied the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law which, in its view, apply a "demonstrable link" test.

70. In distinguishing the present situation from the facts in Nicaragua, the Prosecution notes that Nicaragua was concerned with State responsibility rather than individual criminal responsibility. Further, the Prosecution asserts that the International Court of Justice in Nicaragua deliberately avoided dealing with the question of which body of treaty rules was applicable. Instead the Court focused on the minimum yardstick of rules contained in

⁹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV" or "Fourth Geneva Convention").

Common Article 3 of the Geneva Conventions, which in the Court's view applied to all conflicts in Nicaragua, thus obviating the need for the Court to decide which body of law was applicable in that case.

71. The Prosecution submits that the Trial Chamber erred by not applying the provisions of the Geneva Conventions and general principles of international humanitarian law to determine individual criminal responsibility for grave breaches of the Geneva Conventions. In the Prosecution's submission, these sources require that there be a "demonstrable link" between the perpetrator and a Party to an international armed conflict of which the victim is not a national.

72. The Prosecution submits that the "demonstrable link" test is satisfied on the facts of the case at hand. In its view, the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska ("VRS") had a "demonstrable link" with the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and the Army of the FRY ("VJ"); it was not a situation of mere logistical support by the FRY to the VRS.

73. In addition, the Prosecution submits that the Trial Chamber erred in finding that the only test relied upon in Nicaragua was the "effective control" test. The Court in Nicaragua also applied an "agency" test which, the Prosecution submits, is a more appropriate standard for determining the applicability of the grave breach provisions.

74. Were either the "effective control" test or the "agency" test to be adopted by the Appeals Chamber, the Prosecution submits that in any event both tests would be satisfied on the facts of this case. To support this contention, the Prosecution looks to the fact, *inter alia*, that after 19 May 1992, when the Yugoslav People's Army ("JNA") formally withdrew from Bosnia and Herzegovina, VRS soldiers continued to receive their salaries from the government of the FRY which also funded the pensions of retired VJ soldiers who had been serving with the VRS. The Prosecution looks to a number of additional factors in support of its contention that there was more than mere logistical support by the FRY after 19 May 1992. These factors include the structures and ranks of the VRS and VJ being identical, as well as the supervision of the VRS by the FRY after that date. From those

⁹⁸ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits), Judgment, ICJ Reports (1986), p. 14 ("Nicaragua").

facts, the Prosecution draws the inference that the FRY was exercising effective military control over the VRS.

2. The Defence Case

75. The Defence asserts that the Trial Chamber was correct in applying the “effective control” test derived from Nicaragua and submits that the “demonstrable link” test is incorrect. The Defence formulates the test which the Appeals Chamber should apply as “were the Bosnian Serbs acting as ‘organs’ of another State?”⁹⁹

76. The Defence submits that it is misleading to distinguish Nicaragua on the basis that the decision is concerned only with State responsibility. The Defence further argues that the Court in Nicaragua was concerned with the broader question of which part of international humanitarian law should apply to the relevant conduct.

77. On the facts of the present case there is no evidential basis for concluding that after 19 May 1992, the VRS was either effectively controlled by or could be regarded as an agent of the FRY government. The Defence’s submission is that the FRY and the Republika Srpska coordinated with each other, solely as allies. For this reason, the VRS was not an organ of the FRY.

78. The Defence submits that the “demonstrable link” test is not the correct test to be applied under Article 2 of the Statute. The Defence argues that the test has no authority in international law and submits that it should also be rejected for policy reasons. If the Appeals Chamber were to accept the “demonstrable link” test, this could result in the undesirable outcome of a State being held responsible for the actions of another State or entity over which the State did not have any effective control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

⁹⁹ See Defence’s Substituted Response to Cross-Appellant’s Brief, para. 2.6.

79. The Defence concedes that if the correct test were the “demonstrable link” test, on the facts of this case the test would be satisfied.¹⁰⁰

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. According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case,¹⁰¹ the 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.

82. Only if the Appeals Chamber finds that the conflict was international at all relevant times will it turn to the second question of whether the victims were to be regarded as “protected persons”.

¹⁰⁰ See Defence’s Substituted Response to Cross-Appellant’s Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).

¹⁰¹ See “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction”, The Prosecutor v. Du{ko Tadi}, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995 (“Tadi} Decision on Jurisdiction”), paras. 79-84 (Tadi} (1995) I ICTY JR 353).

2. The Nature of the Conflict

83. The requirement that the conflict be international for the grave breaches regime to operate pursuant to Article 2 of the Statute has not been contested by the parties.

84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

85. In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina ("BH") on the one hand, and the FRY on the other.¹⁰² Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.¹⁰³

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.¹⁰⁴ However, the Trial Chamber did not explicitly state what the nature of the conflict was after 19 May 1992. As the Prosecution points out, "[t]he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb

¹⁰² See para. 2.25 of the Cross-Appellant's Brief:

"The SFRY/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently, it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992." (emphasis added).

¹⁰³ See para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 ("Separate and Dissenting Opinion of Judge McDonald") where she held: "I find that at all times relevant to the Indictment, the armed conflict in opština Prijedor was international in character [...]."

¹⁰⁴ See Judgement, paras. 569-608:

"569. [...] 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. [...]."

570. For evidence of this it is enough to refer generally to the evidence presented as to the bombardment of Sarajevo, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina's border with Serbia on the

Army (VRS) and the BH after the VRS was established in May 1992".¹⁰⁵ Nevertheless, it may be held that the Trial Chamber at least implicitly considered that after 19 May 1992 the conflict became internal in nature.¹⁰⁶

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.¹⁰⁷ 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 iure* 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

(a) International Humanitarian Law

88. The Prosecution maintains that the alleged perpetrator of crimes must be "sufficiently linked to a Party to the conflict" in order to come under the jurisdiction of Article 2 of the Statute.¹⁰⁸ It further contends that "a showing of a demonstrable link between the VRS and the FRY or VJ" is sufficient.¹⁰⁹ According to the Prosecution, "such a link could, at most, be proven by a showing of a general form of control. This

Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro [...]" (emphasis added).

¹⁰⁵ Cross-Appellant's Brief, para. 2.5.

¹⁰⁶ See Judgement, paras. 607-608.

¹⁰⁷ In addition to the evidence referred to in para. 570 of the Judgement, reference may also be made to the facts cited by Judge Li in his Separate Opinion to the Tadić Decision on Jurisdiction (paras. 17-19), for example BH's Declaration that it was at war with the FRY and the reports of various expert bodies suggesting that the conflict was international. Moreover, in three Rule 61 Decisions involving the conflict between the Serbs and the BH Government (Nikolic, Vukovar Hospital, and Karadžić and Mladic), Trial Chambers have found the conflict to have been an international armed conflict. (See "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Dragan Nikoli}, Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995, para 30 (Nikoli} (1995) II ICTY JR 738); "Review of Indictment Pursuant to Rule 61", The Prosecutor v. Mile Mrksi} et al., Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 25; "Review of the Indictments Pursuant to Rule 61 of the Rules Procedure and Evidence", The Prosecutor v. Radovan Karadžić and Ratko Mladić}, Case No.: IT-95-18-R61, Trial Chamber I, 11 July 1996, para. 88)).

¹⁰⁸ Cross-Appellant's Brief, para. 2.31.

legal standard finds support in the provisions of the Geneva Conventions, the jurisprudence of the trials that followed the Second World War, the Tribunal's decisions, the writings of leading publicists, and other authorities."¹¹⁰

89. The Prosecution also contends that the determination of the conditions for considering whether Article 2 of the Statute is applicable must be made in accordance with the provisions of the Geneva Conventions and the relevant principles of international humanitarian law. By contrast, in its opinion the international law of State responsibility has no bearing on the requirements on grave breaches laid down in the relevant Geneva provisions. According to the Prosecution "it would lead to absurd results to apply the rules relating to State responsibility to assist in determining such a question" (i.e. whether certain armed forces are sufficiently related to a High Contracting Party).¹¹¹

90. Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.

91. The Appeals Chamber will therefore discuss the question at issue first from the viewpoint of international humanitarian law. In particular, the Appeals Chamber will consider the conditions under which armed forces fighting against the central authorities of the same State in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that on whose territory they live and operate.

¹⁰⁹ *Ibid.*, para. 2.30.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, paras. 2.21-2.23.

92. A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949.¹¹² Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form "part of [the] armed forces" of a Party to the conflict (Article 4A(1)) or "belong [...]" to a "Party to the conflict" (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2).¹¹³ It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants. Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".

93. The content of the requirement of "belonging to a Party to the conflict" is far from clear or precise. The authoritative ICRC Commentary does not shed much light on the matter, for it too is rather vague.¹¹⁴ The rationale behind Article 4 was that, in the wake of World War II, it was universally agreed that States should be legally responsible for the conduct of irregular forces they sponsor. As the Israeli military court sitting in Ramallah rightly stated in a decision of 13 April 1969 in Kassem et al.:

In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments

¹¹² Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III" or "Third Geneva Convention").

¹¹³ These four conditions are as follows:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognisable at a distance;
- (c) that of carrying arms openly; and
- (d) that of conducting their operations in accordance with the laws and customs of war.

It might be contended that these conditions, which undoubtedly had become part of customary international law, may now be considered to have been replaced by the different conditions set out in Article 44(3) and 43(1) of Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977). This contention should of course be premised on the assumption – for which proof is required – that these two Articles have already been transformed into customary international rules.

Be that as it may, the requirement in Article 43(1) of "being under a command responsible to [a] party to the conflict for the conduct of its subordinates" has not replaced that of "belonging to a Party to the conflict" provided for in Article 4(A)(2) of the Third Geneva Convention. See generally the International Committee of the Red Cross ("ICRC") Commentary on the Additional Protocols (Yves Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987), pp. 506-517, paras. 1659-1681.

¹¹⁴ Jean Pictet (ed.), Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First reprint, Geneva, 1994, p. 57:

"There should be a de facto relationship between the resistance organisation or militia or volunteer corps and the party to which it is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organisation or militia or volunteer corps is fighting".

for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.¹¹⁵

94. In other words, States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term “belonging to a Party to the conflict”.

95. The Appeals Chamber thus considers that the Third Geneva Convention, by providing in Article 4 the requirement of “belonging to a Party to the conflict”, implicitly refers to a test of control.

96. This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as - if they are in a position of authority - to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield de facto power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in

¹¹⁵ Military Prosecutor v. Omar Mahmud Kassem et al., 42 International Law Reports 1971, p. 470, at p. 477. The court consequently held that the accused, members of the PLO captured by Israeli forces in the territories occupied by Israel, did not belong to any Party to the conflict. As the court put it (ibid., pp. 477-478):

“In the present case [...] Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organisation itself, so far as we know, is not prepared to take orders from the Jordan[ian] Government, witness[ed by] the fact that [the Organization] is illegal in Jordan and has been repeatedly harassed by the Jordan[ian] authorities.”

cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.¹¹⁶

97. It is nevertheless imperative to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal. Indeed, the legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.

(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.¹¹⁷ Consequently, it is necessary to

¹¹⁶ See also the ICRC Commentary to Article 29 of the Fourth Geneva Convention (Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994, p. 212):

“It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given. If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible; if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible.”

¹¹⁷ The Appeals Chamber is aware of another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber is referring to the view whereby by virtue of Article 3 of the IVth Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this *lex specialis* States are responsible for all acts committed by their “armed forces” regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the “armed forces” of that State. This opinion was authoritatively set forth by some members of the International Law Commission (“ILC”) (Professor Reuter observed that “[i]t was now a principle of codified international law that States were responsible for all acts of their armed forces” (Yearbook of the International Law Commission, 1975, vol. I, p. 7, para. 5). Professor Ago stated that the IVth Hague Convention of 1907 “made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons” (*ibid.*, p. 16, para. 4)). This view also has been forcefully advocated in the legal literature.

As is clear from the reasoning the Appeals Chamber sets out further on in the text of this Judgement, even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for

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 issue brought before the International Court of Justice was whether a foreign State, the United States, because of its financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of Nicaraguan rebels (the so-called contras) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The Court held that a high degree of control was necessary for this to be the case. It required that (i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed.¹¹⁸ 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.¹¹⁹

determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.

¹¹⁸ Nicaragua, para. 115. As the Court put it, there must be “effective control of the military or paramilitary operations in the course of which the alleged violations of international human rights and humanitarian law were committed”.

¹¹⁹ Ibid., para. 115:

“All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”

101. As is apparent, and as was rightly stressed by Trial Chamber II in Rajic¹²⁰ and restated by the Prosecution in the instant case,¹²¹ the issue brought before the International Court of Justice revolved around State responsibility; what was at stake was not the criminal culpability of the contras for serious violations of international humanitarian law, but rather the question of whether or not the contras had acted as de facto organs of the United States on its request, thus generating the international responsibility of that State.

(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. In the former case one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a State because those individuals acted as de facto State officials. In the latter case, one would have instead to establish whether a private individual may be held criminally responsible for serious violations of international humanitarian law amounting to "grave breaches".¹²² Consequently, it has been asserted, the Nicaragua test, while valid within the context of State responsibility, is immaterial to the issue of individual criminal responsibility for "grave breaches". 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

¹²⁰ See "Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Ivica Raji}, Case No.: IT-95-12-R61, Trial Chamber II, 13 September 1996, para. 25.

¹²¹ Cross-Appellant's Brief, paras. 2.14-2.17.

¹²² Cross-Appellant's Brief, paras. 2.16-2.17; Cross-Appellant's Brief in Reply, para. 2.19.

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.

105. As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility.

106. The second preliminary issue relates to the interpretation of the judgement delivered by the International Court of Justice in Nicaragua. According to the Prosecution, in that case the Court applied "both an 'agency' test and an 'effective control' test".¹²³ In the opinion of the Prosecution, the Court first applied the "agency" test when considering whether the contras could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the contras. According to the Prosecution this test was one of dependency, on the one side, and control, on the other.¹²⁴ In the opinion of the Prosecution, the Court then applied the "effective control" test to determine whether the United States could be held responsible for particular acts committed by the contras in violation of international humanitarian law. This test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the contras.¹²⁵

¹²³ Cross-Appellant's Brief, para. 2.56.

¹²⁴ According to the Prosecution (Cross-Appellant's Brief, para. 2.58), the Court applied the "agency" test when considering whether the contras engaged the responsibility of the United States. The Prosecution has pointed out that in this regard the Court "did not refer to the need for effective control, but rather" – to quote the words of the Court cited by the Prosecution – "whether or not the relationship ...g was so much one of dependency on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (Nicaragua, para. 109).

¹²⁵ Cross-Appellant's Brief, paras. 2.57-2.58.

107. The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.

108. Clearly, the Court did use two tests, but in any case its tests were conceived in a manner different from what is contended by the Prosecution, and in addition they were to a large extent set out along the lines dictated by customary international law. Admittedly, in its judgement, the Court did not always follow a straight line of reasoning (whereas it would seem that a jurisprudential approach more consonant with customary international law was taken by Judge Ago in his Separate Opinion).¹²⁶ In substance, however, the Court first evaluated those acts which, "in the submission of Nicaragua, involved the responsibility of the United States in a more direct manner".¹²⁷ To this end it discussed two categories of individuals and their relative acts or transactions. First, the Court established whether the individuals concerned were officials of the United States, in which case their acts were indisputedly imputable to the State. Almost in the same breath the Court then discussed the different question of whether individuals not having the status of United States officials but allegedly paid by and acting under the instructions of United States organs, could legally involve the responsibility of that State. These individuals were Latin American operatives, the so-called UCLAs ("Unilaterally Controlled Latino Assets"). The Court then moved to ascertain whether the responsibility of the United States could arise "in a less direct manner" (to borrow from the phraseology used by the Court). It therefore set out to determine whether other individuals, the so-called contras, although not formally officials of the United States, acted in such a way and were so closely linked to that State that their acts could be legally attributed to it.

109. It would therefore seem that in Nicaragua the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law",¹²⁸ that a State incurs responsibility for acts in breach of international obligations committed by individuals

¹²⁶ See Nicaragua, pp. 187-190.

¹²⁷ See Nicaragua, para. 75.

¹²⁸ See the Advisory Opinion delivered by the ICJ on 29 April 1999 in Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, para. 62.

who enjoy the status of organs under the national law of that State¹²⁹ or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.¹³⁰ The other two categories embraced individuals who, by contrast, were not formally organs or agents of the State. There were, first, those individuals not having United States nationality (the UCLAs) who acted while being in the pay, and on the direct instructions and under the supervision of United States military or intelligence personnel, to carry out specific tasks such as the mining of Nicaraguan ports or oil installations. The Court held that their acts were imputable to the United States, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision,¹³¹ or because “agents of the United States” had “participated in the planning, direction, support and execution” of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil and storage facilities, etc.).¹³² The other category of individuals lacking the status of United States officials comprised the

¹²⁹ Customary international law on the matter is correctly restated in Article 5 of the Draft Articles on State Responsibility adopted in its first reading by the United Nations International Law Commission: “For the purposes of the present articles of Chapter II: The ‘Act of the State’ under International Law, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question” (Report of the International Law Commission on the work of its Forty-Eighth Session (6 May-26 July 1996), U.N. Doc. A/51/10, p. 126).

Article 5, as provisionally adopted by the ILC Drafting Committee in 1998, is even clearer. It provides (International Law Commission, Fiftieth Session, 1998, U.N. Doc. A/CN.4/L.569, p. 2):

“1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.” (emphasis added).

¹³⁰ See Article 7 of the ILC Draft Articles on State Responsibility adopted by the International Law Commission on first reading. It provides:

“1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question”.

See the First Report on State Responsibility by the Special Rapporteur J. Crawford (22 July 1998), U.N. Doc. A/CN.4/490/ Add.5, pp. 12-16. See also the text of the same provision as provisionally adopted by the ILC Drafting Committee in 1998 (U.N. Doc. A/CN.4/L.569, p. 2). The text of Article 7, as provisionally adopted by the ILC Drafting Committee in 1998, provides:

“The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question”. (ibid.)

¹³¹ See Nicaragua, paras. 75-80.

contras. It was primarily with regard to the contras that the Court asked itself on what conditions individuals without the status of State officials could nevertheless engage the responsibility of the United States as having acted as de facto State organs. It was with respect to the contras that the Court developed the doctrine of "effective control".

110. At one stage in the judgement, when dealing with the contras, the Court appeared to lay down a "dependence and control" test:

What the Court has to determine at this point is whether or not the relationship of the contras to the United States government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States government, or as acting on behalf of that Government.¹³³

111. The Prosecution, and Judge McDonald in her dissent, argue that by these words the Court set out an "agency test". According to them, the Court only resorted to the "effective control" standard once it had found no agency relationship between the contras and the United States to exist, so that the contras could not be considered organs of the United States. The Court, according to this argument, then considered whether specific operations of the contras could be attributed to the United States, and the standard it adopted for this attribution was the "effective control" standard.

112. The Appeals Chamber does not subscribe to this interpretation. Admittedly, in paragraph 115 of the Nicaragua judgement, where "effective control" is mentioned, it is unclear whether the Court is propounding "effective control" as an alternative test to that of "dependence and control" set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. In Nicaragua, in addition to the "agency" test (properly construed, as shall be seen in the next paragraph, as being designed to ascertain whether or not an individual has the formal status of a State official), the Court propounded only the "effective control" test. This conclusion is supported by the evidently stringent application of the "effective control" test which the Court used in finding that the acts of the contras were not imputable to the United States.

¹³² Ibid., para. 86.

¹³³ Ibid., para. 109 (emphasis added).

113. In contrast with what the Prosecution, in following Judge McDonald's dissent, has termed the "agency" test, the Court's agency test amounts instead to a determination of the status of an individual as an organ or official (or member of a public entity exercising certain elements of governmental authority) within the domestic legal order of a particular State. In this regard, it would seem that the Separate Opinion of Judge Ago relied upon by Judge McDonald¹³⁴ and the Prosecution¹³⁵ does not actually support their interpretation.¹³⁶

114. On close scrutiny, and although the distinctions made by the Court 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.

¹³⁴ Separate and Dissenting Opinion of Judge McDonald, para. 25.

¹³⁵ Cross-Appellant's Brief, para. 2.58.

¹³⁶ See the Separate Opinion of Judge Ago in Nicaragua, paras. 14-17. Judge Ago correctly stated that it fell to the Court first to establish whether the individuals at issue had the status of national officials or officials of national public entities and then, where necessary, to consider whether, lacking this status, they acted instead as de facto State officials, thereby engaging the responsibility of the State. For the purpose of establishing the international responsibility of a State, he therefore identified two broad classes of individuals: those having the status of officials of the State or of its autonomous bodies, and those lacking such a status. Clearly, for Judge Ago the issue of deciding whether an individual had acted as a de facto State organ arose only with respect to the latter category. Furthermore, Judge Ago characterised the CIA and the so-called UCLAs in a manner different from the Court (see para. 15).

(ii) The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive

115. The “effective control” test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgement.¹³⁷ 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

116. A first ground on which the Nicaragua test as such may be held to be unconvincing is based on the very logic of the entire system of international law on 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 and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee.¹³⁸ 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

¹³⁷ Judgement, paras. 584-588.

¹³⁸ Article 8 of the Draft provides:

“The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

a) it is established that such person or group of persons was in fact acting on behalf of that State; or
 b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority” (U.N. Doc A/35/10, para. 34, in Yearbook of the International Law Commission, 1980, vol. II (2)).

See also the First Report on State Responsibility by the Special Rapporteur J. Crawford (U.N. Doc. A/CN.4/490/Add.5, pp. 16-24).

The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides:

“The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct” (A/CN.4/L.569, p. 3).

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. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. 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 (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). 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. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it ex post facto publicly endorsed those acts.

119. To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) 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 (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires, 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. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,¹³⁹ a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. 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. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to

¹³⁹ Article 10, as adopted on first reading by the International Law Commission, provides:

“The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity”.

(Report of the International Law Commission on the work of its thirty-second session (5 May–25 July 1980), U.N. Doc. A/35/10, p.31).

See also the First Report on State Responsibility by the Special Rapporteur J. Crawford, U.N. Doc. A/CN.4/490/Add.5, pp. 29-31. The text of article 10, as provisionally adopted in 1998 by the ILC Drafting Committee, provides:

“The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise” (U.N. Doc. A/CN.4/L.569, p. 3).

individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.¹⁴⁰

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. To a large extent the wise words used by the United States-Mexico General Claims Commission in the Youmans case with regard to State responsibility for acts of State military officials should hold true for acts of organised groups over which a State exercises overall control.¹⁴¹

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact

¹⁴⁰ This sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in Article 7 of the International Law Commission Draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member States of Federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy. (See footnote 130 above).

¹⁴¹ The United States claimed that Mexico was responsible for the killing of United States nationals at the hands of a mob with the participation of Mexican soldiers. Mexico objected that, even if it were assumed that the soldiers were guilty of such participation, Mexico should not be held responsible for the wrongful acts of the soldiers, on the grounds that they had been ordered by the highest official in the locality to protect American citizens. Instead of carrying out these orders, however, they had acted in violation of them, in consequence of which the Americans had been killed. The Mexico/United States General Claims Commission dismissed the Mexican objection and held Mexico responsible. It stated that if international law were not to impute to a State wrongful acts committed by its officials outside their competence or contrary to instructions, "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable". It then added that:

"[s]oldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no [international State] liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts" (*Thomas H. Youmans (U.S.A.) v. United Mexican States*, Decision of 23 November 1926, *Reports of International Arbitral Awards*, vol. IV, p. 116).

nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem*), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The Nicaragua Test is at Variance With Judicial and State Practice

124. There is a second ground – of a similarly general nature as the one just expounded – on which the Nicaragua test as such may be held to be unpersuasive. This ground is determinative of the issue. The “effective control” test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised. In short, as shall be seen, this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.

125. In cases dealing with members of military or paramilitary groups, courts have clearly departed from the notion of “effective control” set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). Thus, for instance, in the Stephens case, the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican “irregular auxiliary” of the army, which among other things lacked both uniforms and insignia.¹⁴² In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the United States national by that guard.

¹⁴² See *United States v. Mexico (Stephens Case)*, Reports of International Arbitral Awards, vol. IV, pp. 266-267.

126. Similarly, in the Kenneth P. Yeager case,¹⁴³ the Iran-United States Claims Tribunal (“Claims Tribunal”) held that wrongful acts of the Iranian “revolutionary guards” or “revolutionary Komitehs” vis-à-vis American nationals carried out between 13 and 17 February 1979 were attributable to Iran (the Claims Tribunal referred in particular to the fact that two members of the “Guards” had forced the Americans to leave their house in order to depart from Iran, that the Americans had then been kept inside the Hilton Hotel for three days while the “Guards” manned the exits, and had subsequently been searched at the airport by other “Guards” who had taken their money). Iran, the respondent State, had argued that the conduct of those “Guards” was not attributable to it. It had admitted that “revolutionary guards and Komiteh personnel were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation.” It had asserted, however, that “these revolutionaries did not operate under the name ‘Revolutionary Komitehs’ or ‘Revolutionary Guards’, and that they were not affiliated with the Provisional Government”.¹⁴⁴ In other words, the “Guards” were “not authentic”;¹⁴⁵ hence, their conduct was not attributable to Iran. The Claims Tribunal considered instead that the acts were attributable to Iran because the “Guards” or “Komitehs” had acted as de facto State organs of Iran. On this point the Claims Tribunal noted that:

[m]any of Ayatollah Khomeini’s supporters were organised in local revolutionary committees, so-called Komitehs, which often emerged from the ‘neighbourhood committees’ formed before the victory of the revolution. These Komitehs served as local security forces in the immediate aftermath of the revolution. It is reported that they made arrests, confiscated property, and took people to prisons. [...]

Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary ‘Komitehs’ or ‘Guards’ and at the same time deny responsibility for wrongful acts committed by them¹⁴⁶

127. With specific reference to the action of the “Guards” in the case at issue, the Claims Tribunal emphasised that the two guards who had forced the Americans to leave their house

¹⁴³ See Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92).

¹⁴⁴ Ibid., para. 23.

¹⁴⁵ Ibid., para. 37.

¹⁴⁶ Ibid., paras 39, 45. The Claims Tribunal went on to note that:

“[w]hile there were complaints about a lack of discipline among the numerous Komitehs, Ayatollah Khomeini stood behind them, and the Komitehs, in general, were loyal to him and the clergy. Soon after the victory of the Revolution, the Komitehs, contrary to other groups, obtained a firm position within the State structure and were eventually conferred a permanent place in the State budget” (ibid., para. 39; emphasis added).

were “dressed in everyday clothes, but wore distinctive arm bands indicating association with the new Government, and were armed with rifles”.¹⁴⁷ With reference to those who had searched the Americans at the airport, the Claims Tribunal stressed that “they were performing the functions of customs, immigration and security officers”.¹⁴⁸ Clearly, those “Guards” made up organised armed groups performing de facto official functions. They were therefore different from the Iranian militants who had stormed the United States Embassy in Tehran on 4 November 1979, with regard to which the International Court of Justice noted that after the invasion of the Embassy they described themselves as “Muslim Student Followers of the Imam’s Policy”.¹⁴⁹ Be that as it may, what is notable is that the Iran-United States Claims Tribunal did not enquire as to whether specific instructions had been issued to the “Guards” with regard to the forced expulsion of Americans.¹⁵⁰ The Claims Tribunal took the same stance in other cases.¹⁵¹

¹⁴⁷ Ibid., paras. 12, 41.

¹⁴⁸ Ibid., para. 61.

¹⁴⁹ United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports (1980), p. 13, para. 17.

¹⁵⁰ The Claims Tribunal stated the following:

“The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary ‘Komitehs’ or ‘Guards’ after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of ‘Komitehs’ or ‘Guards’ were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them”. (Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV. p. 92, at para. 43).

The Claims Tribunal went on to say:

“[...] Rather, the evidence suggests that the new government, despite occasional complaints about a lack of discipline, stood behind them [the Komitehs]. The Tribunal is persuaded, therefore, that the revolutionary ‘Komitehs’ or ‘Guards’ involved in this Case, were acting ‘for’ Iran.” (para. 44).

The Tribunal then concluded that:

“[n]or has the Respondent established that it could not control the revolutionary ‘Komitehs’ or ‘Guards’ in this operation [namely, forcing foreigners to leave the country]. Because the new government accepted their activity in principle and their role in the maintenance of public security, calls for more discipline, phrased in general rather than specific terms, do not meet the standard of control required in order to effectively prevent these groups from committing wrongful acts against United States nationals. Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary ‘Komitehs’ or ‘Guards’ and at the same time deny responsibility for wrongful acts committed by them” (para. 45).

¹⁵¹ See William L. Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3, 5 Iran-U.S. Claims Tribunal 1984, p. 198 at p. 226. See also Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran, Award No. 338-484-1, 17 Iran-U.S. Claims Tribunal Reports, 1987, p. 245). Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of “armed men wearing patches on their pockets identifying them as members of the revolutionary guards” (para. 53). A similar stand was taken in Schott v. Islamic Republic of Iran, Award No. 474-268-1, 24 Iran-U.S. Claims Tribunal Reports, 1990, p. 203 at para. 59.

128. A similar approach was adopted by the European Court of Human Rights in *Loizidou v. Turkey*¹⁵² (although in this case the question revolved around the possible control of a sovereign State over a State entity, rather than control by a State over armed forces operating in the territory of another State). The Court had to determine whether Turkey was responsible for the continuous denial to the applicant of access to her property in northern Cyprus and the ensuing loss of control over the property. The respondent State, Turkey, denied that the Court had jurisdiction, on the grounds that the act complained of was not committed by one of its authorities but, rather, was attributable to the authorities of the Turkish Republic of Northern Cyprus ("TRNC"). The Court dismissed these arguments and found that Turkey was responsible. In reaching the conclusion that the restrictions on the right to property complained of by the applicant were attributable to Turkey, the Court did not find it necessary to ascertain whether the Turkish authorities had exercised "detailed" control over the specific "policies and actions" of the authorities of the "TRNC". The Court was satisfied by the showing that the local authorities were under the "effective overall control" of Turkey.¹⁵³

129. A substantially similar stand was recently taken in the *Jorgic* case by the Oberlandesgericht of Düsseldorf in a decision of 26 September 1997.¹⁵⁴ With regard to crimes committed in Bosnia and Herzegovina by Bosnian Serbs, the Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs "a close personal, organisational and logistical interconnection 'Verflechtung'", which was considered to be a sufficient basis for regarding the conflict as

In *Daley*, on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for the five Iranian "Revolutionary Guards" who had taken the car were "in army-type uniforms" at the entrance of a hotel which had come "under the control of Revolutionary Guards" a few days before. (*Daley v. Islamic Republic of Iran*, Award No. 360-1-514-1, 18 Iran-U.S Claims Tribunal Reports, 1988, 232 at paras. 19-20).

¹⁵² *Loizidou v. Turkey* (Merits), Eur. Court of H. R., Judgement of 18 December 1996 (40/1993/435/514).

¹⁵³ In its judgement, the Court stated the following on the point at issue here:

"It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' [...]" (ibid., para. 56).

¹⁵⁴ 2 StE 8/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal's Library).

international.¹⁵⁵ The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FRY.¹⁵⁶

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.¹⁵⁷ Nicaragua also supports this

¹⁵⁵ The Court stated the following:

“The conflict in Bosnia-Herzegovina was an international conflict for the purposes of Article 2 of the Fourth Geneva Convention. Owing to the declaration of independence and the referendum of 29 February and 1 March 1992 and to international recognition on 6 April 1992, Bosnia-Herzegovina had become an autonomous State, independent from Yugoslavia.

The armed conflict that took place on its territory in the following period was not an internal clash (conflict), in which an ethnic group was trying to break with the existing State of Bosnia-Herzegovina and which [as a consequence] had no international character. The expert witness Fischer pointed out that, by using the term international humanitarian law applicable to this conflict, the United Nations Security Council has used the term usual in international terminology to refer to the law applicable to international armed conflicts. This [according to the expert witness] showed that the Security-Council considered the conflict to be international. The expert witness Fischer cited the following circumstances as indicia of an international conflict according to the prevailing view in international law: the participation of organs of a State in a conflict on the territory of another State, e.g. the participation of officers in the clashes, or the financing of and provision of technical equipment to one party to the conflict by another State; the latter at least when it is combined with the aforementioned interconnection [Verflechtung] between personnel. According to this Chamber’s findings, these criteria are met in the case at hand. The Chamber has found that at the beginning of May officers of the JNA, which at that time was purely Serb, began taking Doboje and the surrounding villages. There can, therefore, be no doubt regarding the existence of an international armed conflict at that point in time. However, this Chamber has further found that after 19 May 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May matériel, weapons and vehicles were still being brought from Belgrade to Bosnia-Herzegovina. As a consequence, a close personal, organisational and logistical interconnection [Verflechtung] of the Bosnian-Serb army, paramilitary groups and the JNA persisted. The headquarters of the Bosnian-Serb army maintained a liaison office in Belgrade.” (ibid., pp. 158-160 of the unpublished typescript; unofficial translation).

¹⁵⁶ The Judgement of the Düsseldorf Court of Appeal was upheld on appeal by the Federal Court of Justice (Bundesgerichtshof) by a judgement of 30 April 1999 (unpublished). The appeal was based, inter alia, on a misapplication of substantive law. This ground also included the question of whether the conflict was international in character. The Bundesgerichtshof did not address the matter specifically, thus implicitly upholding the judgement of the Düsseldorf Court. See, in particular, pp. 19-20 and 23 of the German typescript (3 StR 215/98), on file with the International Tribunal library.

¹⁵⁷ See e.g., the debates in the U.N. Security Council in 1976, on the raids of South Africa into Zambia to destroy bases of the SWAPO (see in particular the statements of Zambia (SCOR, 1944th Meeting of 27 July 1976, paras. 10-45) and South Africa (ibid., paras. 47-69); see also SC resolution no. 393 (1976) of 30 July 1976); see also the debates on the Israeli raids in Lebanon in June 1982 (in particular the statements of

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 ...g not to use force against another State."¹⁵⁸ 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.

133. The Appeals Chamber will mention, first of all, the United States Diplomatic and Consular Staff in Tehran case.¹⁵⁹ There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, had not initially acted

Ireland (SCOR, 2374th Meeting of 5 June 1982, paras. 35-36) and of Israel (*ibid.*, paras. 74-78 and SCOR, 2375th Meeting of 6 June 1982, paras. 22-67) and in July-August 1982 (see the statement of Israel, SCOR, 2385th Meeting of 29 July 1982, paras. 144-169)); see also the debates on the South African raid in Lesotho in December 1982 (see in particular the statements of France (SCOR, 2407th Meeting of 15 December 1982, paras. 69-80), of Japan (*ibid.*, paras. 98-107), of South Africa (SCOR, 2409th Meeting of 16 December 1982, paras. 126-160) and of Lesotho (*ibid.*, paras. 219-227)).

Although there does not seem to exist any international practice in this area, it may happen that a State simply providing economic and military assistance to a military group (hence not necessarily exercising effective control over the group) directs a member of the group or the whole group to perform a specific internationally wrongful act, e.g. an international crime such as genocide. In this case one would face a situation similar to that described above, in the text, of a State issuing specific instructions to an individual.

¹⁵⁸ See Nicaragua, paras. 239-249, 292(3) and 292(4).

on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts.¹⁶⁰ Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States' diplomatic premises and subsequently to put an end to that attack.¹⁶¹ Later on, the Iranian authorities formally approved and endorsed the occupation of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, the militants became *de facto* agents of the Iranian State and their acts became internationally attributable to that State.¹⁶²

134. The same approach was adopted in 1986 by the International Court itself in Nicaragua with regard to the UCLAs (which the Court defined as "persons of the nationality of unidentified Latin American countries").¹⁶³ For specific internationally wrongful acts of these "persons" to be imputable to the United States, it was deemed necessary by the Court that these persons not only be paid by United States organs but also act "on the instructions" of those organs (in addition to their being supervised and receiving logistical support from them).¹⁶⁴

¹⁵⁹ United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports (1980), pp. 3 ff.

¹⁶⁰ The Court stated the following:

"No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised 'agents' or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State" (ibid., p. 30, para. 58; emphasis added).

¹⁶¹ Ibid., pp. 30-33 (paras. 60-68).

¹⁶² The Court stated the following:

"The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible [...]" (ibid., p. 35, para. 74; emphasis added).

¹⁶³ See Nicaragua, para. 75.

¹⁶⁴ Ibid., para. 80.

135. Similar views were propounded in 1987 by the Iran-United States Claims Tribunal in Short.¹⁶⁵ Iran was not held internationally responsible for the allegedly wrongful expulsion of the claimant. The Claims Tribunal found that the Iranian “revolutionaries” (armed but not comprising an organised group) who ordered the claimant’s departure from Iran were not State organs, nor did Ayatollah Khomeini’s declarations amount to specific incitement to the “revolutionaries” to expel foreigners.¹⁶⁶

136. It should be added that State practice also seems to clearly support the approach under discussion.¹⁶⁷

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

¹⁶⁵ Alfred W. Short v. Islamic Republic of Iran, Award No. 312-11135-3, 16 Iran-U.S. Claims Tribunal Reports 1987, p. 76).

¹⁶⁶ After finding that the acts of the revolutionaries could not be attributed to Iran, the Claims Tribunal noted the following:

“The Claimant’s reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the Claimant’s departure in circumstances amounting to an expulsion. While these statements are of anti-foreign and in particular anti-American sentiment, the Tribunal notes that these pronouncements were of a general nature and did not specify that Americans should be expelled en masse.” (ibid., para. 35).

¹⁶⁷ For examples of State practice apparently adopting this approach to the question of attribution, see for instance the relevant documents in the Cesare Rossi case (an Italian antifascist staying in Switzerland who was lured by two other Italians acting on behalf of the Italian authorities into crossing the border with Italy, where he was arrested: see 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1929, pp. 280-294); the Jacob Salomon case (a German national was kidnapped by another German national in Switzerland and taken to Germany: see the relevant documents mentioned in 29 *American Journal of International Law* 1935, pp. 502-507, 36 *American Journal of International Law* 1936, pp.123-124). See further the Sabotage cases decided by the United States-Germany Mixed Claims Commission (*Lehigh Valley Railroad Co., Agency of Canadian Can and Foundry Co., Ltd., and various underwriters (United States) v. Germany*, Reports of International Arbitral Awards, vol. VIII, pp. 84 ff. (especially pp. 84-87) and pp. 225 ff. (especially 457-460). In these cases, in July 1916 some individuals, at the request of the German authorities intent on bringing about sabotage in the United States, had set fire to a terminal in New York harbour and to a plant of a company in New Jersey.

Mention can also be made of the Eichmann case (*Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports* 1968, pp. 277-344): see for instance Security Council resolution 4349 of 23 June 1960 and the debates in the Security Council; see in particular the statements of Argentina (SCOR, 865th Meeting of 22 June 1960, paras. 25-27), of Israel (SCOR of the 866th Meeting on 22 June 1960, para. 41), of Italy (SCOR of the 867th Meeting of 23 June 1960, paras. 32-34), of Ecuador (ibid., paras. 47-49), of Tunisia (ibid., para. 73) and of Ceylon (SCOR of the 868th Meeting of 23 June 1960, paras. 12-13).

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

In many of these cases, the need for specific instructions by the State concerning the commission of the specific act with which the individual had been charged, or the *ex post facto* public endorsement of that act, can be inferred from the facts of the case.

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 (and regardless of any possible requirement of State instructions). Such a test is best illustrated by reference to certain cases that deserve to be mentioned, if only briefly.¹⁶⁸

142. The first case is Joseph Kramer et al. (also called the Belsen case), brought before a British military court sitting at Luneburg (Germany).¹⁶⁹ The Defendants comprised not only some German staff members of the Belsen and Auschwitz concentration camps but also a number of camp inmates of Polish nationality and an Austrian Jew "elevated by the camp administrators to positions of authority over the other internees". They were *inter alia* accused of murder and other offences against the camp inmates. According to the official report on this case:

In meeting the argument that no war crime could be committed by Poles against other Allied nationals, the Prosecutor said that by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process they could be regarded as having approximated to membership of the armed forces of Germany.¹⁷⁰

143. Another case is more recent. This is the judgement handed down by the Dutch Court of Cassation on 29 May 1978 in the Menten case.¹⁷¹ Menten, a Dutch national who was not formally a member of the German forces, had been accused of war crimes and crimes against humanity for having killed a number of civilians, mostly Jews, in Poland, on

¹⁶⁸ These cases, although they concern war crimes (the notion of "grave breaches" had not yet come into existence at the time), are nevertheless relevant to our discussion. Indeed, they provide useful indications concerning the conditions on which civilians may be assimilated to State officials.

¹⁶⁹ Trial of Joseph Kramer and 44 Others, British Military Court, Luneberg, 17th September-17th November, 1945, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947 ("UNWCC"), vol. II, p. 1.

¹⁷⁰ *Ibid.*, p. 152 (emphasis added) (the Austrian civilian, Schlomowicz, was not found guilty). See also *ibid.*, p. 109. Most of the accused civilians were found guilty and sentenced to imprisonment. It is clear from this case that according to the court, by acting as *de facto* members of the German apparatus running the Belsen concentration camp, the Polish civilians could be assimilated to German State officials.

behalf of German special forces (SD or Einsatzkommandos). The court found¹⁷² that Menten in fact behaved as a member of the German forces and consequently was criminally liable for these crimes.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵

¹⁷¹ Public Prosecutor v. Menten, 75 International Law Reports 1987, pp. 331 ff.

¹⁷² The court stated the following:

“Since Menten, on the orders of the Befehlshaber of the Sicherheitspolizei in Poland, was dressed in the uniform of an under-officer of this branch of the [German] police when he was dem Einsatzkommando als Dolmetscher zugeteilt [assigned to the Special forces as interpreter], the [District] Court [of Amsterdam in its judgement of 14 December 1977] was justified in assuming that his position in the Einsatzkommando and his performance in within it of a more or less official character. Thus the relationship to the enemy in which Menten rendered incidental services was of such a nature that he could be regarded as a functionary of the enemy.” (ibid., p. 347. The English translation has been slightly corrected by the Appeals Chamber to bring it into line with the Dutch original, which can be found in *Nederlandse Jurisprudentie*, 1978, no. 358, p. 1236).

The court concluded that:

“from the above-mentioned evidence, taken together with the other evidence that in July 1941 Menten, dressed in a German uniform and in company with a number of other persons also so dressed, came to Podhorodce [...] and was present at the killings, [it can be inferred] that he was there with members of the German Staff and that he rendered services to this Staff at the time of and in connection with these killings.” (ibid., p. 348).

¹⁷³ Menten was sentenced to ten years' imprisonment by the District Court of Rotterdam (Judgement of 9 July 1980, ibid., p. 361). It should be pointed out that the Dutch Court of Cassation had been obliged to investigate whether Menten was “in military, state or public service of or with the enemy” as this was an ingredient of the relevant Dutch law (ibid., p. 346). The Appeals Chamber holds, however, that the Menten case is in line with the rules of general international law concerning the assimilation of private individuals to State officials.

¹⁷⁴ See, e.g., the Daley case, where the Iran U.S. Claims Tribunal attributed international responsibility to Iran for acts of five Iranian “Revolutionary Guards” in “army type uniforms” (18 Iran-U.S. Claims Tribunal Reports, 1988, p. 238, at para. 19).

¹⁷⁵ In this connection mention can be made of the Stocké case brought before the European Commission of Human Rights. A German national fled from Germany to Switzerland and then to France to avoid arrest in Germany for alleged tax offences. He was then tricked into re-entering Germany by a police informant and was arrested. He then claimed before the European Commission of Human Rights that he had been arrested in violation of Article 5(1) of the ECHR. The Commission held that:

“[i]n the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to the territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. The Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention” (Stocké v. Federal Republic of Germany, Eur. Court H. R., judgement of 19 March 1991, Series A, no 199, para. 168 (Opinion of the Commission)).

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a “military organization”, the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY

146. The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a de facto State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.

147. It now falls to the Appeals Chamber to establish whether, in the circumstances of the case, the Yugoslav Army exercised in 1992 the requisite measure of control over the Bosnian Serb Army. The answer must be in the affirmative.

148. The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement,¹⁷⁶ but only on the legal interpretation to be given to those facts.

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY

Although these cases concerned State responsibility, they may be relevant to the question of the criminal responsibility of individuals perpetrating grave breaches of the Geneva Conventions, inasmuch as they set out the conditions necessary for individuals to be considered as de facto State organs.

¹⁷⁶ See Separate and Dissenting Opinion of Judge McDonald, para. 1: “I completely agree with and share in the Opinion and Judgment with the exception of the determination that Article 2 of the Statute is inapplicable to the charges against the accused.”

and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

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 and more particularly from the evidence as evaluated by Judge McDonald in her Separate and Dissenting Opinion, 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"¹⁷⁷ 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)".¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that

¹⁷⁷ Judgement, para. 601.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid., paras. 601-602.

¹⁸⁰ As Judge McDonald noted:

"[t]he creation of the VRS [after 19 May 1992] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same [...] The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. [...] The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. [...] Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade." (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

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.¹⁸¹

(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.¹⁸² As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

¹⁸¹ In the light of the demand of the Security Council on 15 May 1992 that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately, the Trial Chamber characterised the dilemma posed for the JNA by increasing international scrutiny from 1991 onwards in terms of the way in which the JNA could:

“be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. [...] The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina” (Judgement, paras. 113-114).

Additionally, the U.N. Secretary-General, in commenting on its purported withdrawal from Bosnia and Herzegovina, concluded in his report of 3 December 1992 that “[t]hough JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the ‘Serb Republic’” (Report of the Secretary-General concerning the situation in Bosnia and Herzegovina, U.N. Doc. A/47/747, para. 10).

¹⁸² Judgement, para. 115:

“The VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993[...].”

See further *ibid.*, para. 590: “The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the ‘Banja Luka’ or ‘1st Krajina’ Corps after 19 May 1992 but retained the same commander.” See also *ibid.*, paras. 114-116, 118-121, 594.

(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.¹⁸³ Much de facto continuity, in terms of the ongoing hostilities,¹⁸⁴ 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.¹⁸⁵

(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.¹⁸⁶

¹⁸³ Ibid., para. 118 (“Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ [...] remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993”) and para. 569 (“[...] the forces of the VJ continued to be involved in the armed conflict after that date”).

¹⁸⁴ See in particular *ibid.*, para. 566:

“The ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of Bosnia and Herzegovina, and various paramilitary groups, all of which occupied or were proceeding to occupy a significant portion of the territory of that State.”

See also para. 579: “The take-over of opština Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date”. See also the Dissenting Opinion of Judge McDonald who noted “the continuity between the JNA and the VRS particularly as it relates to the military operations in the Opština Prijedor area [...]” (Separate and Dissenting Opinion of Judge McDonald, para. 15).

¹⁸⁵ Moreover, it is interesting to observe that while concluding that by 19 May 1992 effective control over the VRS had been lost by the JNA/VJ, the Trial Chamber simultaneously observed that such control nevertheless did not appear to have been regained by the Bosnian authorities. In particular, the Trial Chamber found that the “Government of the Republic of Bosnia and Herzegovina [...] faced [...] major problems [...] of defence, involving control over the mobilization and operations of the armed forces” (Judgement, para. 124, emphasis added).

¹⁸⁶ In and of itself, the logistical difficulties of disengaging from the conflict and withdrawing such a large force would have been considerable. With regard to the extent and depth of the involvement of the large number of JNA forces engaged in Bosnia and Herzegovina and the ongoing nature of their activities beyond 19 May 1992, see *ibid.*, paras. 124-125: “By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. [...] On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS.”

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 1992.¹⁸⁷

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.¹⁸⁸ 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.¹⁸⁹ In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically

¹⁸⁷ See in particular *ibid.*, para. 116 (citing the 1993 publication of the former Yugoslav Federal Secretary for Defence, General Veljko Kadijević, entitled *My view of the Break-up: an Army without a State* (Prosecution Exhibit 30)):

"The units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment [...] First the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina...".

See also para. 590:

"The occupation of Kozarac and of the surrounding villages was part of a military and political operation, begun before 19 May 1992 with the take-over of the town of Prijedor of 29 April 1992, aimed at establishing control over the opština which formed part of the land corridor of Bosnian territory linking the Federal Republic of Yugoslavia (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia."

¹⁸⁸ While the relationship between the JNA and VRS may have included coordination and cooperation, it cannot be seen as limited to this. As the Trial Chamber itself noted: "In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and acted under the command and within the framework of the JNA." (*ibid.*, para. 593; emphasis added).

¹⁸⁹ *Ibid.*, para. 598:

"The Trial Chamber has already considered the overwhelming importance of the logistical support provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. [...] [I]n addition to routing all high-level VRS communications through secure links in Belgrade, a

charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it 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).”¹⁹⁰

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.¹⁹¹

154. Furthermore, the Trial Chamber, noting that the pay of all 1st Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well “be equated with control”.¹⁹² The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being “as much matters of convenience as military

communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade [...].”

¹⁹⁰ Ibid., para. 601.

¹⁹¹ The Trial Chamber noted that:

“It is clear from the evidence that the military and political objectives of the Republika Srpska and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary. [...] The [...] political leadership of the Republika Srpska and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a Greater Serbia. [...] In that sense, there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the Republika Srpska and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies could coordinate their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued” (ibid., paras. 603-604).

¹⁹² Ibid., para. 602. On this point, the Trial Chamber noted, further, that:

“given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that

necessity” and noted that such evidence “establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.”¹⁹³ In the Appeals Chamber’s view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, 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.¹⁹⁴ 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.”¹⁹⁵ Despite this finding, the Trial Chamber declined to make a finding of overall control. Much was made of the lack of concrete evidence of specific instructions. Proof of “effective” control was also held to be insufficient,¹⁹⁶ on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from

existing administrative mechanisms for financing those soldiers and their operations would be relied on

after 19 May 1992[...].” (ibid.).

¹⁹³ Ibid.

¹⁹⁴ See in this regard the testimony of the expert witness Dr. James Gow, transcript of hearing in *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, 10 May 1996, pp. 308-309; *ibid.*, 13 May 1996, pp. 330-338.

¹⁹⁵ Judgement, para. 605.

¹⁹⁶ It was deemed insufficient by the Trial Chamber that the VJ “made use of the potential for control inherent in that dependence”, or was otherwise given effective control over those forces [...]” (ibid.; emphasis added).

Belgrade.¹⁹⁷ However, this finding was based upon the Trial Chamber having applied the wrong test.

156. As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as de facto organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opština Prijedor) 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. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.

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 can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in 1995 cannot constitute direct proof of the nature of the link that existed between the Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the issue of control in this period. 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 iure) and a continuous response to the shifting military and political fortunes of these forces. The political process leading up to Dayton commenced soon after the outbreak of hostilities and was ongoing during the key period under examination. To the extent that its contours were shaped by, and thus reflect, the actual power structures which persisted in Bosnia and

¹⁹⁷ The Trial Chamber noted that:

“the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of matériel by the VJ, had the capability to exercise great influence and perhaps even control over the VRS [...] ?Howevrg there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS [...]” (ibid.).

Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular insight into the political, strategic and military realities which prevailed in Bosnia and Herzegovina up to 1995, and including May 1992. 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.¹⁹⁸ 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.¹⁹⁹ Thus, the Dayton-Paris Accord may indirectly shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

158. The Appeals Chamber will now turn to examine the specific features of the Dayton Accord that are of relevance to this inquiry.

159. By an agreement concluded on 29 August 1995 between the FRY and the Republika Srpska and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the Republika Srpska. The Delegation was to be chaired

¹⁹⁸ See Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the establishment and commencement of operations of an International Conference on the Former Yugoslavia Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1074, 19 September 1996, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) ordered, *inter alia*, the breaking off of political and economic relations with the Republika Srpska and the closure of the border between the Republika Srpska and the FRY to all transport towards the Republika Srpska, except food, clothing and medicine. International observers were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the Government of the FRY appeared to be “meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces.” (Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the state of implementation of the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1124, 3 October 1994, pp. 2-3).

¹⁹⁹ As outlined below, this process culminated in the agreement of the Republika Srpska to be represented at the Dayton conference by the FRY (below, at paragraph 159). This appears to have been in spite of intense opposition, within the Republika Srpska, to the peace settlements proposed by the international community, as is evidenced by the overwhelming rejection by the Bosnian Serbs of the international community’s peace plan for Bosnia and Herzegovina in a referendum which took place in Bosnian Serb-held territory on 27 – 28 August 1994 (See Report of the Secretary-General on the Work of the Organization, UNGAOR, 49th sess., supp. no. 1 (A/49/1), 2 September 1994, p. 95).

by President Milo{evi}, who would have a casting vote in case of divided votes.²⁰⁰ Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the Republika Srpska. The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milo{evi}. This signature had the effect of guaranteeing respect for these commitments by the Republika Srpska. Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord).²⁰¹ In addition, the letter by which the Republika Srpska undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinovi}, for the Republika Srpska.²⁰²

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.

²⁰⁰ This agreement stipulated that the delegation of the Republika Srpska was to be "headed by the President of the Republic of Serbia Mr. Slobodan Milo{evic" (Article 2). Pursuant to this agreement, the leadership of the Republika Srpska agreed "to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milo{evic, shall be decisive" (Article 3). That Mr. Milo{evic was head of the joint delegation was confirmed by Mr. Milo{evic himself in his letter of 21 November 1995 to President Izetbegovi} concerning Annex 9 to the Dayton-Paris Accord. (Agreement on file with the International Tribunal's Library).

²⁰¹ This letter had been signed by Mr. Milutinovic, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the "Delegation of Republika Srpska" to Mr. Milo{evic.

²⁰² See the texts of the Dayton-Paris Accord (General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995).

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),²⁰³ 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,²⁰⁴ the

²⁰³ Article 4(2) of Geneva Convention IV provides as follows:

"Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

²⁰⁴ The preparatory works of the Convention suggests an intent on the part of the drafters to extend its application, inter alia, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to

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.²⁰⁵ 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

find themselves on the territory of the other Party to the conflict occupied by their national State, they nevertheless do not lose the status of “protected persons” (see Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, pp. 561-562, 793-796, 813-814).

²⁰⁵ See also Article 44 of Geneva Convention IV:

“In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government.”

In addition, see Article 70(2):

“Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for the offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.”

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.

V. THE SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKI] I

A. Submissions of the Parties

1. The Prosecution case

172. The Prosecution's second ground of cross-appeal is:

The Trial Chamber, at page 132 para 373 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men or any of them, from the village of Jaski}i.²⁰⁶

173. The Prosecution fully accepts the findings of fact of the Trial Chamber,²⁰⁷ but makes two submissions. First, it submits that, on the basis of the said facts, the Trial Chamber has misdirected itself on the application of the law on the standard of proof beyond reasonable doubt. Secondly, it contends that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misdirected itself on the application of the common purpose doctrine.²⁰⁸

174. In relation to the first error, the Prosecution submits that the only reasonable conclusion to be drawn from the facts found by the Trial Chamber is that of guilt.²⁰⁹ The test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt."²¹⁰ According to the Prosecution, the Trial Chamber's hypothesis that it was a "distinct possibility that the killing of the five victims may have been the act of a quite distinct group of armed men"²¹¹ is not fair or

²⁰⁶ Cross-Appellant's Brief, para. 3.6.

²⁰⁷ T. 169 (20 April 1999).

²⁰⁸ T. 170 (20 April 1999).

²⁰⁹ T. 176 (20 April 1999).

²¹⁰ Cross-Appellant's Brief, para. 3.12.

²¹¹ Judgement, para. 373.

rational.²¹² The use of such terms as “bare possibility”²¹³ and “could suggest”²¹⁴ indicates the misapplication of the test of proof beyond reasonable doubt.²¹⁵

175. As to the second error, the Prosecution submits that the gist of the common purpose doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.²¹⁶ The Trial Chamber found that the Appellant’s participation in the attack on Sivci and Jaski}i was part of the armed conflict in the territory of Prijedor municipality between May and December 1992. A central aspect of the attack was a policy to rid the region of the non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a Greater Serbia. According to the Prosecution, the only conclusion reasonably open from all the evidence is that the killing of the five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaski}i on 14 June 1992.²¹⁷ It is the Prosecution’s submission that this policy of ethnic cleansing was carried out throughout opština Prijedor against non-Serbs by various illegal means, including killings.²¹⁸ In this regard, the Appellant’s actions and presence did directly and substantially assist that policy. It follows that, regardless of which member or members of the Serb forces actually killed the five victims, the Appellant should have been found guilty under Article 7(1) of the Statute.²¹⁹

2. The Defence Case

176. The Defence submits that, in light of its finding that nobody was killed in Sivci on 14 June 1992, the Trial Chamber correctly found that it was a possibility that the five victims in Jaski}i were killed by another, distinct group of armed men, especially as nothing

²¹² Skeleton Argument of the Prosecution, para. 42.

²¹³ Judgement, para. 373: “The bare possibility that the deaths of the Jaski}i villagers were the result of encountering a part of that large force would be enough [...] to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths.”

²¹⁴ *Ibid.*, para. 373: “The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part [...]”

²¹⁵ T. 172 (20 April 1999).

²¹⁶ Cross-Appellant’s Brief, para. 3.19.

²¹⁷ *Ibid.*, paras. 3.24, 3.27.

²¹⁸ Cross-Appellant’s Brief, paras. 3.27-3.29; T. 179-180 (20 April 1999).

is known as to who shot the victims or in what circumstances.²²⁰ Accordingly, the standard of proof beyond reasonable doubt was correctly applied.²²¹

177. In relation to the Prosecution's common purpose submission, the Defence contends that it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means.²²² On the basis of the distinction between the operation in Jaski}i and the operation in Sivci where nobody was killed, the Trial Chamber was correct in concluding that it was not possible to find beyond reasonable doubt that the Appellant was involved in a criminal enterprise with the design of killing.²²³

B. Discussion

1. The Armed Group to Which the Appellant Belonged Committed the Killings

178. The Trial Chamber found, amongst other facts, that on 14 June 1992, the Appellant, with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivci to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaski}i.²²⁴ It also found that five men were killed in the latter village.²²⁵

179. In support of its finding that there was no proof beyond reasonable doubt that the Appellant had any part in the killing of the five men, the Trial Chamber stated:

The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in

²¹⁹ Cross-Appellant's Brief, para. 3.29.

²²⁰ Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.8-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(c).

²²¹ T. 251 (21 April 1999).

²²² Defence's Substituted Response to Cross-Appellant's Brief, para. 3.19; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).

²²³ Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.9-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).

²²⁴ Judgement, paras. 369, 373.

²²⁵ Ibid., paras. 370-373.

which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.²²⁶

180. In relation to the possibility that the killings may have been carried out by another armed group, the Trial Chamber found the following. An armed group of men, including the Appellant, entered Jaski}i. The group separated most of the men from the rest of the villagers, beat and then forcibly removed the men to an unknown location. The Appellant played an active role in the activities of this violent group. The group fired shots as they approached and left the village.

181. It has already been pointed out that the Trial Chamber also found that five men were found killed in Jaski}i after the armed group had left; four of them were shot in the head. Nothing else as to who might have killed them or in what circumstances was known. The Trial Chamber referred, however, to the large force of Serb soldiers, of which the Appellant was a member, that invaded the nearby village of Sivci on the same day, without any villager there being killed. It then stated that the:

[b]are possibility that the deaths of the Jaski}i villagers were the result of encountering a part of that large force [of Serb soldiers that invaded Sivci] would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths.²²⁷

182. The Trial Chamber did not allude to any witness suggesting that another group of armed men might have been responsible for the killing of the five men. In fact, none of the witnesses suggested anything to that effect.

183. In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaski}i.

184. In the light of the above finding, the Appeals Chamber need not consider the second possibility advanced by the Trial Chamber, namely, that the killing of the five men in

²²⁶ Ibid., para. 373.

²²⁷ Ibid.

Jaski}i could have been the “unauthorized and unforeseen act of one of the force that entered Sivci”.

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaski}i even though there is no evidence that he personally killed any of them. The two central issues are:

- (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and
- (ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions,²²⁸ in laws,²²⁹ or in judicial decisions.²³⁰ In international criminal law the principle is laid down, *inter alia*, in Article 7(1) of the Statute of the International Tribunal which states that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime. (emphasis added)

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

²²⁸ An example is provided by Article 27 para. 1 of the Italian Constitution (“La responsabilità penale è personale.” (“Criminal responsibility is personal.”) (unofficial translation)).

²²⁹ See for instance Article 121-1 of the French Code pénal (“Nul n’est responsable pénalement que de son propre fait”), para. 4 of the Austrian Strafgesetzbuch (“Strafbar ist nur, wer schuldhaft handelt” (“Only he who is culpable may be punished”) (unofficial translation)).

²³⁰ This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, see, for Great Britain, *R. v. Dalloway* (1847) 3 Cox CC 273. See also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.²³¹

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those “responsible for serious violations of international humanitarian law” committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy, incitement, attempt and complicity*).

²³¹ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 (“Report of the Secretary-General”), para. 53 (emphasis added).

190. It should be noted that this notion is spelled out in the Secretary General's Report, according to which:

The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.²³²

Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all

²³² Ibid., para 54 (emphasis added).

those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*).²³³ There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of “common enterprise”. It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.²³⁴ Similarly, in the *Hoelzer et al.* case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a “common enterprise” with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.²³⁵

198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen and others*.²³⁶ A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

[I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.²³⁷

²³³ Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35).

²³⁴ The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that “the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot” (ibid., p. 37). In his summing up the Judge Advocate pointed out that:

“There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law” (see official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal’s Library; the report in the UNWCC, vol. I, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (ibid., p. 41).

²³⁵ Hoelzer et al., Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal’s Library).

²³⁶ Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal’s Library).

²³⁷ Ibid., p. 241.

In a similar vein, the Judge Advocate noted in *Schonfeld* that:

if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present [...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.²³⁸

199. It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the *Ponzano* case,²³⁹ which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor,²⁴⁰ and stressed:

[...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].²⁴¹

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offence would not have occurred but for his participation.²⁴² Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.²⁴³

²³⁸ Trial of Franz Schonfeld and others, British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

²³⁹ Trial of Feurstein and others, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

²⁴⁰ The Prosecutor had stated the following:

"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (ibid., p. 4).

²⁴¹ Ibid., summing up of the Judge Advocate, p. 7.

²⁴² In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]" (ibid., pp. 7-8).

²⁴³ In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

200. A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case.²⁴⁴ With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...].²⁴⁵

“that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge” (ibid., p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the Stalag Luft III case, Trial of Max Ernst Friedrich Gustav Wielen and Others, Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal’s Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

“everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25th March 1944 [...] [such] that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]” (ibid., p. 276).

Furthermore, in two cases concerning an accused’s participation in the Kristallnacht riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire Reich. It was sufficient that he was aware of the local action, that he approved it, and that he wanted it “as his own” (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strafsenat. Urteil vom 8 Februar 1949 gegen S. StS 120/48, p. 284-290, 286, vol. II). See also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was “not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews” (unofficial translation).

²⁴⁴ The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

²⁴⁵ The tribunal went on to say:

“Even though these men [Radetsky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder. Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not

201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian²⁴⁶ and German²⁴⁷ cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called “concentration camp” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp*,²⁴⁸ decided by a United States court sitting in Germany and *Belsen*,²⁴⁹ decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of

brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers’ watchman” (ibid., p. 373; emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

“[w]ith respect to the defendants such as Jost and Naumann, [...] it is [...] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they who were persons in authority done so. [...] Far from being a defense or even a circumstance in mitigation, the fact that these defendants did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the Einsatzgruppen, only serves to establish their deeper responsibility for the crimes of the men under their command” (ibid.).

²⁴⁶ See for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the “Repubblica Sociale Italiana” against Italian partisans or armed forces: Annalberti et al., 18 June 1949, in *Giustizia penale 1949*, Part II, col. 732, no. 440; Rigardo et al. case, 6 July 1949, ibid., cols. 733 and 735, no. 443; P.M. v. Castoldi, 11 July 1949, ibid., no. 444; Imolesi et al., 5 May 1949, ibid., col. 734, no. 445. See also Ballestra, 6 July 1949, ibid., cols. 732-733, no. 442.

²⁴⁷ See for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in K. and A., in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in J. and A., ibid., pp. 310-315; the decision of the District Court (Landgericht) of Cologne of 22 and 23 January 1946 in Hessmer et al., in *Justiz und NS-Verbrechen*, vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (Landgericht) of Frankfurt am Main in M. et al. (ibid., pp. 135-165, 154) and the judgement of the Court of Appeal (Oberlandesgericht) of 12 August 1947 in the same case (ibid., pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*, ibid., p. 383-391, 389.

²⁴⁸ Trial of Martin Gottfried Weiss and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5.

²⁴⁹ Trial of Josef Kramer and 44 others, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1.

the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.²⁵⁰ In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.²⁵¹ The convictions of several of the accused appear to have been explicitly based upon these criteria.²⁵²

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory"²⁵³ but failed to do so.²⁵⁴ It would seem that in these cases the required *actus reus* was the active

²⁵⁰ See Dachau Concentration Camp case, UNWCC, vol. XI, p. 14:

"It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary".

²⁵¹ The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:

"The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." (*Belsen case*, UNWCC, vol. II, p. 121.)

²⁵² In particular, the accused Kramer appears to have been convicted on this basis. (See *ibid.*, p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused according to the positions they held." (emphasis added).

²⁵³ *Ibid.*, p.121.

²⁵⁴ In a similar vein, the Case against R. Mulka et al. ("Auschwitz concentration camp case") can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi

participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this

regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (see in particular the Bundesgerichtshof in *Justiz und NS-Verbrechen*, vol. XXI, pp. 838 ff., and especially pp. 881 ff). The BGH stated, p. 882:

"[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the

plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are *Essen Lynching* and *Borkum Island*.

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The *Essen Lynching* (also called *Essen West*) case was brought before a British military court, although, as was stated by the court, it “was not a trial under English law”.²⁵⁵ Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right.” (unofficial translation).

²⁵⁵ Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.

[w]hen the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.²⁵⁶

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission *to prove this charge you do not have to prove an intent to kill*. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is *not an intent to kill but merely the doing of an unlawful act of violence*. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of – and the onus of proof is of course on the prosecution – is that *each and everyone of the accused, before you can convict him, was concerned in the killing* of these three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.²⁵⁷

The Prosecutor then went on to add:

the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen *is guilty in that he is concerned in the killing*. It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and *every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men*.²⁵⁸

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

²⁵⁶ Ibid., p. 89.

²⁵⁷ See transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).

²⁵⁸ Ibid., p. 66 (emphasis added).

three civilians “were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death”.²⁵⁹

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all “concerned in the killing”. The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.²⁶⁰

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich’s Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst*. They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them “like dogs”. They were

²⁵⁹ UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing “that the motives of the crowd against them [the airmen] were deadly, and yet he joined in” (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal’s Library); the second, Kaufer, was found to have “beaten the airmen” and taken “an active part” in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.*, pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airman, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.*, p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen’s death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.*, pp. 66-67, UNWCC, vol. I, p. 91).

²⁶⁰ The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being “concerned in the killing” of the airmen rather than murder as this was “not a trial under English law” (*ibid.*, at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that “as long as everyone realised

then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with “wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing” of the airmen and with “wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon” the airmen.²⁶¹ In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

[I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner.* Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man (*sic*). *No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.* This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.

Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [, e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result.²⁶²

In short, noted the Prosecutor, the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.²⁶³ As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt “that each one of these accused

what was meant by the word 'murder' for the purposes of this trial, [there ...] was ?nog difficulty" (ibid., pp. 91-92).

²⁶¹ See Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).

²⁶² Ibid., p. 1186 (emphasis added). See also p. 1187.

²⁶³ Ibid., p. 1188. See, further note 240 and accompanying text, with regard to the comments made regarding causation in the Ponzano case.

played *his part* in mob violence which led to the unlawful killing of the seven American flyers, [...] under the law *each and every one of the accused [was] guilty of murder*”.²⁶⁴

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.²⁶⁵ Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,²⁶⁶ or they argued that, if there had been such a plot, it did not involve the killing of the airmen.²⁶⁷

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges²⁶⁸ while others were only found guilty of assault.²⁶⁹

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

²⁶⁴ Ibid., p. 1190 (emphasis added). See also pp. 1191-1194.

²⁶⁵ See e.g. *ibid.*, pp. 1201, 1203-1206.

²⁶⁶ See *ibid.*, pp. 1234, 1241, 1243.

²⁶⁷ See *ibid.*, pp. 1268-1270.

²⁶⁸ The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (*ibid.*, pp. 1280-1286).

²⁶⁹ The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (*ibid.*).

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called “*Repubblica Sociale Italiana*” (“RSI”), a *de facto* government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

215. In *D’Ottavio et al.*, on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result. The trial court held that all the other members of the group were accountable not only for “illegal restraint” (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological “causal nexus” between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

[i]ndeed the responsibility of the participant (*concorrente*) [...] is not founded on the notion of objective responsibility [...], but on the fundamental principle of the concurrence of interdependent causes [...]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati*.²⁷⁰

²⁷⁰ See handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). See also *Giustizia penale*, 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

The court then noted that in the case at issue:

[t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted “illegal restraint” [...] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by d’Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, *and foresaw the possible commission of a different crime*. This *foresight (previsione)* necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.²⁷¹

216. In another case (*Aratano et al.*) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

[I]t was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un’attività volontaria in relazione anche all’omicidio*) (judgement of 27 August 1947 *in re: Beraschi*).²⁷²

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of “collaboration with the occupying Germans” but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been “an exceptional and

²⁷¹ See handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).

²⁷² See handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). For a headnote on this case see *Archivio penale*, 1949, p. 472.

unforeseen (*imprevisto*) event”, for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.²⁷³ A similar position was taken by the same court in *Ferrida*. The appellant had participated, “only in his capacity as a nurse,” in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.²⁷⁴ In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it “was in any case a consequence, albeit indirect, of his participation”.²⁷⁵

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in *Mannelli*, where the court explained the required causal nexus as follows:

The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita'*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, it is necessary that the latter crime should constitute the logical and predictable development of the former (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita'*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of

²⁷³ Judgement of 12 September 1946, in *Archivio penale*, 1947, Part II, pp. 88-89.

²⁷⁴ Judgement of 25 July 1946, in *Archivio penale*, 1947, Part II, p. 88.

²⁷⁵ See handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). See also *Giustizia penale*, 1945-46, Part II, cols. 530-532.

For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, see *Torraccini*, judgement of 18 August 1946, in *Archivio penale* 1947, Part II, p. 89; *Palmia*, judgement of 20 September 1946, *ibid.*

the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (mandante) by a merely incidental relationship (emphasis added).²⁷⁶

219. The same notion was enunciated by the same Court of Cassation in many other cases.²⁷⁷ That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.²⁷⁸ Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called “concentration camp” cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to

²⁷⁶ See *Giustizia penale*, 1950, Part II, cols. 696-697 (emphasis added).

²⁷⁷ See e.g. Court of Cassation, 15 March 1948, Peveri case, in *Archivio penale*, 1948, pp. 431-432; Court of Cassation, 20 July 1949, Mannelli case, in *Giustizia penale*, 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, P.M. v. Minafo, in *Giustizia penale*, 1950, Part II, col. 252, no. 202; 24 February 1950, Montagnino, *ibid.*, col.821; 19 April 1950, Solesio et al., *ibid.*, col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.*, held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale*, 1947, Part II, col. 483, no. 382).

²⁷⁸ In the Antonini case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a “reprisal” for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

[i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.²⁷⁹ This Convention would seem to be significant because it upholds the notion of a

holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (see text of the judgement in *Giustizia penale*, 1949, Part II, cols. 740-742).

²⁷⁹ The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (see UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that “some terms used in the Convention such as [...] ‘such contribution’ (Article 2, para. 3(c)) were ambiguous” (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore “interpret ‘such contribution’ [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation” (ibid).

“common criminal purpose” as distinct from that of aiding and abetting (couched in the terms of “participating as an accomplice [in] an offence”). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 (“Rome Statute”).²⁸⁰ At paragraph 3(d), this provision upholds the doctrine under discussion as follows:

[In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...]

(d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- ii. Be made in the knowledge of the intention of the group to commit the crime.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furund`ija*.²⁸¹ There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States. This is consistent

See also Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UNGAOR, 52nd sess., 37th supp., A/52/37.

²⁸⁰ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

²⁸¹ “Judgement”, Prosecutor v. Anto Furundžija, Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.²⁸²

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany²⁸³ and the Netherlands.²⁸⁴ Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France²⁸⁵ and Italy.²⁸⁶

²⁸² Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

²⁸³ See Para. 25(2) of the Strafgesetzbuch: “Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)”. (“If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator.” (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. See BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

“Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist”. (“There is co-perpetration (Mittäterschaft) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (Einverständnis), whereas any criminal action of a participant (Mittäter) going beyond this agreement can only be attributed to that participant.” (unofficial translation)).

²⁸⁴ In the Netherlands, the term designated for this form of criminal liability is “medeplegen”. (See HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; and HR 6 April 1925, NJ 1925, 723, W 11393).

²⁸⁵ See Article 121-7 of the Code pénal, which reads:

“Est complice d’un crime ou d’un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d’autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre”. (“Any person who knowingly has assisted in planning or committing a crime or

They also embrace common law jurisdictions such as England and Wales,²⁸⁷ Canada,²⁸⁸ the United States,²⁸⁹ Australia²⁹⁰ and Zambia.²⁹¹

offence, whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it." (unofficial translation)).

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands a gun to an accomplice in the context of a hold-up, but the accomplice uses the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the form of robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgement of 31 December 1947, *Bulletin des arrêts criminels de la Cour de Cassation* 1947, no. 270, the accomplice "devait prévoir toutes les qualifications dont le fait était susceptible, toutes les circonstances dont il pouvait être accompagné" ("should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation)). See also the decision of 19 June 1984, *Bulletin, ibid.*, 1984, no. 231.

²⁸⁶ The principles of common purpose are delineated, in substance, in the following provisions of the Codice Penale:

"Article 110: Pena per coloro che concorrono nel reato.- Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti." ("Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles." (unofficial translation)); and

"Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento e conseguenza della sua azione od omissione." ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. See in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, *Archivio Penale* 1965, part II, pp. 430 ff. In some cases courts require so-called abstract foreseeability (*prevedibilità astratta*) (see e.g., instance, Court of Cassation, 3 March 1978, *Cassazione penale*, 1980, pp. 45 ff; Court of Cassation, 4 March 1988, *Cassazione penale*, 1990, pp. 35 ff); others require concrete (or specific) foreseeability (*prevedibilità concreta*) (see e.g., Court of Cassation, 11 October 1985, *Rivista penale*, 1986, p. 421; and Court of Cassation, 18 February 1998, *Rivista penale*, 1988, p. 1200).

²⁸⁷ See *R. v. Hyde* [1991] 1 QB 134; *R. v. Anderson*; *R. v. Morris* [1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise (see *Hui Chi-Ming v. R.* [1992] 3 All ER 897 at 910-911).

²⁸⁸ Criminal Code, Section 21(2) reads that where:

"two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

It should be noted that despite the fact that the section refers to an objective foreseeability requirement, this has been modified by the Supreme Court of Canada which held that: "[i]n those instances where the principal is held to a mens rea standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard" (*R. v. Logan* [1990] 2 SCR 731 at 735). Hence, a subjective standard is applied in the case of offences such as murder. See also *R. v. Rodney* [1990] 2 SCR 687.

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that “suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law”.²⁹² In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law

²⁸⁹ E.g., in Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (1997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States’ Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (see *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); *State v. Walton*, 227 Conn. 32; 630 A.2d 990 (1993); *State of Connecticut v. Diaz*, 237 Conn. 518, 679 A. 2d 902 (1996)).

²⁹⁰ Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (*McAuliffe v. R.* (1995) 183 CLR 108 at 114). The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: “in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose” (*ibid.*).

²⁹¹ Article 22 of the Penal Code states:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

²⁹² See Report of the Secretary-General, para. 36 (emphasis added).

and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

- i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.
- ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
- iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the

circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

(b) The Culpability of the Appellant in the Present Case

230. In the present case, the Trial Chamber found that the Appellant participated in the armed conflict taking place between May and December 1992 in the Prijedor region. An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.²⁹³ It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and “pursuant to a recognisable plan”.²⁹⁴ The attacks on Sivci and Jaski}i on 14 June 1992 formed part of this armed conflict raging in the Prijedor region.

231. The Appellant actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts. The common criminal purpose was not to kill all non-Serb men; from the evidence adduced and accepted, it is clear that killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. That the Appellant had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population is beyond doubt. That is the context in which the attack on Jaski}i and his participation therein, as found by the Trial Chamber as well as the Appeals Chamber above, should be seen. That nobody was killed in the attack on Sivci on the same day does not represent a change of the common criminal purpose.

232. The Appellant was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaski}i on 14 June 1992. The Trial Chamber found the following:

Of the killing of the five men in Jaski}i, the witnesses Draguna Jaski}, Zemka [ahbaz and Senija Elkasovi} saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone; Senija Elkasovi} saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away.²⁹⁵

The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaski}i. As the Trial Chamber further noted:

²⁹³ See Judgement, paras. 127-179, which outlines the background to the conflict in the op{tina Prijedor.

[t]hat the armed men were violent was not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence.²⁹⁶

Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.

3. The Finding of the Appeals Chamber

233. The Trial Chamber erred in holding that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had any part in the killing of the five men from the village of Jaski}i. The Appeals Chamber finds that the Appellant participated in the killings of the five men in Jaski}i, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. The Appeals Chamber therefore holds that under the provisions of Article 7(1) of the Statute, the Trial Chamber should have found the Appellant guilty.

234. The Appeals Chamber finds that this ground of the Prosecution's Cross-Appeal succeeds.

²⁹⁴ Judgement, para. 660.

²⁹⁵ Ibid., para. 370.

²⁹⁶ Ibid.

C. Conclusion

235. In light of the Appeals Chamber's finding that Article 2 of the Statute is applicable, the Appellant is found guilty on Count 29 (grave breach in terms of Article 2(a) (wilful killing) of the Statute) and Article 7(1) of the Statute.

236. The Trial Chamber's finding on Count 30 is set aside. The Appellant is found guilty on Count 30 (violation of the laws or customs of war in terms of Article 3(1)(a) (murder) of the Statute) and Article 7(1) of the Statute.

237. The Trial Chamber's finding on Count 31 is set aside. The Appellant is found guilty on Count 31 (crime against humanity in terms of Article 5(a) (murder) of the Statute) and Article 7(1) of the Statute.

VI. THE THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT CRIMES AGAINST HUMANITY CANNOT BE COMMITTED FOR PURELY PERSONAL MOTIVES

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

239. As to the nature of the nexus required, the Trial Chamber found that, subject to two caveats, it is sufficient for the purposes of crimes against humanity that the act occurred "in the course or duration of an armed conflict".²⁹⁷ The first caveat was "that the act be linked geographically as well as temporally with the armed conflict".²⁹⁸ The second caveat was that the act and the conflict must be related or, at least, that the act must "not be unrelated to the armed conflict".²⁹⁹ The Trial Chamber further held that the requirement that the act must "not be unrelated" to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs.³⁰⁰ Secondly, the act must not have been carried out for the purely personal motives of the perpetrator.³⁰¹

A. Submissions of the Parties

1. The Prosecution Case

240. The Prosecution submits that there is nothing in Article 5 of the Statute which suggests that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. In the submission of the Prosecution, no such requirement can be inferred from the requirement that the crime must have a nexus to the armed conflict. In

²⁹⁷ Judgement, para. 633.

²⁹⁸ Ibid.

²⁹⁹ Ibid., para. 634.

³⁰⁰ Ibid., paras. 656-657.

fact, to read the armed conflict requirement as requiring that the perpetrator's motives not be purely personal "would ...g transform this merely jurisdictional limitation under Article 5 into a substantive element of the mens rea of crimes against humanity".³⁰²

241. The Prosecution concedes that this finding did not affect the verdict against the Appellant. However, it submits that the finding involves a significant question of law that is of general importance to the Tribunal's jurisprudence and should therefore be corrected on appeal.³⁰³

242. The Prosecution argues that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons and that the sole authority relied on by the Trial Chamber in support of its finding in fact suggests that, even where perpetrators may have been personally motivated to commit the acts in question, their conduct can still be characterised as a crime against humanity.³⁰⁴ Subsequent decisions of the United States military tribunals under Control Council Law No.10 and of national courts are also consistent with the view that a perpetrator of crimes against humanity may act out of purely personal motives.³⁰⁵

243. Finally, the Prosecution contends that the object and purpose of the Tribunal's Statute support the interpretation that crimes against humanity may be committed for purely personal reasons, arguing that the objective of the Statute in providing a broad scope for humanitarian law would be defeated by a narrow interpretation of the category of offences falling within the ambit of Article 5. Furthermore, if proof of a non-personal motive was required, many perpetrators of crimes against humanity could evade conviction by the International Tribunal simply by invoking purely personal motives in defence of their conduct.³⁰⁶

³⁰¹ Ibid. paras. 658-659.

³⁰² Cross-Appellant's Brief, para. 4.9.

³⁰³ Skeleton Argument of the Prosecution, para. 26.

³⁰⁴ Cross-Appellant's Brief, para. 4.11; T. 150 (20 April 1999).

³⁰⁵ Cross-Appellant's Brief, paras. 4.15 – 4.18.

³⁰⁶ Ibid. paras. 4.22; T. 152 (20 April 1999).

2. The Defence Case

244. In contrast to the Prosecution's Cross-Appeal, the Defence argues that the Trial Chamber's ruling that a crime against humanity cannot be committed for purely personal reasons is correct. Although it concedes that Article 5 of the Statute does not expressly stipulate that crimes against humanity cannot be committed for purely personal reasons, in its submission, the Trial Chamber nevertheless interpreted Article 5 correctly when it found that crimes against humanity cannot be committed for purely personal motives.³⁰⁷

245. The Defence contests the interpretation given to the applicable case law by the Prosecution, arguing that in all the cases cited, the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives.³⁰⁸ In other words, the activities of the defendants were linked to the general activities comprising the pogroms against the Jews and thus the Defence submits that the acts of the defendants were not acts committed for purely personal reasons.

246. The Defence also contests the Prosecution's submissions regarding the object and purpose of the Statute of the International Tribunal, arguing, to the contrary, that policy suggests that it would be unjust if a perpetrator of a criminal act guided solely by personal motives was instead to be prosecuted for a crime against humanity.³⁰⁹

B. Discussion

247. Neither Party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute.³¹⁰ Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

³⁰⁷ Appellant's Amended Brief on Judgement, para. 4.9; T. 227 (20 April 1999).

³⁰⁸ Appellant's Amended Brief on Judgement, para. 4.12; T. 229 (20 April 1999).

³⁰⁹ Appellant's Amended Brief on Judgement, paras. 4.17 – 4.18.

1. Article 5 of the Statute

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words “directed against any civilian population” in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population³¹¹ and that the accused must have known that his acts fit into such a pattern. There is nothing in the Statute, however, which mandates the imposition of a further condition that the acts in question must not be committed for purely personal reasons, except to the extent that this condition is a consequence or a re-statement of the other two conditions mentioned.

249. The Appeals Chamber would also agree with the Prosecution that the words “committed in armed conflict” in Article 5 of the Statute require nothing more than the existence of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a jurisdictional element, not “a substantive element of the mens rea of crimes against humanity”³¹² (i.e., not a legal ingredient of the subjective element of the crime).

250. This distinction is important because, as stated above, if the exclusion of “purely personal” behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it; indeed it is a correct statement of the law. It is only if this phrase is understood as requiring that the motives of the accused (“personal reasons”, in the terminology of the Trial Chamber) not be unrelated to the armed

³¹⁰ Article 25(1) of the Statute reads as follows: “The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice”.

³¹¹ This requirement had already been recognised by this Tribunal in the Vukovar Hospital Rule 61 Decision: “Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.” (“Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence”, *The Prosecutor v. Mile Mrksi} et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 30).

conflict that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of the accused's motives, as distinct from the intent to commit the crime and the knowledge of the context into which the crime fits.

251. As to what the Trial Chamber understood by the phrase "purely personal motives", it is clear that it conflated two interpretations of the phrase: first, that the act is unrelated to the armed conflict, and, secondly, that the act is unrelated to the attack on the civilian population. In this regard, paragraph 659 of the Judgement held:

659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict. (emphasis added)

Thus the "attack on the civilian population" is here equated to "the armed conflict". The two concepts cannot, however, be identical because then crimes against humanity would, by definition, always take place in armed conflict, whereas under customary international law these crimes may also be committed in times of peace.³¹³ So the two – the "attack on the civilian population" and "the armed conflict" – must be separate notions, although of course under Article 5 of the Statute the attack on "any civilian population" may be part of an "armed conflict". A nexus with the accused's acts is required, however, only for the attack on "any civilian population". A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the Judgement. The armed conflict requirement is satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.

252. The Trial Chamber seems additionally to have conflated the notion of committing an act for purely personal motives and the notion that the act must not be unrelated to the armed conflict. The Trial Chamber appears to have viewed the proposition that "the act must not be unrelated to the armed conflict"³¹⁴ as being synonymous with the statement that

³¹² Cross-Appellant's Brief, para. 4.9.

³¹³ On the issue of whether the Statute exceeds customary international law in requiring that there be an armed conflict, see the Tadić Decision on Jurisdiction, para. 141.

³¹⁴ Judgement, para. 634.

the act must “not be done for the purely personal motives of the perpetrator”.³¹⁵ These two concepts, neither of which is a prerequisite for criminal culpability under Article 5 of the Statute, are, in any case, not coextensive. It may be true that if the act is related to the armed conflict, then it is not being committed for purely personal motives. But it does not follow from this that, if the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The act may be intimately related to the attack on a civilian population, that is, it may fit precisely into a context of persecution of a particular group, and yet be unrelated to the armed conflict. It would be wrong to conclude in these circumstances that, since the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The converse is also true; that is, merely because personal motivations can be identified in the defendant’s carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.

2. The Object and Purpose of the Statute

253. The Prosecution has submitted that “the object and purpose of the Statute support the interpretation that crimes against humanity can be committed for purely personal reasons”. The Prosecution cites the Tadić Decision on Jurisdiction, to the effect that “the ‘primary purpose’ of the establishment of the International Tribunal ‘is not to leave unpunished any person guilty of [a] serious violation [of international humanitarian law], whatever the context within which it may have been committed’”.³¹⁶ This begs the question, however, whether a crime committed for purely personal reasons is a crime against humanity, and therefore a serious violation of international humanitarian law under Article 5 of the Statute.

254. The Appeals Chamber would also reject the Prosecution’s submission concerning the onerous evidentiary burden which would be imposed on it in having to prove that the accused did not act from personal motives,³¹⁷ as equally question-begging and inapposite. It is question-begging because if, *arguendo*, under international criminal law, the fact that

³¹⁵ Ibid.

³¹⁶ Cross-Appellant’s Brief, para. 4.20.

³¹⁷ Ibid., para. 4.23.

the accused did not act from purely personal motives was a requirement of crimes against humanity, then the Prosecution would have to prove that element, whether it was onerous for it to do so or not. The question is simply whether or not there is such a requirement under international criminal law.

3. Case-law as Evidence of Customary International Law

255. Turning to the further submission of the Prosecution, the Appeals Chamber agrees that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts, in the words of the Trial Chamber, “fitted into such a pattern” – are met.

256. In this regard, it is necessary to review the case-law cited by the Trial Chamber and the Prosecution, as well as other relevant case law, to establish whether this case-law is indicative of the emergence of a norm of customary international law on this matter.

257. The Prosecution is correct in stating that the 1948 case cited by the Trial Chamber³¹⁸ supports rather than negates the proposition that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as “part and parcel of all the mass crimes committed during the persecution of the Jews”. As the Supreme Court for the British Zone stated, “in cases of crimes against humanity taking the form of political denunciations, only the perpetrator’s consciousness and intent to

³¹⁸ Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), S. StS 78/48, in *Justiz und NS-Verbrechen* vol. II, pp. 498-499. The Accused, Mrs. K. and P., had denounced P’s Jewish wife to the Gestapo for her anti-Nazi remarks. The defendants’ sole purpose was to rid themselves of Mrs. P., who would not agree to a divorce, and the Accused saw no other means of so doing than by delivering Mrs. P. to the Gestapo. Upon her denunciation, Mrs. P. was arrested and brought to Auschwitz concentration camp where she died after a few months due to malnutrition. The Court of First Instance convicted K. and P. of crimes against humanity. (See Decision of Schwurgericht Hamburg from 11 May 1948, (50). 17/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 491-497). The Accused appealed to the Supreme Court of the British Zone which dismissed their appeal and confirmed their convictions, stating that both the physical and the mental elements of a crime against humanity were met. (See Decision of the Supreme Court for the British Zone from 9 November 1948, S. StS 78/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 498-499 at p. 499). According to the Supreme Court, the findings of the Court of First Instance had sufficiently proved that the accused fulfilled this mental requirement.

deliver his victim through denunciation to the forces of arbitrariness or terror are required".³¹⁹

258. The case involving the killing of mentally disturbed patients, decided by the same court and cited by the Prosecution, is also a persuasive authority concerning the irrelevance of personal motives with regard to the constituent elements of crimes against humanity.³²⁰

259. The Prosecution's submission finds further support in other so-called denunciation cases rendered after the Second World War by the Supreme Court for the British Zone and by German national courts, in which private individuals who denounced others, albeit for personal reasons, were nevertheless convicted of crimes against humanity.

260. In Sch., the accused had denounced her landlord solely "out of revenge and for the purpose of rendering him harmless" after tensions in their tenancy had arisen. The denunciation led to investigation proceedings by the Gestapo which ended with the landlord's conviction and execution. The Court of First Instance convicted Sch. and sentenced her to three years' imprisonment for crimes against humanity.³²¹ The accused appealed against the decision, arguing that "crimes against humanity were limited to participation in mass crimes and ... did not include all those cases in which someone took action against a single person for personal reasons". The Supreme Court dismissed the appeal, holding that neither the Nuremberg Judgement nor the statements of the Prosecutor

³¹⁹ *Ibid.*, p. 499.

³²⁰ OGHZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone I*, 1949, pp. 321-343. The Accused, Dr. P and others, were medical doctors and a jurist working in a hospital for mentally disturbed patients. Pursuant to Hitler's directive which ordered the transferral of mentally ill persons to other institutions (where the patients were secretly killed in gas chambers), the Defendants in a few cases participated in the transfer of patients. In most cases, however, they objected to these instructions and tried to save their patients' lives by releasing them from hospital or by classifying them in categories which were not subject to Hitler's directive. The Defendants, charged with aiding and abetting murder, were acquitted by the Court of First Instance because it could not be proven that they had acted with the requisite *mens rea* with regard to participation in the killing of the patients. The Court of First Instance did not take into consideration whether the Defendants' behaviour could constitute a crime against humanity. This was criticised by the Supreme Court for the British Zone, which ordered the re-opening of the trial before the Court of First Instance to ascertain whether the Accused could be found guilty of a crime against humanity. The Supreme Court stated that a "perpetrator [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, [...] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives ("Beweggründe"), the action remains linked to this violent and oppressive system ("Gewaltherrschaft")" (*ibid.*, p. 341). The Defendants, ultimately, were not convicted of crimes against humanity for procedural reasons unrelated to the definition of the offence.

³²¹ Decision of Flensburg District Court dated 30 March 1948 in *Justiz und NS-Verbrechen*, vol. II, pp. 397-402. See this decision for the findings of the District Court to the effect that the denunciation was made for personal reasons.

before the International Military Tribunal indicated that Control Council Law No. 10 had to be interpreted in such a restrictive way. The Supreme Court stated:

[T]he International Military Tribunal and the Supreme Court considered that a crime against humanity as defined in CCL 10 Article II 1 (c) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny ("Gewalt- oder Willkürherrschaft") to such an extent that mankind itself was affected thereby. Such prejudice can also arise from an attack committed against an individual victim for personal reasons. However, this is only the case if the victim was not only harmed by the perpetrator – this would not be a matter which concerned mankind as such – but if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.³²²

261. This view was upheld in a later decision of the Supreme Court in the case of H. H. denounced his father-in-law, V.F., for listening to a foreign broadcasting station, allegedly because V.F., who was of aristocratic origin, incessantly mocked H. for his low birth and tyrannised the family with his relentlessly scornful behaviour. The family members supposedly considered a denunciation to be the only solution to their family problems. Upon the denunciation, V.F. was sentenced by the Nazi authorities to three years in prison. V.F., who suffered from an intestinal illness, died in prison. Despite the fact that H.'s denunciation was motivated by personal reasons, the Court of First Instance sentenced H. for a crime against humanity, stating that "it can be left open as to whether [...] H. was motivated by political, personal or other reasons". Referring to the established jurisprudence of the Supreme Court for the British Zone,³²³ the Court of First Instance held that "the

³²² Decision of the Supreme Court of the British Zone dated 26 October 1948, S. StS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I., pp. 122-126 at p. 124 (unofficial translation). The essence of this statement was reiterated in the Decision of the Supreme Court dated 8 January 1949 against G. (S. StS 109/48, *ibid.*, pp. 246-249). G., a member of the SA (Stormtroopers), had participated in the mistreatment of a political opponent for apparently purely personal motives, namely personal rancour between his family and the family of the victim. Nevertheless, G. was found guilty of a crime against humanity. The Supreme Court dismissed G.'s appeal against his conviction, stating that the motive for an attack was immaterial and that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny (*ibid.*, p. 247).

³²³ The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. StS 43/48, *ibid.*, pp. 60-62 and Decision dated 13 November 1948, S. StS 68/48, *ibid.*, pp. 186-190. See also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. StS 120/49, *ibid.*, pp. 385-391, at p. 388.

motives (“Beweggründe”) prompting a denunciation are not decisive (nicht entscheidend)”.³²⁴

262. A further example is the V. case. In 1943, Nu. denounced Ste. for her repeated utterances against Hitler, the national-socialist system and the SS, made in Nu.’s house in 1942. Ste. was the natural mother of Nu.’s adoptive son. In fact, Nu. had denounced Ste. in the hope of regaining her son who had become increasingly estranged from his adoptive parents and had developed a closer relationship with his natural mother. Upon the denunciation, a special court sentenced Ste. to two years in prison. This court had envisaged her eventual transfer to a concentration camp, but she was released by the allied occupation forces before the transfer took place. In prison, Ste. suffered serious bodily harm and lost sight in one eye. After the war, a District Court sentenced Nu. to six months’ imprisonment for her denunciation of Ste.. Although Nu.’s act of denunciation was motivated by personal reasons, the court considered that her denunciation constituted a crime against humanity.³²⁵

263. Turning to the decisions of the United States military tribunals under Control Council Law No. 10 cited by the Prosecution,³²⁶ it must be noted that they appear to be less pertinent. These cases involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted “for personal reasons” would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible “personal”

³²⁴ Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen*, vol. VI, pp. 631-644, at p. 639. Note, in particular, the findings of the District Court to the effect that the denunciation was motivated by personal concerns. Mention can also be made of the Decision of Schwurgericht Hannover, dated 30 November 1948, in the B. case, S. StS 68/48 (in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I, pp. 186-190). B., an inspector of state church offices, informed his superior that one of his colleagues, P., had repeatedly expressed his doubts about the political situation in Germany and voiced his disapproval of the persecution of the Jews, the official propaganda, cultural policy and anti-clerical attitude of National Socialism. This information reached the Gestapo, who arrested P. A special court sentenced P. to one year and three months in prison. B., charged with crimes against humanity, was acquitted at first instance because the verdict of the Court of First Instance (Schwurgericht Hannover), having extensively examined the accused’s motives (“Beweggründe”), could not determine whether the denunciation had been motivated by politics or religion. The Supreme Court for the British Zone dismissed the judgement of the District Court, stating that “it was erroneous and in contradiction to the consistent jurisprudence of the [Supreme] Court” to consider the motives of the accused as important. (*ibid.*, p. 189).

³²⁵ Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen*, vol. I, pp. 19-25. The decision of the Supreme Court did not directly concern the accused Nu., but a co-accused of hers. Nu. had been sentenced by the District Court of Hamburg for committing a crime against humanity.

³²⁶ See Cross-Appellant’s Brief, paras. 4.15, 4.16.

defence which has as its premise “non-official acts”. The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for “purely personal” motives and that it therefore cannot constitute a crime against humanity is pre-eminently for the defence to raise and one would not expect the court to rule on the issue *proprio motu* and as *obiter dictum*.

264. The two sections of the *Ministries* case, referred to by the Prosecution,³²⁷ are also not strictly relevant, as those sections re-state the law of complicity – “[...] he who participates or plays a consenting part therein is guilty of a crime against humanity” – rather than dealing with the importance or otherwise of whether the accused acted from personal motives. Equally, in the *Justice* case,³²⁸ the defendants do not appear to have raised the defence that they acted for personal motives.

265. The Prosecution also refers to the *Eichmann* and *Finta* cases. The *Eichmann* case is inappropriate as the defendant in that case specifically denied that he ever acted from a personal motive, claiming that he did what he did “not of his own volition but as one of numerous links in the chain of command”.³²⁹ Moreover the court found *Eichmann*, who was the Head of the Jewish Affairs and Evacuation Department and one of the persons who attended the infamous Wannsee Conference, to be “no mere ‘cog’, small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine”.³³⁰ Such a senior official would not be one to whom the “purely personal reasons” consideration could conceivably apply.

³²⁷ U.S. v. Ernst von Weizsaecker et al., *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, United States Government Printing Office, Washington, 1951, vol XIV, pp. 611, 470-471, cited in Cross-Appellant’s Brief, para. 4.15.

³²⁸ U.S. v. Altstoetter et al., *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, United States Government Printing Office, Washington, 1951, vol. III.

³²⁹ Attorney-General of the Government of Israel v. Adolf Eichmann, 36 *International Law Reports* 1968, p. 323.

³³⁰ *Ibid.*, p. 331.

266. The Finta case³³¹ is more on point, not least since the accused was a minor official, a captain in the Royal Hungarian Gendarmerie. He was thus better placed than senior officials to raise an issue as to his exclusively “personal” motives. That case is indeed authority for the proposition that the sole requirements for crimes against humanity in this regard are that:

[...] there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. [...] The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity.³³²

267. According to Finta, nothing more seems to be required beyond this and there is no mention of the relevance or otherwise of the accused’s personal motives.

268. One reason why the above cases do not refer to “motives” may be, as the Defence has suggested,³³³ that “the issue in these cases was not whether the Defendants committed the acts for purely personal motives”. The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999:

For example, it doesn’t matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we’re concerned with is that he stole and he intended to steal, and what we’re concerned with ... here is the same sort of thing. There’s no requirement for non-personal motive beyond knowledge of the context of a widespread or systematic act into which an accused’s act fits. The Prosecutor is submitting that, as a general proposition and one which is applicable here, motives are simply irrelevant in criminal law.³³⁴

269. The Appeals Chamber approves this submission, subject to the caveat that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following *reductio ad absurdum*. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the “purely personal” reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this

³³¹ R. v. Finta, [1994] 1 SCR 701.

³³² *Ibid.*, at p. 819, majority judgement delivered by Cory J..

³³³ Defence’s Substituted Response to Cross-Appellant’s Brief, para. 4.16.

³³⁴ T. 152-153 (20 April 1999).

quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for “purely personal” reasons. Similarly, if the same man said that he participated in the genocide only for the “purely personal” reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of “non-personal” motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused’s acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a “motive” requirement; it simply duplicated the context and mens rea requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, “purely personal motives” do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of mens rea, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof

of the accused's motives. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute.

VII. THE FOURTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT ALL CRIMES AGAINST HUMANITY REQUIRE A DISCRIMINATORY INTENT

A. Submissions of the Parties

1. The Prosecution Case

273. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity must be committed with a discriminatory intent. It is the submission of the Prosecution that the requirement of a discriminatory intent applies only to "persecution type" crimes and not to all crimes against humanity.³³⁵

274. The Prosecution notes that Article 5 of the Statute contains no express requirement of a discriminatory intent for all crimes against humanity. The requirement for such an intent is present in Article 3 of the Statute of the ICTR. The absence of a similar provision in Article 5 of this Tribunal's Statute implies a contrario that at the time of drafting the Statute of this Tribunal, there was no intention to include a similar requirement.³³⁶

275. A requirement of discriminatory intent for all crimes against humanity is also absent from customary international law. The Prosecution notes that the Nuremberg Charter and Control Council Law No. 10, upon which Article 5 is based, distinguish between "murder type" crimes such as murder, extermination, enslavement, etc., and "persecution type" crimes committed on political, racial, or religious grounds. Discriminatory intent need only be shown in relation to "persecution" crimes. The Prosecution submits that the Trial Chamber erred in relying upon a statement in paragraph

³³⁵ Cross-Appellant's Brief, para. 5.5; T. 161 (20 April 1999).

³³⁶ Cross-Appellant's Brief, para. 5.6; T. 162 (20 April 1999).

48 of the Report of the Secretary-General³³⁷ and statements made in the Security Council by three of its fifteen Members to conclude that Article 5 of the Statute was to be interpreted as requiring that all crimes against humanity be committed with a discriminatory intent. In the Prosecution's submission, these sources do not purport to reflect customary international law and thus should not be given undue, authoritative weight in interpreting Article 5.³³⁸ It is the view of the Prosecution that Article 5 does not contain any ambiguity. Thus, to accord weight to these sources to resolve an ambiguity which, in the Prosecution's submission, does not exist, would lead to considerable uncertainty with regard to the scope and content of Article 5 of the Statute.³³⁹

276. The Prosecution submits that the rules of statutory interpretation also militate against requiring a discriminatory intent for all crimes against humanity. If discriminatory intent were required for all crimes against humanity, the Prosecution submits that this would relegate the crime of "persecutions" under Article 5(h) to a residual provision and make "other inhumane acts" in Article 5(i) redundant. The Prosecution submits that the Statute should be interpreted in order to give proper effect to all of its provisions.³⁴⁰

277. Finally, the Prosecution submits that the requirement of discriminatory intent for all crimes against humanity is inconsistent with the humanitarian object and purpose of the Statute and international humanitarian law. The Prosecution argues that requiring a discriminatory intent for all crimes against humanity would create a significant normative lacuna by failing to protect civilian populations not encompassed by the listed grounds of discrimination.³⁴¹

2. The Defence Case

278. The Defence submits that the Trial Chamber's decision that all crimes against humanity require a discriminatory intent should be upheld.

³³⁷ The statement reads as follows: "Crimes against humanity refer to inhumane acts of a very serious nature [...] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."

³³⁸ Cross-Appellant's Brief, paras. 5.7, 5.8; T. 162, 163 (20 April 1999).

³³⁹ Cross-Appellant's Brief, paras. 5.20, 5.22.

³⁴⁰ Cross-Appellant's Brief, para. 5.24; T. 165 (20 April 1999).

³⁴¹ Cross-Appellant's Brief, para. 5.26; T. 165 (20 April 1999).

279. The inclusion of discriminatory intent in the ICTR Statute does not indicate that discriminatory intent need not be shown in order for Article 5 of the Statute of this Tribunal to apply. Rather, the Defence submits that it shows the intention of the Security Council to embrace discriminatory intent as a requirement for crimes against humanity.³⁴²

280. The Defence submits that the silence in Article 5 as to whether discriminatory intent is required for crimes against humanity creates an uncertainty. To resolve this uncertainty, the Appeals Chamber should look to sources such as the preparatory work of the Statute as it interprets Article 5 of the Statute. Thus, the Defence submits that the Trial Chamber was correct in looking to the Report of the Secretary-General and to statements of members of the Security Council in determining that discriminatory intent must be shown in respect of all crimes under Article 5 of the Statute.³⁴³

B. Discussion

281. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity enumerated under Article 5 require a discriminatory intent. It alleges, further, that because of this finding, the Trial Chamber “restricted the scope of persecutions under subparagraph (h) only to those acts not charged elsewhere in the Indictment rather than imposing additional liability for all acts committed on discriminatory grounds. In doing so, it would appear that the sentence against the accused was significantly reduced.”³⁴⁴ However, the Prosecution does not appeal the sentence imposed by the Trial Chamber in respect of the crimes against humanity counts, or seek to overturn the Trial Chamber’s verdict or findings of fact in this regard. Thus, this ground of appeal does not, prima facie, appear to fall within the scope of Article 25(1).³⁴⁵ Nevertheless, and as with the previous ground of appeal, the Appeals Chamber finds that this issue is a matter of general significance for the Tribunal’s jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

³⁴² T. 231-232 (21 April 1999).

³⁴³ T. 236 – 239 (21 April 1999).

³⁴⁴ Skeleton Argument of the Prosecution, para. 32.

³⁴⁵ See Cross-Appellant’s Brief, para. 7.1(4), where the Prosecution requests the Appeals Chamber to “reverse the decision of the Trial Chamber, at page 250 paragraph 652, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute.”

1. The Interpretation of the Text of Article 5 of the Statute

282. Notwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation in its Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations: "The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur".³⁴⁶

283. The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely "persecutions" provided for in Article 5 (h).

284. In addition to such textual interpretation, a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that "persecutions" fall under the Tribunal's jurisdiction if carried out "on political, racial and religious grounds"? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against humanity", thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their

lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.³⁴⁷ Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

286. It would be pointless to object that in any case those instances would fall under the category of war crimes or serious "violations of the laws or customs of war" provided for in Article 3 of the Statute. This would fail to explain why the framers of the Statute provided not only for war crimes but also for crimes against humanity. Indeed, those who drafted the Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly.

³⁴⁶ ICJ Reports (1950), p. 8.

³⁴⁷ See paragraphs 294-300 below.

2. Article 5 and Customary International Law

287. The same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.

288. A careful perusal of the relevant practice shows that a discriminatory intent is not required by customary international law for all crimes against humanity.

289. First of all, the basic international instrument on the matter, namely, the London Agreement of 8 August 1945, clearly allows for crimes against humanity which may be unaccompanied by such intent. Article 6 (c) of that Agreement envisages two categories of crimes. One of them is that of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population", hence a category for which no discriminatory intent is required, while the other category ("persecutions on political, racial, or religious grounds") is patently based on a discriminatory intent. An identical provision can be found in the Statute of the Tokyo International Tribunal (Article 5 (c)).³⁴⁸ Similar language can also be found in Control Council Law No. 10 (Article II (1) (c)).³⁴⁹

290. The letter of these provisions is clear and indisputable. Consequently, had customary international law developed to restrict the scope of those treaty provisions which are at the very origin of the customary process, uncontroverted evidence would be needed. In other words, both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity. Such judicial and other practice is lacking. Indeed, the relevant case-law points in the contrary direction.

³⁴⁸ Article 5 (c) of the Statute of the International Military Tribunal for the Far East provides:

"Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

³⁴⁹ Article II (1) (c) of Control Council Law No. 10 provides:

"Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any

Generally speaking, customary international law has gradually expanded the notion of crimes against humanity laid down in the London Agreement. With specific reference to the question at issue, it should be noted that, except for a very few isolated cases such as Finta,³⁵⁰ national jurisprudence³⁵¹ includes many cases where courts found that in the

civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

³⁵⁰ The Supreme Court of Canada held that:

“[W]ith respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people.” (R. v. Finta, [1994] 1 SCR 701, at p. 813, majority judgement delivered by Cory J.).

³⁵¹ In this regard, mention can be made of some further cases: Ahlbrecht, decided by the Dutch Special Court of Cassation on 11 April 1949 (Nederlandse Jurisprudentie, 1949, no. 425, pp. 747-751); J. and R., decision of the German Supreme Court for the British Zone, judgement dated 16 November 1948, S. StS 65/48 in Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. I, pp. 167-171; Enigster, decided by the District Court of Tel Aviv. As the District Court of Tel Aviv rightly stressed in the Enigster case, some crimes against humanity do not require a persecutory intent. In its Decision of 4 January 1952, the court stated the following:

“As to crimes against humanity, we have no hesitation in rejecting the argument of the Defence that any of the acts detailed in the definition of crime against humanity have to be performed with an intention to persecute the victim on national, religious or political grounds. It is clear that this condition only applies when the constituent element of the crime is persecution itself. The legislator found it necessary to separate persecution from the other types of action by a semi-colon and to precede the word ‘persecution’ with the words ‘and also’, thus clearly establishing that persecution stands by itself, and that it alone is subject to that condition.” (18 International Law Reports 1951, p. 541).

It should be noted, however, that the Court was clearly wrong as far as the question of the famous semi-colon was concerned; it is well known that in actual fact the Protocol of 6 October 1945 replaced the semi-colon with a colon. (For the text of the Protocol see Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, vol. I, pp. XVI-XIX).

Reference can also be made to some cases decided by the German Supreme Court for the British Zone. The Appeals Chamber will briefly mention three of them: R., P. et al. and H.

In a Decision of 27 July 1948 (S. StS 19/48), the court pronounced on the case of R. In 1944, a member of the NSDAP (the German National Socialist Worker’s Party) and the NSKK (National Socialist Motor Vehicle Corps) had denounced another member of the NSDAP and of the SA (Stormtroopers) for insulting the leadership of NSDAP; as a result of this denunciation the victim had been brought to trial three times and eventually sentenced to death. (The sentence had not been carried out because the Russians had occupied Germany in the interim). The Court held that the denunciation could constitute a crime against humanity if it could be proved that the agent had intended to hand over the victim to the “uncontrollable power structure of the [Nazi] party and State”, knowing that as a consequence of his denunciation the victim was likely to be caught in an arbitrary and violent system (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. I, pp. 45-49 at p. 47).

In a Decision of 7 December 1948 (S. StS 111/48), in the P. et al. case, the same court gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military. During the night after Germany’s partial capitulation (5 May 1945) four German marines had tried to escape from Denmark back to Germany. The next day they were caught by Danes and delivered to German troops, who court-martialled and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany, i.e. 10 May 1945, the three were executed. The German Supreme Court found that the five members of the court-martial were guilty of complicity in a crime against humanity. According to the Supreme Court, the glaring discrepancy between the offence and the punishment constituted a clear manifestation of the Nazis’ brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State; there was “an intolerable degradation of the victim[s] to mere means for the pursuit of a goal, hence the depersonalisation and reification of human beings.” (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, *ibid.*, vol. I, pp. 217-229 at p. 220). Consequently, by

circumstances of the case crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

291. It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences Against the Peace and Security of Mankind.³⁵² Similarly, while the inclusion of a discriminatory intent was mooted in the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom),³⁵³ Article 7 of the Rome Statute embodied the drafters' rejection of discriminatory intent.³⁵⁴

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

sentencing the marines to death the members of the court-martial had inflicted an injury upon humanity as a whole.

The same broad interpretation of Control Council Law No. 10 may be found, finally, in a Decision of 18 October 1949 (S. StS 309/49) in the H. case (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, vol. II, pp. 231-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (*Bordkriegsgericht*) against two officers of the German Navy, a submarine commander, charged in 1944 with criticising Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The Judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years' imprisonment). The Supreme Court held that the Judge could be found guilty of crimes against humanity even if he had not acted for political reasons, to the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, *ibid.*, vol. II, pp. 233, 238).

³⁵² See for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48th session May 6-July 26, 1996, UNGAOR 51st sess., *supp.* no. 10 (A/51/10), pp. 93-94.

³⁵³ While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus, others argued that "the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element." These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal's Statute. (See Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17).

³⁵⁴ Article 7(1) of the Rome Statute provides: "For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder [...]." Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the *mens rea* of the defendant and the existence of a widespread or systematic attack directed against a civilian population.

3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".³⁵⁵

295. It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was "adopted" (see operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.

296. Moreover, the Report of the Secretary-General does not purport to be a statement as to the position under customary international law. As stated above, it is open to the Security Council - subject to respect for peremptory norms of international law (*jus cogens*) - to adopt definitions of crimes in the Statute which deviate from customary international law.³⁵⁶ Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources. The Report of the Secretary-General does not provide sufficient indication that the Security Council did so intend Article 5 to deviate from customary international law by requiring a discriminatory intent for all crimes against humanity. Indeed, in the case under consideration it would

³⁵⁵ Report of the Secretary-General, para. 48.

seem that, although the discrepancy between the Report and the Statute is conspicuous, the wording of Article 5 is so clear and unambiguous as to render it unnecessary to resort to secondary sources of interpretation such as the Secretary-General's Report. Hence, the literal interpretation of Article 5 of the Statute, outlined above, must necessarily prevail.

297. Furthermore, it may be argued that, in his Report, the Secretary-General was merely describing the notion of crimes against humanity in a general way, as opposed to stipulating a technical, legal definition intended to be binding on the Tribunal. In other words, the statement that crimes against humanity are crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" amounts to the observation that crimes against humanity as a matter of fact usually are committed on such discriminatory grounds. It is not, however, a legal requirement that such discriminatory grounds be present. That is, at least, another possible interpretation. It is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.

4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute.³⁵⁷ By contrast, the remarks of the United States representative

³⁵⁶ For instance, the express requirement in Article 5 of a nexus with an armed conflict creates a narrower sphere of operation than that provided for crimes against humanity under customary international law.

³⁵⁷ He stated the following: "[W]ith regard to Article 5, that Article applied to all the acts set out therein when committed in violation of the law during a period of armed conflict on the territory of the former Yugoslavia, within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons" (U.N. Doc. S/PV. 3217, p.11).

were expressly couched as an “interpretative statement”; furthermore, that representative added a significant comment: “[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute”³⁵⁸ including the “clarification” concerning Article 5.³⁵⁹ With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration.³⁶⁰ Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 “encompasses” crimes committed with a “discriminatory intent” without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the “context” of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties.³⁶¹ In particular, those statements cannot be regarded as an “agreement” relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the “clarifications” she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the

³⁵⁸ See U.N. Doc. S/PV. 3217, p. 15.

³⁵⁹ On Article 5 the United States representative said that: “[I]t is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds” (U.N. Doc. S/PV. 3217, p.16).

³⁶⁰ He said the following: “While believing that the text of the Statute addresses the tasks that face the Tribunal, and for that reason supporting it, we deem it appropriate to note that, according to our understanding, Article 5 of the Statute encompasses criminal acts committed on the territory of the former Yugoslavia during an armed conflict - acts which were widespread or systematic, were aimed against the civilian population and were motivated by that population’s national, political, ethnic, religious or other affiliation” (U.N. Doc. S/PV. 3217, p. 45).

³⁶¹ Article 31(1) and (2) provide:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report.³⁶² In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (*quod plerumque accidit*) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

³⁶² The Trial Chamber in its Judgement of 7 May 1997 has also correctly emphasised that the phrases "widespread" and "systematic" are disjunctive as opposed to cumulative requirements (see Judgement, paras. 645-648). See also the Nikolic Rule 61 Decision, ("Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, The Prosecutor v. Dragan Nikoli", Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995) (Nikoli) (1995) II ICTY JR 739).

a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is ambiguous or obscure. As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its Tadić Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance, when interpreting Article 3 of the Statute³⁶³ and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.³⁶⁴

C. Conclusion

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.

³⁶³ See Tadić Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the representatives of the United Kingdom and Hungary).

³⁶⁴ See *ibid.*, para 143 (where reference was made to the statements of the representatives of the United States, the United Kingdom and France).

VIII. THE FIFTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: DENIAL OF THE PROSECUTION'S MOTION FOR DISCLOSURE OF DEFENCE WITNESS STATEMENTS

A. Submissions of the Parties

1. The Prosecution Case

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

The majority of the Trial Chamber, composed of Judge Ninian Stephen and Judge Lal Chand Vohrah, erred when it denied the Prosecution motion for production of witness statements[.]³⁶⁵

This ground of appeal arose out of the Decision on Prosecution Motion for Production of Defence Witness Statements of the Trial Chamber delivered on 27 November 1996. By a majority (Judge McDonald dissenting), the Trial Chamber rejected the Prosecution's motion for disclosure of a prior statement of a Defence witness after he had testified. This decision was reached on the basis that such statements are subject to a legal professional privilege, which protects the Defence from any obligation to disclose them. The Prosecution submits that the Trial Chamber erred in the application of the substantive law in the Witness Statements Decision.³⁶⁶

307. The Prosecution submits that a Trial Chamber has the power to order the production of prior statements of Defence witnesses pursuant to Rule 54, unless they are protected by some express or implied privilege in the Statute or Rules.³⁶⁷ This power ensures that a Trial Chamber, entrusted with the duty of making factual findings on the evidence adduced, is presented with evidence which has been fully tested.³⁶⁸ It is submitted that a Trial Chamber should have the benefit of weighing any inconsistencies between statements made by witnesses in arriving at its determinations.³⁶⁹

308. According to the Prosecution, if regard is had to Article 21(4)(g) of the Statute and to Sub-rules 70(A), 90(F) and 97 of the Rules, no express privilege exempts Defence

³⁶⁵ Cross-Appellant's Brief, para. 6.3.

³⁶⁶ Ibid., para. 6.6; T. 190 (20 April 1999).

³⁶⁷ Ibid., paras. 6.6-6.24.

³⁶⁸ T. 186 (20 April 1999).

witness statements from disclosure.³⁷⁰ The privilege adopted by the International Tribunal in Rule 97 of the Rules does not cover third party statements given to Defence counsel, at least not once the Defence decides to present evidence by calling a particular witness.³⁷¹ Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.³⁷²

309. The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vohrah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen's reference to the legal professional privilege found in national jurisdictions is incorrect.³⁷³ The Prosecution submits that, even if an ambiguity exists, it is incorrect to resolve it by referring to the most common practice in adversarial jurisdictions, despite the obvious influence of adversarial systems on the Rules.³⁷⁴ Sub-rule 89(B) of the Rules expressly requires the application of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". In line with this provision, the Trial Chamber should have favoured an interpretation allowing it to order disclosure of Defence witness statements "where it considers that this would enable it to reach a verdict based on all pertinent evidence".³⁷⁵ The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in *United States v. Nobles*.³⁷⁶

310. The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial.³⁷⁷ In particular, the principle of equality of arms does not require that the Defence be allowed to call witnesses under conditions more favourable than those afforded to the Prosecution.³⁷⁸ If the Defence

³⁶⁹ T. 186 (20 April 1999).

³⁷⁰ Cross-Appellant's Brief, paras. 6.7-6.14.

³⁷¹ T. 187 (20 April 1999).

³⁷² T. 187 (20 April 1999).

³⁷³ Cross-Appellant's Brief, paras. 6.15-6.18.

³⁷⁴ *Ibid.*, para. 6.20.

³⁷⁵ *Ibid.*, para. 6.21.

³⁷⁶ 422 U.S. 225 (1975).

³⁷⁷ Cross-Appellant's Brief, paras. 6.25-6.31.

³⁷⁸ *Ibid.*, para. 6.31.

decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.³⁷⁹

2. The Defence Case

311. The Defence submits that the Trial Chamber's Witness Statements Decision was correctly decided.

312. The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue.³⁸⁰ The Defence also submits that, in light of the essentially adversarial system under which the Tribunal operates, the term "the general principles of law" in Sub-rule 89(B) should be interpreted as meaning "the general principles of law emerging from adversarial systems".³⁸¹

313. The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.³⁸²

314. It is also submitted that to allow such disclosure would increase the inequality of arms between the parties.³⁸³ Furthermore, the Defence emphasises that because privilege can be claimed for communications between the client and third parties when litigation is ongoing in most adversarial jurisdictions, such disclosure would be incorrect.³⁸⁴ The Defence also submits that such a disclosure requirement might deter witnesses from

³⁷⁹ Ibid.

³⁸⁰ Defence's Substituted Response to Cross-Appellant's Brief, para. 6.3; Skeleton Argument of the Prosecution, para. 5(b).

³⁸¹ Defence's Substituted Response to Cross-Appellant's Brief, para. 6.13; Skeleton Argument of the Prosecution, para. 5(d).

³⁸² Skeleton Argument of the Prosecution, paras. 5(f)-(g).

³⁸³ T. 275 (21 April 1999).

³⁸⁴ T. 275, 278 (21 April 1999).

testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.³⁸⁵

B. Discussion

1. The Reason for Dealing with this Ground of the Cross-Appeal

315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),³⁸⁶ they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. The Prosecution further submits that the Witness Statements Decision, as it stands, remains persuasive authority that the Defence cannot be ordered to disclose prior witness statements.³⁸⁷

316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

317. It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of

³⁸⁵ Skeleton Argument of the Prosecution, para. 5(h).

³⁸⁶ Article 25(1) provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."

³⁸⁷ T. 185 (20 April 1999).

the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

2. The Power to Order the Disclosure of Prior Defence Witness Statements

318. The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.

319. There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

320. The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.³⁸⁸ The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

321. The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfil its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial, Article 21 dealing with the rights of the accused, and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights³⁸⁹ and

³⁸⁸ Sub-rule 89(B) provides:

“In cases not otherwise provided for in this Section, a Chamber shall apply Rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.”

³⁸⁹ Article 14 provides in part:

Article 6 of the European Convention on Human Rights,³⁹⁰ which are similar to Article 21 of the Statute.

322. With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those powers mentioned by the Appeals Chamber in the Blaškić (Subpoena) decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice.³⁹¹

323. It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal,

“(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...].

(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance [...]; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]; (g) not to be compelled to testify against himself or to confess guilt. [...].”

³⁹⁰ Article 6 provides in part:

“(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...]; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...].”

³⁹¹ See “Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997”, *The Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-AR108bis, Appeals Chamber, 29 October 1997, para. 25.

including the basic notion that the Prosecution has to prove its case against the accused. Although this provision was not in force at the time relevant to the present enquiry, it is worth noting that Sub-rule 73ter(B) provides that should a Pre-Defence Conference be held:

[...] the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:

[...];

- (iii) a list of witnesses the defence intends to call with:
 - (a) the name or pseudonym of each witness;
 - (b) a summary of the facts on which each witness will testify;

[...]

This Sub-rule does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.

324. As stated above, once the Defence has called a witness to testify, it is for a Trial Chamber to ascertain his or her credibility. If there is a witness statement, in the sense referred to above, it would be subject to disclosure only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure. The provisions of Rule 68 are limited to the Prosecution and do not extend to the Defence. Disclosure would follow only once the Prosecution's case has been closed. Even then, Sub-rules 89(C),³⁹² (D)³⁹³ and (E)³⁹⁴ would still apply to such a disclosed witness statement, with the consequence that a Trial Chamber might still exclude it. Furthermore, the provisions of Sub-rule 90(F) relating to self-incrimination would of course apply.

325. The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97³⁹⁵ relates to lawyer-client privilege; it does not cover prior Defence witness statements.

³⁹² Sub-rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."

³⁹³ Sub-rule 89(D) provides: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

³⁹⁴ Sub-rule 89(E) provides: "A Chamber may request verification of the authenticity of evidence obtained out of court."

³⁹⁵ Rule 97 provides in part: "All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial [...]."

C. Conclusion

326. For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

327. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY

(1) DENIES the first ground of the Appellant's Appeal against Judgement;

(2) DENIES the third ground of the Appellant's Appeal against Judgement;

(3) RESERVES JUDGEMENT on the Appellant's Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;

(4) ALLOWS the first ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;

(5) ALLOWS the second ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;

(6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;

(7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal's Statute relating to such crimes;

(8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal's Statute;

(9) HOLDS that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

Done in both English and French, the English text being authoritative.

Mohamed Shahabuddeen
Presiding

Antonio Cassese

Wang Tieya

Rafael Nieto-Navia

Florence Ndepele Mwachande Mumba

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

Judge Nieto-Navia appends a Declaration to this Judgement.

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

[Seal of the Tribunal]

X. DECLARATION OF JUDGE NIETO-NAVIA

1. I am appending a declaration because it is, in my view, necessary to say a few words about Article 25 of the Statute which provides the Prosecution or a convicted person the right to appeal on an error on a question of law invalidating the decision or an error of fact occasioning a miscarriage of justice. It would appear that the Prosecution's appeals against the acquittals on Counts 8, 9, 12, 15, 21 and 32, constituting ground 1 of the cross-appeal, and on Counts 29, 30 and 31, constituting the second ground of cross-appeal, fall within the ambit of Article 25. The civil law principle of *non bis in idem*, according to Black's Law Dictionary, means that the accused "shall not be twice tried for the same crime". The corresponding common law principle of double jeopardy entitles the accused "not [to] be twice put in jeopardy' for the same offence". On the face of it, it would appear that Prosecution appeals against acquittals, though permissible under Article 25, might be in contravention of the legal tenet of *non bis in idem*. My concern is two-fold: (1) is *non bis in idem* a general principle of law; and (2) if so, is Article 25 consistent with the principle?

2. It is notable that the International Tribunal's own Statute recognises the maxim of *non bis in idem*. Article 10 protects a person tried by the Tribunal from subsequent prosecution by a national court. The corollary is also true: a person tried by a national court may not be tried subsequently by the International Tribunal unless the original charge was classified as a common crime, or the national court proceedings did not conform to the fundamental principles of criminal law (that is, the court proceedings were not independent and impartial, or were conducted to shield the accused from international criminal responsibility, or the charge was not prosecuted diligently).

3. Can a general principle of law be discerned from the practice of domestic courts? In the United States, the Supreme Court has interpreted the double jeopardy clause of the Fifth Amendment¹ to mean that the Prosecution cannot appeal against a verdict, whether on an error on a question of law or fact.² This finality accorded to criminal judgements is intended to protect the acquitted or convicted person against "prosecution oppression". Double jeopardy does not bar the convicted person from appealing because he/she chooses to put himself/herself at risk once more.

¹ The Fifth Amendment of the U.S. Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

² See *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Kepner v. United States*, 195 U.S. 100 (1904); *Sanabria v. United States*, 437 U.S. 54 (1978); *Green v. United States*, 355 U.S. 184 (1957).

4. Similarly, in the United Kingdom, the application of the double jeopardy principle precludes the Prosecution from appealing against acquittals, except where the appeal challenges an acquittal tainted by bribery, threats or other interference with a witness or juror,³ or where the appeal is from acquittal in the magistrates' court by case stated to the Divisional Court of the Queen's Bench Division on the ground that it was rendered in error of law or in excess of jurisdiction.

5. Thus, it seems that the common law gives special weight to acquittals. In the United Kingdom, the Prosecution does not have the right to appeal although appeals are allowed in certain clearly circumscribed instances. In the United States, there is a complete bar on appeals against acquittals.⁴

6. I turn now to examine the position adopted by countries in the civil law tradition. Civil law generally allows appeals against decisions at first instance. However, decisions rendered by the second-tier courts can be appealed by way of cassation only on errors of law. In France, the Prosecution may lodge a *pourvoi en cassation* to challenge procedural irregularities, which *inter alia*, include an error in law made by the lower court.⁵

7. In Germany, Prosecution appeals against acquittals are not considered to violate *non bis in idem* because the judgement at trial is not seen to constitute the end of the criminal proceeding.⁶ It seems that, in the German legal system, jeopardy attaches with the criminal charge and continues through all proceedings that arise from the original charge.⁷ Hence, a Prosecution appeal from acquittal is seen as another step in the criminal proceedings.

8. This brief survey of domestic practice, though far from comprehensive, reveals that no general principle of law can be drawn from domestic practice. Unlike the Anglo-American common law system, the civil law system does not construe Prosecution appeals against acquittals to compromise the principle of *non bis in idem*.

³ See s. 54 of the Criminal Procedure and Investigations Act 1996.

⁴ See *supra*, note 2.

⁵ See Dadomo, Christian and Farran, Susan, *The French Legal System* (2nd ed., Sweet & Maxwell, London, 1996), 220.

⁶ See ss. 312 and 333 of the German Criminal Code.

⁷ Justice Holmes, dissenting in *Kepner v. United States*, advocated the adoption of the concept of "continuing jeopardy". He argued that "a man cannot be said to be more than once in jeopardy on the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." The majority, concluding that the verdict at trial terminated the initial jeopardy, rejected Justice Holmes' argument.

9. From the foregoing, I must conclude that there is no general principle of law that would prohibit Prosecution appeals against acquittals. Therefore, it is unnecessary to analyse whether Article 25 is consistent with non bis in idem.

10. It seems to me that this conclusion is buttressed by the fact that the rationale which underpins the common law's vigorous approach is absent in the context of prosecutions before the International Tribunal. The impetus for the special weight given to acquittals is the desire to prevent the government, with its vast superior resources, from abusing its power to prosecute accused persons by re-prosecuting them until it manages to obtain convictions.⁸ In the International Tribunal, while the Prosecution prosecutes on behalf of the international community, it is not supported by a governmental apparatus with abundant resources. Like the Defence, it too must rely on the co-operation of external entities. Moreover, Articles 20(1) and 21(4) guarantee to each party equality of arms.

11. I accept that Prosecution appeals against acquittals conform to the requirements of Article 25. However, I think that the Appeals Chamber should analyse, at the sentencing stage, whether a successful Prosecution appeal should put the person in a worse position than that at the end of trial ("reformatio in pejus").

12. With respect to the fourth ground of cross-appeal, on the question of whether there exists a crime against humanity where the accused acted out of purely personal motives, I join in the reasoning and conclusion offered by my learned colleague, Judge Shahabuddeen, in his separate opinion. I would add only the following to elaborate my own position. The reason that a crime against humanity under Article 5 cannot be committed for purely personal motives completely unrelated to the attack on a civilian population is that, being a crime under international law, there must be a proximate connection between the underlying act(s) and the surrounding armed conflict. An unlawful act perpetrated in the context of an armed conflict, but unrelated to the hostilities, is a common crime under national law. The fact that such a crime was committed in the context of an armed conflict does not render it subject to international humanitarian law.

13. On the question of whether the Prosecution has a right to the production of Defence witness statements, constituting the fifth ground of cross-appeal, I agree with

⁸ See *Green v. United States*, supra note 2.

the decision of the Appeals Chamber for the reasons set out in Judge Shahabuddeen's separate opinion.

Done in both English and French, the English text being authoritative.

Rafael Nieto-Navia

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

XI. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. Some time ago, yet not far from where the events in this case happened, a "breakdown of law and order" occurred. There "were savage and pitiless actions into which men were carried not so much for the sake of gain as because they were swept away into an internecine struggle by their ungovernable passions". The turmoil saw "the ordinary conventions of civilised life thrown into confusion". Sadly, it seems, people took "it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection".¹

2. That last reflection of a great thinker of antiquity was later expressed in the saying by Westlake "that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that the duties arising out of that larger citizenship are owed even to him".² The development of a sense of that "larger citizenship" has been disappointingly slow. Since the ancient chronicler spoke of the "general laws of humanity", then lacking legal force but still recognisable, it has taken over two thousand years for those "laws" to assume the shape of binding norms applying world-wide. To what extent did they govern in this case? And, with what consequences?

3. I agree with the conclusions reached by the Appeals Chamber, and very largely with its arguments, subject to reservations on some aspects (including the relationship between the Rome Statute and the development of customary international law). I propose to explain my position on some of the points on which my reasoning may not be the same.

A. Whether There Was an International Armed Conflict

4. As is observed in paragraph 83 of the judgement of the Appeals Chamber, the "requirement that the conflict be international for the grave breaches regime to operate

¹ Thucydides, *The Peloponnesian War*, tr. Rex Warner (Middlesex, 1961), p. 211, speaking of the island of Corcyra.

² *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim (Cambridge, 1914), p. 274.

pursuant to Article 2 of the Statute has not been contested by the parties". That point is not being considered.

5. As to the points which are being considered, I agree with the Appeals Chamber, and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgement of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge Nicaragua (I.C.J Reports 1986, p. 14). I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.

1. The Issue

6. The issue in this branch of the case is whether, after 19 May 1992, there was an "armed conflict" between the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and Bosnia and Herzegovina ("BH") within the meaning of Article 2, first paragraph, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"). The provision states that "... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ...". There was no state of declared war. If also there was no "armed conflict" as between the FRY and BH (as the majority of the Trial Chamber seemingly thought), the Fourth Geneva Convention did not apply, and the question whether victims were protected persons within the meaning of Article 4, first paragraph, of the Convention did not arise, a question which the majority nevertheless answered. Persons could only be protected by the Convention if the Convention in the first instance applied to the armed conflict by which they were affected.

2. Nicaragua Shows That There Was an Armed Conflict Between the FRY, Acting Through the VRS, and BH

7. Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska ("VRS"). So, I turn to this question.

8. Nicaragua is not easy reading. Many issues were involved, and interpretations differ. A general understanding is that the Court said that the United States had no responsibility for delictual acts committed by the contras because, in its view, the former lacked the requisite degree of control over the latter. However, the Court was careful to say that this "conclusion ... does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras". (I.C.J. Reports 1986, p. 63, para. 110). One part of this unresolved question of responsibility was whether, as claimed by Nicaragua, "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua". (Ibid., p. 19, para. 15(c)). In so far as it was sought to support this part of the claim by reference to funds being supplied by the United States to the contras, the Court held that "the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, ... does not in itself amount to a use of force". (Ibid., p. 119, para. 228).

9. By contrast, the Court considered that, as distinguished from the mere supplying of funds, the United States had committed other acts in relation to the contras which amounted to a threat or use of force against Nicaragua. In paragraph 228 of its judgement, the Court put it this way:

As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State', and 'participating in acts of civil strife ... in another State', in terms of General Assembly resolution 2625(XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to 'involve a threat or use of force'. In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.

The Court then mentioned "the mere supply of funds to the contras" as a form of assistance which did not amount to a use of force, although it amounted to intervention. Subject to that kind of exception, the Court considered that the arming and training of the contras in the circumstances of the case amounted to a use of force.

10. The Court adhered to this view in its formal disposition of the case. In paragraph 292(3) of its holding, it decided that the United States, by "training, arming, equipping, financing, and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua" intervened in the

affairs of Nicaragua. Then, in paragraph 292(4), it held that the United States, "by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State". The acts of intervention which involved a use of force included the arming and training of the contras, the Court having explicitly held that "the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua".

11. This is consistent with the Court's statement, in paragraph 238 of its judgement, that the United States, having no legal right to use force in the circumstances of the case, "has violated the principle prohibiting recourse to the threat or use of force ... by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above)". Paragraph 228, to which the Court referred, is set out in relevant part above.

12. The contras were not using force exclusively on behalf of the United States; the case makes it clear that they were also using force on their own behalf against the Government of Nicaragua. This must be borne in mind in considering the following statement of the Court:

The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. (Ibid., p.114, para.219).

I do not think anything in this passage is opposed to the conclusion that the United States was using force through the contras against the Government of Nicaragua, a finding which the Court in fact made as, I think, the Appeals Chamber in this case recognises (see para. 130 of the judgement). To judge whether that finding is applicable here, it is necessary to consider the facts of this case.

13. The Trial Chamber accepted that, having been itself in direct armed conflict with BH through the Yugoslav People's Army ("JNA"), the FRY established the VRS, trained it, equipped it, supplied it and maintained it. The establishment was done by the FRY, on 19 May 1992, by leaving in BH part of the JNA to function as the VRS, and doing that just days after the Security Council had called on the FRY to withdraw from BH. Senior military officers from the FRY were members of the staff of the VRS. The FRY paid the salaries (and pensions after retirement) of officers of the VRS who came over

Yugoslav Army, or VJ, as the Yugoslav portion of the old JNA was now known. The VRS was engaged in carrying out the FRY's plan of ethnic cleansing and of carving out territory of BH to be ultimately added to that of the FRY so as to realise the FRY's ambition to create a "Greater Serbia".

14. Thus, the FRY did more than provide general funds to the VRS. On the basis of Nicaragua, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in armed conflict within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention, with the consequence that the Convention applied to that armed conflict.

3. The Position Taken by the Majority of the Trial Chamber

15. Citing Nicaragua, the majority of the Trial Chamber (Judge Stephen and Judge Vohrah) held that the test as to whether there was an international armed conflict was whether the FRY had effective control over the VRS, which it considered meant command and control. (Judgement of the Trial Chamber, paras. 598 and 600). It found that the FRY did not have command and control over the VRS and so did not have effective control over the VRS; in its opinion, the relationship between them was one of coordination and cooperation as between allies (as to the legal implications of which I reserve my opinion). Consequently, in the view of the majority, the FRY was not a party to the armed conflict in BH after 19 May 1992. In effect, after that date, that conflict was not international.

16. With respect, it is too high a threshold to insist on proof of command and control for the purpose of determining whether a state was using force through a foreign military entity, as distinguished from whether the state was committing breaches of international humanitarian law through that entity. In Nicaragua, the Court held that the United States was using force through the contras by reason of the fact that, in the circumstances of that case, it was arming and training the contras. The Court did not say that these facts amounted to command and control; if they did, they should have given rise to state responsibility for breaches by the contras of international humanitarian law, which the Court said was not the case.

4. The General Question of State Responsibility for the Delictual Acts of Another

17. On the question whether the United States was responsible for the delictual acts of the contras, the Appeals Chamber considered that Nicaragua was not correct and reviewed the general question of the responsibility of a state for the delictual acts of another. It appears to me, however, that that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through the VRS against BH, not whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS.

18. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an "armed conflict" had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS.

19. The foregoing may be borne in mind in considering the Court's holding in Nicaragua that, by arming and training the contras in the circumstances of that case, the United States had used force. The Court did not declare the nature of any underlying theory. I should not be surprised, however, if it applied a test of effective control, but on the flexible basis that control which is effective for one purpose need not be effective for another, and would interpret the decision that way. Thus, in holding that the United States had used force in arming and training the contras, the Court did not rely on specific instructions, something on which it otherwise laid stress where state responsibility was sought to be founded on the delictual acts of another. In this case, the test of effective control, flexibly applied (as I believe the Court intended it to be), shows that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS.

20. On the more general question whether Nicaragua was correct in its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force, it may be that there is room for reviewing that case. The case may be interpreted to mean that a state could be using force through a foreign military entity without being responsible for any delictual acts committed by that entity otherwise than on the specific instructions of the state. In opposition to a theory based on the need for proof of specific instructions, it may be useful to consider whether there is merit in the argument that, by deciding to use force through an entity, a state places itself under an obligation of due diligence to ensure that such use does not degenerate into such breaches, as it can. However, I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law.

21. For these reasons, although I appreciate the general tendency of the judgement of the Appeals Chamber, I would respectfully reserve my position on the new test proposed.

5. The Position of the Prosecution on the Applicability of Nicaragua

22. The prosecution argues that Nicaragua is not relevant. It makes two points. First, it says that Nicaragua was concerned with the responsibility of a state for delictual acts of third parties, and not with the criminal responsibility of the individual. I am of the view, however, that, whatever the context, what constitutes a use of force (a necessary element of an "armed conflict") is so fundamental as to require constancy of principle. The distinction between the responsibility of a state and the criminal responsibility of the individual is interesting; but it is not of assistance on the question what constitutes a use of force. That is a concept of common currency in international law.

23. Second, the prosecution submits that Nicaragua did not enquire into whether the conflict was internal or international for the purposes of the Geneva Conventions of 1949. In its view, the Court found it unnecessary to do so, considering that, by virtue of common article 3 of the Geneva Conventions, the issues were determinable by reference to customary international law relating to the applicability of minimum humanitarian principles to the use of force, whether in the course of an international armed conflict or in the course of an internal one. That was so, with the consequence that it was not necessary for the Court to determine whether the Geneva Conventions, as such, were

inapplicable by reason of a United States exclusion of multilateral conventions as set out in its acceptance of the compulsory jurisdiction clause of the Statute of the Court. (I.C.J. Reports 1986, paras. 217-220 and 255; and see I.C.J. Reports 1984, p. 421, para. 67).

24. But this does not mean that the Court did not have to consider whether there was a use of force, for, altogether apart from the question whether there was a breach of the Geneva Conventions, Nicaragua, as has been seen, had claimed that "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua..." (I.C.J. Reports 1986, p. 19, para. 15(c)). That is the point involved here. In Nicaragua, the Court did not have to determine whether the conflict was internal or international; but it did have to determine whether the United States was using force against Nicaragua through the contras, and, on my interpretation, it did decide that there was such a use of force. If there was such a use of force by one state against another, *ex definitione* the conflict was international, whether or not it was necessary for the Court to decide that it was.

6. The Demonstrable Link Test Proposed by the Prosecution

25. As mentioned in paragraph 69 of the judgement of the Appeals Chamber, the prosecution submitted that the answer to the question whether the FRY was in armed conflict with BH through the VRS hinged on whether the conflict involved a "demonstrable link" between the VRS and the FRY or VJ, meaning, I believe, something less stringent than either of two tests which were discussed, namely, the agency test and the effective control test. The prosecution accepted that there was no authority to support the idea but thought that general jurisprudence would. In aid of the submission, recourse could be had to the character of the reference in Article 2, first paragraph, of the Fourth Geneva Convention to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties... ". As it has been often observed, the expression "armed conflict" is a factual one, not intended to become burdened with legal technicalities: one respected commentator refers to it as "a de facto concept".³

26. That is true. However, there is a difference between saying that the question whether there is an armed conflict between states is a factual one and saying that, for that reason, it is not necessary to determine whether there is an armed conflict between

states. Factual as the criterion may be, it remains necessary to determine whether there is an armed conflict between states. This question is not a generalised one as to whether an armed conflict has become "internationalised" in any broad sense of the term³ or is it to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an "armed conflict ... between two or more of the High Contracting Parties ..." to the Fourth Geneva Convention. Barring a "declared war" between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns *ex hypothesi*, on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state. If the test premises that it is not necessary to prove that a state was using force, it is not persuasive.

27. More pertinently, if the proposed test is meant to show whether or not force was being used by a state through a foreign army, it has to have the effect of connecting the state with the use of force by the foreign army; and I do not see how it can do this unless it has a degree of specificity commensurate with the gravity of a finding that one state was using force against another and with the serious implications of such a finding for individual criminal responsibility for, if the Convention applies, the individual becomes liable to conviction for certain serious crimes to which he would not otherwise be exposed. If the test has the requisite degree of specificity I do not see the advantage which it possesses over the other tests concerned. Whatever may be said about the latter, they appear to have that quality. Thus, the proposed test is either unnecessary or inadequate.

7. The Test of Appellate Intervention

28. The Appeals Chamber is intervening in this part of the case because it holds that the Trial Chamber applied the wrong legal criterion. In another part of the case (and, in a sense, in this part also), the question of evaluation of facts is concerned. It may be convenient to say a word on the basis on which, I believe, the Appeals Chamber acts.

29. Assessment of facts is primarily a matter for the Trial Chamber. But appeals to the Appeals Chamber are by way of rehearing, though not involving a hearing *de novo*

³ J.S.Pictet, *Humanitarian Law and the Protection of War Victims* (Leyden, 1975), p. 50.

in the Appeals Chamber. Thus, the Appeals Chamber is also a judge of fact, although it must take account of its disadvantage in that, unlike the Trial Chamber, it cannot assess the witnesses first hand. Further, the Appeals Chamber is in as good a position as the Trial Chamber to decide on the proper inferences to be drawn from undisputed facts, or from facts which, being disputed, are established by the findings of the Trial Chamber.

30. However, where there is a difference in assessments of facts, the Appeals Chamber will not simply substitute its assessment for that of the Trial Chamber. As it was said by Brierly, "different minds, equally competent, may and often do arrive at different and equally reasonable results"⁴. Similarly, it has been remarked that "[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable"⁵. In these respects, I agree with the corresponding remark made by the Appeals Chamber in paragraph 64 of the judgement.

31. Consequently, the Appeals Chamber will intervene where it can see that no reasonable person would have taken the view taken by the Trial Chamber. But, of course, the Appeals Chamber can also intervene if the Trial Chamber did not take into account relevant facts, or if it took account of irrelevant ones, or if it applied the wrong legal criterion to the determination of the legal significance of the facts.

32. With respect, I think that, as regards another part of this case (concerning Jaski}i), the decision of the Trial Chamber is not sustained by the criterion of reasonableness. More particularly, however, I consider that, as regards the question whether there was an international armed conflict, the wrong legal criterion was used.

B. Whether There is a Crime against Humanity Where the Accused Acted out of Purely Personal Motives

33. Motive is important to punishment. It is always relevant as evidence. In exceptional cases, not including this, it could be an element of the offence charged, as, in some countries, in the case of a prosecution for libel. But, more generally, it is not.

⁴ Sir Hersch Lauterpacht and C.H.M.Waldock (eds.), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly*, 1958, p. 98.

⁵ *In re W. (An Infant)*, [1971] AC 682, HL, p. 700, per Lord Hailsham.

Therefore, if the Trial Chamber meant that the existence of personal motives excluded the possibility of a crime against humanity being committed if the elements of the crime were proven, I should have difficulty in supporting that. But I respectfully agree with the Appeals Chamber that the Trial Chamber did not mean to say so. What the Trial Chamber said, in paragraph 659 of its judgement, was this:

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

34. There are difficulties in the passage, but, read as a whole and in the context in which it occurred, I do not think it meant that, if the accused "knows that his act fits in with the attack", that attack being one "on the civilian population", the mere circumstance that he acted out of personal motives sufficed to exclude the commission of the crime. "Denunciation" type cases, in which the accused sought to avail himself of the arrangements relating to the attack on the civilian population in order to advance his personal motives, are crimes against humanity. And rightly so, for those are cases in which, however personal were the motives, the act fitted in with the attack on the civilian population, within the contemplation of the phrase used by the Trial Chamber.

35. What, I apprehend, the Trial Chamber had in mind was a distinguishable situation in which, although the accused knew of the attack on the civilian population, he did not in fact intend to link his act to the attack but acted "*for purely personal motives completely unrelated to the attack on the civilian population*".⁶ Thus, in the period of an attack on a certain civilian population, a jealous husband, being a member of the aggressor group, might kill his wife being a member of the attacked civilian population, for exactly the same reasons, and no other, for which he would have killed her had she been a member of his own group. It does not appear to me that the mere fact that he knew of the attack on the civilian population could serve to classify his act as a crime against humanity in the absence of proof that he intended that his act should fit in with the arrangements for the attack. That proof is apparent in "denunciation" type cases. It is absent in the example suggested the arrangements relating to the attack on the civilian population played no part in the commission of the act. Were the law as submitted by

⁶ (Emphasis added). "The intent (or motive) of the perpetrator in 'murder'... must be linked to carrying out the state action or policy". See Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, 1992), p.292.

the prosecution, whereas the killing of the wife who was a member of the aggressor group, would always be simple murder; that of the wife who was a member of the attacked civilian population, would always be a crime against humanity.

36. The hypothesis of the murder of the wife who was a member of the attacked civilian population, is accommodated by the necessity for the prosecution to prove, as an element of a crime against humanity, that the murder was "directed against any civilian population" as is required by the chapeau of Article 5 of the Statute. Such a murder would not have been directed against the civilian population. Where the evidence is of that kind, the prosecution has failed to prove that element of a crime against humanity.

37. The Trial Chamber seems to have regarded the non-existence of personal reasons as being itself an element of the crime to be proved by the prosecution. With respect, that was a mistake. The prosecution does not have to prove negatively that there were no personal reasons; it has to prove affirmatively that the crime was directed against the civilian population. However, the *evidence* may show that the act was not directed against the civilian population for any of several reasons, and one of these may be that it was done for purely personal reasons completely unrelated to the attack on the civilian population, as discussed above. That possibility may be disclosed either by the evidence for the prosecution or by that for the defence. If that is the evidence, failure by the prosecution to overcome it means that the prosecution has failed to prove a required element of a crime against humanity, namely, that the act was directed against the civilian population.

38. That is a far cry from suggesting, as the Trial Chamber seems to have done, that it is an element of the crime, having to be proved by the prosecution, that the act of the accused was not dictated by purely personal motives. But I do not think that the Trial Chamber was wrong in taking the position that, where the act was dictated by purely personal motives which were completely unrelated to the attack on the civilian population, no crime against humanity was committed, even if the accused was aware of that attack.

C. Whether the Prosecution has a Right to Disclosure of Defence Witness Statements

39. I respectfully agree with the decision of the Appeals Chamber on this point but would add something on the reasoning out of the matter and the scope of the result.

40. The provisions of the Statute of the Tribunal relating to evidence are sparse. That suggests that there is room for fashioning the rest of the needed system under Article 15 of the Statute and Rules 54 and 89(B) of the Rules of Procedure and Evidence. Barring amendment of the Rules, how far can the Chambers now go?

41. Rule 90(E) provides for a privilege against self-incrimination, and Rule 97 provides for a lawyer-client privilege⁷. It may be argued that, by implication, these express provisions exclude what is called a litigation privilege, which would have the effect of denying to the prosecution a right of access to defence witness statements. The exclusion of that privilege would leave a Chamber free to order disclosure of such statements in pursuit of its search for truth. But the sparsity of the provisions relating to evidence counsels caution in adopting that approach.

42. I do not think that protection from disclosure is provided by Rule 70(A), which states:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

It could be argued that the last phrase contemplated the pre-trial stage only; but I think that a better view is that the provision (as set out in the scheme of the Tribunal's Rules) was seeking, in part, to cancel out the effect of previous provisions which themselves assumed that, to the extent that such previous provisions did not control, "reports, memoranda or other internal documents" would not be subject to disclosure at any stage of the case. It would be odd if the protection afforded by Rule 70(A) was confined to the pre-trial stage, with the material being open to disclosure at any stage thereafter. No doubt, a similar provision is differently understood elsewhere. But it is good to recall that the transposition of a municipal text to the international plane does not necessarily take with it the technical environment in which the original text had its life. Otherwise,

⁷ The Rules are referred to as they then stood.

one runs into those difficulties which are created "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting"⁸. On balance, I agree with the prosecution that the protection referred to by Rule 70(A), as this provision occurs within the framework of the Tribunal's Rules, is to be regarded as extending throughout the case.

43. The question remains, however, as to what are the categories of material to which the protection provided by Rule 70(A) attaches. The opening words of the provision are not "Save as excepted in the provisions of Rules 66 and 67 ...". The "notwithstanding" formula used means that, "notwithstanding" the provisions of Rules 66 and 67, "reports, memoranda or other internal documents ... are not subject to disclosure ...". If those categories include witness statements and thus deny the defence access to prosecution witness statements, a conflict exists with Rule 66(A)(ii), under which copies of prosecution witness statements must be made available to the defence. The particularity of Rule 66(A)(ii) suggests that witness statements are not included in the general reference to "reports, memoranda or other internal documents" in Rule 70(A). In the result, defence witness statements are not protected against disclosure by virtue of Rule 70(A).

44. But what of the arrangements for reciprocal inspection of materials? Under Rule 66(B), at the request of the defence the Prosecutor is required to

permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

If the defence avails itself of this right, the Prosecutor has a reciprocal right under Rule 67(C), reading:

If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

45. These provisions refer to real evidence, not to proofs of testimonial evidence which is expected to be given by a witness. A larger meaning may be suggested by the words "which are material to the preparation of the defence", but those words occur in

⁸ *Reparation Case, I.C.J. Reports 1949*, p. 215, dissenting opinion of Judge Badawi Pasha.

Rule 66(B) and do not recur in Rule 67(C). Accordingly, even if they bear that larger meaning, those words do not operate to entitle the prosecution to inspect defence witness statements.

46. The prosecution is obliged to furnish the defence with copies of prosecution witness statements and with any exculpatory evidence. Thus, so far as this kind of material is concerned, the defence does not need to invoke reciprocity to gain access to the material.

47. It may seem odd and unbalanced that the defence has a unilateral right to receive copies of prosecution witness statements under Rule 66(A)(ii). But that, I think, is the transmuted equivalent of the right of an accused person, under many legal systems, to be apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it has to be remembered that, altogether apart from the question whether he is guilty or not guilty, a man has a right not to be charged without just cause.⁹ Fairness requires this kind of unilateralism. A man who has been indicted, with the prospect of loss of liberty, has a right to know what is the evidence on the basis of which he is being put through the judicial process. The prosecution does not stand on that ground and has no similar basis for demanding access to the evidence of the defence.

48. In my opinion, the reciprocity provisions of Rule 67(C), read with Rule 66(B) do not enable the prosecution to have access to defence witness statements. More importantly, it appears to me that, *a contrario*, those provisions imply that the prosecution stands excluded from such access materials to which the prosecution may have access, and then only on a reciprocal basis, are specified, and they do not include defence witness statements.

49. A new Rule 73ter(B), not in force at the relevant time, empowers a Trial Chamber to order the defence to file, between the close of the case for the prosecution and the opening of the case for the defence, "a summary of the facts on which each (defence) witness will testify."¹⁰ That goes some way in the direction of the submissions of the prosecution in this case, but not all the way: it implies that the prosecution has no right of access to defence witness statements.

⁹ See the reference by Lord Parker CJ to the impermissibility of "an accusation of crime without cause" in *R. v. Martin* [1961] 2 All ER 747.

¹⁰ See Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha", *Col. J. of Trans. L.*, Vol. 37, 1999, No. 3, p. 761.

50. That is in keeping with the litigation privilege or the work product doctrine. The right is lost only where it is waived by the defence. It is waived where the defence itself puts a defence witness statement in issue by relying on it for one purpose or another. Such was the case of *Nobles*, 422 U.S. 244. There, defence counsel, in cross-examining two prosecution witnesses, sought to impeach their credit by reference to oral statements which they had allegedly made to a defence investigator as preserved in the latter's "report" to defence counsel - something in the nature of a witness statement. In the view of the United States Supreme Court, the trial judge had power, in those circumstances, to order the defence to make the "report" available to the prosecution after examination-in-chief of the investigator by the defence. That, with respect, was right; for the "report", having been relied on by the defence in cross-examining the two prosecution witnesses, was a factor which would obviously enter into the assessment of the truth. The "report" was thus put in issue by the defence itself.

51. On a similarly limited basis, a Trial Chamber has power to order the defence to make a defence witness statement available to the prosecution. I speak of a "limited basis" because I do not support the view that the prosecution has an unlimited right to see a defence witness statement after the witness has testified. The "cards on the table" approach favoured in some thinking on the subject has not reached that point under the Rules of Procedure and Evidence of the Tribunal. Nor, generally speaking, has that point been reached in the global common law system or in the global civil law system as they relate to criminal procedure. The right to protection is not spent at the point at which the witness has testified in chief.

52. I respectfully agree with the Appeals Chamber that a Chamber may order disclosure of a defence witness statement only where it is satisfied that in the particular circumstances disclosure would assist it in determining the truth. Disclosure by way of a fishing expedition is not correct. It is difficult to see how a defence witness statement is to be used by the prosecution otherwise than as a fishing expedition if it were the law that the prosecution has an automatic right to disclosure on completion of the examination-in-chief of each defence witness. At the point of disclosure, the prosecution will have no basis for suspecting that there is any variance between oral testimony and written statement; it will be only "fishing" for a variance.

53. However, it is not clear that this limited and conditional right of access to a defence witness statement is inconsistent with the position taken by the majority of the

Trial Chamber in the relevant Decision of 27 November 1996. In the first paragraph of the separate opinion which he appended to that Decision Judge Vohrah said, "I fully agree with the views expressed by my brother Judge Stephen, for the reasons he has given". In the second paragraph of his own separate opinion, Judge Stephen said

The witness statement had not been in any way referred to in the witness' evidence in chief nor had anything emerged in cross-examination regarding it other than that, in answer to a question about what the witness had said when he made that statement, which was objected to by Defence counsel but was allowed, the witness said that he had "talked about, how can I put it, the truth and only the truth, how long I have known Du{ko Tadi}".

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statement. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution was not intended to apply where a defence witness statement had been in some way referred to in the evidence-in-chief of the witness or otherwise relied upon by the defence. The situation with which the majority was dealing was one in which what was being asserted by the prosecution was an unqualified right to see a defence witness statement provided only that the witness had given evidence-in-chief – even if the statement was not referred to in that evidence. It is not so clear to me that the majority intended to deny that special circumstances could warrant disclosure.

54. There is one other matter. The parties were agreed that nothing in the reliefs prayed for by either side turned on a determination of the above-mentioned point. They were nevertheless also agreed that the importance of the point justified a pronouncement by the Appeals Chamber. The position was similar in respect of the issue whether discriminatory intent has to be proved in respect of all crimes against humanity under Article 5 of the Statute.

55. Were the parties right in the position which they took? I think they were. The principle is conveniently stated thus:

Appellate courts determine only matters actually before them on appeal, and no others, and will not give opinions on controversies or declare principles of law which cannot have any practical effect in settling the rights of the litigants. They consider only those questions that are necessary for the decision of the case and do not attempt further 'to lay down "a rule of guidance or precedent to the bench and bar of the state"'. Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court, unless, it has been held, they are affected with a public interest

or are of moment to the profession, or unless some useful result will follow decision.¹¹

56. That approach is consistent with the *Tadić* Decision on Jurisdiction, at paragraph 139. There, the defence had raised an argument before the Trial Chamber concerning an element of a crime against humanity under Article 5 of the Statute of the Tribunal. The defence did not pursue the argument on appeal. Nevertheless, the Appeals Chamber observed, "Although before the Appeals Chamber the Appellant has forgone the argument ..., in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5".

57. In my view, when the importance of the point in question is regarded, the parties were correct in agreeing that the Appeals Chamber could competently pass on it.

D. Conclusion

58. These remarks concern some elements of the reasoning of the Appeals Chamber. On certain points of law, I hold different views which I desire to preserve. But I agree with the disposition of the cases set out in today's judgement .

Done in both English and French, the English text being authoritative.

Mohamed Shahabuddeen

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

ANNEX A – GLOSSARY OF TERMS

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.
Amended Notice of Appeal against Judgement	Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.
Appellant	Du{ko Tadi}.
Appellant's Amended Brief on Judgement	Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.
Appellant's Brief on Judgement	Appellant's Brief on Appeal Against Opinion and Judgement of 7 May 1997, Case No.: IT-94-1-A, 12 January 1998.
Appellant's Brief on Sentencing Judgement	Appellant's Brief on Appeal against Sentencing Judgement, Case No.: IT-94-1-A, 12 January 1998.
BH	Bosnia and Herzegovina.
Claims Tribunal	Iran-United States Claims Tribunal.
Cross-Appellant	Office of the Prosecutor.
Cross-Appellant's Brief	Brief of Argument of the Prosecution (Cross-Appellant), Case No.: IT-94-1-A, 12 January 1998.
Cross-Appellant's Brief in Reply	Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.
Dayton-Paris Accord	General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995.
Decision on Admissibility of Additional Evidence	Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence"; <i>The Prosecutor v. Du{ko Tadic</i> , Case No.: IT-94-1-A, Appeals Chamber, 15 October 1998.

Defence's Skeleton Argument on the Cross-Appeal	Skeleton Argument – Prosecutor's Cross-Appeal, Case No.: IT-94-1-A, 20 April 1999.
Defence's Substituted Response to Cross-Appellant's Brief	The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.
DR	European Commission of Human Rights, Decisions and Reports.
ECHR	European Convention on Human Rights.
Eur. Commission H.R.	European Commission of Human Rights.
Eur. Court H.R.	European Court of Human Rights.
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro).
Geneva Convention III (Third Geneva Convention)	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
Geneva Convention IV (Fourth Geneva Convention)	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
HRC	Human Rights Committee.
ICCPR	International Covenant on Civil and Political Rights.
ICRC	International Committee of the Red Cross.
ICRC Commentary on Additional Protocols	Yves Sandoz <i>et al.</i> (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987.
ICRC Commentary on Geneva Convention III	Jean Pictet (ed.), Commentary: III Geneva Convention Relative to Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First Reprint, 1994.

ICRC Commentary on Geneva Convention IV	Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
ICTY JR	International Criminal Tribunal for the Former Yugoslavia, Judicial Reports, Kluwer Law International, The Hague.
ILC	International Law Commission.
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
JNA	Yugoslav People's Army.
Judgement	Opinion and Judgment, <i>The Prosecutor v. Duško Tadic</i> , Case No IT-94-1-T, Trial Chamber II, 7 May 1997.
<i>Nicaragua</i>	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J.Reports (1986), p. 14.
Notice of Cross-Appeal	Notice of Appeal, Case No.: IT-94-1-A, 6 June 1997.
Prosecution's Response to Appellant's Brief on Judgement	Cross-Appellant's Response to Appellant's Brief on Appeal Against Opinion and Judgement of May 7, 1997 Filed on 12 January 1998, Case No.: IT-94-1-A, 17 November 1998.
Prosecution Response to Appellant's Brief on Sentencing Judgement	Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998, Case No.: IT-94-1-A, 16 November 1998.

Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.
Rome Statute	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, 17 July 1998.
Rules	Rules of Procedure and Evidence of the International Tribunal.
Sentencing Judgement	Sentencing Judgment, <i>The Prosecutor v Duško Tadic</i> , Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.
Separate and Dissenting Opinion of Judge McDonald	Opinion and Judgment – Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, <i>The Prosecutor v. Duško Tadic</i> , Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997.
Skeleton Argument – Appellant’s Appeal Against Conviction	Skeleton Argument – Appellant’s Appeal against Conviction, Case No.: IT-94-1-A, 19 March 1999.
Skeleton Argument of the Prosecution	Skeleton Argument of the Prosecution, Case No.: IT-94-1-A, 19 March 1999.
Statute	Statute of the International Tribunal.
T.	Transcript of hearing in <i>The Prosecutor v. Duško Tadic</i> , Case No.: IT-94-1-A. (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may exist between the pagination therein and that of the final English transcript released to the public).
<i>Tadic</i> Decision on Jurisdiction	Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, <i>The Prosecutor v. Duško Tadi</i> , IT-94-1AR72, Appeals Chamber, 2 October 1995 (Tadi) (1995) I ICTY JR 353).
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

Tribunal	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
TRNC	Turkish Republic of Northern Cyprus.
UNWCC	Law Reports of Trial of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947.
VJ	Army of the Federal Republic of Yugoslavia.
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.
Witness Statements Decision	Decision on Prosecution Motion for Production of Defence Witness Statements, <i>The Prosecutor v. Duško Tadić</i> , Case No. IT-94-1-T, Trial Chamber II, 27 November 1996.

Annex 464

Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment, paras. 415–16 (5 December 2003)

**UNITED
NATIONS**



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

Case No. IT-98-29-T
Date: 5 December 2003
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr. Hans Holthuis

Judgement Of: 5 December 2003

PROSECUTOR

v.

STANISLAV GALIĆ

JUDGEMENT AND OPINION

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I. INTRODUCTION

1. Trial Chamber I of the International Tribunal (the “Trial Chamber”) is seized of a case which concerns events surrounding the military encirclement of the city of Sarajevo in 1992 by Bosnian Serb forces.

2. The Prosecution alleges that “The siege of Sarajevo, as it came to be popularly known, was an episode of such notoriety in the conflict in the former Yugoslavia that one must go back to World War II to find a parallel in European history. Not since then had a professional army conducted a campaign of unrelenting violence against the inhabitants of a European city so as to reduce them to a state of medieval deprivation in which they were in constant fear of death. In the period covered in this Indictment, there was nowhere safe for a Sarajevan, not at home, at school, in a hospital, from deliberate attack”.¹

3. In the course of the three and a half years of the armed conflict in and around Sarajevo, three officers commanded the unit of the Bosnian-Serb Army (“VRS”) operating in the area of Sarajevo, the Sarajevo Romanija Corps (“SRK”). The second of those three officers, Major-General Stanislav Galić, is the accused in this case (“the Accused”). He was the commander for the longest period, almost two years, from around 10 September 1992 to 10 August 1994. The Prosecution alleges that over this period he conducted a protracted campaign of sniping and shelling against civilians in Sarajevo. Two schedules to the Indictment “set forth a small representative number of individual incidents for specificity of pleading”.² At the end of the Prosecution case and pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence of the International Tribunal, the Trial Chamber decided upon the Defence Motion for Acquittal that the Prosecution had failed to prove some of these scheduled sniping incidents.³

4. The Prosecution alleges that General Galić incurs individual criminal responsibility under Articles 7(1) and 7(3) of the Statute for his acts and omissions in relation to the crime of terror

¹ Prosecution Opening Statement, T. 562-3.

² The First Schedule refers to sniping incidents allegedly committed against civilians by forces under the command and control of the Accused. The Second Schedule lists a number of shelling incidents allegedly committed against civilian targets by forces under the command and control of the Accused, Indictment, para. 15.

³ See Decision on Acquittal (details of that decision are mentioned in Annex B of this Judgement).

(count 1), attacks on civilians (counts 4 and 7), murder (counts 2 and 5) and inhumane acts (counts 3 and 6) committed against civilians in the city of Sarajevo.⁴

5. The Trial Chamber's task is to decide whether the Prosecution's allegations that SRK personnel committed the criminal acts alleged in the Indictment have been proved beyond reasonable doubt. It must then decide what, if any, criminal responsibility General Galić incurs for any such criminal acts committed by SRK personnel.

6. This Judgement is rendered by a majority of the Trial Chamber's judges.⁵ Judge Nieto-Navia, partly dissenting, appends his opinion to this Judgement. Portions of this Judgement where he dissents are mentioned as that of the Majority of the Trial Chamber (or the "Majority").

7. This Judgement is divided into eight Parts. Part I consists of this Introduction. Part II provides a legal framework for the making of legal findings on the facts to be set out in the following part. In this part, the Trial Chamber considers the legal elements of violations of the laws or customs of war and of crimes against humanity, then determines under what circumstances an accused can be convicted for more than one crime based upon the same set of facts, and lastly examines the principles affecting the attribution of criminal responsibility. The factual findings of the Trial Chamber are contained in Part III, beginning with general observations concerning terminology and evidence; they continue with a narrative overview of the events leading to the virtually complete encirclement of the ABiH-held parts of Sarajevo; the facts of the present case follow, in order to establish whether a campaign of sniping and shelling against civilians was conducted in Sarajevo by SRK-forces during the Indictment Period and whether it aimed at spreading terror as alleged by the Prosecution; finally, the Trial Chamber sets out its legal findings, namely whether the facts found, if any, constitute crimes. In Part IV of this Judgement, the Trial Chamber states its legal findings as to the criminal responsibility of the Accused. Part V addresses matters relating to sentencing and Part VI sets forth the disposition. Part VII set forth the separate and dissenting opinion of Judge Nieto-Navia. Finally Part VIII contains four Annexes: the Indictment against General Galić, the procedural history of the case, a glossary of terms and cases, and a set of two maps which are not authoritative and do not necessarily reflect any finding of the Trial Chamber but are attached exclusively in order to assist readers to better orient themselves.

⁴ See the Indictment in Annex A. General Galić is charged with four crimes against humanity (murder and inhumane acts) under Article 5 of the Statute and with three violations of the laws or customs of war (inflicting terror on civilians and attacks on civilians) under Article 3 of the Statute.

⁵ Rule 98 *ter* (C): the judgement shall be rendered by a majority of judges.

II. APPLICABLE LAW

8. In this second part the Trial Chamber examines elements of the crimes charged in the Indictment under Articles 3 and 5 of the Statute.

1. Prerequisites of Article 3 of the Statute

9. For a crime to be adjudicated under Article 3 of the Statute (violation of the laws and customs of the war) the Trial Chamber must determine that a state of armed conflict existed at the time the crime was committed and that the crime was “closely related” to the armed conflict.⁶ According to the Appeals Chamber, 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”.⁷

10. In the *Tadić* Jurisdiction Decision, the Appeals Chamber 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”⁸ and that it “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.”⁹ Article 3 thus refers to a broad category of offences, providing a merely illustrative list in the article itself.¹⁰

11. According to the same Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions (“the *Tadić* conditions”) must be satisfied:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹¹

⁶ *Tadić* Jurisdiction Decision, para. 94.

⁷ *Id.*, para. 70.

⁸ *Id.*, para. 89.

⁹ *Id.*, para. 91.

¹⁰ *Tadić* Jurisdiction Decision, para. 89; *Kunarac* Trial Judgement, para. 401; *Furundzija* Trial Judgement, paras 131-133.

¹¹ *Tadić* Jurisdiction Decision, para. 94.

The *Tadić* conditions limit the jurisdiction of the Tribunal to violations of the laws or customs of war that are at once recognized as criminally punishable and are “serious” enough to be dealt with by the Tribunal.

12. The Indictment charges the Accused with violations of the laws or customs of war under Article 3 of the Statute, namely with one count of “unlawfully inflicting terror upon civilians” (Count 1) and with two counts of “attacks on civilians” (Counts 4 and 7) pursuant to Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949. These offences are not expressly listed in Article 3 of the Statute. Starting with the crime of attack on civilians, the Trial Chamber will determine whether the offence can be brought under Article 3 of the Statute by verifying that the four *Tadić* conditions are met. The Trial Chamber will also inquire into the material and mental elements of the offence. It will then repeat this exercise for the crime of terror.

2. Attack on Civilians as a Violation of the Laws or Customs of War

(a) Introduction

13. Count 4 of the Indictment reads:

Violations of the Laws or Customs of War (attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under Article 3 of the Statute of the Tribunal.

14. The paragraph introducing Count 4 alleges that the Accused, General Galić, as commander of the SRK, “conducted a coordinated and protracted campaign of sniper attacks upon the civilian population of Sarajevo, killing and wounding a large number of civilians of all ages and both sexes, such attacks by their nature involving the deliberate targeting of civilians with direct fire weapons.”

15. Count 7 of the Indictment is in terms identical to Count 4, except that the paragraph preceding Count 7 alleges that the Accused “conducted a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population. The campaign of shelling resulted in thousands of civilians being killed or injured.”

(b) First and Second *Tadić* Conditions

16. Counts 4 and 7 of the Indictment are clearly based on rules of international humanitarian law, namely Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. Both provide, in relevant part, that: “The civilian population as such, as well as individual civilians, shall not be made the object of attack.” The first *Tadić* condition, that the violation must constitute an infringement of a rule of international humanitarian law, is thus fulfilled.

the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.

52. “Attack” is defined in Article 49 of Additional Protocol I as “acts of violence against the adversary, whether in offence or in defence.” The Commentary makes the point that “attack” is a technical term relating to a specific military operation limited in time and place, and covers attacks carried out both in offence and in defence.⁹⁷ The jurisprudence of the Tribunal has defined “attack” as a course of conduct involving the commission of acts of violence.⁹⁸ In order to be punishable under Article 3 of the Statute, these acts have to be carried out during the course of an armed conflict.

53. In light of the discussion above, the Trial Chamber holds that the prohibited conduct set out in the first part of Article 51(2) is to direct an attack (as defined in Article 49 of Additional Protocol I) against the civilian population and against individual civilians not taking part in hostilities.

54. The Trial Chamber will now consider the mental element of the offence of attack on civilians, when it results in death or serious injury to body or health. Article 85 of Additional Protocol I explains the intent required for the application of the first part of Article 51(2). It expressly qualifies as a grave breach the act of *wilfully* “making the civilian population or individual civilians the object of attack”.⁹⁹ The Commentary to Article 85 of Additional Protocol I explains the term as follows:

wilfully: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness', *viz.*, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e.*, when a man acts without having his mind on the act or its consequences.¹⁰⁰

The Trial Chamber accepts this explanation, according to which the notion of “wilfully” incorporates the concept of recklessness, whilst excluding mere negligence. The perpetrator who recklessly attacks civilians acts “wilfully”.

55. For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a

⁹⁷ ICRC Commentary, para. 4783.

⁹⁸ *Krnjelac* Trial Judgment, para. 54; *Kunarac* Trial Judgment, para. 415.

⁹⁹ See Article 85(3)(a) of Additional Protocol I.

¹⁰⁰ ICRC Commentary, para. 3474.

civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant.

56. In sum, the Trial Chamber finds that the crime of attack on civilians is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

57. As regards the first element, the Trial Chamber agrees with previous Trial Chambers that indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.¹⁰¹ It notes that indiscriminate attacks are expressly prohibited by Additional Protocol I.¹⁰² This prohibition reflects a well-established rule of customary law applicable in all armed conflicts.¹⁰³

¹⁰¹ Other Trial Chambers have found that attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians. For example, the *Blaškić* Trial Chamber inferred from the arms used in an attack carried out against the town of Stari Vitez that the perpetrators of the attack had wanted to target Muslim civilians, since these arms were difficult to guide accurately, their trajectory was "irregular" and non-linear, thus being likely to hit non-military targets. *Blaškić* Trial Judgement, paras 501, 512. In the *Martić* Rule 61 proceedings, the Trial Chamber regarded the use of an Orkan rocket with a cluster bomb warhead as evidence of the intent of the accused to deliberately attack the civilian population. The Chamber concluded that "in respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military target but to terrorise the civilians of Zagreb. These attacks are therefore contrary to the rules of customary and conventional international law". The Trial Chamber based this finding on the fact that the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city, *Martić* Rule 61 Decision, paras 23-31. It is relevant to note that the International Court of Justice has stated, with regard to the obligation of States not to make civilians the object of attack, that "they must consequently never use weapons that are incapable of distinguishing between civilian and military targets", ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Report 1996, para. 78.

¹⁰² Article 51(4) of Additional Protocol I prohibits indiscriminate attacks and provides the first conventional definition of indiscriminate attacks. Paragraph (5) of the same provision provides examples of attacks considered to be indiscriminate. The *Kupreškić* Trial Chamber held, with regard to the prohibition of launching indiscriminate attacks, that "it is nevertheless beyond dispute that at a minimum, large numbers of casualties would have been interspersed among the combatants. The point which needs to be emphasised is the sacrosanct character of the duty to protect civilians [...] Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians". *Kupreškić* Trial Judgement, para. 513. See also *Blaškić* Trial Judgement, paras 509-10.

¹⁰³ As recognized by the Appeals Chamber, among the customary rules that have developed to govern both international conflicts and non-international strife is the protection of the civilian population against indiscriminate attacks. *Tadić* Jurisdiction Decision, para. 127. The Trial Chamber observes that, already in 1922, the Air Warfare Rules enunciated the prohibition on indiscriminate attacks, by providing that "where military objectives were situated so that they could not be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from the bombardments." (Article 24 (3), Air Warfare Rules). These rules impose further limits to bombardments by providing in Article 24(4) that "in the immediate neighbourhood of the operations of land forces, the bombardments of cities, towns and villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardments, having regard to the danger thus posed to

58. One type of indiscriminate attack violates the principle of proportionality.¹⁰⁴ The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible.¹⁰⁵ Once the military character of a target has been

the civilian population”. Although these rules were never adopted in legally binding form, they are considered to be an authoritative interpretation of the law. (See, *e.g.*, L. Oppenheim, *International Law* vol II, 7th ed, 1960). The IX Hague Convention concerning Bombing of Naval Forces in Time of War of 1907 also recognized in its Article 12 that collateral civilian casualties might result and urged that precautions be taken to avoid or minimize them. In March 1938, during the Spanish Civil War, the British Prime Minister explained the protest of his country to General Franco over the bombing of Barcelona to members of the House of Commons by stating that “The one definite rule of international law, however, is that 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 bombardments of Barcelona, carried on apparently random and without special aim at military objectives, was in fact of this nature.”(House of Commons Debates, vol. 333, 23 March 1938, col. 1177). In June of that year, in reference to the same conflict, the Prime Minister affirmed before the House of Commons the existence of a rule or principle of international law prescribing that “reasonable care must be taken in attacking...military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.” (House of Commons Debates, vol. 337, 21 June 1938, cols 937-8). In 1938, the Assembly and the Council of the League of Nations both condemned attacks carried out without sufficient precautions to safeguard the civilian population. The Assembly of the League of Nations expressed the concern that the civilian population be bombarded through negligence by stating, *inter alia*, that “any attack on legitimate military objectives must be carried out in such a way that civilian population in the neighbourhood are not bombed through negligence”. In this same sense, the Council of the League of Nations also adopted a resolution condemning *inter alia* as “contrary to the conscience of mankind and to the principles of international law air attacks by the insurgents directed “by negligence’ against civilian population.” In its already cited Resolution 2444 (1968), the UN General Assembly affirmed that among the principles applicable to all armed conflicts was that “a 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.” (G.A. Res. 2444, U.N. GAOR, 23rd Session, Supp. No. 18 U.N. Doc A/7218(1968)). Resolution 2675(1970) also stated that “in the conduct of military operations, every effort should be made to spare the civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury loss or damage to the civilian populations.” (G.A. Res. 2675, U.N. GAOR, 25th Session, Supp. No. 28 U.N. Doc A/8028 (1970).

¹⁰⁴ The principle of proportionality, inherent to both the principles of humanity and military necessity upon which the law of conduct of hostilities is based, may be inferred, *inter alia*, from Articles 15 and 22 of the Lieber Code and from Article 24 of the 1924 Hague Air Warfare Rules. This principle was codified in Article 51(5)(b) and Article 57(2)(a)(iii) and (b) of Additional Protocol I. It should be noted that these provisions do not make explicit reference to the term “proportionality” but speak of “excessive” incidental civilian losses.

Article 51(5) of Additional Protocol I provides that “[a]mong others, the following types of attacks are to be considered as indiscriminate: [...] (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Article 57(2) of Additional Protocol I states that: “(2). With respect to attacks, the following precautions shall be taken:

(a) [...] (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

¹⁰⁵ See Article 57(2) of Additional Protocol I. The precautions required by Article 57(2)(a) must be “feasible” and, in this context, “feasible” means that which is practicable or practically possible. The French version of this paragraph reads: “faire tout ce qui est *pratiquement possible*[...]” (emphasis added). Italy stated in a declaration submitted upon ratification of Additional Protocol I that “feasible” must be understood to mean that which is “practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”. (See Statements of Understanding made by Italy (27 February 1986)). Several states have submitted similar declarations pertaining to Additional Protocol I, with no objections raised by other state parties. (See Statements of Understanding of Belgium (20 May 1986), The Netherlands (26 June 1987), Spain (21 April 1989), Canada (20 November 1990), Germany (14 February 1991), Australia (21 June 1991), and Egypt (9 October 1992).

In another context, the European Commission and Court of Human Rights examined a case of “armed clash” in which a woman, standing in the doorway of her home, had been killed in the course of a supposed ambush operation carried out

ascertained, commanders must consider whether striking this target is “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰⁶ If such casualties are expected to result, the attack should not be pursued.¹⁰⁷ The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack.¹⁰⁸ In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator,¹⁰⁹ making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.¹¹⁰

against members of an alleged armed group. Regarding the obligation to avoid incidental civilian losses, the Commission considered that the planning and control of the operation needed to be assessed “... not only in the context of the apparent targets of an operation but, particularly where the use of force is envisaged in the vicinity of the civilian population, with regard to the avoidance of incidental loss of life and injury to others” (*Ergi v. Turkey* No. 23818/94, Decision on admissibility of 2 March 1995, 80 D&R 157, Commission Report of 20 May 1997). The Court explicitly noted that the responsibility of the State “may also be engaged where [the security forces] fail to take all feasible precautions in the choice of means and methods of security operation mounted against an opposing group with the view to avoiding, or at least, minimising incidental loss of civilian life” (*Ergi v. Turkey*, Judgement of 28 July 1998, para. 79).

¹⁰⁶ See Article 51(5)(b) of Additional Protocol I. The *travaux préparatoires* of Additional Protocol I indicate that the expression “concrete and direct” was intended to show that the advantage must be “substantial and relatively close”, and that “advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”. ICRC Commentary, para. 2209. The Commentary explains that “a military advantage can only consist in ground gained or in annihilating or in weakening the enemy armed forces”. ICRC Commentary, para. 2218. Australia and New Zealand stated at the time of ratification, in almost identical wording, that “the term “concrete and direct military advantage anticipated”, used in Articles 51 and 57 of Additional Protocol I, means *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”. (See Statements of Understanding made by New Zealand (8 February 1988) and Australia (21 June 1991)).

¹⁰⁷ See Article 57(2)(b) of Additional Protocol I.

¹⁰⁸ The ICRC Commentary acknowledges that “the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations, the interests of the civilian population should prevail”. ICRC Commentary, para. 1979.

¹⁰⁹ The Trial Chamber notes that the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words “expected” and “anticipated”. When ratifying Additional Protocol I, Germany stated that “the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight”. (See Statements of Understanding made by Germany (14 February 1991)). Similar declarations were also made by Switzerland (17 February 1982), Italy (27 February 1986), Belgium (20 May 1986), The Netherlands (26 June 1987), New Zealand (8 February 1988), Spain (21 April 1989), Canada (20 November 1990), and Australia (21 June 1991). No other party to Additional Protocol I has raised objections to these declarations.

¹¹⁰ Military manuals provide guidance as to the practical application of this test. The Canadian Law of Armed Conflict at the Operational and Tactical Level, Section 5, para. 27 (1992) indicates, for example, that “consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made” and indicates that the proportionality test must be examined on the basis of “what a reasonable person would do” in such circumstances. The Australian Defence Force, Law of Armed Conflict – Commander’s Guide (1994), at p. 9-10, and the New Zealand Interim Law of Armed Conflict Manual, at para. 515(4), contain a similar provision. See also, e.g., Yugoslav Regulation on the Application of international Laws of War in the Armed Forces of the SRFY, para. 72 (1988).

59. To establish the *mens rea* of a disproportionate attack the Prosecution must prove, instead of the above-mentioned *mens rea* requirement, that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties.¹¹¹

60. The Trial Chamber considers that certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of attack. This is to be determined on a case-by-case basis in light of the available evidence.

61. As suggested by the Defence, the parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas.¹¹² However, the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.

(f) Conclusion

62. The Trial Chamber finds that an attack on civilian can be brought under Article 3 by virtue of customary international law and, in the instant case, also by virtue of conventional law and is constituted of acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.

3. Terror Against the Civilian Population as a Violation of the Laws or Customs of War

(a) Introduction

63. This section of the Judgement expresses the view of the Majority of the Trial Chamber. Judge Nieto-Navia attaches a dissenting opinion.

64. The first count of the Indictment reads:

Count 1: Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under Article 3 of the Statute of the Tribunal.

65. The paragraph introducing Count 1 alleges that the Accused, General Galić, as commander of the SRK, “conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its

¹¹¹ See Article 85(3)(b) of Additional Protocol I.

¹¹² See Article 58 of Additional Protocol I.

civilian population.” This introductory paragraph is headed “Infliction of terror”. The remaining six counts are divided into two groups which are headed, respectively, “Sniping” and “Shelling”. These are evidently descriptive categorizations of the counts, to which the Majority attaches no particular legal significance. Moreover, it will transpire in the course of the Majority’s discussion that “Infliction of terror” is not an appropriate designation of the offence considered here because actual infliction of terror is not a required element of the offence. The Majority will henceforth refer to the offence charged in Count 1 as “the crime of terror against the civilian population”, or simply “the crime of terror”, a purported violation of the laws or customs of war.¹¹³

66. The charge, as such, of terror against the civilian population is one that until now has not been considered in a Tribunal judgement, although evidence of terrorization of civilians has been factored into convictions on other charges.¹¹⁴ This is also the first time an international tribunal has pronounced on the matter.¹¹⁵ After considering the arguments of the Parties, the Majority will examine in detail the legal foundations and other essential characteristics of the charge.

(b) Consideration of the Arguments of the Parties

(i) Prosecution

67. In its Pre-trial Brief the Prosecution explained its position that the character of the armed conflict in Sarajevo as international or non-international was “irrelevant” to the charges against the Accused.¹¹⁶ This was said to be because the 22 May Agreement¹¹⁷ made Article 51 of Additional

¹¹³ The Prosecution refers to it as “the offence of terror”: see, for example, Prosecution Pre-trial Brief, para. 25.

¹¹⁴ In the *Čelebići* case, acts of intimidation creating an “atmosphere of terror” in prison camps were punished as grave breaches of the Geneva Conventions (torture or inhuman treatment) and as violations of Article 3 common to the Geneva Conventions (torture or cruel treatment): *Čelebići* Trial Judgement, paras 976, 1056, 1086-91, and 1119. In the *Blaškić* case “the atmosphere of terror reigning in the detention facilities” was part of the factual basis leading to the Accused in that case being convicted for the crimes of inhuman treatment (a grave breach) and cruel treatment (a violation of the laws or customs of law): *Blaškić* Trial Judgement, paras 695, 700, and 732-3. Blaškić’s additional conviction for “unlawful attack” on civilians was based in part upon the finding that his soldiers “terrorised the civilians by intensive shelling, murders and sheer violence” (id., para. 630; also paras 505, 511). And in the *Krstić* case, General Krstić was accused of persecutions, a crime against humanity, on the basis of his alleged participation in “the terrorising of Bosnian Muslim civilians”: *Krstić* Trial Judgement, para. 533. The Trial Chamber found that a “terror campaign” was in existence: “Numerous witnesses gave evidence that, during Operation Krivaja 95, the VRS shelled the Srebrenica enclave intensively with the apparent intent to terrify the populace” (id., para. 122). Moreover: “On 12 and 13 July 1995, upon the arrival of Serb forces in Potocari, the Bosnian Muslim refugees taking shelter in and around the compound were subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes, and murders” (id., para. 150). The Trial Chamber in *Krstić* characterized “the crimes of terror”, and the forcible transfer of the women, children, and elderly at Potocari as constituting persecution and inhumane acts (id., para. 607; see also paras 1, 41, 44, 46, 147, 153, 292, 364, 517, 527, 537, 653, 668, 671, 677). See also *Martić* Rule 61 Decision, paras 23-31 (use of rocket was not designed to strike a military target but to terrorize the civilian population of Zagreb contrary to the rules of international law); and *Nikolić* Sentencing Judgement, para. 38.

¹¹⁵ The Special Court for Sierra Leone has issued several indictments containing counts of “acts of terrorism” (“terrorizing the civilian population”) brought pursuant to Article 3 common to the Geneva Conventions and to Additional Protocol II; see <<http://www.sc-sl.org>>.

¹¹⁶ Prosecution Pre-trial Brief, para. 132.

¹¹⁷ P58.

Protocol I applicable to the conflict irrespective of its character.¹¹⁸ Thus the Prosecution did not concentrate in this case on proving the character of the conflict.

68. The Trial Chamber has found that Article 51 was indeed part of the law regulating the conduct of the parties and that it was brought into operation at least by the 22 May Agreement. Since the Geneva Conventions and Additional Protocol I can be extended by agreement to any given conflict, and since the 22 May Agreement was not conditioned upon the Sarajevo conflict having, or assuming, a certain character (international or non-international), the Prosecution's position, as set out above, is correct.

69. The Prosecution further maintained that the prohibition against terrorizing the civilian population amounts to a rule of *customary* international law applicable to all armed conflicts. In support of this the Prosecution cited certain rules on aerial warfare prepared in the 1920s but not finalized, two UN resolutions from 1994 condemning atrocities in the former Yugoslavia, and the Spanish penal code from 1995.¹¹⁹ As will be made clear in later discussion, the Majority does not take a position in respect of this question.

70. The Prosecution submitted that the following elements constitute the crime of terror:

1. Unlawful acts or threats of violence.
2. Which caused terror to spread among the civilian population.
3. The acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.

In addition, according to the Prosecution's proposal, there must be a nexus between the acts or threats of violence and the armed conflict, and the Accused must bear responsibility for the acts or threats under Article 7 of the Statute.¹²⁰

71. The Prosecution submitted that the first element in the list above, which is part of the *actus reus* of the offence, is "broad", because it encompasses both acts and threats of violence.¹²¹ The Prosecution sees the acts of violence in the present case as consisting of systematic shelling and sniping of civilians. The Prosecution's case is thus limited to these acts. As for "threats", the alleged shelling and sniping of civilians created, according to the Prosecution, a constant threat that more

¹¹⁸ Prosecution Pre-trial Brief, para. 136.

¹¹⁹ Id., para. 141. The Prosecution Final Trial Brief (para. 8, fn. 5) simply referred back to the submissions in the Pre-trial Brief.

¹²⁰ Prosecution Pre-trial Brief, para. 142. These elements were repeated without change in the Prosecution Final Trial Brief (para. 8).

¹²¹ Prosecution Pre-trial Brief, para. 144.

such acts would be perpetrated at any moment.¹²² The “threats” in the present case are said to be of a kind implicit in the acts of violence. The Trial Chamber is thus not called upon to determine liability for threats that are not implicit, in the Prosecution’s sense.

72. The “special intent requirement” (element 3) is, according to the Prosecution, the distinguishing feature of the crime of terror.¹²³ The Prosecution has interpreted “primary purpose” as requiring that “the infliction of terror upon the civilian population was the predominant purpose served by the acts or threats of violence. It need not be established that the broader campaign in the Sarajevo theatre had this as its sole or only objective.”¹²⁴ Where the special intent, or *mens rea*, cannot be proven directly, it may be “inferred from the nature, manner, timing, frequency and duration of the shelling and sniping of civilians.”¹²⁵

73. “As an element of the offence of terror [... i]t must [...] be established that terror *was in fact caused*”.¹²⁶ In addition to proof of actual infliction of terror, the Prosecution requires a causal connection between the first and second elements (“2. Which caused...”). That is, there must have been not only unlawful acts and actual terror experienced by the population, but also a causal link between the acts and the terror. “[T]he offence of unlawfully inflicting terror [...] is distinguished also by its *effect*, which in the present case was the profound psychological impact on the population”.¹²⁷ The Prosecution does not cite any authority for these submissions.

74. “Population”, according to the Prosecution, does not just mean any number of Sarajevo civilians: “the unlawful shelling and sniping campaigns [had] the result that *much of the civilian population* lived in a state of terror”.¹²⁸ The implication that “population” is to be understood to mean the *majority* of the population, or at least a large segment of it, is found also in the following: “The requirement that terror be spread among the civilian population is satisfied even if certain civilians, or sectors of the population, were not so affected.”¹²⁹

75. In its preliminary submissions the Prosecution did not provide a legal definition of “terror” (i.e. of the emotional effect which figures in the purported second element of the offence), except to refer in a footnote to a dictionary definition of the word as “extreme fear”.¹³⁰ In the course of trial,

¹²² Id., para. 144.

¹²³ Id., paras 143, 148.

¹²⁴ Id., para. 149.

¹²⁵ Id., para. 150.

¹²⁶ Id., para. 25 (emphasis added).

¹²⁷ Id., paras 142-3 (emphasis added).

¹²⁸ Id., para. 145 (emphasis added).

¹²⁹ Id., para. 147.

¹³⁰ Id., footnote 109.

when the Prosecution's expert on terror (a psychologist) was heard, terror was again rendered as extreme fear. The Prosecution later explicitly adopted its expert's definition.¹³¹

76. The Prosecution's legal theory concerning the crime of terror was not elaborated or modified in later submissions.¹³² Except for the Additional Protocols, the Prosecution did not cite an authority for the three elements which, in its view, define the offence. The Majority makes the preliminary observation that the language of the prohibition common to the Additional Protocols, that "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited",¹³³ does not on its face support the Prosecution's second element, that the acts or threats of violence must have caused terror to spread among the civilian population.

(ii) Defence

77. The Defence in its preliminary submissions termed the Prosecution's stand on the applicable law "unacceptable", but did not dismiss outright the availability of the charge. It acknowledged that Article 51 of Additional Protocol I, which prohibits (in the Defence's words) "illegal terror inflicted on civilians", was binding upon the parties to the conflict.¹³⁴

78. The Defence stated that the intent to inflict terror must be demonstrable: "If the Prosecution is charging General Galić with having conducted a long-lasting shelling and sniping campaign designed to terrorize [the] civilian population [...] it must be established that there existed the intent to inflict terror on [the] civilian population by shelling and sniping."¹³⁵ Lastly, the Defence did not take issue with the *actus reus* element "of the criminal act of inflicting terror, as the Prosecution has qualified it", namely acts of violence causing civilian casualties.¹³⁶

79. Thus, from the beginning of the case, the Defence joined the Prosecution in understanding that the scope of the *actus reus* of terror would be limited to the acts underlying Counts 4 and 7 of the Indictment (killing or severe injury of civilians through unlawful attacks), and that "threats" would not be a significant factor. The Defence's only comment on threats was on a theoretical plane, when it stated that for threats of violence to come within the offence of terror they had to be

¹³¹ Response to Acquittal Motion, para. 16.

¹³² As mentioned above, para. 8 of the Prosecution Final Trial Brief simply reverts to the submissions in the Pre-trial Brief.

¹³³ Art. 51(2) of Additional Protocol I and Art. 13(2) of Additional Protocol II.

¹³⁴ Defence Pre-trial Brief, paras 8.11, 8.23, 8.24.

¹³⁵ *Id.*, para. 8.20.

¹³⁶ *Id.*, para. 8.20.

specifically directed against the civilian population. “[The threat] must be serious. It must be real. And it must be capable to cause terror or spread terror among [the] civilian population.”¹³⁷

80. The Defence’s concern about Count 1 appears to have been limited to the question of multiplication of offences referenced to one and the same set of acts.¹³⁸ (This is taken up by the Trial Chamber in its discussion of the law of cumulative convictions.) The implication is that the Defence did not contest the existence of a crime of terror.

81. The Defence’s final written submissions on Count 1 repeat the submissions in its Pre-trial Brief.¹³⁹ However, in another part of its Final Brief, the Defence notes the Prosecution’s position that “the civilian population was the subject of illegal attacks and terror [etc.]”,¹⁴⁰ and then states:

In order to accept the above mentioned, unfounded Prosecution’s conclusions, the Defence’s viewpoint is that the Prosecution must prove the following:

- a) The exact military actions that were conducted against the illegal targets and by which means (i.e. shelling or sniping), including the exact time and place,
- b) That, as part of these illegal actions, there was intention of targeting the civilians with the aim to terrorize,
- c) That the intention to kill the civilians existed,
- d) That the intention to inflict injuries, other than killings existed.¹⁴¹

The difference between this list (which may or may not have been intended by the Defence as an alternative definition of the offence) and the Prosecution’s definition of the elements of the crime of terror is that the Defence does not seem to require proof that the civilian population did, in fact, experience terror (the second element in the Prosecution’s list), but does require proof of the perpetrator’s intent to kill or injure civilians.

82. In yet another part of the Final Brief, however, the Defence does demand proof of actual infliction of terror, as well as a causal link between actual terror and unlawful violent acts:

The prosecutor should have proven several things:

1. that there was terror
2. that this terror was not simply the result of war in an urban theatre, led in a legitimate way

¹³⁷ Defence Closing Arguments, T. 21807.

¹³⁸ Defence Pre-trial Brief, paras 8.21-8.24.

¹³⁹ See Defence Final Trial Brief, paras 1097-104.

¹⁴⁰ Id., para. 445.

¹⁴¹ Id., para. 446.

3. that this terror was the result of illegitimate acts
4. performed by troops commanded by the Accused
5. following his orders
6. (alternatively) that the Accused was aware of the facts and (if he had not given the orders himself) that he had not punished them
7. finally that the result was hoped for as such within the scope of a global plan.¹⁴²

If this was meant as a definition of the crime of terror, the Defence did not cite any authority for it.

83. On the experiential aspect of terror, the Defence said: “It is underestimating the meaning of ‘terror’ to say that if an individual (or individuals) feels ‘extreme fear’ he feels terror.”¹⁴³ Later, in its oral submissions at the trial’s end, the Defence asserted: “Inflicting of terror as an element of a criminal offence [...] cannot be causing of any kind of terror or causing terror of any intensity [...] It has to be of the highest intensity. It has to be long term. It has to be direct. And it has to be capable of causing long-term consequences.”¹⁴⁴

84. As noted in the preceding section, by the end of the trial the Defence seemed to have changed its position on the applicability of Additional Protocol I. In its Final Brief it wrote that the conflict had “the character of civil war [...] it is quite clear that regulations of Additional Protocol II ha[ve] to be applied”.¹⁴⁵ It submitted that Additional Protocol I is limited in its applicability to international conflicts by operation of Article 2 common to the Geneva Conventions.¹⁴⁶ Moreover, in oral submissions on the last day of trial, the Defence expressed “some doubt” as to the status of the 22 May Agreement.¹⁴⁷

85. The Trial Chamber has already found that the 22 May Agreement was in effect during the relevant period, which confirms that the parts of Additional Protocol I referred to therein were operative during that period.¹⁴⁸ Thus the Defence’s final position on the applicability of Additional Protocol I is of no consequence to the discussion of the crime of terror.¹⁴⁹ The Majority notes that,

¹⁴² Id., para. 888.

¹⁴³ Id., para. 584.

¹⁴⁴ Defence Closing Arguments, T. 21810.

¹⁴⁵ Defence Final Trial Brief, para. 977.

¹⁴⁶ Id., paras 971-2.

¹⁴⁷ T. 21966-73.

¹⁴⁸ See *supra*, paras 23-4.

¹⁴⁹ It should be noted, however, that the Defence’s submissions on the constraining effect of Article 2 common (“Common Article 2”) to the Geneva Conventions on the applicability of Additional Protocol I are not accurate. While it is true that the scope of that Protocol’s application is given in Article 1 of the protocol as corresponding to the situations referred to in Common Article 2 – namely “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”, as well as “to all cases of partial or total occupation of the territory of a High Contracting Party” – clearly this does not have the effect of limiting the application of the Conventions and the Protocol to the cases mentioned above. Thus a unilateral declaration pursuant to Article 96 of

in any case, the Defence unequivocally accepted the applicability of Additional Protocol II, which contains the same prohibition against terror as the first Protocol.

(c) Discussion

86. While the Parties have not raised the question of jurisdiction *ratione materiae*, the Majority will consider it *ex officio*, for it is fundamental to the exercise of competence.

87. The Majority must decide whether the Tribunal has jurisdiction over the crime of terror against the civilian population, but only to the extent relevant to the charge in this case. That is to say, the Majority is not required to decide whether an offence of terror in a *general* sense falls within the jurisdiction of the Tribunal, but only whether a *specific* offence of killing and wounding civilians in time of armed conflict with the intention to inflict terror on the civilian population, as alleged in the Indictment, is an offence over which it has jurisdiction.¹⁵⁰ While the Tribunal may have jurisdiction over other conceivable varieties of the crime of terror, it will be for Trial Chambers faced with charges correspondingly different from Count 1 of the present Indictment to decide that question.

Additional Protocol I by the representative authority of a people “fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination” may be enough to bring into force the Conventions and the Protocol, even though the authority is not a state power. More pertinently, Article 3 common to the Geneva Conventions enables parties to a non-international armed conflict to bring into force all or part of the Conventions and, by extension, all or part of Additional Protocol I supplementing the Conventions.

¹⁵⁰ The Majority is aware that several international instruments exist outlawing “terrorism” in various forms. The Majority necessarily limits itself to the legal regime that has been developed with reference to conventional armed conflict between States, or between governmental authorities and organized armed groups, or between such groups within a State. In other words, the Majority proceeds on the understanding that the present case will have a basis, if at all, in the legal regime of the Geneva Conventions and the Additional Protocols and not in international efforts directed against “political” varieties of terrorism. The Majority would also note that “terrorism” has never been singly defined under international law. The first international attempt at codification of “terrorism” was the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, 19 LNOJ 23 (1938), which however did not receive sufficient ratifications and was not pursued. Since that time the international community has followed a thematic approach to the characterization of international terrorism, with subject-specific conventions such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 2 ILM 1042 (1963); the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 13 ILM 41 (1974); the 1979 International Convention Against the Taking of Hostages, 18 ILM 1460 (1979); 1997 International Convention for the Suppression of Terrorist Bombings, 37 ILM 249 (1998); 1999 International Convention for the Suppression of the Financing of Terrorism, 39 ILM 270 (2000); and Convention on the Suppression of Acts of Nuclear Terrorism (in process of negotiation), UN Doc. A/C6/53/L4, Annex I (1998). This incomplete list of relevant global instruments also does not include regional anti-terrorism agreements. Related resolutions of the UN General Assembly include the 1994 Declaration on Measures to Eliminate International Terrorism, UN Doc. A/RES/49/60, and the 1995 Measures to Eliminate Terrorism, UN Doc. A/RES/50/53 (“that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”). The prohibition of terror against the civilian population in times of war, which (as discussed below) is given expression in Geneva Convention IV and the Additional Protocols, is another example of the thematic, subject-specific, approach to “terrorism”.

88. The Majority wishes to emphasize that nothing said below should be taken to limit the jurisdiction of the Tribunal in other cases.¹⁵¹

89. As noted in the preceding section, in the *Tadić* decision on jurisdiction the Appeals Chamber said that four conditions (“the *Tadić* conditions”) must be met for an offence to be subject to prosecution under Article 3 of the Statute (violations of the laws or customs of law): (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim; and (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹⁵²

90. The discussion below begins with preliminary remarks on the Majority’s approach to treaty interpretation and the paramount importance of the *nullum crimen sine lege* principle. The Majority will then consider each of the *Tadić* conditions. The elements of the crime of terror are developed as part of the discussion of the fourth *Tadić* condition.

(i) Preliminary remarks

91. The Majority will instruct itself on two related matters of principle. In its interpretation of provisions of the Additional Protocols and of other treaties referred to below, the Majority will apply Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, namely that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵³ No word in a treaty will be presumed to be superfluous or to lack meaning or purpose.

92. The Majority also acknowledges the importance of the principle found in Article 15 of the 1966 International Covenant on Civil and Political Rights, which states, in relevant part: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. [...] Nothing in this article shall prejudice the trial and punishment of any person for

¹⁵¹ As will be seen, one of the Majority’s conclusions is that proof of actual infliction of terror is not a legal element of the crime under any interpretation of Article 51(2) of Additional Protocol I. This finding does not, of course, amount to a narrowing of the Tribunal’s jurisdiction; on the contrary, the Majority’s rejection of this supposed element proposed by the Prosecution leads to a broader definition of the offence.

¹⁵² *Tadić* Jurisdiction Decision, para. 94.

¹⁵³ Reprinted in 8 ILM 679 (1969).

any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.”¹⁵⁴

93. The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means “that penal statutes must be strictly construed” and that the “paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.”¹⁵⁵ Moreover:

The effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.¹⁵⁶

(ii) First and Second Tadić Conditions

94. The Indictment is not explicit as to which part of Article 51 of Additional Protocol I, or which part of Article 13 of Additional Protocol II, Count 1 is referenced to. Article 51 is an extensive provision in Part IV of the Protocol concerned with the protection of the civilian population. Yet it is clear from the submissions in this case that the intended reference of Count 1 is to sub-paragraph 2 of Article 51, which states:

The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

The second sentence of this excerpt will henceforth be referred to as the “second part” of the second paragraph of Article 51, or simply as the “second part of 51(2)”.

95. The quoted passage is identical to sub-paragraph 2 of Article 13 of Additional Protocol II. Since the Trial Chamber has found that certain parts of Additional Protocol I, including Article 51 thereof, applied to the armed conflict in Sarajevo during the relevant time, the Majority takes Additional Protocol I to be the basis of Count 1. It is not necessary to decide whether Additional Protocol II was also applicable to the conflict. Moreover, the Majority is not called upon to decide whether Additional Protocol I came at any time into effect in the State of Bosnia-Herzegovina

¹⁵⁴ 999 UNTS 171.

¹⁵⁵ *Čelebići* Trial Judgement, para. 408.

¹⁵⁶ *Id.*, para. 413. On the principle of legality see also *Aleksovski* Appeal Judgement, paras 126-7 (“the principle of *nullum crimen sine lege* ... does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime”); and *Vasiljević* Trial Judgement, para. 193 (“the Trial Chamber must further satisfy itself that the criminal conduct in question was

through fulfilment of the Protocol's inherent conditions of application (Article 1 of the Protocol). The implementing instrument, on the evidence in this case, was the 22 May Agreement (as discussed in the preceding section).

96. Thus the first two *Tadić* conditions are met: Count 1 bases itself on an actual rule of international humanitarian law, namely the rule represented by the second part of the second paragraph of Article 51 of Additional Protocol I. As for the rule's applicability in the period covered by the Indictment, the rule had been brought into effect at least by the 22 May Agreement, which not only incorporated the second part of 51(2) by reference,¹⁵⁷ but repeated the very prohibition "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" in the agreement proper.¹⁵⁸

97. The Majority emphasizes that it is not required to pronounce on whether the rule in question is also customary in nature. As stated above, it belongs to "treaty law". This is enough to fulfil the second *Tadić* condition as articulated by the Appeals Chamber. Nevertheless, the Majority will proceed with additional caution here to avoid any possible misunderstanding of its position on this important question.

98. The Appeals Chamber has said "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."¹⁵⁹ In relation to the first point, the Majority understands that it stems from the unqualified imperative of respect for the *nullum crimen sine lege* principle. The fact that the 22 May Agreement was binding on the parties to the conflict, and that certain provisions of Additional Protocol I had thereby undoubtedly been brought into effect, means that in this general sense there is no affront to the principle of *nullum crimen sine lege* by the Majority's determination. In relation to the Appeals Chamber's second point, this raises the question of whether the second part of 51(2) in any way conflicts with, or derogates from, peremptory norms of international law. In the Majority's view, it does not. What the second paragraph of Article 51, read as a whole, intends to say is that the

sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution").

¹⁵⁷ See P58 (22 May Agreement), para. 2.5.

¹⁵⁸ *Id.*, para. 2.3.

¹⁵⁹ *Tadić* Decision on Jurisdiction, para. 143. This was also the view of Security Council members. Speaking at a meeting of the Council on 25 May 1993, at which the Tribunal's Statute was adopted, France's representative commented that "the expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed" (UN Doc. S/PV.3217, p. 11). The representatives of the United States and the United Kingdom expressed the same view (*id.*, pp 15 and 19, respectively).

prohibition against terror is a specific prohibition within the general prohibition of attack on civilians.¹⁶⁰ The general prohibition is a peremptory norm of customary international law.¹⁶¹ It could be said that the specific prohibition also shares this peremptory character, for it protects the same value. However, to reiterate, the Majority is not required to decide this question. What is clear is that, by exemplifying and therefore according with the general norm, the rule against terror neither conflicts with nor derogates from peremptory norms of international law.

99. The following considerations are also relevant. The Additional Protocols were debated and finalized at the 1974-1977 Diplomatic Conference under the auspices of the ICRC. A summary record of the proceedings has been preserved.¹⁶² The ICRC's delegate to the committee to which Article 51(2) of Additional Protocol I was assigned in draft form¹⁶³ said that the rule "merely reaffirmed existing international law", without making a distinction between the provision's first and second parts.¹⁶⁴ This was the consistent attitude at the Conference. States' concerns were for the most part limited to whether the object of the prohibition against terror should be the actor's intent or the capacity of the methods employed to spread violence.¹⁶⁵ Several States simply put on record their approval of the draft provision without proposing changes.

100. To illustrate the insignificant level of controversy, the Majority mentions the committee's summary of its first-session discussions of what was to become Article 51(2): "Some delegations had proposed an interpretation of 'methods intended to spread terror' going beyond the attacks referred to in the first sentence of the paragraph. Specific reference was made in this connexion to propaganda. The language of 'intended to'¹⁶⁶ also gave rise to some controversy. Some delegations suggested that the substantive element of intent would be too difficult to determine and that methods that in fact spread terror should be prohibited. Other delegations emphasized the problem of imposing responsibility for acts that might cause terror without terror having been intended."¹⁶⁷

¹⁶⁰ See ICRC Commentary, para. 4785: "Attacks aimed at terrorizing *are just one type of attack*, but they are particularly reprehensible. Attempts have been made for a long time to prohibit such attacks, for they are frequent and inflict particularly cruel suffering upon the civilian population." (Emphasis added.) While the second part of 51(2) uses the expression "acts or threats of violence", and not "attacks", the concept of "attack" is defined in Article 49 of Additional Protocol I as "acts of violence".

¹⁶¹ See the discussion in the preceding section on the crime of attack on civilians. See as well ICRC Commentary, para. 1923. The Trial Chamber also notes that in a 1995 decision on the applicability of Additional Protocol II to the conflict in Colombia, the Constitutional Court of Colombia accepted the customary-law status of Article 13 of the Protocol, including the prohibition against terror: Ruling No. C-225/95, excerpted in translation in M. Sassòli and A. A. Bouvier (eds.), *How Does Law Protect in War?* (Geneva: ICRC, 1999), p. 1366 (para. 30) (henceforth "Sassòli & Bouvier").

¹⁶² *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 17 vols. (Geneva: ICRC, 1974-77) (henceforth "Records").

¹⁶³ The draft provision was then numbered 46.

¹⁶⁴ *Records*, vol. XIV, p. 36.

¹⁶⁵ *Id.*, vol. XIV, pp 48-75.

¹⁶⁶ The original formulation of the second part was: "In particular, methods intended to spread terror among the civilian population are prohibited."

¹⁶⁷ *Records*, vol. XV, p. 241.

101. In the report on its second session, the committee stated: “The prohibition of ‘acts or threats of violence which have the primary object of spreading terror’ is directed to intentional conduct specifically directed toward the spreading of terror and excludes terror which was not intended by a belligerent and terror that is merely an incidental effect of acts of warfare which have another primary object and are in all other respects lawful.”¹⁶⁸ What little disagreement there was about the draft provision was thus put to rest.¹⁶⁹

102. Article 51 of Additional Protocol I was adopted by the plenary of the Diplomatic Conference on 26 May 1977 with 77 in favour, one against, and 16 abstentions.¹⁷⁰ France, the only state voting against, explained that it objected, for various reasons, to the provisions of paragraphs 4, 5, 7, and 8 of Article 51 (but not of paragraph 2).¹⁷¹ The concerns of the abstaining States were also confined to paragraphs 4, 5, 7, and 8.¹⁷²

103. Explicit reference to the terror clause is found twice in the States’ explanations of their votes on Article 51. In both cases the endorsement of the prohibition is strong and unqualified. The Byelorussian Soviet Socialist Republic noted the “criminal” character of conduct which the prohibition aimed to counteract:

Also very important from the standpoint of increasing the protection afforded to the civilian population is the provision in Article [51] concerning the prohibition of the use of force or threat of the use of force for the purpose of intimidating the civilian population. Intimidating peaceful citizens and spreading terror among the civilian population is well known to be one of the infamous methods widely resorted to by aggressors seeking to attain their criminal ends at whatever price.¹⁷³

104. The plenary adopted Additional Protocol I in whole by consensus on 8 June 1977.¹⁷⁴ Following this, many States provided further explanations of their positions, but there was no further reference to the terror clause of Article 51(2).¹⁷⁵ There were no treaty reservations of any relevance to this provision. A perusal of the *travaux préparatoires* of the Diplomatic Conference thus satisfies the Majority that all participating States condemned the strategy of terrorizing civilians as, in Byelorussia’s words, an “infamous method” of warfare.¹⁷⁶

¹⁶⁸ Id., vol. XV, p. 274.

¹⁶⁹ Id., vol. XV, pp 328-31.

¹⁷⁰ Id., vol. VI, p. 163.

¹⁷¹ Id., vol. VI, pp 161-2; see also vol. VII, p. 193.

¹⁷² Id., vol. VI, pp 164-8, 187-8 (FRG).

¹⁷³ Id., vol. VI, p. 177. See also the comments of the Ukrainian Soviet Socialist Republic, id., vol. VI, p. 201.

¹⁷⁴ Id., vol. VII, pp 194 and 205, respectively.

¹⁷⁵ Id., vol. VII, pp 191-251.

¹⁷⁶ By 1992, when there were around 191 countries in the world, 118 States had ratified Additional Protocol I and five had signed the treaty without ratifying it. The State of Bosnia-Herzegovina succeeded to the Protocol on 31 December 1992. This information is available at the ICRC’s web site: <<http://www.icrc.org>>.

testified to seeing three injured people on his way to the clinic, and more at the clinic, but he did not witness where they were or what they were doing prior to the explosion.

408. The allegation as to the second and third shell explosions has been made out. The most likely sequence is that the first of these struck the north-western edge of the playground bounded by buildings to the east of Oslobodilaca Sarajeva Street. The playground at the time was being used as a trading ground for essential civilian goods. The evidence establishes that the people gathered there ran for cover after hearing the explosion in Oslobodilaca Sarajeva Street. Several minutes later, after they had emerged to retrieve their goods, the second shell (which was the first shell to strike the playground) exploded. This was the shell that caused most of the casualties. After a short while another shell exploded at the foot of an apartment block to the south of the playground. The Trial Chamber accepts the forensic evidence that the latter two shells were 120 mm calibre and flew in from the east and from east-northeast, respectively. Each of these shells left impact marks on the ground that were longer to the east of the crater and strongly elliptical, indicating that the angle of descent in each case was not steep. The Trial Chamber thus rejects the claim of the Viličić Shelling Report that one of these shells could have been fired from a distance of only 300 metres, which would have resulted in a near-vertical angle of descent and near-circular impact traces.

409. A 120 mm mortar fired at the first increment charge at an angle close to 45 degrees has a range of 1,574 metres, according to the Viličić Report.¹⁴⁴² It is not known in this case what level of charge was used. Since the Trial Chamber has determined that the confrontation line east of the site of the incident was no more than 600 metres away, whatever the charge used the projectile would have been carried, at a gentle elevation angle, a distance greater than 600 metres. Therefore the Indictment's allegation that the origin of fire was SRK-held territory has been made out in relation to the two shells that were investigated in detail.¹⁴⁴³ It can reasonably be assumed that the first shell to strike formed part of the same attack and therefore also originated in SRK territory. This conclusion is not affected by any reasonable margin of error applied to the investigators' estimation of the direction of fire. The Trial Chamber finds that the three shells struck civilians engaged in peaceful activities. No military personnel were seen in the vicinity at the time of the attack. The Trial Chamber rejects the suggestion that the office of the Territorial Defence mentioned by Sabahudin Ljusa and Eldar Hafizović was the target of the attack. The sequence of shell explosions tended away from its supposed location, not closer to it, and there is no evidence that the office was damaged in the attack. There is no reasonable explanation of why both the second and third shells would land significantly short of the first shell if the first shell was directed at the Territorial

¹⁴⁴² Viličić Shelling Report, Table 2, p. 5.

¹⁴⁴³ See P3727 which indicates a range of possible firing positions bounded by dotted lines converging from the west on Alipašino Polje.

Defence office. The Trial Chamber does not see any merit in the other Defence submissions, which, as noted above, are of a general nature.

410. The Trial Chamber thus finds that the fourth scheduled shelling incident constituted an attack that was, *at the very least*, indiscriminate as to its target (which nevertheless was primarily if not entirely a residential neighbourhood), and was carried out recklessly, resulting in civilian casualties.

(e) Sarajevo Airport

411. The Trial Chamber considers the situation at the airport to be complex. The SRK had given up the airport to the UN for the delivery of humanitarian supplies and related purposes. UNPROFOR was therefore to control the use of the airport. UNPROFOR used it also to communicate with the rest of the world¹⁴⁴⁴ and as a meeting point for brokering negotiations among the belligerents.¹⁴⁴⁵ SRK troops were positioned on both sides of the airport runway, especially on the south-east.¹⁴⁴⁶

412. Notwithstanding the airport agreement, the BiH authorities permitted some people to cross the runway, and even issued permits to allow civilians through it.¹⁴⁴⁷ In some periods, between 80 and 300 people each night crossed the runway.¹⁴⁴⁸ ABiH troops dressed as civilians used to cross the runway with military supplies for the city.¹⁴⁴⁹ In fact, the Presidency seemed to allow the use of the airport, *inter alia*, for military purposes.¹⁴⁵⁰

413. The SRK, therefore, repeatedly complained that, during the night, the airport area was used by people to leave Sarajevo and by the ABiH to allow military personnel and supplies into the city.¹⁴⁵¹ On 3 April 1993, following these protests, an official order was issued by the commander of the SRK 4th Light Artillery Regiment to prevent by use of force any movement across the airport.¹⁴⁵² UNPROFOR battalions entrusted with the implementation of the airport agreement used

¹⁴⁴⁴ Indić, T. 18595; 18661-2; Tucker, T. 9931; Witness W, T. 9538; Mole, T. 11040-42.

¹⁴⁴⁵ Kupusović, T. 674; Witness W, T. 9646 (closed session).

¹⁴⁴⁶ DP35, T. 17600; Karavelić, T. 11878. The SRK also held some areas around the airport itself, such as Nedarići and the Airport Settlement, Witness DP4, T. 14147; Abdel-Razek, T. 11654-5; Carswell, T. 8359; Witness Y, T. 10872-3.

¹⁴⁴⁷ Witness Y, T. 10869-70.

¹⁴⁴⁸ Cutler, T. 8939.

¹⁴⁴⁹ Witness Y, T. 10870. In many cases, soldiers intercepted while crossing the runway and found to be armed would have their weapons confiscated by UNPROFOR, Witness W, T. 9700.

¹⁴⁵⁰ Witness Y, T. 10870; 10972.

¹⁴⁵¹ Tucker, T. 9931; Briquemont, T. 10052-4; Thomas, T. 9308; Pashchenko, T. 17363. According to witness W, a military in charge of the forces at the airport, crossing became a major problem in November 1992, T. 9696-9700.

¹⁴⁵² D1491 (Order issued by the commander of the 4th Light Artillery Regiment. Before shooting, however, the order apparently required SRK soldiers to file an oral protest to UNPROFOR about the presence of unauthorized people in the airport), Witness DP35, T. 17595-17606. The witness, relying on the assumption that no night-vision device was available to SRK troops around the airport, admitted that the order was to shoot indiscriminately at any type of detected movement.

to patrol the airport at night to stop such crossing:¹⁴⁵³ weapons found were seized and destroyed.¹⁴⁵⁴ However, the patrolling was not very effective; people were still able to cross, and, at the beginning, some people were able to bring weapons into the city due to mistakes by UNPROFOR or tricks devised by the ABiH.¹⁴⁵⁵

414. Regardless of the patrolling by UNPROFOR, General Abdel-Razek, UNPROFOR Commander of Sector Sarajevo from August 1992 to February 1993, stated that “every day we received reports, telling us that a lady was killed with her child while she was trying to cross.”¹⁴⁵⁶ In particular, between November 1992 and March 1993,¹⁴⁵⁷ many civilians were killed or injured each night on the airport’s runway.¹⁴⁵⁸ UN personnel were also victims of fire.¹⁴⁵⁹ On some occasions, at least up to January 1994,¹⁴⁶⁰ the airport was also shelled, both from SRK- and from ABiH-controlled territory.¹⁴⁶¹

415. The Trial Chamber is convinced by the evidence that SRK soldiers shot without knowing whether the movements they saw on the runway were caused by civilians or by soldiers dressed as civilians.¹⁴⁶² UN officials protested to the SRK command against such indiscriminate fire.¹⁴⁶³

416. The Trial Chamber finds that the SRK was well aware that civilians crossed the runway. The Accused stated that he intended to stop such movement “by all means”; that statement implies that he agreed that attacks would be carried out indiscriminately, thus also against civilians. However, the Prosecution has not presented decisive evidence to identify shooting locations around

¹⁴⁵³ Carswell, T. 8360.

¹⁴⁵⁴ Witness W, T. 9715.

¹⁴⁵⁵ Witness W, 9700-6.

¹⁴⁵⁶ Abdel-Razek, T. 11594-6.

¹⁴⁵⁷ Witness W, T. 9699; Witness Y, T. 10869; Abdel-Razek, T. 11596-7 (referring to the end of his period in Sarajevo). This was highlighted by many witnesses as the period with more attempts to flee Sarajevo, especially through the airport, due to the cold and the lack of food that greatly affected the morale of the civilian population in the city, Tucker, T. 9931.

¹⁴⁵⁸ UNPROFOR personnel seized the documents from the bodies and ascertained that both civilians and soldiers tried to cross the airstrip, Witness Y, T. 10870. See also Witness W, T. 9584 (closed session; tape of previous interview). The vast majority of the people trying to cross the airstrip, however, were civilians, Karavelić, T. 11877 (99% were civilians).

¹⁴⁵⁹ Briquemont, T. 10052-4; Tucker, T. 9932; Abdel-Razek, T. 11595.

¹⁴⁶⁰ Thomas, T. 9308-9, referring to P2064, UNPROFOR SitRep [situation report] covering 4 and 5 January 1994.

¹⁴⁶¹ Briquemont, T. 10095-7 and P2082, protest letter from Briquemont to Karadžić (regarding a shelling on 5 January 1993); Witness W, T. 9556-7 (“not much firing of Serb origin on the airport”, while more on the Bosnian areas in the vicinity of the airport); Cutler, T. 8937, 9008, stating that on one occasion in February 1993 it was concluded that rounds probably came from an ABiH mortar position. According to DP35, the tower of the airport was hit by ABiH fire from Igman, DP35, T. 17504.

¹⁴⁶² DP35, T. 17606; Witness Y, T. 10872-5; Abdel-Razek, T. 11594-6; Bukva, T. 18467-73. Also, DP35, in response to a question on how the SRK would have distinguished civilians from soldiers on the runway, stated that he did not know, and that it would have been the responsibility of the local brigade commander to tell his subordinates how to make the distinction, DP35, T. 17602. Nonetheless, there is some evidence that SRK troops surrounding the airport did have at their disposal night-vision devices, Carswell, T. 8362-4. According to Tucker, too, the firing against civilians at night happened through “night-sights”, Tucker, T. 9932. No evidence was however led at trial on their number, quality and availability.

¹⁴⁶³ Abdel-Razek, T. 11596. See also T. 11600-1, 11644.

the airport, to address the issue of visibility of people crossing the runway at night, to show the possible impact of night-vision devices on the ability of the SRK to target specific objects on the runway, or to ascertain the presence or intensity of nearby combat activity.¹⁴⁶⁴ The Trial Chamber is aware that, when there is doubt whether a person is a civilian or a military, that person is not a legitimate military target. Due to the considerations above, however, the Trial Chamber is not able to point to any specific death or injury as representative of the campaign charged in the Indictment. It nevertheless finds the episodes of indiscriminate firing against people crossing the runway relevant to establishing that indiscriminate fire against civilians by SRK forces was an accepted and known fact.

(f) Briješko Brdo Area

417. Witnesses testified that, throughout the armed conflict, the residential area around Briješko brdo Street, presently named Bulbulistan Street and which belongs to the local commune of Marinka Bradovica, Novi Grad municipality,¹⁴⁶⁵ was continuously attacked by shooting and shelling from the SRK side,¹⁴⁶⁶ although it was far from the confrontation lines.¹⁴⁶⁷ Houses in that neighbourhood, situated on a hill named Briješko brdo and controlled by the ABiH during the conflict,¹⁴⁶⁸ were badly damaged by frequent shelling and shooting.¹⁴⁶⁹

418. Rasema Menzilović, a resident of that area, testified that she lived in the basement of her house for a long time in order to protect herself from SRK shooting and shelling attacks.¹⁴⁷⁰ She would get up at night to do chores - such as drawing water, tilling land, repairing the roof damaged by shelling – because she feared being targeted during the day.¹⁴⁷¹ She also explained that the fetching of water was dangerous. Residents of the neighbourhood around Briješko brdo Street, left without running water,¹⁴⁷² fetched water from a well at a spring located about 50 metres from the

¹⁴⁶⁴ Witness W, T. 9594-9595.

¹⁴⁶⁵ Kundo, T. 5969.

¹⁴⁶⁶ Kovać, T. 956-57; Ramiza Kundo, T. 5938; Menzilović, T. 7006, 7009-12, 7023; P3673, Witness Statement of Ramiza Kundo, p. 3.

¹⁴⁶⁷ Ramiza Kundo, T. 5938; Menzilović, T. 6982, 7010.

¹⁴⁶⁸ Kovać, T. 924, 971; Hamill, T. 6182. The area of Briješko brdo was under the control of 2nd Vitez (or Viteska) Brigade of the 1st Corps of the ABiH; Kovać, T. 947. On the other side of the confrontation line, the Briješće Company (also called the 1st Company) of the Rajlovac Brigade of the SRK was positioned around the field area; Kovać, T. 957; Sinisa Krsman, T. 19033, 19047.

¹⁴⁶⁹ Menzilović, T. 6998, T. 7006, T. 7010-11. Ramiza Kundo stated that her house was quite badly damaged by shelling and there were shots coming through the wall at all hours; P3673, Witness Statement of Ramiza Kundo, pp. 2-3.

¹⁴⁷⁰ Menzilović, T. 7006.

¹⁴⁷¹ Menzilović, T. 6982, 6999, 7011-12, 7041.

¹⁴⁷² Ramiza Kundo, T. 5938-39; Menzilović, T. 6981.