Bundesstrafgericht
Tribunal pénal fédéral
Tribunale penale federale
Tribunal penal federal

Case numbers: BB.2017.9 - BB.2017.10 - BB.2017.11
Secondary proceedings: BP.2017.4 - BP.2017.5 - BP.2017.6

Decision of 30 May 2018
Appellate Division

Composition	Federal criminal judges [G.G.], president, [P.N.] and [S.B.], [C.A.], court clerk
Parties	**Appellants:** **1. A., 2. B.,** both represented by [advocate A], **3. C.,** represented by [advocate B] **vs.** **Respondents** **1. PUBLIC PROSECUTOR OF THE CONFEDERATION,** **2. [The accused],** Represented by [advocates C and D],
Subject	Abandonment of proceedings (Art. 322 para. 2 CPP); legal assistance (Art. 29 para. 3 Cst.)

Facts:

A. Following a criminal report filed on 19 October 2011 emanating from the Swiss Association against Impunity (Trial), by order of the same date, the Public Prosecutor of the Confederation (hereinafter: MPC) opened a criminal investigation into war crimes (Art. 264b ss of the Swiss Criminal [Code of 21 December 1937 [CP]; RS 311.0 and Art. 108 and 109 aCPM of the Swiss Military Criminal Code of 13 June 1927 [hereinafter: aCPM]; RS 321.0) against [the accused], an Algerian national born on ….. 1937, a former Major General in the Algerian army and former … Minister. According to the report filed, [the accused] is alleged to have played a crucial role in committing atrocities perpetrated during the Algerian Civil War in the early 1990s when he was in power. He is alleged to have ordered, participated in and encouraged the widespread use of torture in Algeria, as well as murders and forced disappearances of alleged opponents, whether members or not of Islamist movements (MPC 05-01-0001 ss).

B. In the same factual context, several criminal charges were filed against the MPC. Among these were those sent to it on 19 October 2011 by B., who filed a report against [the accused] and joined the proceedings as a plaintiff. B. claimed to have been arrested and tortured by the security services on two separate occasions in 1993 for having been a member of the Islamic Salvation Front (hereinafter: FIS; MPC exhibit 05-02-0002). On 10 February 1994, B. travelled from Algeria to Switzerland (MPC exhibit 05-02-0012), where he was granted asylum by a decision of 27 November 1997 (MPC exhibit 05-02-0010 ss).

Furthermore, on 24 October 2011, A. indicated to the MPC that he himself had been subjected to torture and arbitrary arrests when [the accused] was in power in Algeria. He stated that he wished to join the proceedings as a plaintiff (MPC exhibit 05-04-0001). He also claimed that he had been tortured after being arbitrarily arrested in February 1992 in Oran before being deported and that he had been detained in various camps over a period of more than three years and 9 months without ever being charged or sentenced. He stated that he was released on 23 November 1995, but that he was again abducted in October 1997 and was held prisoner while being subjected to appalling acts of torture until 23 March 1998 (MPC exhibits 05-04-0001 ss).

On 30 May 2014, C. also filed a criminal report with the MPC (MPC exhibits 05-08-0001 ss). He stated that he was also detained in Algeria at the time of the events and that he was subjected to acts of torture on several occasions (MPC exhibits 05-08-0003; 05-08-0005). He alleged that he had been a prisoner in various centres where he was subjected to violence on a regular basis (MPC exhibit 0508-0006).

C. On 19 October 2011, the MPC opened an investigation into [the accused] for war crimes committed during the Algerian Civil War (MPC exhibit 01-00-0001). On the same day, it issued a warrant against the aforementioned individual, who testified as a defendant on 20 October 2011.

By an order of 1 December 2011, the MPC established that it had jurisdiction in the case (MPC exhibits 02-00-0002 ss). On 25 July 2012, this Court rejected the appeal filed by [the accused] against the said order (Swiss Federal Criminal Court decision, BB.2011.140). For its part, the Swiss Federal Court declared the appeal filed by [the accused] against the aforementioned decision to be inadmissible (Swiss Federal Court decision of 8 November 2012, 1B_542/2012).

D. Between November 2011 and November 2016, the MPC conducted several hearings in the presence of the defendant, the plaintiffs and a number of witnesses (MPC exhibits sections 12, 13 and 15).

E. On 13 August 2014, the MPC submitted a request for mutual assistance from Algeria to the Federal Office of Justice (MPC exhibits section 18). Because the request was not submitted directly to the Algerian authorities, the MPC submitted a new version on 2 March 2015, which was handed over to Algeria by means of a letter dated 7 April 2015. No response was ever received.

F. On 3 March 2016, the MPC requested copies of the records of any French criminal proceedings brought against [the accused] from the competent French authorities, in particular following a criminal complaint filed on 28 June 2002 in Paris by Algerian nationals (MPC exhibit 18-03-0001). The French authorities provided the requested documents on 18 July 2016 (MPC exhibit 18-030007).

G. By a letter dated 22 November 2016, the MPC informed the parties of the imminent conclusion of the investigation and set a deadline for requests for further evidence to be taken (MPC exhibits 16-00-0812 ss), to which the plaintiffs responded by requesting, among other things, to testify about the existence of an armed conflict at the time of the matter under investigation, and to have various witnesses testify, as well as to have an expert assessment drawn up. In their statements of claim, the plaintiffs also requested to be paid CHF 1 each by [the accused] as compensation for the moral damage suffered, with the costs of the proceedings to be borne by the defendant. They requested that the latter's pleadings be dismissed (MPC exhibits 1600-0868 ss; 16-00-0929 ss). These requests were not granted.

H. By virtue of a writ of 4 January 2017, the MPC issued an order to abandon the proceedings in which it held that the attacks which took place in Algeria between 1991 and 1994 lacked the intensity required by the case law for establishing the existence of a non-international armed conflict. Consequently, the Swiss authorities have no jurisdiction to prosecute. It set the investigation costs at CHF 18,500. The costs submitted by the plaintiffs were accepted as they stood, with [the advocate A], representing A. and B., receiving CHF 42,055.25 and [the advocate B], representing C., receiving CHF 28,392.90. For his part, [the accused] chose not to assert any claims (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1).

I. On 16 January 2017, A., B. and C. each filed an appeal against the said order in the Appellate Division. All three requested: principally, that the order be

quashed, that it be held that there was an armed conflict at the time of the events under investigation and that the case be remitted to the MPC for it to continue the investigation; additionally, that the said order be quashed, that the matter be remitted to the MPC while requesting it to continue the investigation into the existence of an armed conflict by agreeing to the requests for further evidence to be taken made by the parties, namely the appointment of an expert to conduct an assessment of the question of a non-international armed conflict in Algeria in 1992, the execution of a first letter rogatory sent to Algeria on 7 April 2015, the sending of the second letter rogatory in preparation for the examination of certain witnesses, the examination of new witnesses and the re-examination of previously examined witnesses who had yet to be examined on the existence of an armed conflict, subject to claiming for costs and expenses. The appellants also requested to have access to legal assistance (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1).

As grounds, they cited a violation of topical provisions of the Swiss Military Criminal Code in force at the time of the events, of the *in dubio pro duriore* principle and of their right to be heard.

J. On 7 February 2017, [the accused] filed his submissions and requested that the appeals be rejected, subject to claiming for costs and expenses. In the main, he shares the view of the MPC as concerns the absence of any armed conflict in Algeria during his time in power (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 8).

In its response of 21 February 2017, the MPC also ruled that the appeals be rejected, subject to claiming for costs and expenses (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 10).

In their replies of 17 March 2017, the appellants maintained their pleadings in full, adducing new exhibits in support of their case (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 14).

Upon being asked to submit a rejoinder, [the accused] maintained his pleadings on 13 April 2017. He also requested that the new exhibits submitted by the appellants be declared inadmissible (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 19).

In its rejoinder of 25 April 2017, the MPC also referred back to its pleadings (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 20).

Upon being asked to respond to the request made by [the accused] to have the new exhibits submitted by the appellants dismissed, the latter requested that they be admitted into the proceedings (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 23). The MPC deferred to the court on this question (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 22).

The arguments and evidence invoked by the parties will be reiterated, if necessary, in the legal grounds.

The ruling of the Court:

1.

1.1 Rulings abandoning proceedings issued by the MPC may be contested with the relevant authority (Art. 322 para. 2 CPP; Art. 393 para. 1 let. a CPP and

37 para. 1 of the Federal Act on the Organisation of the Federal Criminal Authorities of the Confederation [LOAP; RS 173.71]). This may relate to the abandonment itself but also to costs, damages and any forfeitures (GRÄDEL/HEINIGER, Commentaire bâlois, Swiss Criminal Procedure Code, 2nd ed. 2014 [hereinafter: Commentaire bâlois CPP], no. 5 ad Art. 322 CPP).

1.2 In its capacity as an appellate authority, the Appellate Division considers, with full powers of examination, the appeals submitted to it (Message concerning unification of criminal procedure law of 21 December 2005 [hereinafter: CPP Message], FF 2006 1057, p. 1296 *in fine*; GUIDON, Commentaire bâlois CPP, no. 15 *ad* Art. 393 CPP; KELLER, Kommentar zur Schweizerischen Strafprozessordnung [StPO], Donatsch/Hansjakob/Lieber [eds.], 2nd ed. 2014, no. 39 *ad* Art. 393 CPP; SCHMID/JOSITSCH, Handbuch des schweizerischen Strafprozessrechts, 3rd ed. 2017, no. 1512).

2. Where there are objective grounds for doing so, the Public Prosecutor and the courts may separate or combine criminal proceedings (Art. 30 CPP). In the present case, the three appeals are intrinsically connected: they relate to the same events and all three relate to the same ruling abandoning proceedings, by means of identical submissions. Combining cases BB.2017.9 - BB.2017.10 - BB.2017.11 is justified on grounds of procedural economy.

3.

3.1 Under Art. 322 para. 2 CPP, the parties may contest a ruling abandoning proceedings with the objections authority within 10 days. Under Art. 393 para. 2 CPP, an objection may contest an infringement of the law, including exceeding and abusing discretionary powers, the denial of justice and unjustified delay (let. a), an incomplete or incorrect assessment of the circumstances of the case (let. b) or a decision that is inequitable (let. c). An objection against decisions issued in writing or orally must be filed within ten days in writing and with a statement of grounds with the objections authority (Art. 396 para. 1 CPP). The appeals of 16 January 2017 against the ruling abandoning proceedings of 4 January 2017 were filed in good time.

3.2 Any party with a legitimate interest in the quashing or amendment of a decision may seek an appellate remedy (Art. 382 para. 1 CPP; Swiss Federal Court decision of 8 March 2013, 1B_657/2012, Recital 2.3.1). That interest must be current (Swiss Federal Criminal Court decision of 13 September 2013, BB.2013.88, Recital 1.4 and cited references). The notion of party referred to in this provision should be understood within the meaning of Art. 104 and 105 CPP. Art. 104 para. 1 let. b CPP grants this status to the private claimant, that is, according to Art. 118 para. 1 CPP, to the "person suffering harm who expressly declares that he or she wishes to participate in the criminal proceedings as a criminal or civil claimant". Pursuant to Art. 115 para. 1 CPP, a person suffering harm is "a person whose rights have been directly violated by the offence". Art. 105 CPP also grants the status of party to other persons involved in the proceedings, such as persons suffering harm (para. 1 let. a) or the person who has reported the offence (para. 1 let. b), where their rights

are directly affected and to the extent necessary to safeguard their interests (para. 2; Swiss Federal Criminal Court decision of 5 October 2017, BB.2017.100, Recital 1.4).

3.3 The capacity to act of the claimant, of the person suffering harm or of the person who has reported the crime against an order of dismissal or nonsuit is thus subject to the condition that they are directly affected by the offence and can claim to have a legitimate interest in the decision being quashed. As a general rule, only the holder of the legal good protected by the criminal provision that has been infringed may invoke a direct violation (ATF 129 IV 95, Recital 3.1 and the cited judgments). The rights affected are individual legal goods such as life and bodily integrity, property, honour, etc. (CPP Message, *op. cit.*, p. 1148). By contrast, where the violation primarily protects the collective interest, private individuals are only deemed to be persons suffering harm if their private interests have actually been affected by the alleged acts, such that the damage suffered is found to be the direct consequence of the act complained of (ATF 129 IV 95, Recital 3.1 and the cited judgments; Swiss Federal Court decisions of 15 March 2013, 1B_723/2012, Recital 4.1; of 24 January 2012, 1B_489/2011, Recital 1.2; Swiss Federal Criminal Court decision of 22 January 2013, BB.2012.67, Recital 1.3). The violation must also be of a certain seriousness. In that respect, the classification of the offence is not the determining factor, the impact of the offence on the person suffering harm being decisive (ATF 129 IV 216, Recital 1.2.1), which must be assessed objectively and not on the basis of the latter's personal and subjective sensitivity (Swiss Federal Court decision of 30 June 2009, 6B_266/2009, Recital 1.2.1). Art. 115 para. 2 CPP adds that a person entitled to file a criminal complaint is deemed in every case to be a person suffering harm. According to the CCP Message, the paragraph in question provides a clarification by decreeing that persons entitled to file a criminal complaint in accordance with Art. 30 para. 1 CP, in other words the holders of the legal rights that have been affected, must be deemed in every case to be persons suffering harm (CPP Message, *ibidem*).

3.4 In the case in point, proceedings are opened for war crimes within the meaning of Art. 264b ss CP and Art. 108 and 109 aCPM. The legal goods protected by these rules are persons and property (VEST, Schweizerisches Strafgesetzbuch, Praxiskommentar, Trechsel/Pieth [eds.], 3rd ed. 2018, no. 8 ad preliminary remark to Art. 264b CP). More specifically, Art. 264c para. 1 let. a and para. 2 CP protect life, Art. 264c para. 1 let. b, e, f and para. 2 CP freedom and Art. 264c para. 1 let. c and para. 2 CP physical and mental integrity (Swiss Federal Criminal Court decision of 27 October 2016 BB.2016.36 + 37, Recital 1.2.1; KESHELAVA/ZEHNDER, Commentaire bâlois Droit pénal II, Niggli/Wiprächtiger [ed.], Art. 111-392 CP, 2013, no. 2 ss *ad* Art. 264c CP). Furthermore, the facts described in Art. 264c CP also relate to legally protected collective rights, including peace and the ethnic composition of a population (KESHELAVA/ZEHNDER, *op. cit.*, no. 4 *ad* Art. 264c CP and cited references). The appellants (the plaintiffs) claim that their freedom has been directly

affected, as well as their physical and psychological integrity. Therefore, they have the capacity to act.

3.5 The appeal is thus admissible; there are grounds for considering the case.

4.

4.1 In his comments of 13 April 2017, [the accused] submitted a new request to have all of the exhibits submitted by the appellants, or at the very least some of them (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.107-1.111), removed from the case. He argued in this respect that the appellants would have had ample time and opportunity to submit the multitude of exhibits adduced in support of their appeals well before these were filed. He argued, more specifically, that they could have put them forward on 6 December 2016, that being the deadline set by the MPC for submitting their requests for evidence. According to him, if the Court were to accept the evidence adduced in support of the appellate remedy, it should, on the same grounds of lateness, at the very least reject the evidence sent with the reply (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.19). For their part, the appellants argue that the case file handed over by the lower court is, in this case, insufficient to enable the appellate authority to reach a decision. According to them, the latter should therefore, in the present case, disclose the additional evidence necessary for processing the appeal.

4.2 The right to be heard guaranteed by Art. 29 para. 2 Cst. includes, in particular, the right for the concerned party to submit relevant evidence and to have its offers of evidence considered if they are of such a nature as to influence the decision to be delivered (judgment 1B_368/2014 of the Federal Court dated 5 February 2015, Recital 3.1 and cited references). Thus, Art. 385 para. 1 let. c CPP states that if this Code requires that the appellate remedy be accompanied by a statement of the grounds, the person seeking the appellate remedy must indicate precisely what evidence they wish to adduce in support of the appellate remedy. Grounds must be stated for appellate remedies in all cases, meaning that the submission of evidence with the appellate remedy is an obligation (ZIEGLER/KELLER, Commentaire bâlois CPP, no. 1 Art. 385 CPP). The provisions relating to appellate remedies in the strict sense (Art. 393-397 CPP) do not include any specific stipulations in regard to new facts and evidence. The legislator decided against introducing a restrictive regime in regard to new allegations and evidence, except in the very specific case of Art. 398 para. 4 CPP relating to the appeal, which is not relevant here. Consequently, with the majority of the doctrine, it must be acknowledged that the appellant may submit new averments and evidence to the appellate authority (Swiss Federal Court decisions of 13 January 2013, 1B_768/2012, Recital 2.1 issued on the matter of provisional detention and the cited doctrine; of 20 December 2013, 1B_332/2013, Recital 6.2; Swiss Federal Criminal Court decision of 2 May 2018, BB.2017.204, Recital 2.2 and cited references). Pursuant to Art. 389 para. 3 CPP, the appellate authority shall take the required additional evidence ex officio or at the request of a party. This provision lays down the effort to determine material truth, a process in which the authority has an

active role to play. Evidence is required in circumstances where it may have an effect on the outcome of the dispute (see CPP Message, p. 1294). The authority may nevertheless refuse new evidence when a non-arbitrary early disclosure of this evidence demonstrates that the evidence in question is not of such a nature as to alter the outcome of the evidence already disclosed (Swiss Federal Court decisions of 31 October 2013 6B_654/2013, Recital 2.2; of 15 February 2013 6B_614/2012, Recital 3.2.3 and the cited references).

4.3 In view of the above considerations, [the accused]'s request that the evidence adduced by the appellants in support of their appeals be rejected on grounds of lateness cannot be granted. By adducing this evidence in support of their appellate remedies, the appellants were simply complying with the requirement imposed on them by law (Art. 385 para. 1 let. c CPP). This may include any grounds, whether new to or already in the case file (CALAME, Commentaire romand, Swiss Criminal Procedure Code, Kuhn/Jeanneret [eds.], 2011, no. 22 *ad* Art. 385 CPP; GUIDON, Die Beschwerde gemäss Schweizerischer Strafprozessordnung, 2011, nos. 370; 395). From this perspective, it is irrelevant whether the appellants have already submitted the evidence to the MPC. This seals the fate of this complaint.

4.4 There are also no grounds for allowing the respondent's alternative submission, which tends to exclude the evidence adduced by the appellants in support of their responses (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.107 to 1.111), with lateness being further grounds. In general, the notion of new facts includes the new claims and evidence submitted. The CPP is silent as to the possibility of submitting new items or information during appellate proceedings. However, the doctrine held that various indications point to the legislation providing for a free right to submit new facts. To the extent that an appellate remedy is a full and devolutive ordinary remedy that allows for a consideration of the contested decision with full powers of examination, all of the known facts that occurred until the decision on appeal is issued must, in principle, be taken into consideration. Therefore, the new evidence is allowed (ATF 141 IV 396, Recital 4.4; Swiss Federal Court decision of 5 February 2015, 1B_368/2014, Recital 3.2 and cited reference). On that basis, the reasoning of the respondent, who considers as a matter of principle that documents adduced in support of the response were submitted late, cannot be followed. Furthermore, some of the contested exhibits (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.107 et 1.108) were already included in the case file (respectively BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 and 1.25) before they were "submitted" as an annex to the reply; as such, they cannot be deemed to count as new evidence.

4.5 That being the case, it should be noted, however, that, as underlined by the MPC and the respondent, the criminal period to be taken into consideration in this instance runs from 14 January 1992 to 31 January 1994, that being the exact period of [the accused]'s appointment to the High Council of State (hereinafter: HCE). Therefore, the exhibits setting out the situation in Algeria

outside this time window cannot be held to be relevant (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.16; 1.17; 1.67; 1.68 to 1.94; 1.98; 1.102 to 1.104).

5. In a formal objection, the appellants claimed that their right to be heard had been violated. They argued that the requests for further evidence to be taken which they submitted within the relevant time period set by the MPC were ignored and dismissed without the slightest reason being given despite the fact that they would have helped, in their estimation, to clarify whether an armed conflict existed. This argument was countered by both the MPC and [the accused]. In its response, the former commented on each of the new requests for further evidence to be taken made by the appellants, but concluded that they had requested further evidence without providing grounds for the need to carry out investigations and done so despite the fact that the evidence collected up to the notification of conclusion of the proceedings was in itself sufficient to disprove the existence of an armed conflict. For his part, the latter stated that not only were the requests made by the appellants listed in the contested decision but the MPC had also expressly ruled on their fate.

5.1 Pursuant to Art. 318 CPP, if the public prosecutor regards the investigation as completed, it shall issue a summary penalty order or give written notice to those parties whose address is known of the imminent conclusion of the investigation and inform them whether it is intended to bring charges or abandon the proceedings. At the same time, it shall allow the parties a period within which to submit requests for further evidence to be taken (para. 1). It may reject requests for further evidence to be taken only if the evidence involves matters that are irrelevant, obvious, known to the criminal justice authority or already satisfactorily proven in legal terms. The decision shall be issued in writing and with a brief statement of the grounds. Requests for further evidence to be taken that are refused may be made again in the main proceedings (para. 2).

5.2 The CPP Message indicates that the requirement for a statement of grounds provided for by Art. 318 para. 2 CPP aims to ensure that the court passing judgment is aware of the grounds that resulted in a request for further evidence to be taken being refused and is able to take them into consideration and to assess them, if, in the main proceedings, the party reiterates the proposed further evidence that has been refused (FF 2005 1254).

Furthermore, the guarantee of the right to be heard, deduced from Art. 29 para. 2 Cst., makes it a requirement for the authority to provide grounds for its decisions, in order that the parties are able to understand and assess the opportunity to counter them, and that the appellate authorities are able to exercise their control (ATF 136 I 229, Recital 5.2 p. 236; 135 I 265, Recital 4.3 p. 276; 126 I 97, Recital 2b p. 102). It is sufficient for the authority to refer at least briefly to the grounds for its decision, so that the interested party is made aware of the scope of the decision and can knowingly contest it; the authority may confine itself to discussing the relevant means only, without being required

to respond to all of the arguments submitted to it (ATF 134 I 83, Recital 4.1 p. 88; 133 III 439, Recital 3.3 p. 445; 130 II 530, Recital 4.3 p. 540). Provided that the grounds underlying the authority's decision are made clear, the right to a reasoned decision is satisfied even if the grounds submitted are incorrect. The grounds may be implicit and arise from the various recitals of the decision (Swiss Federal Court decision of 25 May 2009, 2C_23/2009, Recital 3.1). Thus, a violation of the right to be heard only arises if the authority does not fulfil its minimum obligation to examine the relevant issues (ATF 129 I 232, Recital 3.2. p. 236; 126 I 97, Recital 2b p. 102 and the cited references; Swiss Federal Court decision of 7 April 2011, 6B_28/2011, Recital 1.1).

5.3 The appellants cannot be followed. In its part concerning the facts, under section heading "conclusion of the proceedings" (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 number 1.8), the contested order clearly refers to the further investigations requested by the plaintiffs in their letter of 6 December 2016 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 number 1.8.1), which shows that the MPC was aware. Furthermore, in 2.4.3, the contested order comments on how such offers of further evidence should be dealt, stating: "On that basis, the investigation served to demonstrate that no armed conflict took place (...) in Algeria in 1992 and 1994. Therefore, there is no need to conduct further investigations". Although the explanation provided is relatively succinct, it is sufficient to enable the appellants to understand why the MPC held that the evidence submitted was not such as to change its assessment of the facts. Moreover, in its response, it stated the grounds for holding that *each* of the further investigations requested by the plaintiffs in December 2016 was not justified (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 Act. 10 pt. 3.4). Therefore, if, contrary to all probability, the appellants' right to be heard on this point in the contested order had been violated, such a violation would have been remedied as part of the present appellate proceedings. On those grounds, the complaint is dismissed.

6.

6.1 The dispute concerns the question of whether the MPC was right to abandon proceedings SV.11.0231 initiated against [the accused] for war crimes (Art. 264b ss CP / Art. 108 and 109 aCPM). The MPC held that there was no armed conflict in Algeria at the time the respondent was in power. It held that in order for a conflict to exist, it must be of sufficient intensity and the opposing parties must have a certain degree of organisation and structure. The MPC notes that armed clashes did take place in Algeria between 1992 and 1994 between the Algerian security forces on the one hand and Islamist groups on the other. During that time, numerous attacks and assaults of all kinds, resulting in multiple casualties, including civilians, were carried out by the parties to the conflict in violation of the fundamental guarantees relating to humane treatment as provided for by the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (RS 0.518.51) and the Protocol Additional (dated 8 June 1977) to the Geneva Conventions of 12 August 1949 relating to the Protection

of Victims of Non-International Armed Conflicts (Art. 4 para. 2 let. g; RS 0.518.522; [hereinafter: Protocol II], which entered into force for Switzerland on 17 August 1982 and for Algeria on 16 February 1990). It held nevertheless that the attacks did not reach the level of intensity required by case law to admit the existence of a non-international armed conflict. Furthermore, the investigation could not have produced evidence in support of the view that the Islamist groups were organized to such an extent that they could be described as parties to the conflict. According to the MPC, the fact that a non-international armed conflict did not exist in Algeria at the time of the events means that, in this case, Art. 108 and 109 aCPM do not apply and, therefore, the Swiss authorities have no jurisdiction to proceed in the matter. This view is shared by [the accused]. For their part, the appellants argue essentially that a state of emergency was declared in Algeria on 9 February 1992 and that the regime subsequently engaged in a campaign to eradicate the FIS and its supporters. They note that, immediately following the official ban imposed on the FIS by the regime on 4 March 1992, several armed groups were established to fight against the authorities by taking up arms and engaging in direct and violent confrontation with government forces. According to them, the Armed Islamic Group (hereinafter: GIA) and the Armed Islamic Movement (hereinafter: MIA) were the two main armed groups in activity at the time of the events. The appellants hold that these groups had a clear hierarchical structure and were highly organised. They also refer to the ability of these groups to procure weapons, to define military strategies, to publish communiqués and to negotiate. They criticise the MPC in this regard for having based itself solely on [the accused]'s statements in determining these various characteristics. Furthermore, the appellants dispute the fact that the clashes that occurred at the time did not reach the level of intensity required by case law. They argue that the events which took place in Algeria should be viewed as a civil war.

6.2 The offences of which [the accused] is accused took place between 14 January 1992 and 31 January 1994 in Algeria, a period during which he was a member of the HCE. Therefore, the applicable provisions are those of Art. 108 and 109 aCPM, under which, until 31 December 2010, in their version in force at the time, violations of humanitarian law were punished (Military Court of Cassation decision of 27 April 2001 in the matter of F.N., Recitals 3a and 3b, published in "Procès de criminels de guerre en Suisse", Ziegler/Wehrenberg/Weber [eds.], 2009, p. 359 ss). Pursuant to Art. 109 aCPM, "any person who has contravened the prescriptions of international conventions on the conduct of hostilities and on the protection of persons and objects, [and] any person who has violated other recognized laws and customs of war must be punished with imprisonment unless more severe provisions are applicable. In serious cases, the penalty shall be imprisonment (para. 1)". In principle, the provisions of Art. 108 ss aCPM applied in situations of declared war and other armed conflicts between two or more States (Art. 108 para. 1 aCPM). Art. 108 para. 2 aCPM provided, however, that the violation of international agreements was also punishable if the agreements provided for a broader scope of application. It follows that the "prescriptions

of international conventions on the conduct of hostilities and on the protection of persons and objects" which apply to conflicts not of an international nature – which therefore have a broader scope of application than those of conventions applicable to international conflicts alone – were also referred to in Art. 109 para. 1 aCPM. These include, primarily, the 1949 Geneva Conventions (as well as their two 1977 additional protocols) and, in particular, Art. 3 common to the said conventions (hereinafter: Common Article 3). The latter prohibits, *inter alia*, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (Art. 3 para. 1 no. 1 let. a) and "outrages upon personal dignity, in particular humiliating and degrading treatment" (Art. 3 para. 1 no. 1 let. c). Common Article 3 requires, however, an "armed conflict not of an international character occurring within the territory of one of the High Contracting Parties" (ANCELLE *in* Droit pénal humanitaire, Moreillon/Bichovsky/Massouri [eds.], 2nd ed. 2009, Series II Volume 5, p. 121).

6.2.1 According to the Message relating to the amendment of the federal laws in preparation for the implementation of the Rome Statute of the International Criminal Court, it must be acknowledged that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between government authorities and organised armed groups or between such groups within a State. The scale of the conflict is not a factor (FF 2008 3461, 3528; see also International Criminal Tribunal for the former Yugoslavia [hereinafter: ICTY], *Tadić Case*, Decision on the Defence Motion for Interlocutory appeal on Jurisdiction, para. 70). Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature are, by contrast, not deemed to be armed conflicts (Art. 1 para. 2 of Protocol II; see also Art. 8 para. 2 let. f of the Rome Statute of the International Criminal Court of 17 July 1998 [RS 0.312.1], which entering into force for Switzerland on 1 July 2002; hereinafter: Rome Statute).

6.2.2 In relation more specifically to armed conflicts not of an international character, pursuant to Common Article 3, conflicts in which at least one of the involved parties is not a governmental entity qualify as such. This article is the only provision applicable worldwide that governs all non-international armed conflicts (ICRC Commentary to Art. 3 of the Geneva Convention I, 2018; hereinafter: ICRC Commentary 2018). It assumes that at least one of the parties to the conflict is not a state and that the situation reaches a level that distinguishes it from other forms of violence to which international law does not apply, such as situations of internal disturbances and tensions, for example riots, isolated and sporadic acts of violence and other acts of a similar nature. The threshold required in this case is higher than for an international armed conflict (VITÉ, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, article published in English in the International Review of the Red Cross, Vol. 91, no. 873, March 2009, pp. 69-94, and cited reference, in particular *Tadić Case*, aforementioned, para. 70). Common Article 3 refers in fact to any "conflicts which are in many respects similar to an international war, but take place within the confines of a single country", in other words, "hostilities" between "armed forces" on both sides

(ICTY*, Boskoski & Tarculovski Case* of 10 July 2008 [hereinafter: *Boskoski & Tarculovski Case]*, para. 185). Therefore, it is a conflict confined to the territory of a state (AIVO, Le statut de combattant dans les conflits armés non internationaux, 2013, p. 22). In practice, a government cannot deny the existence of a non-international armed conflict, within the meaning of Common Article 3, when faced by collective armed action which cannot be suppressed by ordinary means, such as the police and the enforcement of ordinary criminal legislation. The use of the military and the promulgation of special powers would, in the large majority of cases, be conclusive evidence that the situation in question is indeed an armed conflict in the sense of Common Article 3 (BUGNION, The International Committee of the Red Cross and the Protection of War Victims, Geneva 1994, p. 333).

6.2.3 For the definition of non-international armed conflict, reference should also be made to Art. 1 of Protocol II (ICRC Commentary 2018 no. 431). This provision gives a narrower definition of this notion. It must involve a conflict taking place on the territory of a High Contracting Party between its armed forces and dissident armed forces or organised armed groups exercising such control over a part of its territory that it is able to carry out continuous military operations (Swiss Military Tribunal division 2, decision of 26 August 1999 published *in* Procès de criminels de guerre en Suisse, [Ziegler/Wehrenberg/Weber, eds.], 2009, p. 324). Thus, while Common Article 3 refers to low-intensity internal armed conflicts requiring a minimum degree of military organisation, Protocol II applies rather to high-intensity internal conflicts in which armed groups are well organised, exercise control over part of the national territory and carry out continuous military operations under a chain of command. Therefore, there are two distinct degrees of internal armed conflict. While Common Article 3 may also apply within the field of application of Protocol II on account of its lower applicability threshold, the reverse is not true (AIVO, *op. cit.*, p. 23). However, recent practice has sought to bring the conditions of applicability of Protocol II as close as possible to those of Common Article 3. To that end, it has tended to adopt a narrow interpretation of the additional conditions laid down in Art. 1 of Protocol II (KOLB/SCALIA, Droit international pénal, Précis, 2nd ed. 2012, p. 138). It should also be noted that although the threshold for the application of Common Article 3 is lower, it only applies from the moment an armed struggle within a state entity becomes such that it ceases to be a simple matter of maintenance of law and order (AIVO, *ibidem*).

6.3 In terms of practice, and in particularly the practice of the ICTY, the test for the existence of an internal armed conflict consists of two fundamental cumulative criteria: the intensity of the violence and the organisation of the parties to the conflict (ICTY*, Boskoski & Tarculovski Case*, para. 175; KOLB/SCALIA, *op. cit.*, p. 137; FIOLKA/ZEHNDER, Commentaire bâlois, Droit pénal II, 3rd ed. 2013, no. 23 *ad* Art. 264b CP; ICRC Commentary 2018 no. 422). These two components cannot be described in abstract terms but must be assessed rather on a case-

by-case basis by weighing up many indicative data (VITÉ, *op. cit.* and cited references, in particular ICTY, *Haradinaj, Balaj & Brahimaj Case*, Judgment of 3 April 2008 [hereinafter: *Haradinaj Case*]). Furthermore, they are of a relatively flexible nature and, above all, have been established for the purpose of distinguishing them from internal disturbances, which do not give rise to the application of the rules of international humanitarian law (ANCELLE, *op. cit.*, p. 127-128). "Internal disturbances and internal tensions" may be defined as situations of confrontation and violence within a state and at a level of intensity such that they may be contained and quashed by law enforcement officers. The use of significant military resources and armed forces by a state in quashing insurgents turns a situation of internal disturbances into an internal armed conflict (AIVO, *ibidem;* ICRC Commentary 2018 no. 425).

6.3.1 As concerns the intensity criterion, various indicative factors have been taken into account by the ICTY, including the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security, and whether any resolutions on the matter have been passed. It also took into account the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements (*Boskoski & Tarculovski Case*, para. 177 and cited reference). At a systemic level, an indicative factor of internal armed conflict is the way that organs of the State, such as the police and military, use force against armed groups. The ICTY noted that, in such cases, it may be instructive to analyse the use of force by governmental authorities, in particular, how certain human rights are interpreted, such as the right to life and the right to be free from arbitrary detention, in order to appreciate if the situation is one of armed conflict (*Boskoski & Tarculovski Case,* para. 178). Lastly, it recalled in the latter case that care is needed not to lose sight of the requirement for protracted armed violence in the case of an internal armed conflict when assessing the intensity of the conflict (*Boskoski & Tarculovski Case*, para. 175). However, these are assessment factors that serve to determine whether the threshold of intensity has been reached on a case-by-case basis, rather than cumulative conditions (VITÉ, *op. cit.*, p. 7). It remains that, depending on the circumstances, conclusions may be drawn from one or the other of the criteria. For example,

the existence of high-intensity armed hostilities between state governmental authorities and a non-governmental armed group or between several non-governmental armed groups may indicate that these groups have reached a degree of organisation required to qualify as a party to a non-international armed conflict (ICRC Commentary 2018 no. 434).

6.3.2 As concerns the second criterion (the degree of organisation of the parties), it requires that the actors of armed violence reach a minimal degree of organisation. As concerns state governmental forces, they are presumed to satisfy this criterion without it being necessary to carry out an assessment in each case (ICTY, *Haradinaj Case,* para. 60). As for non-governmental armed groups, the indicative factors that are relied upon include five categories, none of which are, in themselves, essential to establish whether the "organisation" criterion is fulfilled (*Haradinaj Case*, *ibidem*).

In the first group are those factors signalling the presence of a command structure, such as the establishment of a general staff or high command, which appoints and gives directions to commanders, disseminates internal regulations, organises the weapons supply, authorises military action, assigns tasks to individuals in the organisation, and issues political statements and communiqués, and which is informed by the operational units of all developments within the unit's area of responsibility. Also included in this group are factors such as the existence of internal regulations setting out the organisation and structure of the armed group; the assignment of an official spokesperson; the communication through communiqués reporting military actions and operations undertaken by the armed group; the existence of headquarters; internal regulations establishing ranks of servicemen and defining duties of commanders and deputy commanders of a unit, company, platoon or squad, creating a chain of military hierarchy between the various levels of commanders; and the dissemination of internal regulations to the soldiers and operational units (*Boskoski & Tarculovski Case,* para. 199).

Secondly, factors indicating that the group could carry out operations in an organised manner have been considered, such as the group's ability to determine a unified military strategy and to conduct large scale military operations, the capacity to control territory, whether there is territorial division into zones of responsibility in which the respective commanders are responsible for the establishment of Brigades and other units and appoint commanding officers for such units; the capacity of operational units to coordinate their actions, and the effective dissemination of written and oral orders and decisions (*Boskoski & Tarculovski Case,* para. 200).

In the third group are factors indicating a level of logistics have been taken into account, such as the ability to recruit new members; the providing of military training; the organised supply of military weapons; the supply and use of uniforms; and the existence of communications equipment for linking headquarters with units or between units (*Boskoski & Tarculovski Case,* para. 201).

In a fourth group, factors relevant to determining whether an armed group possessed a level of discipline and the ability to implement the basic obligations of Common Article 3 have been considered, such as the establishment of disciplinary rules and mechanisms; proper training; and the existence of internal regulations and whether these are effectively disseminated to members (*Boskoski & Tarculovski Case,* para. 202).

Lastly, a fifth group includes those factors indicating that the armed group was able to speak with one voice, such as its capacity to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries; and its ability to negotiate and conclude agreements such as cease fire or peace accords (*Boskoski & Tarculovski Case,* para. 203).

ICTY jurisprudence specifies, however, that contrary to the conditions for the application of Protocol II, the application of Common Article 3 to a party to a non-international armed conflict requires a lower degree of organisation. An armed group is therefore held to be organised under this provision if it has a chain of command and if its leader is capable of exerting his or her authority over the members of the said group (*Boskoski & Tarculovski Case,* para. 197).

6.3.3 For its part, the International Criminal Court (hereinafter: ICC) held that since Art. 8 para. 2 let. f of the Rome Statute only requires that the armed group in question be “organised”, any degree of organisation is sufficient to establish the existence of a non-international armed conflict. It also noted that the exercise of control over a part of the territory by the groups in question is not required (decision of Chamber II of the ICC of 7 March 2014 in the Katanga proceedings ICC-01/04-01/07 [hereinafter: *Katanga Case*], para. 1186). In order to assess the intensity of the conflict, to the extent that under Art. 8 para. 2 let. f of the Rome Statute, “violence must go beyond sporadic or isolated acts”, it stated that it complied with the practice developed on this point by the ICTY (see Recital 6.3.1 above; *Katanga Case*, para. 1187 and its reference to the decision of Chamber I of the ICC in the *Lubanga* proceedings [hereinafter: *Lubanga Case*] ICC-01/04-01/06 of 14 March 2012, para. 538).

In the *Katanga Case*, the ICC held that a non-international armed conflict in the Democratic Republic of the Congo existed (para. 1218). It held in this regard that the various armed groups in question (the Union of Congolese Patriots, the Congolese People’s Army and the *Ngiti* militia group) had a hierarchical structure and internal discipline, occupied various military positions and had training facilities for their troops. Weapons were available to the groups and they had the ability to conduct military operations. Some of the groups had also adopted a political programme and had official spokespeople (*Katanga Case*, paras. 1207-1211). As regards the *Ngiti* militia in particular, the ICC held that it should be considered an armed group notwithstanding that its constituent troops were spread among several camps placed under the authority of various commanders, they had various means of communication and weapons and ammunition were available to them. Lastly, the members of

that militia pursued common objectives and conducted joint military operations over a protracted period (*Katanga Case*, para. 1209). It further held that the fighting between the different groups was part of a cycle of violence that extended far beyond isolated acts insofar as the armed conflict was both protracted and intense owing, *inter alia*, to its duration and the volume of attacks perpetrated throughout the territory. It further noted that the United Nations Security Council had recognised the existence of this armed conflict and adopted numerous resolutions on the matter (*Katanga Case*, paras. 1216-1218, see also *Lubanga Case*, para. 543).

In the *Bemba* case, the ICC also held that an armed group of rebels existed, despite the fact that the men were not paid, were undisciplined, and received minimal, if any, training. It held that the rebels had a command structure and available military equipment, including communications devices and weapons. According to the ICC, the ability to plan and carry out military operations was the only reasonable conclusion to be drawn from the extent, seriousness and intensity of their military involvement in the conflict, which had enabled them to take control of sizeable territory and to engage in regular hostilities (decision of Trial Chamber III of the ICC of 21 March 2016 in the Bemba proceedings ICC-01/05-01/08, paras. 659-660).

6.3.4 In the *Akayesu* case, Chamber I of the International Criminal Tribunal for Rwanda (hereinafter: ICTR) stated that armed conflicts should be distinguished from mere acts of banditry or unorganized and short-lived insurrections. The term “armed conflict” in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent (Judgment of Chamber I of the ICTR of 2 September 1998 in ICTR-96-4-T, para. 620; see also Judgment of Chamber I of the ICTR of 6 December 1999 in the proceedings of the *Rutaganda* case, Case no. ICTR-96-3-T, para. 93). It concluded that a state of internal armed conflict existed by holding that “two armies” were engaged in hostilities during the events alleged in the indictment, that one of them had soldiers systematically deployed under a command structure (hierarchical structure), and that the two armies exercised control over different territory distinct from a clearly defined demilitarised zone (*ibidem*, para. 174). During the events alleged in the indictment, one of the armies had significantly increased the Rwandan territory under its control and carried out continuous and sustained military operations. Its troops were disciplined and possessed a structured leadership which was answerable to authority (*ibidem*, para. 627).

6.4 The Islamic Salvation Front (hereinafter: FIS) was founded in Algeria in March 1989 and legalised as a political party the following September. On 12 June 1990, it won a landslide victory in the elections for the municipal and regional assemblies (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.1 p. 4). Despite the ensuing repression, the party secured a commanding lead in the first round of the legislative elections held on 26 December 1991 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.2 p. 23; MPC exhibit 1000-0018), which would have put it in a very strong position to secure an overwhelming majority in the National

Assembly if the second round had been held on 16 January 1992. However, the second round was suspended. By a presidential decree of 4 January 1992, the People's National Assembly was dissolved and, on 11 January 1992, the then President, Chadli Bendjedid, was forced to resign (MPC exhibits 10-00-0019; 10-00-0047). The HCE was created on 14 January 1992 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 617-618; MPC exhibits 16-00-0671 ss). Composed of five members, this body was initially presided over by Mohamed Boudiaf (hereinafter: Boudiaf; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 2; MPC exhibit 1600-0671). [The accused], was also part of the HCE; the army was hierarchically subordinate to it (MPC exhibits 16-00-0671; 13-00-0009). On 9 February 1992, the HCE decreed a 12-month state of emergency and dissolved the FIS in March 1992 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 p. 4). The Islamist violence, which had previously been limited to social unrest, turned into an armed struggle (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 8). In light of the continued hostilities, the state of emergency was extended indefinitely on 7 February 1993 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 3; 1.4 pt. 5.1; 1.10 p. 400) and was finally lifted on 23 February 2011 (MPC exhibit 16-00-0663).

The suspension of the second round of the Parliamentary elections led to a violent conflict involving both police repression and armed attacks carried out by Islamist opponents, causing multiple victims, including civilians (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 2; 1.4 p. 4; 1.5 p. 644; MPC exhibits 1000-0049; 10-00-0050; 23-00-0132).

In 1992, and in some cases earlier, the armed uprising was led by many different organisations, chief among which were the FIS, the MIA, which broke up in late 1993, the Movement for an Islamic State (hereinafter: MEI), the GIA, founded in 1992, the Islamic Front for Armed Jihad (hereinafter: FIDA) and numerous small groups operating exclusively at a local level (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.1 p. 11; 1.4 p. 5; 1.7 p. 301)

6.5 Intensity

In general, the documents in the file point to an undeniable increase in violence, at least following the dissolution of the FIS in March 1992 (MPC exhibit 13-00-0096; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.33 p. 45). 1992 witnessed the emergence of an increasingly violent power play between state governmental forces and their families and FIS militants, who were becoming increasingly radicalised (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 p. 649 and 650; Act. 1.10; 1.29 p. 107). In this context, [the accused] stated that the police were not content with fighting the terrorists with weapons alone, but had sought rather "to drain this den of terrorism by any means." (MPC exhibit 13-00-0013) and that "as for any terrorists not willing to lay down their arms, they had to be killed" (MPC exhibit 13-000014). The law enforcement authorities were initially the prime targets of the process of radicalisation, resulting in isolated attacks against police and military police officers and attacks on barracks. The official records indicate that the disturbances of February 1992 left 103 dead,

including 31 police officers, and 414 injured, including 144 police officers (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 653). Over the months, the proliferation of attacks carried out against the police merely served to reinforce the views of those in the army who were in favour of an uncompromising crackdown (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 645). The President of the HCE, Boudiaf, was assassinated on 29 June 1992, while a bomb attack at Algiers Airport on 26 August 1992 killed 10 people and injured around a hundred (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 3; Act. 1.4 p. 647). This event marked a turning-point in the armed clashes since well-known public figures were no longer the sole targets of such attacks (MPC exhibit 23-00-0058). In 1992, nearly 600 people were killed either by security forces or by armed opposition groups. Over 270 members of the security forces and up to 20 civilians were killed following armed attacks carried out by opposition Islamist groups. At the same time, around 300 people were killed by the security forces. A number of these people were armed opponents, but many others were civilians killed in exchanges of gunfire during demonstrations or when breaking the curfew (MPC exhibit 13-00-0095).

The trends seen in 1992 worsened in 1993, with the state of emergency being extended at the beginning of the year (MPC exhibit 23-00-0058; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 40). Estimated to number 2,000 men in 1992 (most of whom were from the MIA), by 1993 the guerillas numbered 22,000 as a result of the enlistments in the GIA, with their numbers culminating, following the emergence of the Islamic Salvation Army (hereinafter: AIS), at 40,000 in 1994 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 327). For example, in 1993, the GIA implemented its “total war” ideology (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 p. 316). The almost exclusive target of assassinations – the preserve of the armed groups – were members of the security services and government members directly involved in the fight against terrorism. However, an attack carried out in March 1993 against members of the government marked the beginning of a wave of attacks against those seen as legitimately representing the regime (WILLIS, The Islamist Challenge in Algeria, A political history 1996, p. 282). The climate of terror only intensified (bomb threats, written threats, etc.; MPC exhibits 16-00-0491; 1600-0492). The extension of the guerilla war resulted in the military intensifying their crackdown, which began to take the form of anti-guerilla warfare (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 399). Between 1 January and 30 March 1993, nearly a hundred armed fighters are estimated to have been killed and some 450 people are thought to have been arrested (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 399). On 22 March, an attack carried out by Islamists on a barracks resulted in 41 deaths, including 18 military personnel and 23 Islamists, and led the military leaders to taking a tougher stance (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 399 and 400). In April 1993, the systematic effort to dismantle the Islamist networks reached a new level. Between 3 April and 30 June, a number of networks were broken up and more

than 120 Islamists were killed during the operations. During the last months of 1993, the guerilla war intensified. Thirteen Islamists were killed, and in October the abduction of three French consular agents led to a resumption of lightning raids by law enforcement, resulting in hundreds of deaths among the Islamists. From the start of 1993, approximately 851 Islamists are estimated to have died at the hands of the law enforcement authorities, while nearly 500 police officers and military personnel are estimated to have been killed over the same period (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 401). 1993 also witnessed an increase in the number of attacks against civilians, with women and people seen as representatives of the state no longer being spared, including civil servants, magistrates, journalists and academics (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.33 p.45; 1.10 p. 405 and 406). In the autumn of 1993, foreigners were also targeted by the Islamists. On 21 September 1993, two French surveyors were found murdered (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.48). From then on, nothing appeared to stand in the way of the most radical of the underground groups. Ambushes against the law enforcement authorities and armed confrontations turned into real war operations. Between September and December 1993, 26 foreigners died in attacks (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 405 ss). In December 1993, repression, terrorism, the emergence of urban quasi-guerilla warfare and the formation of Islamist maquis resulted in three thousand five hundred deaths in two years.

In 1994, the conflict continued unabated. In early 1994, between 15 and 22 January, nearly 300 civilians and soldiers died during clashes, ambushes or attacks. According to the press, an average of 15 law enforcement officers and probably as many civilians died every day in the conflict between the law enforcement authorities and the Islamists (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.66). In other words, society as a whole faced a state of intense and constant terror (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.100 p. 5). Approximately 30,000 people died between January 1992 and 1994 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 p. 3). The abuses were committed both by the security forces and by members of the Algerian armed groups (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 pt. 5.4).

6.5.1 Number, duration and intensity of the clashes

More specifically, the number, duration and intensity of the clashes over the period in question point to violent hostilities. The (very long) list of such clashes is undoubtedly indicative of a constant state of conflict that only intensified over the months (e.g. attacks, hold-ups, ambushes, assaults and clashes; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.2 p. 10; 1.5 p. 645, 650, 652 to 659; 1.35; 1.36; 1.42; 1.43; 1.44; 1.46; 1.49; 1.51; 1.54; 1.63 to 1.66; MPC exhibits 16-00-0484 ss; 16-00-0496 ss; 16-00-0512). In 1992, the whole country went up in flames (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.34 p. 46). A number of documents in the file also refer to a significant number of military operations, manoeuvres and actions of all kinds (MPC

exhibit 13-00-0010). [the accused] stated in this regard that all possible means were used in the fight against Islamist terrorism (MPC exhibit 13-00-0012). The file also refers to multiple “lightning raids” (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 649, 652 to 659; 1.10 p. 401; 1.11 p. 234, 237; 1.36; MPC exhibits 16-00-0484 ss) and to search and sweep operations (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 400, 420, 421; 1.11 p. 240; MPC exhibits 12-15-0011; 13-00-0010), sometimes referred to as being large-scale or systematic (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 400 and 421). However, it is also evident from the exhibits submitted that various clashes which took place in 1992 lasted for several days. For example, “starting on 14 July [1992] and for roughly ten days – and nights – special military police units, supported by a fleet of armed helicopters – Mi-8 with 23-millimetre rapid-fire cannons and Mi-24 fitted with anti-personnel missiles – hunted down the Islamist fighters. The operations took a heavy toll, with the MIA suffering serious setbacks” (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 223). Consider this further statement: “there remain several heavily armed maquis, still based in the nearby mountains, and the last groups operating on the outskirts of Algiers. The security forces spent the summer attempting to suppress the two hotbeds. The clashes were violent, and civilian populations were often the victims of these battles between two determined opponents” (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 225). Further on, it is stated that “starting on the morning of 30 August and for a period of three days, military police did battle with a group of heavily armed terrorists who had taken refuge in Khazrouna, around forty kilometres from Tamesguida” (Act. 1.11 p. 235).

Therefore, while these documents do not point to frontlines where fighting was initiated and continued (MPC exhibit 13-00-0074), it cannot be concluded, as the respondents do, that the law enforcement authorities merely conducted a series of anti-terrorist operations limited to brief skirmishes during the period under investigation. The aforementioned battle that took place in Khazrouna between the law enforcement authorities and four terrorists required approximately 300 men as backup and the support of four armoured cars. During the attack, some 16 apartments were shelled, demonstrating the violence of the conflict and the determination of the Islamists (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 *ibidem*). It should be recalled in this regard that, depending on the circumstances, very brief hostilities may nevertheless reach the level of intensity of a non-international armed conflict if, in a particular case, there are other indicators of hostilities of sufficient intensity to require and justify such an assessment (ICRC Commentary 2018 no. 440 and cited references).

6.5.2 Victims

During the years under investigation, the documents in the file point to continuing clashes led by both the police and their opponents. Bombings – a “specialism” of the Islamists – resulted in numerous casualties (see Recital

6.5 above). While in early 1992 law enforcement authorities were the preferred targets of their opponents, over the course of the following months people whose positions made them representatives of the state also gradually came to be targeted by Islamist attacks, including civil servants, local executive officials and journalists (MPC exhibit 16-000477). Furthermore, in 1993, the civilian population also paid a heavy price for the ongoing clashes (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 401, 406; 1.43; 1.44; 1.48; 1.49; 1.61; 1.62; see also Recital 6.5 above).

6.5.3 Destruction

It is also evident from the documents in the file that dwellings (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 56-57; 1.11 p. 237) and a range of public infrastructures were regularly targeted. These were destroyed or damaged on a regular basis (sabotage, fires). The targets of the attacks included, among others, the headquarters of the Algerian National Navy (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.2 p. 10; 1.35), military police stations (MPC exhibit 16-00-0610), airports (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.2 p. 10; 1.39), barracks (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 399 and 400; 1.66), telephone and electric power facilities (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 650; 1.100; MPC exhibits 16-00-0488; 16-00-0610), the security headquarters of a number of *wilayas* (MPC exhibit 16-00-0610), cement plants (MPC exhibit 1600-0514), post offices (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 650; MPC exhibit 16-00-0514), mosques (MPC exhibit 16-00-0515; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 650 footnote 135), bridges and schools (MPC exhibit 23-00-061).

6.5.4 Weapons

According to witness D., in the autumn of 1992 combat units of the law enforcement authorities were under-equipped for combating terrorism or engaging in unconventional war. For example, they had no walkie-talkies, no night vision binoculars and no bulletproof vests (MPC exhibit 12-15-0010). However, various documents in the file refer to the law enforcement authorities being equipped with tanks, armoured vehicles and helicopters (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 648; 1.10 p. 425; 1.11 p. 235, 236, 239), which they used on a regular basis in tracking down members of the Islamist groups, in particular when carrying out combat operations against the maquis (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 234, 235, 239). Land combat forces and paratroopers were also involved (MPC exhibit 13-00-0077) in the operations carried out against the Islamist forces.

According to [the accused], the armed groups were equipped with a range of weapons of war, including Kalashnikovs and sawed-off shotguns (MPC exhibit 12-15-0011; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.21), bazookas, sub-machine guns, machine guns (MPC exhibit 13-00-0088), pistols (MPC exhibit 12-15-0010), automatic pistols (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 250), RPGs, mortars, light machine guns, bombs

(130 bombs [BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 645]), anti-tank grenade launchers and several hundred kilos of explosives (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 645, 650; Act. 1.11 p. 22, 225; 236, 238; 1.36; MPC exhibits 16-00-0468; 16-00-0482;). It is true that according to the respondent, “the GIA had limited operational capabilities at first, but by carrying out individual operations against targeted individuals such as military personnel, police officers and military police officers they were able to recover weapons. Their aim was to recover weapons from military personnel, police officers and military police officers. That is how they were gradually able to improve their operational capabilities. They also improved their *modus operandi*. They would set up ambushes and recover weapons. By operating in this way, they were gradually able to secure resources that enabled them to fight a war proportional to their size. That is how they were able to secure the necessary operational capabilities to engage in a form of combat adapted to their strengths” (MPC exhibit 13-00-0074). However, according to the documents in the file, the weapons made available to the Islamist groups, particularly bombs, were sometimes provided to them by activists based in, among other places, Germany, (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 232), France and Morocco (MPC exhibit 16-00-517; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.22).

Admittedly, from the documents in the file, it is difficult to clearly establish the degree to which the distribution of weapons among the two parties to the conflict intensified during the period under investigation. For example, with regard to the highly specialised structure created by the government in the autumn of 1992 with a view to establishing a single coordination function for the fight against terrorism (Centre for the Conduct and Coordination of Anti-Subversive Action; hereinafter: CC ALAS), it is apparent that the effectiveness of the new structure was severely limited by administrative burdens. The special forces unit seldom had the use of all of its troops, forming merely a hard core reinforced on an ad hoc basis by conventional units that were generally more of an obstacle than an asset. Moreover, there appears to have been a lack of modern resources, with a special credit line therefore being required, although the release of the funds was blocked by bureaucracy (Act. 1.11 p. 240). It is also true that the Islamist groups appear not to have had such readily available stocks of weapons, but that in order to procure weapons they were forced to carry out multiple attacks.

[The accused] held that the hardware available to the terrorists was limited to small arms, and that the same was true of the security forces. However, [the accused] cannot be followed. It should be noted that in the *Haradinaj case*, the ICTY held that machine guns and mortars should be regarded as heavy weapons (para. 45). It is precisely these kinds of weapons that were available to the Islamist groups at the time.

Therefore, we must conclude that while doubts remain about the quantity of weapons that were actually available to the combatants engaged in the hostilities in question, between 1992 and 1994 heavy weapons were already in the hands of both parties.

6.5.5 Reinforcement and mobilisation of state governmental forces

Faced with the spiral of violence that began in early 1992, the army gradually ramped up its security operation. Civilians were armed and mobilised alongside the security forces, the police, the military police and the army (MPC exhibit 15-00-0032). Army units (battalions, brigades), air force units (regiments of air fusiliers and heavy patrols by helicopters) and the navy, with battalions of navy fusiliers, were involved in the fight against terrorism (MPC exhibit 12-15-0016). The autumn of 1992 saw the creation of the CC ALAS. The task of this logistics body was to assign troops and equipment to the regions. It was also responsible for coordinating all of the services involved. CESARI notes that the CC ALAS was an elite unit made up of the best troops from the army, the military police and the police with the aim of intensifying the fight against the Islamists, with significant resources at its disposal to achieve this objective (helicopters, tanks), and that it was deployed primarily in the Blida region to the south of Algiers (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 648). Furthermore, specialist army personnel known as "*Ninjas*" were also deployed on the ground, forming a unit operating across the entire national territory tasked with carrying out special operations (MPC exhibit 13-00-0079). In April 1993, several military units thought to total around fifteen thousand men were dispatched to the seven departments of the Algérois region to oversee the police and military police intervention brigades with the aim of surrounding the Islamist strongholds (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 400). As concerns the number of Islamist fighters, estimated in 1992 to total around 2,000 men, primarily from the MIA, by 1993 they numbered some 27,000 members (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.18 p. 3).

Moreover, the harder line taken by the authorities translated from the outset into a restriction of civil liberties in the name of security. In August 1992, several daily newspapers were suspended (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 646 and 647; 1.42). The emergency legislation and related decrees also deprived citizens of the rights guaranteed by the Algerian constitution as well as the protection of human rights provided by international conventions, of which Algeria was a signatory (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 pt. 5.1). As a result, civilians accused of violating state security could be tried by military tribunals. In 1993, most of the civilians accused of political violence were tried by special courts (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 *ibidem*). In October 1992, an anti-terrorism law was promulgated that served, among other things, to establish courts of special jurisdiction made up of civilian and military judges whose sentences were final (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 401). The new courts dealt with a wide range of matters, from

assassination attempts to restrictions on the freedom of religious practice and civil liberties. Lastly, the law set the age of criminal responsibility for crimes of terrorism and subversion at 16 years (and not 18) and provided for the extension of police custody for such offences for up to 12 days. As a result, with effect from 3 January 1993, persons accused of subversion and terrorism were tried by special courts in which the rights to which detainees should have been entitled were often violated (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 pt. 5.2.1). As soon as the law entered into force, a total of more than 800 people were arrested between October and November (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 648). Moreover, in its report of 2 March 1993, Amnesty International found that under the emergency legislation more than 9,000 people were held in administrative detention in camps located in the south of the country (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 2).

It is also apparent from the documents in the file that between March 1992 and January 1993, 48 people were sentenced to death. A legislative decree of 1 October 1992 also allowed the imposition of the death penalty by special courts for offences that had previously been punishable by a life sentence (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 11).

The file also indicates that on 19 January 1992 approximately ten security centres were set up (MPC exhibits 13-00-0029; 13-00-0030 ss; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 4). More than 9,000 people are thought to have been detained in such centres during the state of emergency in 1992-1993 (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 4; 1.5 p. 622 footnote no. 291; 1.95 p. 94 footnote no. 23). Furthermore, special military police forces numbering some 15,000 men were set up in April 1993 with the task of restoring public order and safety in the Mitidja area and the outskirts of Algiers, where the FIS had secured its best election results (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 52, 53, 58).

This evidence establishes beyond doubt that during the period under investigation, the Algerian state was confronted with hostilities which could not be suppressed by ordinary means (such as the police and the enforcement of ordinary criminal legislation).

6.5.6 Torture

The file also reveals that during the period under investigation, numerous acts of torture were committed in security institutions, military prisons, police stations and detention centres (MPC exhibits 12-110047; 12-10-0019; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 5 ss.; for further details, see Recital 7.3.5 below).

6.5.7 UN Security Council

That being so, while international organisations such as Amnesty International (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3), Human Rights Watch (MPC exhibits 13-00-0014 to 13-00-0182) and the Human Rights Committee (report of 25 September 1992 CCPR/C/79/Add.1) expressed concern over the deteriorating situation in Algeria in September 1992,

particularly in relation to human rights during the period in question, no resolutions were adopted by the UN Security Council in respect of the matter.

6.5.8 Existence of cease fire orders or agreements

CESARI notes that faced with the explosion of violence, in 1992 the military authorities put themselves in a position to negotiate (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 400). However, none of the parties to the conflict, whether on the side of the FIS or of the authorities, were willing to negotiate, with each party believing that the other would capitulate first (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 10). Furthermore, although in late 1993 the Algerian regime attempted to change its strategy by setting up the National Dialogue Commission and the National Reconciliation Conference in September of the same year, the move ended in failure, with the FIS not being invited to take part (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 10). The situation was further compounded by the fact that the GIA remained opposed to any kind of negotiation with the regime and used violence to undermine any attempt at appeasement (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 16). Therefore, it must be recognised, as [the accused] notes, that the file makes no reference to any agreement between the parties to the conflict or to any cease fire during the period in question.

6.5.9 Number of civilians forced to flee the combat zones.

There is nothing in the file to support the contention that various areas of the Algerian national territory saw a mass exodus of civilians during the period under investigation, notwithstanding that from 1993 onwards civilians were no longer spared by the attacks carried out by the Islamist groups in particular (see Recital 6.5 above). It remains that a part of the population in the outskirts of south-east Algiers did flee an area where life had become unbearable as a result of the excesses and abuses that took place there on a daily basis (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 54 and 55). Some even moved abroad (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 56).

6.5.10 Control of the national territory

It is evident from the file that the various armed groups were present, albeit to varying degrees, across the entire national territory of Algeria and principally in the regions and cities in the north of the country. Shortly after the dissolution of the FIS, there were reports of numerous “liberated areas”, that is, areas under the control of armed Islamists (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 53). Furthermore, in 1992, the groups opposed to the police joined forces in the maquis. In 1992, around twelve groups were identified, primarily in the Algérois, in the south and, above all, in the east of the country, with each guerilla zone falling under the joint authority of a military commander and an emir responsible for recruiting soldiers (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 645). The maquis of Lakhdaria to the south east of Algiers was used as a rear base by the commandos operating in Blida, Médéa, Kadiria and Larba (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.5 p. 645; 1.95 p. 323). Urban areas were also much used, particularly by the numerous armed gangs claiming affiliation with the GIA (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 30). There were also so-called liberated zones, such

as the Islamist communes in 1993 (Birkhadem, Saoula, Douéra and Kheraissia to the south of Algiers), which appeared to have fallen under the control of armed fighters who had established new ways of life and new administrative structures (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 30). The same appears to have happened in certain regions in the north of the country, with Chlef and Blida being particularly badly affected (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.4 pt. 4.1). The towns of Tipaza, Boumerdès, Médéa, Bouìra and Aïn Defla also served as rear bases for members of the GIA (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 404 and 405). The armed groups also remained present in the major mountain ranges until 1995 (the Atlas of Blida, the Ouarsenis mountains, the Aures Mountains, the high plateaus of Constantinois and the Edough Massif; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 36), where they had set up roadblocks to mark out their respective territories. These regions appear to have been less affected by violence than much of the rest of the country, although this should not be taken to mean that the maquisards were not present there. Paradoxically, it was in the “most peaceful” regions (Grande Kabylie, Ouarsenis, Constantinois) that the maquisards had their war infrastructures (for example, the maquis of Chekfa and Azazga; BB.2017.9 - BB.2017.10 - BB.2017.11 Act 1.95 p. 322-324).

Therefore, there is no question that the armed groups active between 1992 and 1994 managed well-demarcated territories, whether districts, municipalities or mountainous areas where they had established their maquis (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 221). It is true that some documents in the file indicate that government representatives were never prohibited, even temporarily, from accessing any part of the national territory (MPC exhibit 14-00-0036) and that towns and villages were never occupied, besieged or suffered intense shelling (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 p. 302). However, other documents refer to systematic destruction and roads under control (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 324).

While the territories controlled by the armed groups were not completely inaccessible, they nevertheless formed bastions, with state governmental forces struggling to root them out (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 233). Therefore, it must be concluded that, despite what the respondents claim, the armed groups occupied territories within the meaning of the aforementioned case law.

6.5.11 In light of the foregoing, it must be held, contrary to the decision that was handed down, that the intensity criterion was, in this instance, met. It is true that not all of the evaluation criteria relating to it are fully met. However, it is not necessary that all criteria be met in order for the intensity of a conflict to be recognised (see Recital 6.3.1 above). As set out above, there is evidence of many decisive criteria being undeniably met in this case. To conclude otherwise would imply that the events which took place in Algeria during the

relevant criminal period should be viewed as routine policing operations in response to internal tensions. That is not the case here.

6.6 Organisation

Insofar as the criterion relating to the intensity of the conflict is met in this case, the degree of organisation of the parties to the conflict needs to be re-examined. The contested decision held, in this respect, that while the security forces acting for the Algerian government were sufficiently well organised to qualify as parties to the conflict, the same cannot be said of the armed Islamist groups. It notes that the investigation was unable to obtain sufficient indications that the requirements relating to the existence of an armed conflict had been met. With reference in particular to the GIA, which it describes as the most well-known group, it indicates that very little information is available about its structure. While there are, admittedly, undeniable indications of its hold over the population, these are not sufficient to hold that the criteria required by the relevant case law are met.

6.6.1 As noted above (Recital 6.4 above), there was a plethora of armed groups operating at the time of the events (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 9; MPC exhibits 23-00-0104; 23-00-0133). Among these were the GIA, which – like the MPC – requires closer study.

The GIA was founded on 31 August 1992 during a meeting held in the suburbs of Algiers (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.11 p. 224; 250; MPC exhibit 23-00-0133); [A.L.] (hereinafter: [L.]), known as […], was appointed as its national emir during this meeting. At the time, [L.] had 600 Islamist fighters under his command. He provided the group with an organisation chart, a clandestine publication (*al Chahâda*) and regulations. Following his arrest in the summer of 1993, [L.] was replaced by [M. A.], known as [J.A.], until February 1994; http://anglesdevue.canalblog.com/archives/2009/10/14/15427135.html). Whenever an emir was killed or arrested, he would be replaced immediately (MPC exhibit 23-00-0133). Formed of Algerian veterans who had fought in Afghanistan (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 15; MPC exhibits 15-00-0125; 18-03-0290), the GIA soon established itself as the most significant militant group (MPC exhibit 23-00-0134), benefiting from logistical and ideological support internationally, with European Islamists providing it with weapons and financial assistance (MPC exhibit 23-00-0136).

6.6.2 Presence of a command structure

Structure

The GIA was a fragmented organisation based on a system of geographical allegiance (district, estate, town) (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 404). It was structured in such a way that Algeria was effectively divided into several distinct military zones, with each zone being presided over by a regional emir. Each emir was assisted by an Islamic legislative committee, generally comprising a single *mufti* or *thâbit chr'iy* (legislator)

responsible for issuing *fatwas* (legal opinions) that legalised the actions undertaken by the emir. The *mufti* was also responsible for indoctrinating new recruits and for inciting them to wage jihad. A council (*majliss*), committees, support networks and shelter and arms supply networks would form around the emir (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 404, 405).

An Advisory Board that included all of the regional emirs was presided over by the national emir, who had several more or less autonomous groups available to him. The national emir, protected by a praetorian guard, was the real tyrant of the group. He would sentence to death anyone suspected of disobedience or tepid support. In theory, his investiture was performed by means of a *"moubâya'a"*, a kind of oath of allegiance. In practice, the emirs imposed themselves by their capacity to do harm, their dangerousness, their wealth and the support they enjoyed within the group. The emir would take one fifth of any spoils http://anglesdevue.canalblog.com/archives/2009/10/14/15427135.html).

In short, the GIA was organised around at least three levels: the national, area and *wilaya* levels. Each level was made up of an *imara*, the equivalent of "headquarters or general staff", with the national *imara* (*imara wataniya*) resembling a "presidency". Below this was the area *imara* and the regional *imara*. As concerns the more strictly military aspect, this consisted of a hierarchical structure in sections, "the base level", sub-companies (*facilat*) and companies (*katiba*), and then battalions (*djund*). The *mujahideen* could also be organised as commandos (*zumra*) for the purpose of carrying out more specific missions, operating as numerous dormant networks reactivated according to operational requirements (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 31; 1.10 p. 404).

Over time, the various components of the GIA gradually established a real war economy. By recruiting among delinquents and repeat offenders, they were able to channel certain forms of crime in their favour (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 404). The number of people thought to have been mobilised within the GIA's networks is estimated at between 5,500 and 10,000, three quarters of whom were located in a triangular area linking Western Algiers, Boumerdès and Blida. Towns and cities in the centre of the country (Algiers, Bilda, Tipaza, Boumerdès, Médda, Bouìra and Aïn Defla) served as a rear base for the triangle and were the focus of the vast majority of terrorist attacks. In the east and west of the country, the influence of the groups affiliated with the GIA was more diffuse, with the exception of Jijel. Lastly, Kabylie was not spared by the acts of destruction and murders (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.10 p. 404, 405).

Ideology

It is evident from the file that unlike other groups, the GIA refused to engage in political action. Its slogan was: "no truce, no dialogue, no reconciliation" (MPC exhibit 23-00-0106). It called for "total war" against the regime, which it regarded as illegitimate and which, in its view, had to be completely destroyed (BB.2017.9

- BB.2017.10 - BB.2017.11 Act. 1.7 p. 316). It was thus opposed to any form of negotiation (MPC exhibits 10-00-0028; 10-00-0092). Accordingly, it categorised the whole of society as either supporters of jihad or enemies of Islam, never hesitating to direct its armed action and terror against both civilians and Muslims (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 25; MPC exhibits 23-00-0133; 23-00-0124) and against all social groups which, whether intentionally or unintentionally, helped to ensure the regime remained in place. Administrative authorities, the school system and foreigners became “legitimate” targets, in the same way as security guards (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 317). The radicalism targeted both the political and the family order (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 317) and led to other military-Islamist organisations being temporarily marginalised. The GIA’s spectacular communication policy (with assassinations of foreigners and well-known intellectuals) made it a potential leader of jihad in Algeria. The group made its marks by engaging in the most inhumane practices of terror, slitting its victims’ throats, carrying out mass massacres of innocent people, spreading terror, eliminating rivals and recalcitrants and frantically promoting martyrdom and a mystical cult of death (MPC exhibits 15-00-0102; 15-00-0125). Furthermore, its initial establishment in the Algérois was conducive to media exposure, at the expense of other organisations based in the mountainous areas located far from Algiers (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 p. 318).

Cooperation

Although the cooperation between the dissident groups active at the time was short-lived, the file refers, during the period in question, to a number of coordination meetings held between the MIA and the GIA over the course of the first two years of the conflict, resulting in particular in the creation of a national executive committee charged with appointing a *liwa* (general). A unit was also set up in the centre of the country to better structure the relations between the various existing entities (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 25), demonstrating a willingness and an ability to engage with the GIA as a whole.

6.6.3 Carrying out operations in an organised manner

The GIA-led jihad was designed to be conducted on “all fronts, both inside and outside Algeria”, i.e. including abroad. The result of this generalisation of the notion of enemy was that all forms of action were encouraged, leaving all of the autonomous armed groups claiming to be affiliated with the GIA with much room for manoeuvre. The group therefore engaged in all forms of violence across the national territory, thereby acquiring near nationwide representation (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 319). The extreme freedom enjoyed by the groups acting in the name of the GIA also served to turn every district where they were established into an area under the control of the organisation, reinforcing the impression of its supremacy (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 318).

With the exception of high-profile attacks requiring dozens of men, GIA fighters generally operated in small, mobile and elusive groups (of between three and ten men, up to a maximum of 20), enabling them to avoid direct confrontation with the army (http://anglesdevue.canalblog.com/archives/2009/10/14/ 15427135.html).

Furthermore, the GIA understood better than its rivals that the economy was a determining factor for the long-term viability of the regime. In 1993, it therefore created an internal "economic destruction and sabotage" unit, highlighting the extent to which its struggle involved weakening the resources of the regime (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 319). In its eyes, this justified the destruction of the economic infrastructure since the economic apparatus, particularly the hydrocarbon sector, was the main obstacle to the success of the guerilla war. Far from being a rudderless organisation, the GIA came to embody the most accomplished form of an Islamist eradication policy. The one-upmanship practised by the regime was met by the "total war" conducted by the emirs, who, if they could not overthrow the regime, sought, at the very least, to destroy its resources. Led by military rather than religious figures, at this stage the emirs' jihad became a long-term war (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 320).

Thus, as set out above (Recital 6.5.10*)*, while there appears to have been no territory under the full control of the armed groups, their presence is beyond doubt and can be seen in various ways and places. The most symbolic space in which they were present was probably in the former maquis of the National Liberation Front used during the War of Independence and located in the mountains and forests surrounding Algeria's major cities. The urban environment was also widely used, particularly by the many armed groups claiming to be affiliated with the GIA. Here, their presence was diffuse and volatile, with their fighters, who were born in the local neighbourhoods, using their intimate knowledge of the maze of alleys to both launch attacks against the security forces and escape retaliation. Lastly, as noted previously (see 6.5.10 above), the literature also points to the existence of so-called "liberated" zones, a term used to refer to areas that appeared to have come under the control of armed fighters who were establishing new ways of life and new administrative structures (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 30; 1.9 p. 43). As concerns the GIA more specifically, its emergence and rapid establishment in the Mitidja considerably narrowed the sphere of action of other groups such as the MIA. In 1993 and 1994, the GIA launched a widespread recruitment drive and established its first maquis in the mountains near the town of Lakhdaria and in the Constantinois, despite the presence of the MIA and MEI (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 323).

6.6.4 Level of logistics

In 1991-1992, the MIA, among other organisations, set out to recruit seasoned professional fighters, attracting many candidates wanting to fight. However, the selection procedures that it put in place were long and rigorous (gradual recruitment, background checks carried out among friends and

relatives, etc.). As a result, the many candidates for jihad who had been rejected by the MIA fell back on the armed urban gangs, which became affiliated with the GIA and took in vast numbers of young Islamist fighters sympathetic to its cause flocking to join its ranks (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 p. 308; 1.8 p. 29; 1.95 p. 317). A number of GIA fighters had been Afghan *mujahideen* who had fought against the Soviets in the 1980s (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 15); in other words, the group recruited fervent Islamists as well as members of the Algerian criminal classes. Bandits, alcoholics, delinquents and ex-convicts were among those radicalised, "retrained" and directed towards jihad (MPC exhibits 15-00-0125; 18-03-0290). Before having any kind of military policy and clear political objectives, these small groups engaged in criminal activities (racketeering activities among businesses, the local population, etc.), which very often resulted in the "retrainees" becoming highly effective guerilla fighters. (http://anglesdevue.canalblog.com/archives/ 2009/10/14/15427135.html).

Fighters were required to undergo rites of passage to join the ranks of the armed groups, ensuring firm commitment on the part of subordinates (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 51). As a result, as the battlefronts became increasingly intense, the GIA was able to amass resources, strengthen its operational structures and improve the recruitment of its fighters who, because of their absolute ideology, were extremely unified (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.27 p. 16). For example, MARTINEZ notes that: "Whereas until 1993, in response to the crackdown, the GIA had drawn part of its human resources from the breeding ground provided by the conurbations of the Mitidja, profound changes related to the increased professionalisation of its organisation served to broaden its social and regional base to bring its maquisards closer to the AIS fighters" (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.8 p. 28 footnote 89). By contrast, it appears that unlike other groups, rather than wearing a specific uniform, GIA members assumed an "Islamic look", with shaved heads, beards and loose clothing (MPC exhibit 13-00-0087; BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.95 p. 303). MARTINEZ also notes that the armed groups needed more than just foreign aid to survive: they also found the necessary, regular and risk-free resources they needed within their own environment by engaging in racketeering activities among the local population and businesses (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.9 p. 64, 65).

6.6.5 Necessary discipline for ensuring compliance with the fundamental obligations arising from Common Article 3

Given the GIA's ideology and how it put its ideology into practice, it is clear that the group did not meet the criterion relating to the obligation to ensure compliance with the fundamental obligations of Common Article 3.

6.6.6 Ability of the group to speak with one voice

During the period in question, the GIA never engaged in any negotiations or discussions relating to any cease fire or peace agreements. By contrast, it

was involved in (unsuccessful) talks in an attempt to unify the then active dissident organisations.

However, of the various groups present in Algeria, the GIA was, during the period under investigation, the only group to attract media attention (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.7 p. 301; 1.95 p. 301). The group had a structured communication policy, with the weekly *El-Ansar* published in London serving as a mouthpiece for the GIA from 1993 onwards. Its two editors also served as liaison officers for the group and handled its press releases, introduced every new emir and wrote ideological tracts (MPC exhibit 2300-0136). In addition, during this period, the Algerian and international media regularly reported the group's communiqués, which they received by post or as videos and through which the GIA claimed responsibility for the numerous attacks committed (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.21; 1.24; 1.26 p. 16; 1.27 p. 16; 1.28; 1.29 p. 195; 1.30; 1.57; MPC exhibit 14-00-0030).

6.7 In view of the foregoing, it must therefore be accepted, particularly in light of Common Article 3, that, for the period under consideration, and contrary to the conclusion of the MPC, the GIA met the conditions required to qualify as an armed group.

6.8 It follows that the condition for qualifying as a non-international armed conflict in Algeria between January 1992 and January 1994 is met. Consequently, Art. 108 and 109 aCPM apply in this instance, thereby establishing the jurisdiction of the Swiss authorities. For that reason, the MPC must therefore complete the investigations. Therefore, on this point the appeals are allowed.

7. Even if the admissibility of this first complaint is enough to decide the case, it should be noted that the appellate remedies would, in any event, have resulted in a positive outcome for the following reasons.

7.1 In its ruling abandoning proceedings, the MPC states that the charges brought against the accused and which are the subject of the investigation essentially relate to extrajudicial killings, forced disappearances of alleged opponents and acts of torture (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 p. 11). It notes that the said acts of torture correspond to offences punishable under Art. 264a para. 1 let. f CP, entered into force on 1 January 2011 within the scope of the new criminal provisions as part of the implementation of the Rome Statute, but that the events under investigation took place in Algeria in the years 1992 to 1994. The MPC therefore ruled out applying Art. 264a CP based on the principle of non-retroactivity applicable in criminal law.

7.2

7.2.1 Pursuant to Art. 264a para. 1 let. f CP (under marginal title “Torture”), the penalty is a custodial sentence of not less than five years for any person who, as part of a widespread or systematic attack directed against any civilian population, inflicts severe pain or suffering or serious injury, whether physical or mental, on a person in his or her custody or under his or her control.

Pursuant to Art. 101 para. 1 let. b CP, in the case of crimes against humanity within the meaning of Art. 264a para. 1 and 2 CP, there is no limitation of the

right to prosecute. While there can be no question over imprescriptibility as provided for by Art. 101 para. 1 CP in relation to crimes against humanity committed subsequent to the entry into force in 2011 of the new criminal provisions designed to implement the Rome Statute, the fate of acts committed prior to the said revision remains to be determined.

7.2.2 Art. 2 CP lays down the conditions of applicability of criminal law in time. It reiterates the general principle of the non-retroactivity of criminal law (Art. 2 para. 1 CP), but it also provides for the exception known as the principle of *lex mitior*, namely the applicability of the new law to acts committed prior to its entry into force if the sanction is more lenient (Art. 2 para. 2 CP). Art. 388 to 390 CP complete Art. 2 CP and rely on the same principles of non-retroactivity and the application of the principle of *lex mitior* for the execution of judgments, sentences and measures, time limits and complaints (GAUTHIER, Commentaire romand, Code pénal [Swiss Criminal Code] I [hereinafter: Commentaire romand CP I], 2009 no. 9 *ad* Art. 2 CP). Specifically with respect to the provisions of the new law on time limits for prosecution and the execution of sentences, and pursuant to Art. 389 para. 1 CP, if they are less strict they also apply to offenders who have committed or been convicted before the new law came into force. Article 389 CP expressly states “unless the law provides otherwise”.

This exception flows from Art. 101 para. 3 CP with regard to the exclusion from limitation of war crimes and crimes against humanity. This provision states that the exclusion from limitation of the offences of genocide and war crimes applies specifically if the right to prosecute or execute the sentence was not time-barred by 1 January 1983 in accordance with the law applicable until that point in time. With regard to crimes against humanity, exclusion from limitation applies if the right to prosecute or execute the penalty was not time-barred under the previous laws when the Amendment of 18 June 2010 to this Code came into force, in accordance with the law applicable until that point in time. Thus, crimes against humanity, including torture (Art. 264a let. f *cum* Art. 101 para. 1 let. b and 101 para. 3 CP) are imprescriptible if they were not time-barred as at 1 January 2011 (ZURBRÜGG, Commentaire bâlois, Droit pénal I, no. 23 *ad* Art. 101 CP; see statement by WIDMER-SCHLUMPF BO E 2009 p. 340). In these cases, the new provisions relating to exclusion from limitation also apply to acts committed prior to the entry into force of the punishable offences (TRECHSEL, Praxis Kommentar, Schweizerisches Strafgesetzbuch, 3rd ed. 2018, no. 2 *ad* Art. 389 CP). Offences for which there is no limitation of the right to prosecute within the meaning of Art. 101 para. 3 CP constitute an exception to the principle of *lex mitior* and the rule applies independently of provisions relating to exclusion from limitation that are more lenient (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, Petit Commentaire Code pénal, 2nd ed. 2017, nos. 1 to 3 *ad* Art. 389 CP).

As concerns the punishment of acts of torture committed between 26 June 1987 (date of entry into force of the UNCAT for Switzerland) and 31 December 2006 (Art. 6 para. 1 CP in its new version, which entered into force on 1 January 2007;

RO 2006 3459), it was necessary to refer to different provisions of general law such as those relating to serious assault (Art. 122 CP), endangering the life or health of another (Art. 127 CP), coercion (Art. 181 CP), false imprisonment and abduction (Art. 183 CP), murder (Art. 112 CP), etc. (MEMBREZ, La lutte contre l'impunité en droit suisse, compétence universelle et crimes internationaux, 2nd ed. 2015, p. 8 and 166).

7.3 Therefore, the issue is to determine whether Switzerland has jurisdiction to prosecute acts of torture committed, as in the present case, prior to 2011 in a foreign country without the offender or the victim being in Switzerland.

7.3.1 The principle of the territorial scope of application laid down in Art. 3 CP according to which the sovereignty of the state is the basis of its right to prosecute any person who commits a felony or misdemeanour on its national territory constitutes the fundamental rule for determining where a criminal offence should be prosecuted (HARARI/LINIGER GROS, Commentaire romand CP I, nos. 2 and 3 *ad* Art. 3 CP). Where the act was committed abroad and the jurisdiction of the Swiss authorities cannot be derived from Art. 3 CP, Art. 4 to 7 CP also provide for Swiss jurisdiction on the basis of other criteria (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 9 *ad* rem. prel. to Art. 3 to 8 CP). In particular, Art. 6 CP governs the jurisdiction of the Swiss authorities in the case of felonies or misdemeanours committed abroad, prosecuted in terms of an international convention. Thus, it is evident from Art. 6 CP that the CP applies to any person who commits a felony or misdemeanour abroad that Switzerland is obliged to prosecute in terms of an international convention provided the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission (let. a); and the person concerned remains in Switzerland and is not extradited to the foreign country (let. b).

7.3.2 Art. 6 CP applies only in the event of felonies or misdemeanours committed abroad and is therefore subsidiary to Art. 3 CP (POPP/KESHELAVA, Commentaire bâlois Droit pénal I, 3rd ed. 2013, nos. 2 and 12 *ad* Art. 6 CP). It assumes that Switzerland has undertaken to prosecute the offence in question through an international convention (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 3 *ad* Art. 6 CP). Furthermore, Art. 6 para. 1 CP provides, on the one hand, for the principle of double jeopardy and requires, on the other hand, that the person who committed the felony or misdemeanour remain in Switzerland and cannot be extradited to the foreign country (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, nos. 4 and 5 *ad* Art. 6). The conditions referred to above require no further developments here and are met in the present case (see Swiss Federal Criminal Court decision of 25 July 2012, BB.2011.140, Recitals 3.1 and 3.4).

In the present case, the events under investigation took place in Algeria only and only concern Algerian nationals, with the consequence being that Art. 6 CP does apply. The acts that may be taken into consideration here include torture. On 26 June 1987, Switzerland ratified the Convention of 10 December

1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT; RS 0.105). As for Algeria, it had also been bound by the Convention since 12 October 1989. Both Switzerland and Algeria were therefore bound by the UNCAT prior to the period during which the events under investigation took place.

7.3.3 Under Art. 1 of the UNCAT, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". Art. 2 para. 1 of the UNCAT provides that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Art. 4 para. 1 of the UNCAT states that "each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.". It follows that the UNCAT is not directly applicable and acts may only be prosecuted on this basis if they fall under a provision of Swiss law allowing the application of the convention (FF 1985 III 273 p. 287; MÖHLENBECK, Das absolute Folterverbot, 2007, p. 45).

7.3.4 In the present case, the MPC instituted proceedings against [the accused] in November 2011 for acts committed during the Algerian Civil War. In his capacity as Minister, [the accused] is alleged to have played a critical role in the commission of the offences perpetrated in Algeria during this period between 1992 and early 1994 by ordering, participating in and instigating the widespread use of torture, murder and forced disappearances of alleged opponents, whether members or not of the Islamist guerillas (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 p. 2 s.). In light of the investigation conducted to date by the MPC, and based on the evidence being investigated, it is possible that acts of murder (Art. 112 CP) – the only offence not yet time-barred (Art. 97 para. 1 let. a CP) – were committed. It is necessary to establish whether the investigated acts which amount to murder may legitimately be described as torture within the meaning of Art. 1 of the UNCAT.

7.3.4.1 Murder is an act known as intentional homicide and is distinguished from homicide, which is governed by Art. 111 CP, by the particularly reprehensible nature of the act (ATF 118 IV 122, Recital 2b and cited references). Pursuant to Art. 112 CP, murder is "where the offender acts in a particularly unscrupulous manner, in which the motive, the objective or the method of commission is particularly depraved". These are only examples, however, and, in general terms, a person who demonstrates a notable lack of scruples

with respect to the ethical nature of his or her behaviour and acts with selfishness and a disregard for life is deemed to have committed murder (Swiss Federal Court decision of 22 February 2016, 6B_355/2015, Recital 1.1 and cited references; HURTADO POZO/ILLANEZ, *in* Commentaire romand, Code pénal II [hereinafter: Commentaire romand CP II], 2017, nos. 6 and 10 *ad* Art. 112 CP). For example, the Swiss Federal Court held that the offence had been committed in a particularly unscrupulous manner in the cases of an offender who had assassinated a judge with the sole purpose of destabilising the government (ATF 117 IV 369), a mother who drowned her child in a bathtub in an act of revenge against her husband by depriving him of his son and preventing him from having custody of him (Swiss Federal Court decision of 3 December, 2009, 6B_719/2009) and a group of youths who had killed a man after inflicting several hours of terrible suffering on him (Swiss Federal Court decision of 4 December 2009, 6B_762/2009 and 6B_751/2009). Furthermore, a particularly depraved method of commission is characterised in particular by the fact that the offender tortures his or her victim before killing him or her, and displays particular sadism or cruelty by inflicting acute physical or psychological suffering upon him or her (Swiss Federal Court decision of 6 April 2006, 6P.49/2006 and 6S.102/2006, Recital 6.1 and cited references; DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 18 *ad* Art. 112 CP). The method of commission relates to the circumstances and means used by the murderer to kill his or her victim and is, for example, particularly depraved in situations where the offender tortures or betrays the victim (HURTADO POZO/ILLANEZ, *op. cit.*, no. 14 *ad* Art. 112 CP).

7.3.4.2 The United Nations Committee Against Torture (hereinafter: CAT) found itself having to address the question of moral reparation for the relatives of victims who had been tortured to death. The question arose in an Argentinian case and, because the events that were the subject of the decision took place prior to the entry into force of the UNCAT for Argentina, the CAT dismissed the matter and did not pass judgment (decision of the Committee against Torture O.R., M.M., and M.S. c. Argentina, CAT Communications nos. 1, 2 and 3/1988 of 22 November 1988, Recital 2.4). In the more specific area of the death penalty, the CAT held that the method of execution could be likened as such to torture or ill treatment within the meaning of the Convention, particularly in the case of stoning as a method of execution (Association for the Prevention of Torture and Center for Justice and International Law, Torture in International law: A Guide to Jurisprudence, https://www.apt.ch/content/files res/jurisprudenceguidefrench.pdf, 2009, p. 41; decision of the Committee against Torture A.S. c. Sweden, CAT Communication no. 149/1999 of 24 November 2000).

7.3.4.3 For its part, the Swiss Federal Court held that a mother who had inflicted torture on her own child had committed murder within the meaning of Art. 112 CP, describing the offences as very serious, depraved and revolting (Swiss Federal Court decision of 13 June 2003, 6S.145/2003, Recital 4.3).

A similar conclusion was reached in the case of an offender who had attacked a very elderly woman and persecuted her in a depraved and cruel manner for several minutes, beating her multiple times and seriously torturing her before strangling and suffocating her with a cushion (Swiss Federal Court decision of 9 December 2016, 6B_1307/2015, Recital 2.2). In some cases, Swiss case law has also allowed the plaintiff's right to appeal in situations where the acts reported are likely to fall within the scope of provisions prohibiting acts of torture and other cruel or degrading treatment or punishment, citing, among others, the UNCAT (Swiss Federal Court decision of 28 May 2013, 1B_729/ 2012, Recital 2.1). The case law found that this is particularly the case in situations where the applicant died as a result of supposedly inappropriate treatment (ATF 138 IV 86, Recitals 3.1.1 and 3.1.2).

7.3.4.4 It follows from the foregoing that while not all murders are the result of torture and, conversely, not all acts of torture result in death, certain acts that are also punishable as murder also constitute acts of torture. For example, where victims have died as a result of torture inflicted by the perpetrator, the offence of murder may be considered an ultimate form of torture on account of the particularly depraved method of commission (see Recital 7.3.4.1 above).

7.3.5 In the present case, the plaintiffs refer in their statements to ill treatment and abductions, but also to disappearances and killings. Speaking of one particular episode at the camp, witness E. testified during a hearing that "I know [military security] used torture, as did other services. I say that because I witnessed it on 25 February 1993 at the camp in Aïn M'guel. (...). Hooded military police officers entered the camp with batons and metal bars, striking people indiscriminately after getting us to stand in a line (...). The military security officer then turned up with a list and started calling out the names of certain people, which I can still remember, and then what happened is what I wrote in my book. My name was also called out. I was made to lie down in front of the gate and then they pushed my head into the sand. Then we were made to stand in a single file to walk from the gate to a tent that had been put up near the soldiers' dormitory. Along the way, hooded policemen standing on either side of us hit us as we walked by. (...) They hit me with metal bars, bludgeons and batons until I passed out, but they didn't use the butt of their weapons. I thought I was going to die. (...). The 600 detainees (...) were beaten up for around four hours." (MPC exhibit 12-100009). As concerns other acts of torture, the same witness stated that these included, for example, "being hung and handcuffed to the bars of the cell, naked to the waist, and flogged and beaten with a pipe (...)", claiming that he himself had suffered such treatment (MPC exhibit 12-10-0019). In regard to this situation, Appellant C. stated during his examination that "it degenerated into insults and I was taken down to a small bedroom measuring 2 metres by 1 where there was a wooden chaise longue with two straps. There was a bucket and a tap nearby. I was forced to lie down and I was strapped down. They put

a mop over my face and chucked dirty water over me while holding my head really tightly. I felt like I was dying. I couldn't breathe. I was told that if I had something to say, I should lift my little finger. I was throwing up water, especially when they sat on my stomach" (MPC exhibit 12-11-0017). These testimonies were also corroborated by many press articles and books describing the situation in Algeria in the 1990s (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 2, 5 ss; 1.11 p. 270; 1.29 p. 113, 197; 1.95 p. 96, 98, 101). In particular, an Amnesty International report that recounted the deterioration of human rights under the state of emergency in Algeria describes the methods of torture used, which included "beatings, frequently with sticks, wires, belts or broom handles on all parts of the body; burning with cigarettes; pulling out nails; insertion of bottles and other objects into the anus; the "chiffon" (cloth, *nashshaf*) whereby the victim is tied to a bench and half-suffocated by a cloth soaked in dirty water and chemicals; and electric shocks" (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 1.3 p. 6; 1.11 p. 270; 1.95 p. 79 footnote no. 68). During the testimony of Appellant B, the latter stated that he was testifying "for the people who had died as a result of torture", adding: "I have a list of people from my village who died after being taken to the military police station. Not to mention the people who were arrested in the morning and immediately executed" (MPC exhibit 12-01-0009). Also in reference to the executions, Witness F. stated: "It was a period of extreme violence; it doesn't get more violent than that. I never thought I would witness such barbaric acts. (...) A van or an unmarked vehicle would come and pick up the men returning from work, arrest them and take them to a torture centre. They would undress them and take their passports, which they burnt, which meant they wouldn't be coming out. They would put them in small dungeons, like wild animals. I could hear their screams. When a person was almost "finished", they would take them into the forest and shoot them in the back of the neck. (...). In each sector, (...) there were the same symptoms: torture and summary executions". "The aim of these missions was simply to kill as many people as possible. Whether it was the FIS militants or others, the point was to spread terror. These people had to be executed. Most of the people I saw going in never came out. The aim was, first, to try to get information, but with a view to executing people from the outset" (MPC exhibit 12-03-0010). In the decision handed down, the MPC itself also acknowledged that the investigation had helped to shine a light on the commission of acts of torture by organs of the Algerian state in security institutions and detention centres (BB.2017.9 - BB.2017.10 - BB.2017.11 Act. 2.1 p. 18).

7.3.6 Thus, it cannot be ruled out, in this case, that murders were the ultimate result of the acts of torture inflicted upon the victims. All of the exhibits contained in the file reinforce the suspicions surrounding the countless offences committed during the period under investigation. Insofar as the murders committed are not time-barred (Art. 112 CP in conjunction with Art. 97 para. 1 let. a CP; see Recital 7.2.2 above), this also means that under Art. 101 para. 3 CP, the crimes of torture under consideration punishable under the criminal provisions in force

at the time of the events and not time-barred on the aforementioned date (see Recital 7.2.2 above) have become imprescriptible. Since these offences must be prosecuted ex-officio, they should be the subject of investigations by the MPC. It follows that, by virtue of the *in dubio pro duriore* principle prevailing at this stage of the proceedings, the MPC could not rule out Art. 264a let. f CP (ATF 138 IV 86, Recital 4.1.1).

7.4

7.4.1 Pursuant to Art. 264a CP, the offences listed in para. 1 constitute crimes against humanity provided they were committed as part of a widespread or systematic attack carried out against the civilian population (FF 2008 3461, p. 3516). An attack of this kind generally stems from a strategy or policy of a government or organisation (DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/RODIGARI, *op. cit.*, no. 7 *ad* Art. 264a CP). The attack must be widespread, that is to say that it is distinguished by its scale or is systematic, in which case it is distinguished by its degree of organisation (FF 2008 3461, p. 3517; DUPUIS/MOREILLON/PIGUET/BERGER/ MAZOU/RODIGARI, *op. cit.*, no. 8 *ad* Art. 264a CP). The said attack must be carried out against the civilian population. In other words, it is sufficient for the perpetrator to have caused one casualty, regardless of nationality, provided the action forms part of a broader widespread or systematic attack (FF 2008 3461, p. 3515; DUPUIS/MOREILLON/PIGUET/BERGER/MAZOU/ RODIGARI, *op. cit.*, no. 9 *ad* Art. 264a CP).

7.4.2 In the case in point, in light of the investigations carried out by the MPC, the characteristics referred to above and necessary for the application of Art. 264a CP cannot be denied. As concerns both the degree of organisation and the number of casualties, the said attack appears to have been widespread and systematic. The testimony of Witness G., questioned by [the advocate], indicated that torture had become a systematic practice from the very first cases dealt with after 1992. He stated: “I remember defendants in March 1992 who all claimed to have been tortured, especially those who had been brought before military courts, which were seen at the time as being more reliable than civilian courts. Upon questioning, the *modus operandi* was found to be the same with regard to the practice of torture, the length of detention and the methods of transfer and arrest. There was a feeling that there was a kind of framework for the practice of torture, with invariably the same escalation in the seriousness of the methods used (beatings, waterboarding, electrocution, burning with cigarettes, etc.)” (MPC exhibit 12-09-0025). Witnesses have also reported that the law enforcement authorities targeted the entire population indiscriminately, “whether FIS militants or others” (MPC exhibit 12-03-0009).

7.4.3 It follows from the above that the events which are the subject of the investigation may have been committed as part of a widespread or systematic attack directed against the civilian population within the meaning of Art. 264a CP.

7.4.4 In relation to the subjective dimension of the said offence, it is generally accepted that any criminal against humanity must have acted with knowledge

of the attack (GARIBIAN, Commentaire romand CP II, no. 18 ad Art. 264a CP). In the case in point, there is no doubt that [the accused] was aware of the acts committed under his authority. It is evident from the examination of Appellant C. that "[the accused] was everywhere at once. For example, when he went to Germany to see H., he asked him to assassinate two FIS leaders, which shows that he was the decision-maker" (MPC exhibit 12-11-0021).

7.5 As argued above (Recital 7.3.4.1 ss), in cases where victims died as a result of torture inflicted by the perpetrator, it cannot be precluded in the present case that murder charges could be brought. The same applies when such acts were not committed in Switzerland but Swiss universal jurisdiction is established based on Art. 6 CP in conjunction with the UNCAT.

It follows from the foregoing that in view of the UNCAT and the fact that murder offences are, as we have just seen, still not time-barred and form part of broader widespread attacks targeting the civilian population, the MPC should, in this case, have considered whether charges of torture or murder could have been brought against [the accused]. It did not. As such, given the *in dubio pro duriore* principle prevailing at this stage of the proceedings, to issue a ruling abandoning proceedings would be rash.

8. From the foregoing, the question of establishing whether Art. 318 para. 2 CPP was violated in this instance appears to have ceased to be relevant.

9. It follows that the appeals are allowed and the case is remitted to the MPC for further investigation as set out in the recitals.

10. The requests for legal assistance have ceased to be relevant.

11. In view of the outcome of the proceedings, the losing respondents are to bear the costs (Art. 428 para. 1 CPP), which should, pursuant to Art. 5 and 8 para. 1 of the regulation of the Swiss Federal Criminal Court of 31 August 2010 relating to the charges, emoluments, costs and compensation in federal criminal proceedings (RFPPF; RS 173.713.162), be fixed at CHF 4,000. Inasmuch as the costs cannot be borne by the MPC (Art. 428 para. 4 and 423 para. 1 CPP; Swiss Federal Criminal Court decision of 20 December 2016, BB.2016.325, Recital 7 and cited references), the costs are ultimately fixed at CHF 2,000 and are to be borne by [the accused].

12. The successful party is entitled to appropriate damages for costs incurred in the proper exercise of his or her procedural rights (Art. 433 para. 1 let. a CPP, applicable by reference to Art. 436 CPP; Swiss Federal Criminal Court decision of 20 June 2014, BB.2014.63). Art. 12 para. 1 RFPPF provides that attorneys' fees be determined on the basis of the time actually devoted to the matter and necessary for the defence of the represented party. [The advocate A] submitted a fee note for his two clients totalling CHF 16,596.00, inclusive of VAT (BB.2017.10 - BB.2017.11 Act. 14.1). For his part, [the advocate B] claimed a total of CHF 9,720.00, inclusive of all taxes, for his work (BB.2017.9 Act. 14.1).

Both charge an hourly rate of CHF 300. However, it is customary practice for this authority to apply an hourly rate of CHF 230 (Swiss Federal Criminal Court decision of 2 March 2012, BB.2012.8, Recital 4.2). For that reason, the fee notes must be reduced. Furthermore, [the advocate A] claimed some 35

hours for drafting the submissions, while [the advocate B] claimed 20 hours; with the former claiming to have devoted 14 hours and the latter 10 hours to drafting the response. It should be noted, however, that both the three submissions and the three responses are identical in every respect. Therefore, it shall be held that only one of each was drafted. The total number of hours claimed for drafting them will therefore be adjusted accordingly. In view of the complexity and scale of the case, a total of 45 hours for the preparation of the appeal and the response is to be granted, which amounts to a total of CHF 10,350. One third of this amount shall be allocated to [the advocate A], with the remaining balance going to [the advocate B].

Furthermore, only [the advocate A] indicated having spent 4 hours on interviews with his two clients. Insofar as the appeals do not refer to different situations for each of the appellants, only one hour of interview per client should be allowed, giving an overall amount of CHF 460.

Lastly, with respect to the dispatch of the written submissions, [the advocate A] only has indicated having disbursed CHF 36 on 16 January 2017, and the same amount again for the dispatch of the written responses on 17 March 2017. These amounts are allowed.

Therefore, C. is awarded a total of CHF 3,450 (including VAT) as compensation for his lawyer's work. As regards the work of [the advocate A], a total of CHF 7,432 (including VAT) is to be paid as compensation, with one half going to A. and the other half to B. These costs are to be borne jointly by the MPC and [the accused].

For these reasons, the Appellate Division decides:

1. That appeals BB.2017.9 - BB.2017.10 - BB.2017.11 are joint appeals.
2. To allow the appeals.
3. To quash the order of the Public Prosecutor of the Confederation of 4 January 2017.
4. To remit the case to the Public Prosecutor of the Confederation, which shall complete the investigation as set out in the recitals.
5. The requests for legal assistance have ceased to be relevant.
6. Court fees of CHF 2,000 are to be paid by [the accused].
7. C. is awarded a total amount of CHF 3,450 as compensation for his lawyer's work. As regards the work of [the advocate A], a total of CHF 7,432 is to be paid as compensation, with one half going to A. and the other half to B. These costs are to be borne jointly by the MPC and [the accused].

Bellinzona, 5 June 2018

On behalf of the Appellate Division of the Swiss Federal Criminal Court

The President: The Court Clerk:

Distribution

- [advocate A]
- [advocate B]
- Public Prosecutor of the Confederation
- [advocates of the respondents, C and D]

Indication of remedies
No ordinary remedies against this decision are available.