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Tribunal Pénal
International pour
l'ex-Yougoslavie

JUDGEMENT SUMMARY

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

APPEALS CHAMBER

The Hague, 3 May 2006

SUMMARY OF APPEALS JUDGEMENT FOR MLADEN NALETILIĆ AND VINKO MARTINOVIĆ

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

As the Registrar announced, the case on our agenda is Prosecutor versus Mladen Naletilić and Vinko Martinović. In accordance with the scheduling order issued on 18 April 2006, today the Appeals Chamber will deliver its Judgement.

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

BACKGROUND

The events giving rise to this appeal took place between April 1993 and January 1994 during the conflict between the Croatian Defence Council ("HVO") and the Army of Bosnia and Herzegovina ("ABiH") in Mostar and its surrounding municipalities in south-western Bosnia and Herzegovina. In particular, this appeal deals with crimes related to the HVO attack on the villages of Sovići and Doljani that began on 17 April 1993, the HVO attack on Mostar that began on 9 May 1993 and the HVO attack on the village of Raštani beginning on 22 September 1993.

Mr. Mladen Naletilić was born in 1946 in Široki Brijeg in Bosnia and Herzegovina. He founded a military group called the Convicts' Battalion, or the "KB", which, after the conflict in Mostar against the Serb-Montenegrin forces in 1992, became a professional unit for special combat under the direct command of the HVO Main Staff. Attached to the KB were several Anti-Terrorist Group units, called "ATGs".

On 31 March 2003, the Trial Chamber found Mr. Naletilić guilty under eight Counts for the crimes of persecutions as a crime against humanity (Count 1), unlawful labour as a violation of the laws or customs of war (Count 5), torture as a crime against humanity (Count 9), torture as a grave breach of the Geneva Conventions of 1949 (Count 10), wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 (Count 12), unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 (Count 18), wanton destruction not justified by military necessity as a violation of the laws or customs of war (Count 20) and plunder of public or private property as a violation of the laws or customs of war (Count 21). Mr. Naletilić was found to be individually responsible pursuant to Article 7(1) of the Statute of the International Tribunal for certain crimes and responsible as a superior under Article 7(3) of the Statute for other crimes. The Trial Chamber imposed on Mr. Naletilić a single sentence of twenty years of imprisonment.

Mr. Vinko Martinović was born in 1963 in Mostar. In 1992, Martinović joined the Croatian Defence Forces ("HOS") and became a commander. At least from mid-May 1993, he was the

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commander of a group of soldiers who held positions at a confrontation line in Mostar. He was the commander of the Vinko Škrobo ATG, which was part of the KB.

The Trial Chamber found Mr. Martinović guilty under nine Counts for the crimes of persecutions as a crime against humanity (Count 1), inhumane acts as a crime against humanity (Count 2), inhuman treatment as a grave breach of the Geneva Conventions of 1949 (Count 3), unlawful labour as a violation of the laws or customs of war (Count 5), wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 (Count 12), murder as a crime against humanity (Count 13), wilful killing as a grave breach of the Geneva Conventions of 1949 (Count 14), unlawful transfer of a civilian as a grave breach of the Geneva Conventions of 1949 (Count 18) and plunder of public or private property as a violation of the laws or customs of war (Count 21). Mr. Martinović was found to be directly responsible under Article 7(1) of the Statute for crimes as well as responsible as a superior under Article 7(3) of the Statute for other crimes. The Trial Chamber imposed on Mr. Martinović a single sentence of eighteen years of imprisonment.

THE GROUNDS OF APPEAL

I will now address the grounds of appeal in turn, starting with Mr. Naletilić's and Mr. Martinović's grounds concerning due process of law and their grounds relating to the international character of the armed conflict, followed by two of the Prosecution's grounds relating to persecutions and deportation. I will then address Mr. Naletilić's and Mr. Martinović's grounds challenging various factual findings in the Trial Judgement and the Prosecution's appeal together with Mr. Martinović's appeal on cumulative convictions. Lastly, I will address Mr. Naletilić's and Mr. Martinović's grounds of appeal on sentencing, which will be followed by a reading of the Disposition of the Judgement.

ALLEGED ERRORS CONCERNING DUE PROCESS OF LAW

Now, turning to Mr. Naletilić's and Mr. Martinović's grounds relating to due process of law.

Vagueness of the Indictment

Mr. Naletilić alleges under his 12th and 21st grounds of appeal and Mr. Martinović under his second ground of appeal, that the Indictment was too vague in that it did not sufficiently plead a number of incidents for which they were found responsible.

The Appeals Chamber recalls that the question of whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him or her so that the accused may prepare a proper defence. In some instances, however, a conviction may be entered under a defective indictment where it is deemed to have been cured because the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her such that the accused was in a reasonable position to understand the charges brought. Where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result.

While the Appeals Chamber finds that the Indictment failed to plead material facts in relation to the charges for most of the incidents challenged by Mr. Naletilić and Mr. Martinović, it has found that the Prosecution provided timely, clear and consistent information that cured these defects in the Indictment, with the exception of the following three incidents: first, the turning of a private property into the headquarters of Mr. Martinović's unit around 7 July 1993; second, the incident of beating in July or August 1993 involving several prisoners in the area under Mr. Martinović's command; and finally, the incident of beating involving a prisoner called Tsotsa.

Thus, the Trial Chamber erred in finding Mr. Martinović responsible for these three incidents.

The Appeals Chamber dismisses in its entirety Mr. Naletilić's 12th ground of appeal and his 21st ground of appeal insofar as it relates to the alleged vagueness of the indictment. It allows Mr. Martinović's second ground of appeal in part.

Alternative charging

Next, as part of his first ground of appeal, Mr. Martinović submits that the Trial Chamber erred in law in finding that alternative charges could be brought against him.

The Appeals Chamber holds that, while alternatively charging on the basis of the same conduct is generally permissible, it depends on the circumstances of the case. In this case, the Trial Chamber was correct in finding that alternative charging was permissible. The Appeals Chamber recalls that it has previously held that cumulative charging on the basis of the same acts is generally allowed on the basis that "prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven." The same reasoning allows for alternative charging. As with cumulative charging, "[t]he Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence."

The Appeals Chamber therefore dismisses Martinović's sub-ground of appeal in its entirety.

INTERNATIONAL CHARACTER OF THE ARMED CONFLICT

Turning now to Mr. Naletilić's and Mr. Martinović's grounds of appeal concerning the international character of the armed conflict.

The Trial Chamber found both Mr. Naletilić and Mr. Martinović guilty on several Counts of grave breaches of the Geneva Conventions of 1949 pursuant to Article 2 of the Statute. On appeal, Mr. Naletilić, under his 37th ground of appeal, and Mr. Martinović, under his first ground of appeal, submit that the Trial Chamber erred in law by holding that an international armed conflict existed during the period and in the area relevant to the Indictment, and consequently by finding them guilty of grave breaches of the Geneva Conventions of 1949. They submit that the evidence presented to the Trial Chamber was unreliable and, in addition, that they cannot be held responsible for the character of the armed conflict.

The Appeals Chamber finds that Mr. Naletilić's and Mr. Martinović's claims concerning the unreliability of the evidence do not meet the formal requirements for raising an appeal and, as such, they are dismissed.

Next, the Appeals Chamber notes that Mr. Naletilić and Mr. Martinović were not found responsible for the fact that the conflict was international, but rather for the crimes committed in the context of the international armed conflict. However, the Appeals Chamber finds that a related issue, which both Mr. Naletilić and Mr. Martinović assert by implication, requires further consideration. Namely, whether the Trial Chamber erred in law by failing to require the Prosecution to prove, as an element of crimes under Article 2 of the Statute, that they were aware of the international character of the armed conflict.

The Appeals Chamber recalls that Article 2 of the Statute gives the International Tribunal "the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely, [certain] acts against persons or property protected under the provisions of the relevant Geneva Convention". The language of the Geneva Conventions makes clear that the grave breaches regime applies "only in international armed conflicts." In *Tadić*, the Appeals Chamber concluded that the international armed conflict element had been incorporated into Article 2 of the Statute such that it only applies to offences committed within the context of international armed conflicts.

The Appeals Chamber holds that the existence and international character of an armed conflict are both jurisdictional prerequisites (as established in *Tadić*) and substantive elements of

crimes pursuant to Article 2 of the Statute. In *Kordić and Čerkez*, the Appeals Chamber stated that although the accused need not “make a correct legal evaluation as to the international character of the armed conflict,” he must be “aware of the factual circumstances, e.g., that is a foreign state was involved in the armed conflict” in order to be held responsible for an Article 2 crime. This is because the principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. Thus, the Prosecution’s obligation to prove intent for a crime charged under Article 2 also encompasses establishing the accused’s knowledge of the factual circumstances pertinent to the internationality of an armed conflict.

As a result, the Appeals Chamber finds that the Trial Chamber erred in failing to explicitly find that the Prosecution showed that Mr. Naletilić and Mr. Martinović were aware of the facts making the armed conflict international. However, this error did not affect the Trial Judgement. Based on the entirety of the findings contained in the Trial Judgement, a reasonable trier of fact could only have found that Mr. Naletilić and Mr. Martinović were aware of the requisite factual circumstances.

PROSECUTION’S GROUNDS ON PERSECUTIONS AND DEPORTATION

I now turn to the Prosecution’s grounds of appeal relating to persecutions and to deportation.

Persecutions

As its first ground of appeal, the Prosecution contends that the Trial Chamber adopted an incorrect approach in law and in fact to the evaluation of the evidence in holding that certain crimes committed by Martinović did not constitute underlying acts of persecutions due to insufficient evidence that they were committed on racial, political or religious grounds. The Prosecution contends that the Trial Chamber did not consider whether the discriminatory grounds could be inferred from the context of the incidents or the evidence as a whole.

The Appeals Chamber recalls that it is well established that discriminatory intent may be inferred from the context of an attack on the civilian population where it is substantiated by the circumstances surrounding the acts allegedly underlying the crime of persecutions. However, the Appeals Chamber finds that the Prosecution has failed to show that the circumstances surrounding the incidents it raises substantiate its claim that the acts in question were carried out with discriminatory intent.

The Appeals Chamber therefore dismisses the Prosecution’s first ground of appeal in its entirety.

Deportation

As its third ground of appeal, the Prosecution contends that the Trial Chamber erred in law in holding that deportation requires the transfer of persons across State borders in order to distinguish it from forcible transfer.

The Appeals Chamber notes that there is no occasion, in this case, to define the elements of deportation as a crime against humanity under Article 5(d) of the Statute, as the Indictment included no charges under that Article. The Appeals Chamber therefore need not address the Trial Chamber’s comments in paragraph 870 of its Judgement to the effect that the International Tribunal’s jurisprudence defines deportation as transfer across a state border. The Appeals Chamber also sees no need to consider the issue as a matter of general significance to the International Tribunal’s jurisprudence, as the issue has been settled in the *Stakić* Appeal Judgement.

Furthermore, the question whether “deportation” encompasses a border element is irrelevant for the purposes of liability under Article 5(h), because acts of forcible displacement are

equally punishable as underlying acts of persecutions whether or not a border is crossed. It is not necessary, for the purposes of a persecutions conviction, to distinguish between the underlying acts of “deportation” and “forcible transfer”; the criminal responsibility of the accused is sufficiently captured by the general concept of forcible displacement. To the extent the Trial Chamber suggested otherwise, it erred in law, but this error did not affect the judgement, as both Mr. Naletilić and Mr. Martinović were in any event convicted for persecutions through the underlying act of forcible transfer.

For these reasons, Judge Schomburg dissenting, the Prosecution’s third ground of appeal is dismissed.

NALETILIĆ’S AND MARTINOVIĆ’S GROUNDS ALLEGING FACTUAL ERRORS IN THE TRIAL JUDGEMENT

Next, I address Mr. Naletilić’s, and then to Mr. Martinović’s, grounds of appeal under which they allege that the Trial Chamber committed various errors in making its factual findings.

I will not summarize each of these grounds of appeal in detail. Rather, I will focus on the merits of Mr. Naletilić’s first, third, sixth and 21st grounds of appeal, as well as parts of his fourth and eighth grounds. Mr. Martinović’s sub-grounds will be addressed insofar as they relate to the use of detainees to assist in the looting of private property. With respect to the remaining grounds of appeal on the Trial Chamber’s factual findings, the Appeals Chamber has dismissed them for reasons explained in the Judgement.

Mr. Naletilić’s grounds of appeal

Turning first to Mr. Naletilić’s grounds of appeal, the Trial Chamber found that throughout the time relevant to the Indictment, he was the overall commander of the KB and the attached ATG units. Mr. Naletilić challenges the Trial Chamber’s finding of a superior-subordinate relationship supporting criminal responsibility under Article 7(3) for certain offences. He contests in particular the Trial Chamber’s reliance on Exhibit PP 704, a salary list for members of the KB and ATG units dated November 1993; on the testimony of Witness Falk Simang; and finally, on Exhibit PP 928, the so-called “Radoš Diary” for a finding of Article 7(3) criminal responsibility.

Having considered each of the instances in which Mr. Naletilić claims that the Trial Chamber erred in relying on the salary list of the KB and ATG units, the Appeals Chamber finds that, with the exception of two of them, the Trial Chamber’s reliance on this exhibit did not constitute an error.

The first such instance concerns the Trial Chamber’s finding, based solely on the salary list, that Miro Marjanović was a subordinate of Mr. Naletilić at the time when he administered beatings to prisoners in the Heliodrom. The Trial Chamber did not conclude that Miro Marjanović was under the command of Mr. Naletilić prior to or after November 1993, nor did it make a finding as to when Miro Marjanović administered beatings on the prisoners in the Heliodrom. The Appeals Chamber has reviewed the evidence of those witnesses who the Trial Chamber relied on for its finding that Miro Marjanović was among the most notorious perpetrators of beatings at the Heliodrom. With the exception of one witness, who refers to an incident in which he was beaten by a certain “Marijanović” in late May 1993, none of the other witnesses provide specific dates as to when Miro Marjanović beat prisoners at the Heliodrom. The Appeals Chamber therefore finds that no reasonable trier of fact could have found, solely on the basis of, the salary list that it had been established beyond reasonable doubt that Miro Marjanović was a subordinate of Mr. Naletilić when he administered beatings to prisoners in the Heliodrom. This error leads to a miscarriage of justice since, absent the finding that Miro Marjanović was a subordinate of Mr. Naletilić at the relevant time, Mr. Naletilić could not have been found responsible pursuant to Article 7(3) for the cruel treatment and wilfully causing great suffering inflicted by Miro Marjanović on prisoners at the Heliodrom.

The second instance concerns the Trial Chamber's finding that Ivica Kraljević, the warden of Ljubuški prison, was the same Ivica Kraljević listed in Exhibit 704. Additional evidence admitted on appeal shows that the warden of Ljubuški prison, Ivica Kraljević, was not the same Ivica Kraljević that appears listed as a member of the KB in Exhibit 704. However, for reasons which I will state later on, it is not necessary for the Appeals Chamber to address the consequences on the Trial Judgement of this finding.

With respect to the testimony of Witness Falk Simang, the Appeals Chamber dismisses all of Mr. Naletilić's arguments concerning the Trial Chamber's alleged errors in relying upon this evidence for its factual findings.

Turning now to the issue of the "Radoš Diary", Mr. Naletilić argues that the Trial Chamber erred in admitting the Radoš Diary as evidence in rebuttal because it did not amount to evidence in rebuttal. Rather, he argues, the Diary was used to support and bolster the Prosecution's case in chief.

The Appeals Chamber notes that it will intervene to exclude evidence in the event that it finds that a Trial Chamber committed a discernible error in the exercise of its discretion to admit evidence, and that this error resulted in unfair prejudice to the appellant, thereby rendering his trial unfair. In the present case, while the Trial Chamber directed itself to the correct legal standard on the admissibility of rebuttal evidence, it erred in applying this standard to the facts. It found that the Radoš Diary was admissible as rebuttal evidence on the basis that it concerned - and I quote - "the events related to Sovići and Doljani." The Appeals Chamber notes that the events in Sovići and Doljani formed an integral part of a number of charges in the Indictment, and thus were fundamental to the case brought by the Prosecution. Therefore, evidence pertaining to the events in Sovići and Doljani should have been brought as part of the Prosecution case in chief and not in its case in rebuttal. However, the Appeals Chamber notes that Mr. Naletilić had ample time and opportunity to challenge the Radoš Diary and to respond to the allegations therein concerning the events in Sovići and Doljani, and did make extensive use of this opportunity at trial. The Appeals Chamber therefore finds that Mr. Naletilić did not suffer unfair prejudice as a result of this error.

For these reasons, the Appeals Chamber allows in part Mr. Naletilić's first and third grounds of appeal. His fourth, sixth and eighth grounds of appeal are dismissed in their entirety.

Next, under his 21st ground of appeal, Mr. Naletilić argues that the Trial Chamber erred in finding that he had the requisite *mens rea* regarding the activities carried out by ATGs in Ljubuški prison and in Mostar.

Mr. Naletilić's arguments concerning his responsibility for the activities of ATGs in Mostar are dismissed for reasons set out in the Judgement. With regard to Ljubuški, the Trial Chamber's finding that Mr. Naletilić had reason to know about the mistreatment of prisoners by his subordinates in Ljubuški prison is essentially based on the fact that he was present when KB soldiers severely mistreated Witness Y on one occasion while the bus transporting Witness Y and other prisoners to Ljubuški prison got stuck in the mud. The Appeals Chamber notes that the Trial Chamber failed to make a finding that Mr. Naletilić was on notice that his subordinates would return to Ljubuški prison to mistreat prisoners there. As noted by the Trial Chamber itself, the evidence shows that, on the particular occasion when he witnessed the mistreatment of Witness Y on the way to Ljubuški, Mr. Naletilić told his soldiers to stop the beating and to get going. Although the Trial Chamber found that evidence from several witnesses regarding the complaint of the warden of Ljubuški prison about his inability to prevent KB soldiers from entering the prison and mistreating prisoners was telling, it did not find that Mr. Naletilić knew of that complaint. The Appeals Chamber therefore finds that no reasonable trier of fact could have found beyond reasonable doubt, on the sole basis of this incident, that Mr. Naletilić had reason to know that his subordinates would commit such crimes in Ljubuški prison. The Trial Chamber's error led to a miscarriage of justice since, without proof of Mr. Naletilić's *mens rea* with respect to Ljubuški prison, Mr. Naletilić could not have been held responsible pursuant to Article 7(3) for the cruel treatment and wilfully causing great suffering inflicted upon prisoners

at Ljubuški prison, and for persecutions made by these underlying acts. For these reasons, the Appeals Chamber allows in part Mr. Naletilić's 21st ground of appeal.

Mr. Martinović's grounds of appeal

As part of his second ground of appeal, Mr. Martinović submits that the Trial Chamber erred in finding him responsible for unlawful labour under Article 7(3) of the Statute for the use of the detainees Witnesses F, YY and AB to assist in the looting of private property. Witness F gave evidence that Štela's soldiers were present while he was forced to assist in looting, but that he only recognised one of them who was a commander, namely "Zubac". On cross-examination, the witness gave evidence that he did not know with certainty which unit "Zubac" belonged to. In light of this, the Appeals Chamber finds that it was not open to a reasonable trier of fact to conclude on the basis of Witness F's testimony that "Zubac" was Mr. Martinović's subordinate. The Trial Chamber therefore erred in finding that Witness F was forced to loot by Mr. Martinović's soldiers. With respect to Witness AB, the Appeals Chamber finds that, in light of the witness's testimony that he did not know whether it was Mr. Martinović's soldiers that forced him to loot, it was not open to a reasonable trier of fact to conclude that Witness AB was forced by Mr. Martinović's subordinates to assist in looting. The Appeals Chamber notes, however, that these errors did not lead to a miscarriage of justice because the Trial Chamber was still presented with and relied on the evidence that Witness YY was forced to loot by Mr. Martinović's subordinates, which Mr. Martinović has failed to demonstrate was in error. Mr. Martinović's sub-ground of appeal is therefore dismissed.

CUMULATIVE CONVICTIONS

Now I will now address Mr. Martinović's sub-ground of appeal and the Prosecution's fourth ground of appeal on cumulative convictions.

Mr. Martinović

Mr. Martinović challenges cumulative convictions as such, and argues that his cumulative convictions based on the same conduct cause him prejudice because the same act is given multiple and aggravating characterisations. The Appeals Chamber recalls that the permissibility of cumulative convictions as well as the principles governing their application is well-established in the practice of the International Tribunal and that, its jurisprudence recognises that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct." The Appeals Chamber finds no cogent reasons for departing from this jurisprudence. As a result, Mr. Martinović's sub-ground of appeal is dismissed.

The Prosecution

The Prosecution submits that because an underlying act of the crime of persecutions need not amount to a crime under Article 5 of the Statute, persecutions is necessarily legally distinct from other Article 5 crimes. Specifically, the Prosecution argues that torture and persecutions as Article 5 crimes each contain elements that are materially distinct from those of the other.

The Trial Chamber found Mr. Naletilić responsible for "persecutions under Article 5(h) of the Statute, torture under Article 5(f) of the Statute and torture under Article 2(b) of the Statute, for his treatment of [W]itnesses FF and Z." However, the Trial Chamber held that "[w]hen there are positive findings in relation to both persecutions and another crime against humanity, the conviction that is upheld is that of persecutions". For that reason, upon a comparison of multiple convictions based on the same acts, the Trial Chamber entered convictions only for persecutions under Article 5(h) and for torture under Article 2(b) of the Statute in relation to the mistreatment of Witnesses FF and Z. It therefore entered no conviction for torture under Article 5(f) for this incident.

The Appeals Chamber recalls that in the *Kordić and Čerkez* Appeal Judgement it held that *intra*-Article 5 convictions under the Statute for persecutions as a crime against humanity with other crimes against humanity may be permissibly cumulative under the *Čelebići* test.

The Appeals Chamber, Judge Schomburg and Judge Güney dissenting, finds that the definition of persecutions contains materially distinct elements not present in the definition of torture under Article 5 of the Statute, namely, the requirements of proof that an act or omission discriminates in fact and proof that the act or omission was committed with specific intent to discriminate. Torture, by contrast, requires proof that the accused caused the severe pain or suffering of an individual, regardless of whether the act or omission causing the harm discriminates in fact or was specifically intended as discriminatory. Thus, cumulative convictions on the basis of the same acts are permissible in relation to these crimes under Article 5 of the Statute. The Appeals Chamber finds that the Trial Chamber's conclusion was erroneous in disallowing the conviction against Mr. Naletilić for torture as a crime against humanity pursuant to Article 5(f) of the Statute in relation to the mistreatment of Witnesses FF and Z, and allows the Prosecution's fourth ground of appeal.

SENTENCING

Let me now come to sentencing. With regard to sentencing, Mr. Martinović has appealed the determinations of the Trial Chamber under his third ground of appeal. Mr. Naletilić challenges his sentence under his 25th and 40th grounds of appeal. A number of their submissions have been considered by the Appeals Chamber and dismissed for lack of merit. However, the Appeals Chamber has found that the Trial Chamber erred in three respects, which I will summarize in turn.

In the first place, Mr. Martinović submits that the Trial Chamber erred in failing to consider in mitigation of sentence that he facilitated his transfer to the International Tribunal through the following steps. First, upon learning of the Indictment against him, he personally requested his own extradition to The Hague. Second, after the decision by the Zagreb County Court on his transfer was rendered, he filed a submission expressly waiving his right to appeal the decision and requesting his prompt extradition.

The Appeals Chamber observes that, on the balance of probabilities, it has been proven that Mr. Martinović waived his right to appeal the decision of the Zagreb County Court. It has not, however, been shown on the balance of probabilities that Mr. Martinović personally requested his own extradition. The Appeals Chamber considers that mere facilitation of the transfer process cannot be considered voluntary surrender, but that such facilitation may itself be considered as a mitigating factor. In light of the specific circumstances of this case, the Appeals Chamber considers Mr. Martinović to have facilitated his transfer to the International Tribunal. The Trial Chamber therefore erred in stating that "the circumstances of [Mr. Martinović's] transfer to the Tribunal *cannot* be considered in mitigation of sentence." However, given that Mr. Martinović was involved in criminal proceedings at the time of his transfer, and that there is some indication that the time saved by facilitating transfer would have been approximately one month, the Appeals Chamber does not consider that this mitigating circumstance would have been given significant weight at sentencing. The Trial Chamber thus did not commit an error affecting the judgement.

Secondly, Mr. Martinović submits that, despite noting his claims that he helped his BH Muslim neighbours, that his general attitude is the same towards BH Muslims and BH Croats, and that BH Muslim detainees were helped by him and wanted to stay with him rather than in other units, the Trial Chamber failed to address them in mitigation when determining his sentence.

The Appeals Chamber finds that the Trial Chamber's failure to address these claims of assistance to BH Muslims in the sentencing part of its Judgement was in error under the reasoned opinion requirement. However, whether or not Mr. Martinović's assistance was actually taken into account by the Trial Chamber at sentencing as a mitigating factor, it is entitled too little weight and would have no impact on Martinović's resulting sentence.

In the third place, both Mr. Martinović and Mr. Naletilić submit that the Trial Chamber erred in holding that their command roles amounted to an aggravating factor in sentencing.

The Appeals Chamber has on several occasions confirmed that a Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator's position of authority. The wording of the sentencing section of the Trial Judgement suggests that the Trial Chamber's consideration of Mr. Martinović's and Mr. Naletilić's command roles did not only pertain to its evaluation of the form and degree of their participation in the crimes, but went further. The Trial Chamber found that Mr. Naletilić's and Mr. Martinović's positions as commanders rendered their roles more serious. In so far as this relates to their convictions under Article 7(1) of the Statute, the Appeals Chamber finds no error. However, in as much as this relates to their convictions under Article 7(3) of the Statute, the Appeals Chamber considers there to be an error. Given that the Trial Judgement is unclear as to exactly which Counts this factor was considered to aggravate, the Appeals Chamber finds, in Mr. Naletilić's and Mr. Martinović's favour, that the Trial Chamber erred. However, the Appeals Chamber considers that, in light of the gravity of the crimes for which Mr. Naletilić and Mr. Martinović were convicted and the circumstances of the case, this error has no impact on the sentence.

In conclusion, the Appeals Chamber notes that it has set aside, in part, a few of the convictions entered by the Trial Chamber against Mr. Naletilić and Mr. Martinović. However, taking into account the particular circumstances of this case as well as the form and degree of the participation of Mr. Naletilić and Mr. Martinović in the crimes affirmed on appeal, as well as the seriousness of those crimes, the Appeals Chamber finds that the sentences imposed by the Trial Chamber against them are within the range that a reasonable Trial Chamber could have ordered.

For the foregoing reasons, **THE APPEALS CHAMBER**

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

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 17 and 18 October 2005;

SITTING in open session;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL:

NOTES that the Prosecution's second ground of appeal has been withdrawn;

ALLOWS, Judge Güney and Judge Schomburg dissenting, the Prosecution's fourth ground of appeal, **AFFIRMS** Naletilić's conviction for torture as a crime against humanity under Count 9 of the Indictment and **HOLDS** that the conduct underlying this conviction encompasses, *inter alia*, the mistreatment of Witnesses FF and Z;

DISMISSES, Judge Schomburg dissenting in part, the Prosecution's remaining grounds of appeal;

WITH RESPECT TO NALETILIĆ'S GROUNDS OF APPEAL:

ALLOWS, in part, Naletilić's first and third grounds of appeal in so far as they relate to Naletilić's superior responsibility for the beatings administered by Miro Marjanović to prisoners at the Heliodrom, **ALLOWS**, in part, Naletilić's 21st ground of appeal in so far as it relates to Naletilić's superior responsibility for the mistreatment of prisoners in Ljubuški prison, **SETS ASIDE** his conviction for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Count 12 of the Indictment in so far as the conduct underlying this conviction encompasses the beating of prisoners at the Heliodrom administered by Miro Marjanović, **SETS ASIDE** his convictions for persecutions on political, racial and religious grounds as a crime against humanity under Count 1 of the Indictment and for wilfully causing great suffering or serious injury to body or health as a grave breach of the

Geneva Conventions of 1949 under Count 12 of the Indictment in so far as the conduct underlying these convictions encompasses the incidents of mistreatment of prisoners in Ljubuški prison;

DISMISSES Naletilić's remaining grounds of appeal against convictions and sentence in all other respects; and

AFFIRMS Naletilić's sentence of 20 years of imprisonment, subject to credit being given under Rule 101(C) for the period already spent in detention;

WITH RESPECT TO MARTINOVIĆ'S GROUNDS OF APPEAL:

ALLOWS, in part, Martinović's second ground of appeal in so far as it relates to the defects in the Indictment regarding the pleading of turning a private property into the headquarters of the Vinko Škrobo ATG, the incident of beating in July or August 1993 involving several prisoners and the incident of beating involving a prisoner called Tsotsa, and **SETS ASIDE** his conviction for unlawful labour as a violation of the laws or customs of war under Count 5 of the Indictment in so far as the conduct underlying this conviction encompasses the incident of turning a private property into the headquarters of the Vinko Škrobo ATG and his conviction for wilfully causing great suffering or serious injury to body or health as a grave breach of the Geneva Conventions of 1949 under Count 12 in so far as the conduct underlying this conviction encompasses the incidents of beating of detainees in July or August 1993 and of a detainee called Tsotsa;

DISMISSES Martinović's remaining grounds of appeal against convictions and sentence in all other respects; and

AFFIRMS Martinović's sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) for the period already spent in detention;

and finally,

RULES that this Judgement shall be enforced immediately pursuant to Rule 118;

ORDERS, in accordance with Rule 103(C) and Rule 107, that Naletilić and Martinović are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.
