JUDGMENTS RENDERED IN 1999 BY THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND FOR RWANDA: TADIĆ (APP. CH.); ALEKSOVSKI (ICTY); JELISIĆ (ICTY); RUZINDANA & KAYISHEMA (ICTR); SERUSHAGO (ICTR); RUTAGANDA (ICTR)

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The year of 1999 witnessed extensive activity in the two United Nations *ad hoc* Tribunals established to prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia and in Rwanda. By the end of 1999, the three Trial Chambers of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY")[1] had handed down six judgments (five after trials on the merits[2] and one sentencing judgment after a guilty plea[3]). Two of these judgments (the Aleksovski Judgement and the Jelisić Judgement) were rendered by an ICTY Trial Chamber in 1999.[4]

The three Trial Chambers of the International Criminal Tribunal for Rwanda (hereinafter "ICTR")[5] have handed down five judgments (three after trials on the merits[6] and two sentencing judgments after guilty pleas).[7] Three

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1. 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, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993).

2. Prosecutor v. Duško Tadić, Opinion and Judgment, IT-94-1-T, May 7, 1997; Prosecutor v. Zejnil Delalić et al., Judgement, IT-96-21-T, Nov. 16, 1998; Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T, Dec. 10, 1998; Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14/1-T, June 25, 1999; Prosecutor v. Goran Jelisić, Judgement, IT-95-10-T, Dec. 14, 1999.

Please note that this article will use either "Judgment" or "Judgement" consistent with the official usage of the particular decision.

3. Prosecutor v. Dražen Erdemović, Sentencing Judgement, IT-96-22-T*bis*, March 5, 1998.

4. An extremely important 1999 achievement of the Yugoslavian Tribunal was the issuance of the Milošević et al. Indictment on May 24, 1999, bringing charges against Slobodan Milošević and four other top Serbian military and political leaders for alleged crimes committed in Kosovo between January and May of 1999. The other Accused are Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, and Vlajko Stojiljković. Charged with personal and superior responsibility under 7(1) and 7(3) of the ICTY Statute (only Šainović is charged exclusively under 7(1)) for violations of Articles 3 (violations of the laws or customs of war, for murder) and 5 (crimes against humanity, for deportation, murder, and persecution) of the Statute, the Accused are alleged to have planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror, violence, destruction, and massacres directed at Kosovo Albanian civilians.

Both Tribunals have several cases at various stages of the pretrial process; in addition to the judgments, hundreds of decisions have been rendered in the form of orders or other decisions on motions before the Trial and Appeals Chambers. Similarly, each Tribunal has added public indictments or joined or amended existing indictments during the year. Due to the limited scope of this article, these other indictments, decisions, or events will not be discussed here.

5. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between January 1, 1994 and December 31, 1994, SC Res. 955, annex, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/59 (1994), *reprinted in* 33 ILM 1602 (1994).

6. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T,Sept. 2, 1998; Prosecutor v. Clement Kayishema & Obed Ruzindana, Judgement, ICTR-95-1-T,May 21, 1999; and Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement, ICTR-96-3-T, Dec. 6, 1999.

7. Prosecutor v. Jean Kambanda, Judgement and Sentence, ICTR-97-23-T, Sept. 4, 1998; Prosecutor v. Omar Serushago, Sentence, ICTR-98-39-S, Feb. 5, 1999.

of these, the Kayishema and Ruzindana Judgement, the Rutaganda Judgement, and the Serushago Sentence, were rendered by an ICTR Trial Chamber in 1999. Also in 1999, the purportedly common Appeals Chamber[8] handed down what is apparently[9] the final judgment in the *Tadić* case.[10] The Appeals Chamber has several cases and motions pending from both Tribunals.

I. THE APPEALS CHAMBER

According to the ICTY and ICTR Statutes, the Appeals Chamber hears decisions appealed by persons convicted by either the ICTY or ICTR Trial Chambers, or from the Prosecutor of an error on a question of law invalidating the decision, or on an error of fact that has occasioned a miscarriage of justice. It is also empowered, under the Rules of Procedure and Evidence, to review a decision at the request of a state directly affected by an interlocutory decision if such decision concerns issues of general importance to the Tribunal. After the Tadić Interlocutory Appeal on Jurisdiction, it could also be said to have established a precedent for hearing other appeals considered of general importance to the Tribunal.[11]

II. 1999 APPEALS CHAMBER JUDGMENTS: TADIĆ JUDGEMENT

On July 15, 1999, the Appeals Chamber rendered its Judgement in the *Tadić* case, the first such decision discharged by the Appeals Chamber. Because the Appeals Chamber is common to both the Yugoslavian and Rwandan Tribunals, this decision has important implications for both Tribunals. The Trial Chamber Judgment in *Tadić* had been handed down in the ICTY by Trial Chamber II on May 7, 1997, finding the Accused guilty on nine counts, guilty in part on two counts, and not guilty on twenty counts. Of these twenty not-guilty verdicts, eleven of the counts were acquitted because a majority of the Trial Chamber held that the grave breach charges brought under Article 2 of the Statute were inapplicable because it had not been proven that the victims were protected persons, an element of the offence.

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8. "Purportedly" because it has to date been made up exclusively of judges elected to the ICTY.

9. "Apparently" because it is unclear whether Tadić can file or has filed an appeal from the Appeals Chamber's Judgement when it found him guilty on nine counts for which he was previously found not guilty by the Trial Chamber. Such a right to appeal from an Appeals Chamber decision is not provided for under the Statute or Rules.

10. Prosecutor v. Duško Tadić, Judgement, IT-94-1-A, July 15, 1999.

11. While not explicitly provided for in the Statute or the Rules (since the appeal was lodged by Tadić prior to his trial and conviction), the Appeals Chamber nevertheless determined it had authority to hear an appeal by Tadić challenging the jurisdiction of the Tribunal. *See* Prosecutor v. Duško Tadić a/k/a "Dule," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, Oct. 2, 1995, App. Ch., at ¶¶ 4-6, (seemingly basing its authority on "common sense," practicality, and the interests of justice).

In its appeal against the Trial Chamber's Judgment, the Defense argued that Tadić's right to a fair trial was prejudiced because he was denied "equality of arms" between the Prosecution and the Defense, due to the prevailing circumstances in which the trial was conducted. It further asserted that the Trial Chamber erred as to finding him guilty of the murders of two Muslim policemen, Osman Didović and Edin Bešic. Leave to file an appeal concerning conduct of his former counsel had been previously denied by the Appeals Chamber, so these were the only two remaining appeals against the Judgment. In the appeal against the Judgment, the Defense sought to have the guilty verdicts set aside and a re-trial ordered. In the alternative, Tadić sought to have the guilty verdicts, as to the two policemen, reversed and correspondingly, that the sentence be reviewed.

Five cross-appeals were filed by the Office of the Prosecutor (hereinafter "OTP"). Of the eleven not-guilty verdicts relating to grave breaches, seven were appealed by the Prosecution, and in addition, two of the not guilty verdicts were appealed in regards to murder charges alleging Tadić's participation in the killings in Jaskići. There were thus a total of nine acquittals appealed by the OTP in the first two cross-appeals. The three remaining cross-appeals concerned questions of general importance to the work of the Tribunal: the OTP challenged the Trial Chamber's determination that a crime against humanity cannot be committed for purely personal reasons; it challenged the Trial Chamber's finding that discriminatory intent is a required element of crimes against humanity under Article 5 of the ICTY Statute; and it argued that a majority of the Trial Chamber erred in a November 1996 decision denying a Prosecution motion for production of defense witness statements, creating an untenable precedent.

A. *Tadić's Appeal Against Judgment*

1. Inequality of Arms

The first ground of appeal by the Defense concerned a complaint that due to circumstances disproportionately impacting the Accused's case (such as the failure of the *Republika Srpska* to cooperate by securing witnesses) Tadić's right to a fair trial was prejudiced because there was an inequality of arms between the Prosecution and the Defense. Equality of arms - the principle 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'"[12] - is guaranteed by the fundamental right to a fair trial, as embodied in human rights instruments and Article 21(4)(b) of the ICTY Statute.

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12. Prosecutor v. Dusko Tadić, Judgement, IT-94-1-A, July 15, 1999.

The Appeals Chamber decided that because of the Tribunal's limited enforcement powers and its reliance on state cooperation, this principle must be given a liberal interpretation in the ICTY. Additionally, noting that the Chambers are empowered to issue any necessary orders, summonses, subpoenas, warrants, and transfer orders to aid an investigation or effectuate a trial,[13] the Appeals Chamber determined that a Chamber therefore, "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."[14] However, the Appeals Chamber noted that the Appellant/Defense was not complaining that the Trial Chamber had not responded adequately to its requests for assistance, and indeed it was uncontested that the Trial Chamber took virtually all measures within its authority to assist the Defense when requested and necessary. The Appellant had remained silent as to certain difficulties encountered in defending its case, and then relied on the equality of arms principle to complain not that the Trial Chamber had failed to assist it when seized of a request to do so, but instead that Tadić did not receive a fair trial because authorities in the *Republika Srpska* had not cooperated in securing the attendance of certain witnesses. As such, the Appeals Chamber denied Tadić's appeal on this ground, holding that the Appellant failed to establish that he was denied equality of arms by the Trial Chamber.

2. *Appeal of Conviction for the Murder of Two Policemen*

The remaining ground of appeal by the Defense concerned a complaint that an error of fact lead to a miscarriage of justice, and consequently, Tadić should not have been convicted of the murder of two policemen. It was uncontested that reasonableness is the standard to be used in determining whether the Trial Chamber's factual finding should stand. In the appeal, Tadić complained that he was convicted of these murders solely on the testimony of one unreliable witness. Noting that the Trial Chamber Judges have the task of hearing, assessing, and weighing the evidence presented at trial and must necessarily be given a margin of deference to findings of fact reached by the Trial Chamber, the Appeals Chamber concluded that the Appellant failed to establish that the witness was suspect or that his testimony was inherently implausible. Finding no merit to the claim that the Trial Chamber acted unreasonably in relying on this testimony in finding that the Appellant killed the two policemen, this basis of appeal was also rejected.

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13. *Id.* at ¶ 52.
14. *Id.*

B. Cross-Appeals by the OTP

Five cross-appeals were filed by the Office of the Prosecutor. The first two concerned acquittals. The three remaining cross-appeals were not alleged to have had a bearing on the verdicts or that an appeal laid under Article 25(1) of the Statute. However, both sides agreed that the issues were matters of general importance affecting the conduct of trials before the Tribunal and therefore were deemed to merit the attention of the Appeals Chamber. Hence, the Appeals Chamber pronounced its opinion in these matters.

1. Grave Breaches and "Protected Persons"

The first ground of cross-appeal by the OTP concerned the Trial Chamber's finding that it had not been proven that the victims were "protected persons" under Article 2 of the Statute (which gives the Tribunal jurisdiction over grave breaches of the 1949 Geneva Conventions). For Article 2 to apply, it must first be established that the nature of the conflict was at all relevant times international in character, and second that the grave breach alleged was perpetrated against persons or property "protected" by one or more of the 1949 Geneva Conventions. The Appeals Chamber noted that an internal armed conflict may in certain situations become international if another state intervenes in the conflict through its troops or if some of the participants in the internal conflict act on behalf of another state.[15] The Appeals Chamber found that international law provides for applying three different tests to determine if individuals or groups may be regarded as *de facto* organs of the state or agency: 1) a test of "overall control" to determine if the acts of armed groups can be attributable to a state; 2) a test of "specific instructions (or subsequent public approval)" to determine if individuals or militarily unorganized groups act on behalf of states; and 3) a test of "assimilation of individuals to State organs on account of their actual behavior within the structure of a State (and regardless of any possible requirement of State instructions."[16] After analyzing the facts, the Appeals Chamber concluded that the armed forces of the *Republika Srpska* were acting under the overall control of and on behalf of the FRY. Thus, "even after May 19, 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."[17]

In determining whether the victims were "protected persons," the Appeals Chamber reasoned that the Fourth Geneva Convention was intended to protect

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15. *Id.* at ¶ 84.
16. *Id.* at ¶ 141.
17. Prosecutor v. Dusko Tadić, Judgement, IT-94-1-A, July 15, 1999.

civilians to the maximum extent possible and to provide protection to civilians who do not have diplomatic protection and who are "not subject to the allegiance and control" of the state in whose hands they may find themselves, and therefore, it is the substance of relations between the parties, not their legal characterization, which is controlling.[18] In essence, under this criteria, it does not matter if the victims (Bosnian Muslims and Croats) and perpetrator (Bosnian Serb) are technically from the same nationality. Determining that the victims in this case were "protected persons" who found themselves in the hands of armed forces of a state of which they were not nationals, the Appeals Chamber concluded that the Trial Chamber erred in acquitting Tadić of the grave breach charges on the ground that the grave breaches regime was not applicable. It thus reversed the not guilty verdicts of the seven grave breach counts appealed.

Perhaps the most surprising articulation in this section is the suggestion in footnote 113 that the four conditions set out in Article 4 of Geneva III for determining the legitimacy of combatants "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."

2. *Insufficient Evidence as to the Killings in Jaskići*

The second ground of cross-appeal by the OTP concerned the Trial Chambers finding that there was insufficient evidence to establish that Tadić had participated in the killings of five men in Jaskići. In this regard, the Prosecution complained that the Trial Chamber misapplied the standard of proof of beyond a reasonable doubt, as the only reasonable conclusion that could be drawn from the facts is that the Accused was guilty as charged. Further, the OTP contended that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misapplied the common purpose doctrine, which essentially holds 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"[19] After reviewing the case law, the Appeals Chamber held that common design as a form of accomplice liability is firmly established in customary international law and is implicit in the Statute. It also determined that case law has demonstrated its applicability to three distinct categories of cases. The *actus reus* of participation in a common design requires: 1) a plurality of persons; 2) the existence of a common plan, design, or purpose to commit a crime justiciable under the Statute; and 3) participation of the Accused in this common design.

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18. *Id.* at ¶ 168.
19. *Id.* at ¶ 175.

The *mens rea* differs depending upon the category of common design under consideration. In the *Tadić* case, the Appeals Chamber concluded, based upon the factual findings of the Trial Chamber, that Tadić had actively participated in a common criminal purpose and that he actively took part in a common criminal purpose to attack Jaskići by rounding up and severely beating some of the men from Jaskići. As a result, the Appeals Chamber held that the only possible conclusion the Trial Chamber could have drawn was that Tadić had the intent to participate in the common criminal purpose to commit inhumane acts, and willingly took the foreseeable risk that members of the group being attacked might be killed during this attack. The Appeals Chamber therefore held that the Trial Chamber erred in finding that it had not been proven beyond a reasonable doubt that Tadić had any part in the killing of the five men from Jaskići. Setting aside[20] the Trial Chamber's not guilty verdict on these charges, the Appeals Chamber found Tadić guilty in the death of these men.

3. Crimes Against Humanity - Purely Personal Motives

The third ground of cross-appeal by the OTP involved the Trial Chambers' finding that crimes against humanity cannot be committed for purely personal reasons. In order to convict an accused of crimes against humanity, the Prosecution must prove the existence of an armed conflict and that there was a sufficient nexus between the armed conflict and the acts alleged. After reviewing Article 5 of the Statute and customary international law, the Appeals Chamber concluded that the motive of the perpetrator does not acquire any relevance for establishing evidence of crimes against humanity. It thus opined that the requirement that an act must not have been carried out for purely personal motives does not form part of the prerequisite elements necessary to prove the commission of the crime.[21]

4. Crimes Against Humanity - Discriminatory Intent

The fourth ground of cross-appeal by the OTP concerned the Trial Chamber's finding that all crimes against humanity require a discriminatory intent. In interpreting the text of Article 5 of the Statute and surveying customary international law, the Appeals Chamber determined that discriminatory intent is not a required element of crimes against humanity. In reviewing the Report of the Secretary-General and statements made by some members of the Security Council concerning Article 5 of the Statute, these

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20. The Trial Chamber uses the terms "set aside" and "reverse" the verdict/judgment interchangeably.

21. Prosecutor v. Duško Tadić, Judgement, IT-94-1-A, July 15, 1999.

"interpretive sources" were deemed to be insufficient to establish that all crimes against humanity need be committed with a discriminatory intent.[22] Thus, the Appeals Chamber held that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent.

It is unclear exactly how this part of the decision will affect the Rwanda Tribunal, as the ICTR Statute's crimes against humanity provision differs in significant terms from the crimes against humanity provision enumerated in the ICTY Statute. Indeed, under the terms of Article 3 of the ICTR Statute, the ICTR has the power to prosecute certain crimes, including murder, inhumane acts, and "persecutions on political, racial and religious grounds," when these crimes are committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." Yet, this language may be interpreted narrowly as a result of paragraph 284 of the Tadić Judgement of the Appeals Chamber, which states that because the Yugoslavia Statute has a persecution subsection for crimes carried out "on political, racial and religious grounds," to interpret the Statute and the law as requiring that all crimes against humanity require discriminatory intent would render the persecution subsection "illogical and superfluous" as the presumption is that law-makers enact rules that are meaningful in all their elements. Applying this analysis to Article 3 of the ICTR Statute would make the chapeau of the Article in conflict with the remainder of the Article, which too includes a persecution subsection. The Appeals Chamber notes that supplemental means of interpretation can be resorted to when the text of an instrument is unclear.[23] Consequently, if the text of Article 3 of the ICTR Statute is challenged and determined to be ambiguous due to its duplicative persecutorial requirement which may render one or the other superfluous, then turning to customary international law for guidance, and drawing on the *Tadić* Judgement in this regard, it could conceivably be determined that Article 3 of the ICTR Statute could be interpreted as not imposing a discriminatory intent for all crimes against humanity.[24]

5. Disclosure of Defense Witness Statements

The fifth ground of cross-appeal by the OTP resulted from an earlier denial of the Prosecution's motion for disclosure of a prior statement of a defense witness after he had testified. The Prosecution maintained that this decision remained persuasive authority for the proposition that the Defense cannot be

22. *Id.* at ¶ 293.

23. *Id.* at ¶ 303.

24. *Id.* at ¶ 292 (stating that customary international law "does not presuppose a discriminatory or persecutory intent for all crimes against humanity.")

ordered to disclose prior witness statements. Accordingly, the issue concerned the power of a Trial Chamber to carry out its judicial functions while conducting a fair and impartial trial, including the Trial Chamber's duty to ascertain the credibility of witnesses. The Appeals Chamber opined that the lawyer-client privilege does not cover Defense witness statements, and held that, depending on circumstances of each case, a Trial Chamber may order the disclosure of Defense witness statements after examination-in-chief of the witness.

C. Summary

In the *Tadić* Judgement, the Appeals Chamber denied the two remaining grounds of appeal sought by the Appellant/Defense. It allowed the OTP's cross-appeals, and reversed the Trial Chamber's verdict as to the grave breach charges appealed, and also reversed the Trial Chamber's determination that the Accused had played no part in the killing of five men from the village of Jaskići. The Appeals Chamber further determined that a crime against humanity can be carried out for purely personal motives and that discriminatory intent is not required for all crimes against humanity, only for the persecution crimes covered by Article 5(h) of the Statute. Finally, it held that depending on the facts of each case, a Trial Chamber may order the disclosure of Defense witness statements after examination-in-chief of the witness.

Because the Appeals Chamber denied Tadić's appeal on all counts, and allowed and reversed as to each of the Prosecution's cross-appeals, it resulted in Tadić being found guilty on nine additional charges. This of course means that the Appeals Chamber found the accused, Tadić, guilty on nine counts for which the Trial Chamber had previously found him not guilty. The consequences of such a determination are currently unknown, as the new convictions have apparently not been challenged by appeal. In the ICTY Statute, Article 24 only provides for an appeal "from persons convicted by the Trial Chambers" - it does not explicitly provide for an appeal for a person convicted by the Appeals Chamber. Thus, it is unclear whether there is an absolute denial of any right of appeal from an Appeals Chamber. Yet, because Tadić was found guilty of nine counts for the first time, it could be argued that he has a right to appeal these convictions, despite the fact that they were imposed by the Appeals Chamber.[25] If such a right is asserted and found, the appeal would clearly need to be heard by a differently constituted Appeals Chamber. As noted by the Appeals Chamber in the Tadić Interlocutory Appeal

25. Prosecutor v. Duško Tadić, Judgement, IT-94-1-A, July 15, 1999.

on Jurisdiction, narrowly interpreting the jurisdiction of the Appeals Chamber "falls foul of a modern vision of the administration of justice."[26]

In addition to the aforementioned appeals, the Defense also filed an appeal against the Sentencing Judgement imposed by the Trial Chamber. However, because Tadić was convicted on nine additional counts by the Appeals Chamber, this portion of the appeal was deferred until the Appeals Chamber sentences Tadić on the new convictions.

III. 1999 ICTY TRIAL CHAMBER JUDGMENTS

A. Aleksovski Judgement

The Indictment against Zlatko Aleksovski was issued on November 2, 1995, confirmed on November 10, 1995, and he was arrested on June 8, 1996 by the Croatian police acting pursuant to an arrest warrant issued by the Tribunal. He spent ten months and twenty days in detention in the Republic of Croatia before being transferred to the ICTY Detention Center in The Hague on April 28, 1997. The trial began on January 6, 1998 and ended on March 23, 1999. The judgment was pronounced orally on May 7, 1999, and the written decision rendered on June 25, 1999. The oral judgment was announced before the written judgment was completed because Aleksovski's detention time exceeded the sentence imposed by the Trial Chamber. Aleksovski was sentenced to a mere two and one half years' imprisonment for the one count on which he was found guilty and as his total detention time amounted to two years, ten months, and twenty-nine days, he was ordered immediately released, notwithstanding any appeal.

The Aleksovski trial was heard by Trial Chamber I. The Indictment charged Aleksovski, commander/warden of Kaonik prison, with three counts: Article 2 of the Statute, grave breaches (inhuman treatment; and wilfully causing great suffering or serious injury to body or health); and Article 3 of the Statute, violations of the laws or customs of war (outrages upon personal dignity.) The Indictment alleged that during a six month period in 1993, hundreds of Bosnian Muslim civilians were detained under Aleksovski's custody in Kaonik prison. Additionally, during this time the detainees "under his control" were subjected to deplorable conditions in the prison and to various forms of physical and psychological mistreatment within and outside the prison, including physical and psychological abuse leading to death. Aleksovski was charged under 7(1) and 7(3) of the Statute for individual criminal responsibility for his implicit and explicit participation in the offences alleged and for his

26. Prosecutor v. Duško Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, Oct. 2, 1995, App. Ch. at ¶ 6.

responsibility as a superior for the acts committed by military or civilian persons under his authority and control.

In its Judgement, the Trial Chamber noted that Articles 2 and 3 of the Statute apply only when the offences alleged are committed in the context of an armed conflict and with a sufficient nexus between the offence and the armed conflict. The nexus requirement was interpreted to mean that the act was perpetrated against the victim "because" of the conflict.[27] The Trial Chamber noted that it was not disputed that an armed conflict existed. However, because under traditional interpretations of Article 2 (the grave breach provisions) the armed conflict must be international in character, the Trial Chamber was unable to agree on the applicability of Article 2 as to the facts established at trial. The majority concluded that the victims were not "protected persons", a status which is required to incur criminal liability for violating the grave breach provisions of the Geneva Conventions. As such, Aleksovski was found not guilty on the two grave breach counts, without the Trial Chamber examining whether the offences alleged amounted to grave breaches of the Geneva Conventions. This acquittal could be in jeopardy as a result of the Appeals Chamber holding in the *Tadić* Judgement, discussed above.

The remaining count, alleging violations of Article 3 of the Statute, charged as a serious violation of Common Article 3 of the Geneva Conventions under the proscription of committing outrages upon personal dignity, was then considered by the Trial Chamber after it reached general conclusions as to the Accused's behavior, position, authority over, and responsibility for conditions and mistreatment within and outside Kaonik prison.

As to incurring 7(1) liability, an Accused can be held responsible not only for crimes they perpetrate physically, but also for "crimes committed by others which [the Accused] is said to have personally ordered, instigated or otherwise aided and abetted."[28] Participation may occur before, during, or after the act is committed and need not be manifested through physical assistance, as moral support, encouragement, and sometimes mere presence is sufficient to incur liability if it has a significant effect on the commission of the crime.[29] As to incurring 7(3) liability, the Trial Chamber acknowledged that an Accused can be held criminally responsible for failing to take steps to halt, prevent, or punish crimes committed by subordinates, when there is a means and a legal duty to do so. "Superior responsibility", used to capture both doctrines of command responsibility (usually attributed to military authorities) and superior authority (usually attributed to political/civilian leaders), may be ascribed to an Accused

27. Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14/1-T, June 25, 1999.
28. *Id.* at ¶ 59.
29. *Id.* at ¶¶ 62-64.

if (i) there exists a *de facto* or *de jure* superior-subordinate relationship between the Accused and the perpetrator; (ii) the superior knew or had reason to know a crime had been committed or was about to be committed; and (iii) the superior failed to take all the necessary and reasonable measures under the circumstances existing at the time to prevent or halt the crime or to punish the perpetrator.

Under facts established at trial, the Trial Chamber found Aleksovski responsible under both 7(1) and 7(3) theories of responsibility for his participation, through acts or behavior, for crimes committed within the Kaonik prison compound. It also held that he aided and abetted in the use of detainees as human shields or trenchdiggers, incurring 7(1) responsibility. In regards to 7(3) liability, the Trial Chamber found a superior-subordinate relationship over prison guards sufficiently established, but not such relationship over HVO soldiers. It held that the Accused could not be held responsible for crimes committed outside the Kaonik prison compound. It remains unclear whether Aleksovski was, as warden/commander of Kaonik prison, a civilian or military leader.

The Trial Chamber then turned to Aleksovski's responsibility under 7(1) for crimes committed within Kaonik prison, either physically by the Accused, or by ordering, instigating or otherwise aiding and abetting in the crimes, and under 7(3) for crimes committed by persons under his control and authority. For 7(1) responsibility, the Trial Chamber considered it proven beyond a reasonable doubt that Aleksovski was responsible for the detention conditions in Kaonik prison, and that it was his duty to see to the hygiene, health, and welfare of the detainees. However, the Trial Chamber held that while the conditions were extremely poor and clearly did not meet international human rights standards, it had not been adequately proven that the Accused failed to take measures incumbent upon and available to him or that he deliberately ordered or allowed the conditions to arise.[30]

As to the physical and psychological abuse, the Trial Chamber found it sufficiently proved that in some instances the Accused aided and abetted in mistreatment by means of verbal or expressive encouragement or by silence when it was his duty to oppose or repress the acts; at times he physically participated in physical violence; other times he ordered the beating and other mistreatment of detainees.[31] Consequently, the Trial Chamber found that the violence inflicted within the Kaonik prison, both individually and by persons under his authority, constituted an outrage upon personal dignity, in particular humiliating and degrading treatment within the meaning of Common Article 3,

30. *Id.* at ¶ 221.

31. *Id.* at ¶¶ 86-89.

as justiciable under Article 3 of the Statute for individual criminal responsibility under Articles 7(1) and 7(3) of the Statute. Further, the use of detainees as human shields or trench-diggers was also held to constitute an outrage upon personal dignity. Aleksovski was held responsible under 7(1) for aiding and abetting in these crimes.

Perhaps the most surprising part of the Aleksovski Judgement is the stunningly low sentence imposed for the conviction. Aleksovski was found guilty of one count for violations of the laws or customs of war under two theories of responsibility, which established the culpability of the Accused for the physical and emotional violence inflicted on detainees in Kaonik prison. As noted above, in pronouncing its sentence, the Trial Chamber imposed two and a half years' of imprisonment, which exceeded the amount of time Aleksovski had already been in detention, so he was immediately released. While brought under one count, and convicted of only one count, the outrages upon personal dignity charge consisted not of a single crime, but a course of conduct comprising a series of heinous crimes committed by Aleksovski and by persons under his authority against a large number of individuals.

Judge Rodrigues attached a dissenting opinion as to the applicability of the grave breach provisions, determining that the international character of the conflict was indeed established, even though it was his opinion that such characterization of the conflict is not a condition prerequisite before Article 2 of the Statute can be applied. The majority, Judges Vohrah and Nieto-Navia, also attached a joint opinion on the applicability of Article 2 of the Statute, explaining its finding that the victims were not "protected persons" within the meaning of Article 4 of the Fourth Geneva Convention, which enunciates the persons and property protected by the grave breach regime. The majority concluded that to be a protected person, the civilian victim must hold a nationality different from that of the captors/perpetrators.[32] The majority found that the detainees (Bosnian Muslims) held the same nationality as their captors (Bosnian Croats, who may or may not have held a dual nationality as Croatian).[33] However, as discussed above, a contrary determination was made by the Appeals Chamber in the *Tadić* Judgement. Also note that although not considering the merits of the grave breach charges because the prerequisite elements were deemed not to have been satisfied, the Trial Chamber considered that the violence inflicted on the Muslim detainees of Kaonik prison constituted "a *grave* violation of the principles of international humanitarian law arising

32. Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14/1-T, June 25, 1999.

33. *Id.* at ¶¶ 32-34.

from the Geneva Conventions", language which indicates it might constitute a grave breach if an international armed conflict were found.[34]

B. The Jelisić Judgement

On October 19, 1999, Trial Chamber I rendered its Judgement against Goran Jelisić. This case represents the first genocide trial to be held in the ICTY. Jelisić, who called himself the "Serb Adolf," was charged in the Indictment with one count of genocide, twelve counts of violations of the laws or customs of war for murder, three counts of violations of the laws or customs of war for cruel treatment, one count of violations of the laws or customs of war for plunder, twelve counts of crimes against humanity for murder, and three counts of crimes against humanity for inhumane acts. The Indictment alleged Jelisić's participation in crimes committed against Muslims and Croats at the Luka camp in northern Bosnia, where he "held a position." He was charged exclusively under 7(1). In October 1998, Jelisić pleaded not guilty to the genocide charge, but guilty to the thirty-one remaining charges of crimes against humanity and war crimes. Trial on the one count of genocide, which alleged that the Accused committed or aided and abetted in killing members of the group, ended in acquittal in a Judgement announced on October 19, 1999. According to the press release, the Trial Chamber found that the OTP failed to prove beyond a reasonable doubt that Jelisić acted with the requisite intent to destroy, in whole or in part, the Bosnian Muslim population as a national, ethnic or religious group, or that he had "the clear knowledge that he was participating in genocide, that is to say the destruction, at least in part, of a given group." Nonetheless, the acquittal appears to based primarily on a finding that the OTP had failed to establish that genocide had been committed in the region, and it therefore had difficulty finding the Accused guilty of genocide. The Trial Chamber also appeared to take into account the fairly low status of Jelisić, and the language of the Judgement indicates there was some hesitation to find a low level actor guilty of genocide, particularly when it was not firmly established that genocide had been committed in the region.

As to the guilty plea on the thirty-one counts of war crimes and crimes against humanity, pursuant to Article 62 *bis* of the ICTY Rules of Procedure and Evidence, the Trial Chamber must be satisfied that the guilty plea is voluntary, informed, unequivocal, and that "there is a sufficient factual basis for the crime and the accused's participation in it." The Trial Chamber determined that the evidence established there was no doubt that Jelisić committed the crimes he admitted, and it agreed with the Prosecutor's legal qualification of the

34. *Id.* at ¶ 228.

crimes as constituting crimes against humanity and violations of the laws or customs of war. He was sentenced to 40 years' imprisonment.

IV. 1999 ICTR TRIAL CHAMBER JUDGMENTS

A. Serushago Sentence

On September 24, 1998, the Indictment against Omar Serushago, alleging six counts of violations of Articles 2 and 3 of the ICTR Statute, was filed by the OTP, but only five of these counts were confirmed by Judge Ostrovsky, who dismissed one count of the Indictment. The remaining counts alleged one count of genocide, and four counts of crimes against humanity for murder, extermination, torture, and rape.

On December 14, 1998, Serushago pleaded guilty to four of the five counts of the modified Indictment; he pleaded not guilty to the rape count. Subsequently, the rape charge was withdrawn by the OTP.[35] In reviewing the charges and the acknowledgement of the Accused of his culpability for the crimes, and after considering the case on its merits and general principles regarding the determination of sentences, Trial Chamber I rendered its Judgement on February 5, 1999.

Considering the gravity of the offences, including Serushago's guilt for genocide, regarded as the "crime of crimes," and the fact that the Accused personally murdered four Tutsi and that thirty-three other people were killed by militia under his authority, the Trial Chamber noted that he committed these crimes knowingly and with premeditation. In considering mitigating factors, the Trial Chamber noted the youth, family, and social background of the Accused, and particularly stressed that Serushago cooperated with the Office of the Prosecutor, he voluntarily surrendered, he entered a guilty plea, and had expressed remorse and contrition. It concluded that exceptional mitigating circumstances afforded him some clemency. As such, Serushago was sentenced to a single term of fifteen years' imprisonment.

B. Kayishema & Ruzindana Judgement

On May 21, 1999, after the joint trial of Clement Kayishema and Obed Ruzindana, Trial Chamber II of the ICTR rendered the Rwanda Tribunal's second judgment after a trial on the merits. The trial against Kayishema, the *Prefect* of Kibuye *Prefecture,* and Ruzindana, a commercial businessman in Kigali, began on April 11, 1997 and adjourned on November 17, 1998. The

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35. See short discussion in Kelly D. Askin, *The International Criminal Tribunal for Rwanda: Its Treatment of Crimes Against Women, in* INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES & PROSPECTS (John Carey & John Pritchard eds., vol. II, 2000).

Accused, both Hutu, were charged under Articles 2-4 of the Statute with genocide, crimes against humanity, and violations of Common Article 3 and Additional Protocol II. These charges were also brought pursuant to Articles 6(1) and 6(3) of the ICTR Statute, which grants the Tribunal jurisdiction to prosecute persons responsible for individual and superior criminal responsibility.

Kayishema alone was charged under counts one through six with genocide (genocide, without specificity as regards to acts of Art.2(2)(a)-(e) of the Statute), crimes against humanity (murder, extermination, and other inhumane acts), and violations of Common Article 3 and Additional Protocol II (violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment) for a massacre at a Catholic Church and Home in St. Jean. He was charged identically under counts seven through twelve for a massacre at a Stadium in Kibuye Town. Kayishema was again charged with these same crimes and acts under counts thirteen through eighteen for a massacre at a Church in Mubuga. Counts nineteen through twenty-four charge both Kayishema and Ruzindana with these identical crimes and acts, for alleged massacres committed in the area of Bisesero.

1. Genocide

The Trial Chamber noted that before an Accused can be held responsible for genocide, it must be proven that the Accused had the intent to destroy, in whole or in part, a racial, ethnic, religious, or national group by committing one of the specified prohibited acts. The Trial Chamber focused primarily upon the prohibited acts of killing and/or causing serious bodily harm to members of a group, and determined that both Kayishema and Ruzindana, did intend to destroy the Tutsi group by means of killing or seriously injuring them. As to the massacres at the Complex and Stadium, Kayishema was held to have instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, and execution of genocide by killing and causing serious bodily harm to Tutsis; as to the massacre at the Church, Kayishema was held to have intended to have aided and abetted the preparation and execution of the massacres. Both Kayishema and Ruzindana were held to have instigated, ordered, committed, *and* otherwise aided and abetted in the preparation and execution of the massacre of Tutsis in the Bisesero area.

2. *Crimes Against Humanity*

Enunciating the elements of murder, the Trial Chamber held that an Accused can be held accountable if, when engaging in unlawful conduct, s/he (i) causes the death of another; (ii) by a premeditated act or omission; (iii) intending to kill any person or intending to cause grievous bodily harm to any person.[36] Articulating the elements of extermination, the Trial Chamber held that an Accused can be held accountable for participating in the mass killing of others or in creating conditions of life that lead to the mass killing of others through acts or omissions, for having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and, for being aware that their acts or omissions form part of a mass killing event, if the acts or omissions form part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds.[37] Elements of other inhumane acts as a crime against humanity were stipulated as follows: the Accused must (i) commit an act of similar gravity and seriousness to the other acts enumerated in the Statute; (ii) with the intention to cause the other inhumane act (whether against a victim or witness); and (iii) with knowledge that the act is perpetrated within the overall context of the attack.[38]

3. *Violations of Common Article 3 and Additional Protocol II*

In order for an act to breach Common Article 3 and Protocol II, the Trial Chamber stated that the following elements must be established: (i) that the armed conflict in Rwanda during this period was of a non-international character; (ii) there is a link between the Accused and the armed forces; (iii) the crimes must be committed *ratione loci* and *ratione personae*; and (iv) there must be a nexus between the crime and the armed conflict.[39] This Trial Chamber thus concurs with the Akayesu Trial Chamber's restrictive interpretation that serious violations of Common Article 3 are only justiciable when committed by persons acting in furtherance of the war effort.[40]

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36. Prosecutor v. Clement Kayishema & Obed Ruzindana, Judgement, ICTR-95-1-T, ¶ 140, May 21, 1999.

37. *Id.* at ¶ 144.

38. *Id.* at ¶ 154.

39. *Id.* at ¶ 169.

40. *Id.* at ¶ 175. It is also interesting that the Trial Chamber imposed a requirement of proof that the conflict is internal, as the common Appeals Chamber held in the Tadić Interlocutory Appeal on Jurisdiction Decision that Common Article 3 and most parts of Additional Protocol II are part of customary international law, applicable to internal and international armed conflicts. *See*. Prosecutor v. Duško Tadić a/k/a "Dule," Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 Oct. 1995, App. Ch., at ¶ 98.

4. Legal Findings

As to the first three massacre sites, of which solely Kayishema is charged, the evidence established that thousands of Tutsis seeking refuge from various communes fled to each of these sites, historically regarded as safe havens, to escape atrocities perpetrated by the Hutus throughout Kibuye *Prefecture.* At each of these sites, gendarmes under Kayishema's authority and control guarded the entrances and prevented Tutsis from leaving. Conditions inside the sites became desperate, as food, water, and other supplies were neither provided nor allowed. During a five day period, the tens of thousands of Tutsi imprisoned at these sites were systematically slaughtered; only a handful survived. It was not disputed that the massacres occurred. The issue was whether Kayishema incurred criminal liability by means of his presence, acts, omissions, words, or authority. The Trial Chamber deemed it proved beyond a reasonable doubt that Kayishema was present at each of the massacres, and participated in the attacks by such means as encouraging, ordering, instigating, inciting, or otherwise aiding and abetting in the attacks.

As to the charges against Kayishema and Ruzindana for massacres in the area of Bisesero, the evidence established a series of massive, organized attacks by Hutu against Tutsi during which thousands of Tutsi civilians were systematically slaughtered. The Trial Chamber was satisfied that Ruzindana and Kayishema, acting on some occasions in concert and on other occasions separately, personally attacked Tutsis seeking refuge in Bisesero, and by their words or acts, further aided in the "mass murder" of these victims. Indeed, the Trial Chamber held that both Accused orchestrated and directed many of the massacres in Bisesero.

In reaching its verdict, the Trial Chamber found both Accused guilty of each genocide count charged against them. However, they were found not guilty as to each crimes against humanity, Common Article 3, and Additional Protocol II charge. A majority of the Trial Chamber held that as to counts charging the Accused with crimes against humanity by means of extermination and murder, these crimes were, under the facts of this case, "fully subsumed" by the genocide crimes. It is important to emphasize that the judgment did not hold that crimes against humanity are always subsumed within genocide. It was the particular facts of this case - the same acts (murder, extermination) committed against the same victims - that caused a majority of the Trial Chamber to reach this conclusion. Judge Kahn however dissented on this point, pointing out that in the practice of the Tribunals this issue is dealt with in the sentencing phase (by imposing concurrent sentences when found guilty of the same act under different Articles of the Statute), not in the guilt phase.

The Trial Chamber unanimously held that the Accused were not guilty of committing inhumane acts as a crime against humanity. While the Trial

Chamber noted that the Accused did indeed commit inhumane acts as a crime against humanity, it rejected the use of "inhumane acts" as a "catch all" category of crimes, and determined that because the OTP, while generally alleging and referring to widespread violence, mutilation, and abuse, did not specifically identify precisely which inhumane acts were being prosecuted and did not adequately particularize which pieces of evidence supported these charges, it found the Accused not guilty on these counts.[41] The not guilty verdicts as to the Common Article 3 and Additional Protocol II counts were made based on determinations that the Prosecution did not prove that the Accused, both civilians, were supporting the Government efforts against the RPF (the standard seemingly erroneously adopted in *Akayesu*), and that therefore the Accused did not incur criminal liability for their crimes under Article 4 of the Statute.[42]

In conclusion, four guilty verdicts were rendered against Kayishema on the genocide counts, although he was then held to be not guilty on four crimes against humanity counts, four violations of Common Article 3 counts, and four violation of Protocol II counts. One guilty verdict was rendered against Ruzindana on the genocide count, and he was similarly acquitted on one count each alleging crimes against humanity, violations of Common Article 3, and violations of Additional Protocol II. Kayishema was sentenced to life imprisonment, and Ruzindana was sentenced to twenty-five years' imprisonment.

C. Rutaganda Judgement[43]

On December 6, 1999, Trial Chamber I rendered its Judgement against Georges Rutaganda, a prominent businessman and second vice-president of the *Interahamwe* on the national level, for crimes committed during April 1994 at the outbreak of the genocide. Rutaganda was deemed to have ordered, incited, and carried out murders and to have caused serious bodily or mental harm to members of the Tutsi ethnic group, by such means as distributing firearms and other weapons to *Interahamwe* members and by taking part in attacks in Kicukiro and Nyanza, during which hundreds of Tutsis were massacred.

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41. Prosecutor v. Clement Kayishema & Obed Ruzindana, Judgement, ICTR-95-1-T, May 21, 1999.

42. *Id.* at ¶ 618, 624.

43. Please note that because this judgment was rendered after this article was written, it is not given extensive treatment here.

Rutaganda was convicted of one count of genocide[44] and two counts of crimes against humanity for extermination and murder. The Indictment had charged Rutaganda with one count of genocide, four counts of crimes against humanity (one count for extermination, three counts for murder), and three counts of violations of Common Article 3 of the Geneva Conventions (all brought as murder charges). Thus, while convicted on three counts, he was found not guilty on five counts, with the two counts of crimes against humanity considered subsumed within the genocide conviction, and the three Article 4 charges (for violations of Common Article 3) deemed to have been insufficiently proven.

The reasoning for the not-guilty verdicts for two of the crime against humanity charges for murder are explained as being a lesser included offence of extermination as a crime against humanity, and therefore an Accused cannot be held criminally responsible for both extermination and murder on the basis of the same act.[45] However, he was also convicted on one count of murder as a crime against humanity for the slaying of a specifically named individual whom Rutaganda killed with a machete. In regards to the acquittals for all Common Article 3 charges, even though the Trial Chamber found the existence of an internal armed conflict and a nexus between the armed conflict and the crimes committed by the *Interahamwe* militia, it nevertheless unconvincingly determined that it had not been adequately established that a nexus existed between the criminal culpability of the Accused and the armed conflict.[46]

Rutaganda was sentenced concurrently to life imprisonment for the genocide conviction, life imprisonment for the crime against humanity (extermination) conviction, and fifteen years' imprisonment for the crime against humanity (murder) conviction.

As of December 31, 1999, not a single person has been convicted in the ICTR of war crimes (the charges brought under Common Article 3 and Additional Protocol II for crimes committed in internal armed conflicts).

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44. In this judgment, it is also interesting to note that crimes of sexual violence appear to be subsumed within the genocide verdict, even though sexual violence was not specifically charged in the indictment. For instance, in the section on Legal Findings for genocide, the Trial Chamber held: "Some young girls were singled out, taken aside and raped before being killed. Many of the women who were killed were stripped of their clothing. The soldiers then ordered the *Interahamwe* to check for survivors and to finish them off. The Accused directed the *Interahamwe* . . .The Chamber finds that is has been established beyond any reasonable doubt that the Accused was present and participated in the Nyanza attack. Furthermore, it holds that by his presence, the Accused abetted in the perpetration of the crimes." Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement, ICTR-96-3-T, ¶ 417, Dec. 6, 1999.

45. Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement, ICTR-96-3-T, §§5.3-5.4, Dec. 6, 1999.

46. See *id.* at §5.6.