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International pour
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JUDGEMENT SUMMARY

(Exclusively for the use of the media. Not an official document)

APPEALS CHAMBER

The Hague, 22 March 2005

SUMMARY OF APPEALS JUDGEMENT FOR MILOMIR STAKIĆ

Please find below the summary of the Appeals judgement today read out by Judge Pocar:

As the Registrar announced, the case on our agenda is Prosecutor versus Milomir Stakić. In accordance with the scheduling order issued on 16 March 2006, today the Appeals Chamber will deliver its Judgement. As stated in that order, this hearing for the delivery of the Judgement is taking place pursuant to Rule 15bis (A) of the Tribunal's Rules of Procedure and Evidence, in the absence of one of the Judges of the Appeals Chamber, Judge Andréia Vaz, who is unavailable for reasons of authorised Tribunal business.

Following the practice of the International Tribunal, I will not read out the text of the Judgement except for the Disposition. Instead, I will summarise the issues on this appeal and the findings of the Appeals Chamber. I emphasise that this summary is not part of the written Judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written Judgement will be made available to the parties at the conclusion of this hearing.

Background

This case concerns the Appellant's role in the events that occurred in the Municipality of Prijedor, located in Bosnia and Herzegovina, from 30 April 1992 until 30 September 1992. These events, which are set out in detail in the Trial Judgement, followed the 30 April 1992 Serbian takeover of Prijedor and include the atrocities related to the Omarska, Keraterm and Trnopolje camps.

The trial began on 16 April 2002 and the Judgment was rendered on 31 July 2003. The Trial Chamber found the Appellant not guilty of the crime of genocide (Count 1), complicity in genocide (Count 2) and other inhumane acts (forcible transfer) as a crime against humanity (Count 8). The Trial Chamber found the Appellant guilty of extermination as a crime against humanity (Count 4); murder as a violation of the laws and customs of war (Count 5); and persecutions as a crime against humanity (Count 6), incorporating the crimes of murder as a crime against humanity (Count 3) and deportation as a crime against humanity (Count 7). The Trial Chamber imposed on Milomir Stakić the sentence of life imprisonment qualified, however, by mandatory review after 20 years. Both the Appellant and the Prosecution appealed against this Judgment on 1 September 2003. The hearing on appeal took place on 4, 5 and 6 October, 2005.

The Grounds of Appeal

I will now briefly address the grounds of appeal in turn, starting with 3 of the Prosecution's grounds of appeal followed by 5 of the 7 of the Appellant's grounds of appeal. The Prosecution's appeal on cumulative convictions will be considered together with the Appellant's appeal on cumulative convictions. Lastly, I will consider the Appellant's ground of appeal on sentencing.

Prosecution Grounds of Appeal

Now, turning to the Prosecution's respective grounds of appeal.

Adopting the order followed in the judgement, I will start with the Prosecution's third ground of appeal. The Prosecution argues that the Trial Chamber erred in law when, in the process of determining whether the Appellant committed genocide, it declined to define the target group as all the non-Serbs in

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Prijedor Municipality and instead required the Prosecution to establish genocide with respect to both Bosnian Croats and Bosnian Muslims. The Prosecution further argues in the alternative that the Trial Chamber erred in fact when it found that there was insufficient evidence to show that the Bosnian Croat group was separately targeted by acts potentially amounting to the *actus reus* for genocide.

The Appeals Chamber, Judge Shahabuddeen dissenting, finds that the Trial Chamber did not err in concluding that the elements of genocide must be separately considered in relation to Bosnian Muslims and Bosnian Croats. Support for the view that a group targeted for genocide must be positively defined is found in the etymology of the term 'genocide', the drafting history of the Genocide Convention, subsequent discussion by experts and Article 4 of the Statute. The arguments suggested by the Prosecution to the effect that a group can be subjectively defined are immaterial in reaching this conclusion. This sub-ground of appeal is thus dismissed.

The Appeals Chamber also rejects the Prosecution's alternative argument that the Trial Chamber erred in fact when it found that there was insufficient evidence to show that the Bosnian Croats were a targeted group. It is true that the Trial Chamber identified a number of individual violent acts the victims of which were members of the Bosnian Croat group. However, the fact that some Bosnian Croats, some Bosnian Croat properties, and some sites of importance to Bosnian Croats were victimised does not necessarily compel the conclusion that the Bosnian Croat group as such was targeted by acts that could constitute the *actus reus* for genocide. In light of the totality of the evidence concerning crimes against Bosnian Croats, it was not unreasonable for the Trial Chamber to have found that it could not "conclude that the Bosnian Croat group was separately targeted." This ground of appeal is therefore dismissed.

Next, turning to the Prosecution's first and second grounds of its appeal, the Prosecution raises six challenges to the Trial Chamber's conclusion that the Appellant lacked the requisite *dolus specialis* for genocide. The Appeals Chamber will address each of these challenges in turn.

First, the Prosecution contends that the Trial Chamber erred in considering the *mens rea* of others - namely, the direct perpetrators of the crimes in Prijedor - rather than focusing on the Appellant's mental state alone. The Appeals Chamber finds that it is clear that the Trial Chamber did not suggest that genocidal intent on the part of others was a prerequisite to convicting the Appellant for genocide. Rather, it simply considered whether the apparent intentions of others could provide indirect evidence of the Appellant's own intentions when he agreed with those others to undertake criminal plans. The Trial Chamber also considered the direct evidence of the Appellant's mental state, including his statements, and found it insufficient to establish genocidal intent. The Appeals Chamber sees no error in this approach.

Second, the Prosecution argues that the Trial Chamber improperly required it to prove an intent to kill *all* Bosnian Muslims in the region. The Appeals Chamber is not persuaded by this argument. In the very paragraph cited by the Prosecution to support its argument, the Trial Chamber specifically found that the Prosecution had not proven that the Appellant sought to "destroy[] *in part* the Muslim group." The Trial Chamber's reference to structures being in place to kill all Muslims, merely constitutes evidence that the Appellant did not seek to destroy the Bosnian Muslim group in whole *or in part*. The Appeals Chamber considers that the Trial Chamber did not err, under the circumstances in this case, in concluding that the Appellant lacked *dolus specialis* for genocide.

Third, the Prosecution argues that the Trial Chamber confused motive with intent, erroneously concluding that because the Appellant's ultimate motive was simply to remove the Bosnian Muslims from Prijedor, he did not intend to destroy the group as a means to that end. The Appeals Chamber finds, however, that the Trial Chamber expressly distinguished between the "goal" of the operation - that is, motive - and the methods that the Appellant intended to employ in order to bring that goal about. With respect to the latter, the Trial Chamber found "insufficient evidence of an intention to achieve the goal by destroying in part the Muslim group." The Trial Chamber specifically considered whether the Appellant intended to achieve his goal through particular actions, including killing and the imposition of inhumane conditions of life, which amounted to genocide. The Appeals Chamber finds no error in this approach.

Fourth, the Prosecution argues that the Trial Chamber erroneously failed to consider the Appellant's intent to inflict conditions of life calculated to bring about destruction, focusing exclusively on acts of deportation. The Appeals Chamber finds that, while the Trial Chamber did not specifically discuss whether the conditions that prevailed in detention camps and deportation convoys constituted evidence of this intent, a Trial Chamber need not spell out every step of its analysis. Rather than

repeating itself unnecessarily, the Trial Chamber referred back to its analysis in previous paragraphs in relation to the Appellant's mental state - for instance, its conclusion that the Appellant's public statements suggested that his intention was only to displace the Bosnian Muslim population and not to destroy it. This analysis was equally applicable to all of the alleged genocidal acts, including the imposition of intolerable living conditions pointed to by the Prosecution. The Trial Chamber's own factual findings elsewhere in the Judgement illustrate that it was well aware of the evidence demonstrating the terrible conditions in the camps and on deportation buses. The Appeals Chamber sees no error in this approach.

Fifth, the Prosecution contends that the Trial Chamber failed to draw proper inferences from the Appellant's utterances. While the Appeals Chamber agrees that utterances might constitute evidence of genocidal intent even if they fall short of express calls for a group's physical destruction, it finds on the facts of this case that the Trial Chamber adequately and reasonably considered the Appellant's derogatory statements and propaganda in paragraph 554 of the Trial Judgement. The Prosecution has therefore not demonstrated that no reasonable Trial Chamber could fail to conclude that the Appellant's utterances demonstrated his genocidal intent beyond reasonable doubt.

Finally, the Prosecution contends that the Trial Chamber improperly compartmentalised its inquiry, considering the *mens rea* evidence separately with respect to the various genocidal acts alleged rather than taking into account the totality of the evidence, and that it ignored or gave insufficient weight to several categories of relevant evidence bearing on the Appellant's *mens rea*. The Appeals Chamber agrees with the Prosecution that the Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state. Nonetheless, it does not appear that the Trial Chamber's piecemeal approach had any effect on its conclusion. The reasons it gave with respect to Article 4(1)(b) and (c) simply cross-referenced its analysis of mental state with respect to Article 4(1)(a), in which it concluded that there simply was no evidence in the record that proved that the Appellant sought to destroy the Muslim population. In reaching this conclusion, it must be assumed, the Trial Chamber was obviously aware of its own factual findings, but found them insufficient to establish intent beyond a reasonable doubt.

Further, when the Prosecution appeals from factual findings against it, it bears a heavy burden of persuasion. The Appeals Chamber cannot conclude that the evidence in this case is so unambiguous that a reasonable Trial Chamber was *obliged* to infer that intent was established beyond a reasonable doubt. To the contrary, the evidence could reasonably be seen as consistent with the conclusion the Trial Chamber did draw: that the Appellant merely intended to displace, but not to destroy, the Bosnian Muslim group.

In short, the first three Prosecution grounds of appeal are dismissed.

Joint Criminal Enterprise

Next, we turn to the mode of liability in this case. In its analysis of the Appellant's responsibility, the Trial Chamber specifically rejected the application of joint criminal enterprise as a mode of liability despite the fact that it had been pleaded by the Prosecution both in the Indictment and at trial. In lieu of joint criminal enterprise, the Trial Chamber applied a mode of liability which it termed "co-perpetratorship," which is new to the jurisprudence of this Tribunal. Although neither party has appealed the Trial Chamber's application of this mode of liability, the general importance of this issue to the application of the law warrants the scrutiny of the Appeals Chamber *proprio motu*. The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers. To avoid such uncertainty and ensure respect for the values of consistency and coherence in the application of the law, the Appeals Chamber must intervene to assess whether the mode of liability applied by the Trial Chamber is consistent with the jurisprudence of this Tribunal.

The Appeals Chamber finds that the mode of liability of "co-perpetratorship," as defined and applied by the Trial Chamber, does not have support in customary international law, or in the settled jurisprudence of this Tribunal. As the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal, its decision as to the mode of liability it employed in the Trial Judgement is invalidated. To remedy this error, the Appeals Chamber applies the correct legal framework - that of joint criminal enterprise - to the factual conclusions of the Trial Chamber to determine whether they support liability for the crimes charged.

Although the Indictment does not expressly refer to categories of joint criminal enterprise liability, the allegations therein nonetheless made it clear that the Prosecution intended to rely on both the first and third categories of joint criminal enterprise. Upon a close review of the Trial Judgement, the Appeals Chamber holds that the Trial Chamber's factual findings support the conclusion that the Appellant participated in a joint criminal enterprise, the common purpose of which amounted to the commission of the crimes against humanity of persecutions, deportation and other inhumane acts (forcible transfer), punishable under Articles 5(h), 5(d) and 5(i) of the Statute, against the Bosnian Muslim and Bosnian Croat populations of Prijedor. The Appellant shared the intent to further this common purpose, and had the intent to commit the underlying crimes. Further, the Appeals Chamber holds that the factual findings of the Trial Chamber demonstrate that a natural and foreseeable consequence of the implementation of this common (criminal) purpose was the commission of the crimes of extermination and murder. The Appellant, who participated in the implementation of the common purpose, reconciled himself with the likely commission of these crimes.

In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber's factual findings support the Appellant's liability for the crimes against humanity of persecutions, deportation and inhumane acts (forcible transfer) pursuant to the first category of joint criminal enterprise, and for the crimes against humanity of extermination and murder, and the war crime of murder pursuant to the third category of joint criminal enterprise.

In various sections of his appeal brief, the Appellant has raised a number of arguments challenging the Trial Chamber's use of *dolus eventualis* as a form of *mens rea*, submitting that the Trial Chamber impermissibly enlarged the *mens rea* required for the crimes against humanity of murder, extermination and persecutions, as well as the war crime of murder, and that by doing so the Trial Chamber violated the principles of *nullum crimen sine lege* and *in dubio pro reo*. Since the Appeals Chamber has established the Appellant's responsibility via the mode of liability of joint criminal enterprise, the Appeals Chamber has addressed these arguments in the context of this mode of liability.

The Appeals Chamber notes that the mode of liability of joint criminal enterprise was recognized as a mode of liability in customary law as early as 1992 and that it has been clarified in the jurisprudence of the Appeals Chamber that the use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of *nullum crimen sine lege* and *in dubio pro reo*. On this basis, the Appellant's challenges must fail.

Appellant's Grounds of Appeal

Next, we turn to the Appellant's first ground of appeal, which contains three sub-grounds concerning the alleged 'expansion' of the Indictment by the Trial Chamber. In his first two sub-grounds, the Appellant alleges that the Trial Chamber erred by relying on "acts" originating outside the time-period of the Indictment, and by preventing him from contesting the alleged error during the proceedings at trial. The Appeals Chamber finds that some of the "acts" referred to by the Appellant constitute material facts, which must be pleaded, while others amount to evidence, which need not be pleaded. The material facts referred to by the Appellant, including his authority and role in the joint criminal enterprise during the Indictment period, were properly pleaded. The remainder of the "acts" referred to by the Appellant in fact constituted evidence, and therefore did not need to be pleaded in the Indictment. Further, the Appellant has not shown, by reference to either the trial record or the Trial Judgement, that the Trial Chamber prevented him from introducing relevant evidence. Therefore the Appellant's first two sub-grounds of appeal are dismissed.

In his third sub-ground of appeal, the Appellant submits that the Indictment did not sufficiently inform him as to how his status as commander could be used as an aggravating circumstance in determining his sentence, and that he was therefore prevented from contesting this matter at trial. The Appeals Chamber finds that this submission is inconsistent with the jurisprudence of this Tribunal. The Appeals Chamber has previously found that, as a matter of principle, there is no requirement that the Prosecution plead aggravating factors in an indictment. This ground of appeal is accordingly dismissed.

In the second and third ground of appeal, the Appellant alleges a number of factual and legal errors which he argues denied him a fair trial occasioning a miscarriage of justice. The Appellant submits that the Trial Chamber erred in denying his request to obtain certain expert witnesses, in not admitting nine witness statements pursuant to Rule 92bis, in denying his motion for a mistrial based on violations of Rule 68, in admitting certain of the Prosecution's Rule 92bis evidence, in issuing numerous Rule 91 warnings to defence witnesses, and in admitting "unreliable and untrustworthy" evidence. The Appeals Chamber has addressed each of these specific challenges in detail in the text of the judgement and has

dismissed them, and the Appellant's second ground of appeal, on the basis that the Trial Chamber did not commit any errors.

The Appellant further argues that the Trial Chamber "drew impermissible inferences from circumstantial evidence" regarding his state of mind and degree of knowledge of the crimes being committed in the prison camps, "on the battlefield" and in the municipality in general, errors which he alleges invalidate all of his convictions. The Appeals Chamber clarifies that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of both that crime and the related mode of liability beyond a reasonable doubt. This standard applies whether the evidence evaluated is direct or circumstantial. Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In light of this standard, the Appeals Chamber in the judgement has addressed in detail the alternative inferences suggested by the Appellant and found that the Trial Chamber did not err in drawing the inferences it did. In view of the foregoing, the Appeals Chamber dismisses the Appellant's third ground of appeal.

Article 5

In his fourth ground of appeal, the Appellant submits that the Trial Chamber erred in law and in fact in its application of various elements of Article 5 of the Statute.

In his first sub-ground of appeal, the Appellant denies that the attacks in Prijedor were widespread or systematic as required by Article 5. The Appellant has failed to demonstrate to the Appeals Chamber how the Trial Chamber's findings of the existence of a systematic attack were unreasonable in light of all the evidence. Therefore, the Appeals Chamber finds that there is no basis on which to overturn the finding by the Trial Chamber that the attack was systematic. Having found that the Trial Chamber did not err in concluding that a systematic attack occurred, the Appeals Chamber finds that, for reasons of judicial economy, it is not necessary to address whether such an attack is also widespread. The related submissions are accordingly dismissed.

In his second sub-ground of appeal, the Appellant argues that the Trial Chamber erred in law in its treatment of extermination as a crime against humanity. He submits that extermination requires both that a "vast scheme of collective murder" be established and that the accused person have knowledge of such a scheme. He further submits that the *mens rea* for extermination requires an intent to kill a large number of individuals, the number of which should be in the thousands in order to meet the threshold of severity and gravity of the crime. Finally, he submits that *dolus eventualis* is not sufficient to establish the *mens rea* for extermination.

The Appeals Chamber finds that the jurisprudence of the Tribunal does not support requirements for the crime of extermination of a 'vast scheme of collective murder', knowledge of such a scheme, or a numerical minimum of victims required for extermination. The Appeals Chamber also finds that *dolus eventualis* is sufficient to meet the *mens rea* requirements for liability pursuant to the third category of joint criminal enterprise. As the Appellant has not shown that the findings of the Trial Chamber on which the Appeals Chamber relied in reaching this conclusion are in error, this sub-ground of appeal is dismissed.

Deportation

Next, we consider the sub-ground of appeal on deportation. The Appellant submits that the Trial Chamber erred in its application of the law on deportation by not requiring forcible displacement across a national border and by inferring that he had the intent to deport the non-Serb population permanently. He further submits that the Trial Chamber overlooked evidence demonstrating that persons left Prijedor voluntarily, and erred when it concluded that departures organised by international humanitarian organisations are not permitted under international law.

The Appeals Chamber holds that the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. The Appeals Chamber has found no evidence that demonstrates that transfers across constantly changing frontlines may amount to deportation under customary international law. It therefore concludes, Judge Shahabuddeen dissenting, that the Trial Chamber's finding in this respect in fact expands criminal responsibility by giving greater scope to the crime of deportation than exists under customary international law, and thus violates the principle of *nullum crimen sine lege*.

The Appeals Chamber considers that the *mens rea* of deportation does not require an intent that deportees should not return. The Trial Chamber therefore erred when it reached a contrary conclusion on the basis of the ICRC commentary. However, the Trial Chamber's error proved harmless in this case.

With respect to the factual basis for the Trial Chamber's finding on deportation, the Appellant has not demonstrated how the Trial Chamber's conclusions about the coercive atmosphere pervading the Municipality of Prijedor are such that no reasonable trier of fact could have made them. Consequently, the Appeals Chamber finds that the Trial Chamber did not err either as a matter of law or fact in finding that the departures were involuntary, and therefore unlawful. In this respect, the Appeals Chamber considers that the participation of an NGO in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful. Further, although displacement for humanitarian reasons is justifiable in certain situations, the Appeals Chamber agrees with the Prosecution that it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity. In the instant case, the evidence supports only one reason why it might arguably have been safer for Bosnian Muslims in Prijedor to be displaced: the dangers posed to them by the criminal scheme of persecutions undertaken by the Appellant and his co-perpetrators.

The Trial Chamber's error with respect to the nature of the cross-border transfer requirement for the crime of deportation necessitates that the Appeals Chamber apply the correct legal definition of the crime to the factual findings of the Trial Chamber. Before doing so, the Appeals Chamber finds *proprio motu* that the notion of "other inhumane acts" contained in Article 5(i) of the Statute cannot be regarded as a violation of the principle of *nullum crimen sine lege* as it forms part of customary international law. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that a conviction based on Article 5(i) of the Statute for acts of forcible transfer could not be entered.

On the basis of the correct definition of deportation, the Appeals Chamber is satisfied that the forcible displacement of Witness Čehajić, who was transported by convoy from Prijedor on 5 September 1992 and arrived in Karlovac, Croatia, one day later, amounts to deportation. However, the Appeals Chamber finds *proprio motu* that a few of the incidents in respect of which the Trial Chamber found deportation, most notably the transfer of 1,561 people from the Trnopolje Camp in the Municipality of Prijedor to Karlovac, cannot with certainty be placed within the Indictment period. Other findings in the Trial Judgement related to forcible displacements across frontlines between the parties to the conflict, as well as between locations under Serb control, are not sufficient to ground a conviction for deportation. Instead the Trial Chamber should have entered a conviction for other inhumane acts under Article 5(i) of the Statute for these incidents, detailed in the Appeal Judgement, which amount to acts of forcible transfer.

Persecutions

With respect to the fourth sub-ground of appeal concerning Article 5, The Appellant submits that the Trial Chamber lowered the threshold of proof required for persecutions by accepting *dolus eventualis* as sufficient to prove the *mens rea* for acts underlying persecutions. He further submits that the Trial Chamber provided inadequate analysis of how the *dolus specialis* requirement for persecutions was met. The Appeals Chamber finds that the Trial Chamber carefully considered evidence of the Appellant's personal discriminatory intent; such intent was neither presumed nor "transferred" from the direct perpetrators. It further concludes that the Trial Chamber did not err in its consideration of the evidence on the Appellant's *mens rea* for persecutions. Accordingly, the arguments of the Appellant are dismissed.

Article 3

Under his fifth ground of appeal, the Appellant challenges his conviction on Count 5 for murder as a violation of the laws and customs of war. He claims that the Trial Chamber erred in its consideration of the evidence establishing a "nexus" between the acts of the Appellant and the armed conflict, as required by Article 3 of the Statute, because it did not specifically analyse the required nexus with respect to each alleged act. Contrary to this submission, the Appeals Chamber finds that when the Trial Judgement is considered as a whole, it is clear that the requisite nexus analysis was indeed undertaken. For each of the three categories of killings considered - the camp killings, the convoy killings and the municipality killings - the Trial Chamber sufficiently demonstrated that the Appellant's Article 3 crimes were linked to the armed conflict. This ground of appeal is accordingly dismissed.

Cumulative Convictions

Now we will consider the Prosecution's fourth ground of appeal and the Appellant's seventh ground of appeal on cumulative convictions.

The Prosecution submits that the Trial Chamber erred when it declined to enter convictions for the crimes against humanity of murder and deportation in light of the conviction for the crime against humanity of persecutions based on, *inter alia*, the same underlying acts, reasoning that persecutions most accurately captured the nature of the Appellant's criminal conduct taken as a whole. The Appellant submits that the Trial Chamber erred in convicting him cumulatively for both persecutions and extermination based on the same conduct.

The Appeal Chamber considers that the test to be applied with respect to cumulative convictions was clearly established in the *Čelebići* Appeal Judgement and refined in the *Kordić* Appeal Judgement. In the view of the Appeals Chamber, the Trial Chamber erred in law in exercising discretion to convict only in relation to the crime that it considered to most closely and most comprehensively reflect the totality of the accused's criminal conduct. When the evidence supports convictions under multiple counts for the same underlying acts, the test as set forth in *Čelebići* and *Kordić* does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements.

The Appeals Chamber, Judge Güney dissenting, considers that a proper application of the test for cumulative convictions in this case demonstrates that convictions are permissible for the following crimes against humanity: persecutions under Article 5(h); deportation under Article 5(d); other inhumane acts under Article 5(i); and extermination under Article 5(b). Only a conviction for murder under Article 5(a) is not permissible, as that crime does not require any material elements to be proven over and above those required for the crime of extermination.

The Appeals Chamber thus dismisses the Appellant's appeal relating to his cumulative convictions for persecution and extermination. The Prosecution appeal is granted, but the Appeals Chamber finds *proprio motu* that it is not permissible to enter a conviction for murder as a crime against humanity because it is impermissibly cumulative with the conviction for extermination.

Sentencing

In his sixth ground of appeal, the Appellant submits that the Trial Chamber erred in imposing a life sentence. A number of the Appellant's submissions in this regard have been considered by the Appeals Chamber and dismissed for lack of merit. However, the Appeals Chamber finds that the Trial Chamber committed three discernible errors in imposing the sentence. The Appeals Chamber addresses these errors in turn.

First, the Appellant submits that the Trial Chamber erred by imposing conditions of the review of the sentence when such authority is reserved to the relevant Host State and by usurping the competence vested in the President of the Tribunal to ultimately decide such matters. The Appeals Chamber notes that the Disposition appears to impose a "20-year review obligation" on the Host State. This obligation is inconsistent with the regime set forth in the Statute and Rules. The Statute, Rules, relevant Practice Direction, and Model Agreement for enforcing sentences each provide that eligibility of a convicted person for pardon, early release or commutation of sentence is determined by the law of the State in which the convicted person is serving his sentence. These instruments also define the precise nature of the supervisory role of the Tribunal in this situation, granting the President of the Tribunal the power to make a final determination in each case. Imposing a 20-year review obligation on the courts of the Host State is contrary to these provisions as it imposes on the Host State both the date of review and the relevant considerations when conducting the review, thereby supplanting applicable municipal laws. Further, by vesting the courts of the Host State with the power to suspend the sentence, the Trial Chamber effectively removes the power from the President of the Tribunal to make the final determination regarding the sentence. The Appeals Chamber finds that the Trial Chamber acted *ultra vires* in imposing a review obligation on the Host State and therefore committed a discernible error.

Second, the Appellant contends that the Trial Chamber erred in concluding that his professional background as a physician was an aggravating factor for sentencing purposes. For the conclusion that the Appellant's medical background could be cited as an aggravating factor, the Trial Chamber relied only on the *Kayishema and Ruzindana* and *Ntakirutimana* Trial Judgements. The Appeals Chamber does not find these precedents persuasive. In *Kayishema and Ruzindana* the Trial Chamber simply stated that as a medical doctor Kayishema owed a duty to his community and that this constituted an aggravating factor but said little as to the legal basis for its conclusion. In *Ntakirutimana* the Trial Chamber's reference to

the duty of a medical doctor appears to have been made in a context which is completely different from that of the case before this Appeals Chamber. For these reasons, the Appeals Chamber thus finds that the Trial Chamber committed a discernible error in identifying the professional background of the Appellant as an aggravating factor.

Third, the Appellant argues that the Trial Chamber erred as a matter of law and abused its discretion in concluding that a “long phase of preparation and planning” was an aggravating factor. The Appeals Chamber does not dispute that, as noted by the Prosecution, a long phase of planning and preparation can be an aggravating factor. Although the Trial Judgement is not clear in this regard, the Appeals Chamber notes that this long phase of planning and preparation appears to have ended with the take-over of Prijedor (30 April 1992). The Appeals Chamber considers it unfair to consider for aggravation purposes, findings concerning events that are temporally outside the scope of the Indictment, without providing a reasoned opinion as to why doing so would be appropriate in the circumstances of the case. For this reason, the Appeals Chamber finds that the Trial Chamber committed a discernible error.

The Appeals Chamber has considered the errors made by the Trial Chamber and comes to the conclusion that their impact on the sentence has to be regarded as very limited. It takes note, however, that one of the errors concerns the sentence itself. Therefore, in view of the fact that the imposition of a fixed term sentence must be revised, the Appeals Chamber will impose an appropriate sentence, properly reflecting both the criminality of the Appellant and the substance of the sentence imposed by the Trial Chamber.

I shall now read the operative paragraph of the Appeals Chamber Judgement. Mr. Stakić, would you please stand?

Disposition

For the foregoing reasons, THE APPEALS CHAMBER

PURSUANT to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 4, 5 and 6 of October 2005;

SITTING in open session;

SETS ASIDE, *proprio motu*, the finding that the Appellant was responsible as a co-perpetrator and **FINDS** the Appellant responsible as a participant in a joint criminal enterprise, pursuant to Article 7(1) of the Statute;

ALLOWS, Judge Güney dissenting, the Prosecution’s fourth ground of appeal, **FINDS** both that cumulative convictions for Murder as a Crime against Humanity (COUNT 3) and Persecutions as a Crime against Humanity (COUNT 6) are permissible, and that cumulative convictions for Deportation as a Crime against Humanity (COUNT 7) and Persecutions as a Crime against Humanity (COUNT 6) are permissible, **RESOLVES** that the Trial Chamber incorrectly failed to enter a conviction against the Appellant for Deportation, but **FINDS**, *proprio motu*, that a conviction for Murder as a Crime against Humanity (COUNT 3) is impermissibly cumulative with the Appellant’s conviction for Extermination as a Crime against Humanity (COUNT 4);

DISMISSES the Prosecution’s appeal in all other respects;

ALLOWS in part, Judge Shahabuddeen dissenting, the Appellant’s fourth ground of appeal, particularly as it concerns the Trial Chamber’s interpretation of the requirements for deportation, and **VACATES**, Judge Shahabuddeen dissenting, the findings of legal responsibility for certain acts of deportation specified in the judgement;

ALLOWS, in part, the Appellant’s sixth ground of appeal concerning sentencing;

DISMISSES the Appellant’s appeal in all other respects;

AFFIRMS the Appellant’s acquittal for Genocide (COUNT 1);

AFFIRMS the Appellant’s acquittal for Complicity in Genocide (COUNT 2);

AFFIRMS, Judge Güney dissenting, the Appellant's conviction for Extermination, a Crime against Humanity (COUNT 4);

AFFIRMS the Appellant's conviction for Murder as a Violation of the Laws or Customs of War (COUNT 5);

AFFIRMS the Appellant's conviction for Persecutions, a Crime against Humanity (COUNT 6);

RESOLVES, Judge Güney dissenting, that the Trial Chamber incorrectly found the Appellant not guilty for Other Inhumane Acts (Forcible Transfer), a Crime against Humanity (COUNT 8);

IMPOSES a global sentence of 40 years' imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period the Appellant has already spent in detention;

SETS ASIDE the Disposition of the Trial Chamber insofar as it imposed an obligation on the Host State to review the Appellant's sentence after a specified time had elapsed;

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Mr. Stakić, you may be seated.

Madam/Mister Registrar, would you please deliver copies of the judgement to the parties. The Appeals Chamber stands adjourned.
