

United Nations
Nations UniesInternational Criminal Tribunal
for the former Yugoslavia
Tribunal Pénal International
pour l'ex-Yougoslavie

(IT-03-68)

NASER ORIĆ



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Found not guilty

Senior Commander of Bosnian Muslim forces in municipalities in eastern Bosnia and Herzegovina, including Srebrenica, from 1992 until the fall of the Srebrenica enclave in 1995

- Found not guilty

Born	3 March 1967, in the village of Potočari, municipality of Srebrenica, Bosnia and Herzegovina
Indictment	Initial: confirmed on 28 March 2003, made public on 11 April 2003; second amended: 4 October 2004; third amended: 30 June 2005 in accordance with Rule 98bis decision of 8 June 2005
Arrested	10 April 2003, by the multinational Stabilisation Force (SFOR)
Transferred to ICTY	11 April 2003
Initial and further appearances	15 April 2003, pleaded not guilty to all counts of the indictment
Trial Chamber Judgement	30 June 2006, sentenced to two years' imprisonment; immediate release ordered on 30 June 2006 (he was entitled to credit for time served in detention since 10 April 2003 and was released on 1 July 2006)
Appeals Chamber Judgement	3 July 2008, found not guilty

STATISTICS

Trial days	196
Witnesses called by Prosecution	52
Prosecution exhibits	625
Witnesses called by Defence	30
Defence exhibits	1024
Witnesses called by Trial Chamber	1
Chamber exhibits	7

TRIAL	
Commenced	6 October 2004
Closing arguments	3-10 April 2006
Trial Chamber II	Judge Carmel Agius (presiding), Judge Hans Henrik Brydensholt and Judge Albin Eser
Counsel for the Prosecution	Jan Wubben, Patricia Sellers Viseur, Gramsci di Fazio, Joanne Richardson, Jose Doria
Counsel for the Defence	Vasvija Vidović, John Jones
Judgement	30 June 2006

APPEALS	
Appeals Chamber	Judge Wolfgang Schomburg (presiding), Judge Mohamed Shahabuddeen, Judge Liu Daqun, Judge Andrésia Vaz , Judge Theodor Meron
Counsel for the Prosecution	Michelle Jarvis, Christine Dahl, Paul Rogers, Laurel Baig, Nicole Lewis, Najwa Nabti
Counsel for the Defence	Vasvija Vidović, John Jones
Judgement	3 July 2008

RELATED CASES <i>by geographical area</i>	
BLAGOJEVIĆ & JOKIĆ (IT-02-60) "SREBRENICA"	
ERDEMOVIĆ (IT-96-22) "PILICA FARM"	
KARADŽIĆ & MLADIĆ (IT-95-5/18) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"	
KRSTIĆ (IT-98-33) "SREBRENICA-DRINA CORPS"	
MILOŠEVIĆ (IT-02-54) "KOSOVO, CROATIA AND BOSNIA"	
NIKOLIĆ MOMIR (IT-02-60/1) "SREBRENICA"	
OBRENOVIĆ (IT-02-60/2) "SREBRENICA"	
ORIĆ (IT-03-68)	
PERIŠIĆ (IT-04-81)	
POPOVIĆ <i>et al.</i> (IT-05-88) "SREBRENICA"	
STANIŠIĆ & SIMATOVIĆ (IT-03-69)	
TOLIMIR (IT-05-88/2) "SREBRENICA"	
TRBIĆ (IT-05-88/1) "SREBRENICA"	

INDICTMENT AND CHARGES

The initial indictment against Naser Orić was confirmed on 28 March 2003 and made public on 11 April 2003. Pursuant to the Trial Chamber Decision of 3 July 2003, the Prosecution filed an amended indictment on 16 July 2003. On 4 October 2004, the Trial Chamber ordered that the second amended indictment filed by the Prosecution on 1 October 2004 be the operative indictment against the accused. Following the decision by the Trial Chamber of 8 June 2005, in accordance with Rule 98bis, the Prosecution filed the third amended indictment on 30 June 2005. This was the operative indictment prior to the presentation of the defence case.

According to the indictment, in May 1992 Naser Orić was appointed commander of the Srebrenica Municipal Territorial Defence (TO) Staff, which was later re-named the Srebrenica Armed forces. His command was further extended when he was appointed the commander of the Joint Armed Forces of the sub-region Srebrenica in early November 1992 encompassing the geographical regions of several municipalities, namely: Srebrenica, Bratunac, Vlasenica and Zvornik in eastern Bosnia.

The indictment generally alleged that, at all times relevant to the charges of the indictment, by virtue of his position and authority as commander, Naser Orić commanded all units that were operating within his area of responsibility. This included all units in combat activities in the municipalities of Srebrenica and Bratunac in Bosnia and Herzegovina, in particular the combat activities in Ratkovići on 21 and 27 June 1992, Ježestica on 8 August 1992, Fakovići on 5 October 1992, Bjelovac between 14 and 19 December 1992 and Kravica on 7 and 8 January 1993 and all units including the military police involved in the detention and custody of Serb individuals in Srebrenica.

According to the indictment, Naser Orić demonstrated both *de jure* and *de facto* command and control in military matters and exercised effective control over his subordinates.

Between 24 September 1992 and 20 March 1993, members of the military police under the command and control of Naser Orić, allegedly detained several Serb individuals in the Srebrenica police station and in the building behind the Srebrenica Municipal building. It was alleged that these detainees were subjected to physical abuse, serious suffering and injury to body and health. In some instances, prisoners were beaten to death.

Naser Orić, from about September 1992 to August 1995, knew or had reason to know that his subordinates were about to plan, prepare or execute the imprisonment, killing and/or cruel treatment of Serbs detained at the Srebrenica police station and the building behind the Srebrenica Municipal building, or had done so, and he failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The indictment further alleged that during the period May 1992 to February 1993, Muslim armed units engaged in various military operations against the Bosnian Serb Army (VRS) in eastern Bosnia. In the course of such operations, Muslim armed units in the municipalities of Bratunac, Srebrenica and Skelani, burnt and otherwise destroyed a minimum of 50 predominantly Serb villages and hamlets. As a result, thousands of Serb individuals fled the area.

Naser Orić was charged on the basis of individual criminal responsibility (Article 7(1) of the Statute) and on the basis of superior criminal responsibility (Article 7(3) of the Statute) with:

- **Wanton destruction of cities, towns or villages, not justified by military necessity** (violations of the laws or customs of war, Article 3).

He was charged on the basis of superior criminal responsibility (Article 7(3) of the Statute) with:

- **Murder and cruel treatment** (violations of the laws or customs of war, Article 3).

TRIAL

The trial commenced on 6 October 2004 before Trial Chamber II, Judge Carmel Agius (presiding), Judge Hans Henrik Brydesholt and Judge Albin Eser. The Prosecution completed its case-in-chief on 31 May 2005. On 8 June 2005, the Trial Chamber issued an oral decision pursuant to Rule 98bis. The defence

began presenting its case on 4 July 2005 and concluded on 1 February 2006. The closing arguments of the Prosecution were presented on 3 and 4 April and those of the Defence 5 ,6 , 7 and 10 April 2006.

RULE 98bis DECISION

After the conclusion of the presentation of Prosecution evidence, the Trial Chamber can rule of whether there is a case to answer. If the Chamber believes that the Prosecution has not presented sufficient evidence to prove certain charge(s), it can dismiss those charges before the beginning of the presentation of defence evidence.

Rule 98bis was amended on 8 December 2004 and the decision in the *Orić* case was the first application of the amended rule. The amendments made the procedure entirely oral, no longer party driven, and thus much quicker. The Trial Chamber found that the standard of review remains the same, namely whether the Prosecution's evidence, if believed, is sufficient for any reasonable trier of fact to find that guilt of the accused has been proved beyond reasonable doubt.

In its Rule 98bis ruling, the Trial Chamber found that there was evidence which, if believed, would be capable of proving that the general legal requirements for the application of Article 3 were met, namely that:

- an armed conflict existed between 10 June 1992 and 20 March 1993 on the territory of Bosnia and Herzegovina;
- there was a nexus between the acts of Naser Orić and such armed conflict;
- the crimes of murder, cruel treatment, wanton destruction and plunder constitute violations of rules of international customary law which protect important values and entail individual criminal responsibility; and that
- regarding the crimes of murder and cruel treatment, the persons alleged to have been killed or subjected to cruel treatment were persons taking no active part in the hostilities at the relevant time.

The Trial Chamber elaborated on the applicable law in relation to both the underlying crimes and criminal responsibility.

Having considered all the evidence presented by the Prosecutor, the Trial Chamber entered a judgement of acquittal of Naser Orić of the charges against him in Counts 4 and 6 of the second amended indictment, namely the charge of plunder of public or private property, a violation of the laws and customs of war. More specifically, the indictment charged Naser Orić only with the plunder of "*cattle, furniture and television sets*". The Trial Chamber found that there was very little evidence pertaining to the plunder of furniture and TV sets and thus that the evidence adduced did not fulfil the jurisdictional requirement of Article 1 of the Statute, namely the requirement that the violations be serious.

While the Trial Chamber held that there was ample evidence which, if believed, could lead to the conclusion that several hundred head of cattle were appropriated during or immediately after the attacks, it found that any criminal responsibility of Naser Orić was offset by the real and present necessity to acquire food for the survival of the population of Srebrenica. Having recognised that the defence of necessity was an established principle in customary international law in 1992 and 1993, the Trial Chamber considered the extraordinary humanitarian circumstances in Srebrenica at the time. It thus found that there was abundant evidence that Srebrenica was isolated, that the starving population was drastically increasing with the influx of refugees and that there had been repeated calls for help.

The Trial Chamber noted that there was no evidence that the taking away of cattle was disproportionate or that the direct perpetrators of the appropriation of cattle had brought about the humanitarian situation themselves, but rather that these acts had become indispensable for the survival of the population of Srebrenica. The Trial Chamber thus held that the Prosecution failed to adduce evidence capable of supporting a conviction for the crime of plunder of public or private property and consequently acquitted Naser Orić of Counts 4 and 6 of the second amended indictment.

The Trial Chamber ordered the continuation of the case against Naser Orić in relation to the other counts in the indictment, namely Counts 1, 2, 3 and 5. However, with regard to the alleged murder of Bogdan Živanović in Count 1 and the alleged cruel treatment of Miloje Obradović in Count 2, the Trial Chamber found that there was no evidence capable of supporting a conviction and that Naser Orić consequently did

not need to address these alleged incidents. Similarly, with regard to the alleged wanton destruction in the villages of Radijevići and Božići set out in Counts 3 and 5, the Trial Chamber found that there was no evidence capable of supporting a conviction and that Naser Orić therefore did not need to address those alleged incidents during the Defence case.

For practical purposes, the Trial Chamber asked the Prosecution to present an amended version of the indictment to reflect the above mentioned findings. The third amended indictment was filed on 30 June 2005.

TRIAL CHAMBER JUDGEMENT

This judgement dealt with the crimes of murder and cruel treatment of prisoners and of wanton destruction of cities, towns or villages alleged to have happened in Srebrenica in 1992 and 1993 for which the accused was indicted on 30 June 2005.

After Srebrenica was re-captured by Bosnian Muslims in May 1992, they felt a pressing need to organise an effective defence. On 20 May 1992, an informal group of Bosnian Muslim men, who had already set up individual fighting groups in the area, met in the nearby hamlet of Bajramovici to establish the "Srebrenica TO Staff". The accused, who was present during this meeting, was elected as Commander. His appointment was subsequently confirmed by Sefer Halilović, Chief of the Supreme Command Staff of the Army of the Republic of Bosnia and Herzegovina, and by Alija Izetbegović, the President of Bosnia and Herzegovina. On 3 September 1992, the Srebrenica TO Staff was re-named the Srebrenica Armed Forces Staff.

Between 24 September and 16 October 1992, and again from 27 December 1992 to 20 March 1993, a number of Serbs were captured by Bosnian Muslim fighters and detained at the Srebrenica Police Station and, during the second time-period, also at a building behind the Srebrenica municipal building ("Building"). While they were generally exposed to the same appalling living conditions as the local population, their condition was significantly exacerbated by the maltreatment.

From the very moment it detained prisoners, the Srebrenica military police assumed all duties and responsibilities (under international law) relating to the treatment of prisoners in time of conflict. Evidence showed that Mirzet Halilović, the commander of the military police until 22 November 1992, did not exercise adequate supervision of the detention facility or the activities of the guards while carrying out their duties. To the contrary, Mirzet Halilović even contributed to the cruel treatment of the Serb detainees. The replacement of Mirzet Halilović with Atif Krdzić on 22 November 1992 did not benefit the detainees. Not one person or document refers to his presence in either of the two buildings where prisoners were kept. In addition, during his term as commander, more murders and cruel treatment took place. The Trial Chamber found that the Srebrenica military police, through its commanders Mirzet Halilović and Atif Krdzić, was responsible for the injuries inflicted on the victims.

The Trial Chamber also found that Naser Orić exercised effective control over the military police but only as of 22 November 1992. Prior to this date, it is not clear whether the Srebrenica Armed Forces Staff and Naser Orić as Commander exercised effective control over the military police. It is clear, however, that there was an attempt to restructure and improve its performance in October and November 1992, for example with the replacement of Mirzet Halilović by Atif Krdzić. The new military police commander reported to Osman Osmanović, the Chief of Staff of the Srebrenica Armed Forces who reported to Naser Orić.

The Trial Chamber found insufficient reliable evidence that Naser Orić ever visited either of the two detention facilities between December 1992 and March 1993, when the second group of Serb prisoners was held there. Although Naser Orić was aware that Serbs were detained in Srebrenica, there is no indication that anyone kept him informed about their condition.

Nonetheless, since Naser Orić was aware that incidents of murder and cruel treatment had previously occurred, the Trial Chamber found that Naser Orić was put on notice that the security and the well-being of all Serbs detained from that time forward in Srebrenica was at risk, and that this issue needed to be adequately addressed and monitored. Naser Orić also knew that the severe malnutrition and the psychological effects of being under siege had severely affected the judgement of people in Srebrenica, several of whom behaved erratically. The Trial Chamber found that Naser Orić had reason to know about acts of murder and cruel treatment committed at the Srebrenica Police Station and the Building between 27 December 1992 and 20 March 1993.

However, the security and well-being of Serb prisoners disappear from Naser Orić's agenda after an investigation into the alleged killing of a prisoner by Mirzet Halilović, and his eventual replacement by Atif Krdzić. In his 2001 interview with the Office of the Prosecutor, Naser Orić is reported as stating that because of the deteriorating military situation, the detention of prisoners was not on his mind, as there were others responsible for it.

The Trial Chamber holds that, as a general rule, the treatment of prisoners in armed conflict, including their physical and mental condition, cannot be deemed less important than military considerations, however important they may be. As a general rule the person entrusted with the responsibility over prisoners is in a position to fulfil this obligation. It does not, and cannot, apply when there is the impossibility to act, or when it would be utterly unreasonable to expect one to act, as in the case of a life-threatening situation. In this case, the Trial Chamber found that Naser Orić, as a commander, could discharge such responsibilities by delegating part of them to a subordinate and enquiring from time to time, and in the absence of reports, at least require them in whatever format.

The Trial Chamber found it unacceptable that commanders, like Naser Orić, could be free of their obligation to protect prisoners from murder and cruel treatment simply by assigning a subordinate to the job and not enquiring further about their status. Naser Orić never enquired about the fate of the Serb prisoners kept at the two detention facilities in Srebrenica from the day Atif Krdzić was appointed commander of the Srebrenica military police *in lieu* of Mirzet Halilović. In addition, he expressed and explained his lack of further involvement on the basis of his military commitments elsewhere and that there were others in charge of prisoners.

The Trial Chamber rejected the Defence submission that Naser Orić had inadequate means at the time to prevent the crimes committed against the prisoners. The replacement of Mirzet Halilović and the investigation of his alleged killing of a Serb prisoner show that this could have been achieved, even in the absence of sophisticated structures and well-trained personnel.

The Trial Chamber therefore found Naser Orić guilty of not taking the necessary and reasonable measures to prevent the crimes at the Srebrenica Police Station and the Building between December 1992 and March 1993.

However, with respect to the duty to punish, the Trial Chamber came to a different conclusion, namely that Naser Orić could not be held responsible for having failed to punish the crimes committed. The Trial Chamber came to the conclusion that there was insufficient evidence of effective control over the military police prior to 22 November 1992, when Naser Orić had actual knowledge of murder and cruel treatment. Thereafter, when Naser Orić exercised effective control, the Trial Chamber only found that he had reason to know of the crimes. However, whereas for the duty to prevent it suffices that the accused was put on notice that crimes may possibly occur or reoccur, the duty to punish presupposes that crimes have in fact been committed and that a superior was aware of sufficient indications to assume their occurrence. Since such indications were absent in the case of Naser Orić, the accused could not be held responsible for having failed to take the necessary and reasonable measures to punish his subordinates for the commission of these crimes.

Weighing Naser Orić's individual criminal responsibility in respect of the attack on Jezestica on 7 and 8 January 1993, the Trial Chamber found that the elements of the crime of wanton destruction were not fulfilled with regard to the other attacks for which such responsibility had been charged.

The Trial Chamber was convinced that Naser Orić was generally aware that Bosnian Serb property was destroyed by Bosnian Muslims, primarily civilians, who followed the fighters during attacks. However, the Prosecution failed to prove that he instigated wanton destruction. On the contrary, evidence indicated that Naser Orić opposed this conduct.

With respect to aiding and abetting, the Trial Chamber found that Naser Orić, as a leader of a group of fighters, had the responsibility to prevent reckless destruction by his subordinates. This duty extended to preventing wanton destruction by other fighters and civilians if Naser Orić knew that such reckless destruction was being, or was about to be, committed in the course of attacks in which his subordinates participated. At a minimum, he had a duty to prevent civilians from being present during such attacks. However, the Trial Chamber did not establish that Naser Orić could have prevented unjustified destruction by civilians who were present before, during and after attacks in massive numbers and who were beyond any control. With respect to fighters, the Trial Chamber was not convinced that in the particular circumstances of the attack on Jezestica on 7 and 8 January 1993, Naser Orić could have prevented fighters from committing destruction, or aiding and abetting civilians to commit such destruction. There was no evidence that his fighting group had any involvement in the wanton destruction

that occurred during the attack. There was also insufficient evidence that Naser Orić had control over, or even communication with other fighting groups during the attack. In addition, although Naser Orić participated in the attack, there was no evidence that his presence was that of an 'approving spectator', required to hold him individually criminally responsible in light of the above. The Trial Chamber concluded that the Prosecution failed to establish that Naser Orić in any way instigated or aided and abetted the commission of wanton destruction not justified by military necessity in Jezestica on 7 and 8 January 1993.

The Trial Chamber examined Naser Orić's criminal responsibility for his subordinates only in respect of the attacks on Ratkovici and Gornji Ratkovici (21 June 1992), on Brađevina (27 June 1992) and Jezestica (8 August 1992 and 7 and 8 January 1993). Regarding all four attacks, the Trial Chamber heard evidence that Bosnian Muslim fighters and civilians committed acts of wanton destruction, but there was almost no evidence that would further identify those perpetrators. However, such identification is not required by law, provided that it can be established that those responsible were under the control of the superior.

With respect to the question of the existence or otherwise of effective control by Naser Orić over the perpetrators it has already been explained that effective control can be based on legal, as well as on a factual position of authority.

However, while the Trial Chamber found that Naser Orić exercised effective control over his own fighting group from Potočari, a village located approximately four kilometres northeast of Srebrenica, the Trial Chamber did not find enough evidence that Naser Orić in *fact* exercised effective control over the various groups of fighters who participated in these attacks. There was no organised army with a fully functioning command structure, but one of local groups remaining relatively independent and voluntary and a mass of uncontrollable civilians that were present at every attack. Therefore, the Trial Chamber came to the conclusion that regarding all four attacks under consideration, Naser Orić could not be held criminally responsible for his subordinates' acts of wanton destruction of cities, towns or villages, which were not justified by military necessity.

On 30 June 2006, the Trial Chamber rendered its judgement: Naser Orić, on the basis of superior criminal responsibility (Article 7(3) of the Statute), was found guilty of:

- **Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder between 27 December 1992 to 20 March 1993** (violation of the laws or customs of war, Article 3)
- **Failure to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of cruel treatment between 27 December 1992 and 20 March 1993** (violation of the laws or customs of war, Article 3)

He was acquitted of all the other counts.

Sentence: two years' imprisonment

Naser Orić was entitled to credit for time spent in detention, namely three years, two months and 21 days. The Trial Chamber therefore ordered his immediate release.

APPEALS CHAMBER JUDGEMENT

On 31 July 2006, the defence filed a notice of appeal against the Trial Judgement. The Prosecution also filed its notice of appeal on 31 July 2006.

On 16 October 2006, the defence filed its appeal brief. On 18 October 2006, the Prosecution filed the latest version of its appeal brief.

The appeals hearing took place on 1 and 2 April 2008.

The Appeals Chamber granted Naser Orić's first and fifth grounds of appeal, he alleged therein that the Trial Chamber failed to make findings on the criminal responsibility of his only identified subordinate, Atif Krdžić. Additionally, the Trial Chamber failed to determine whether Naser Orić knew or had reason to know that Atif Krdžić was about to or had committed crimes. In the absence of these findings, Naser Orić's convictions under Article 7(3) of the Statute could not stand. These errors therefore invalidated the Trial Chamber's decision to convict Naser Orić for his failure to prevent his subordinate's alleged criminal

conduct in relation to the crimes committed against Serb detainees between December 1992 and March 1993.

The Appeals Chamber found that the Prosecution, in its first ground of appeal, failed to demonstrate that the Trial Chamber misapplied the burden of proof or erred in failing to consider that Naser Orić's *de jure* command over the Military Police between 24 September and 16 October 1992 created a presumption that he exercised effective control over that unit. For reasons explained in its Judgement, the Appeals Chamber further found that the Prosecution failed to demonstrate that the Trial Chamber erred in fact when it found that Naser Orić did not have effective control over the Military Police between 24 September and 16 October 1992.

Under the last part of its first ground of appeal, the Prosecution alleged that, had the Trial Chamber applied the "had reason to know" standard correctly, it would have concluded that Naser Orić had reason to know that crimes of murder and cruel treatment had occurred between 27 December 1992 and 20 March 1993, and convicted him for failing to punish. The Appeals Chamber noted that, whereas responsibility under Article 7(3) of the Statute requires proof of the superior's knowledge or reason to know of his subordinate's criminal conduct, the Prosecution contended that Naser Orić had reason to know that the crimes of murder and cruel treatment themselves had occurred. The Prosecution submitted that, in the present case, knowledge or reason to know of the crimes and knowledge or reason to know of the subordinate's criminal conduct were "one and the same". The Appeals Chamber considered that the Prosecution failed to substantiate this assertion and, consequently, that it need not consider any further the last part of the Prosecution's first ground of appeal.

For the foregoing reasons, the Prosecution's first ground of appeal was dismissed in its entirety. The Appeals Chambers declined to consider the Prosecution's fifth ground of appeal and considered that the Prosecution's remaining grounds of appeal were rendered moot as a result of the Appeals Chamber's discussion and conclusion on Naser Orić's appeal.

In light of the foregoing, the Appeals Chamber found that the appropriate course of action could only be a reversal of Naser Orić's convictions under Article 7(3) of the Statute.

The Appeals Chamber underscored that, like the Trial Chamber, it had no doubt that grave crimes were committed against Serbs detained in Srebrenica at the Srebrenica Police Station and the Building between September 1992 and March 1993. Also, the Defence did not challenge that crimes were committed against Serb detainees. However, proof that crimes had occurred was not sufficient to sustain a conviction of an individual for these crimes.

On 3 July 2008, the Appeals Chamber reversed the Trial Chamber judgement and found Naser Orić not guilty.

Judge Mohamed Shahabuddeen appended a declaration. Judge Liu Daqun appended a partially dissenting opinion and declaration. Judge Wolfgang Schomburg appended a separate and partially dissenting opinion.